

64817-9

64817-9

FILED
COURT OF APPEALS, DIVISION ONE
STATE OF WASHINGTON
2010 APR -9 AM 11:02

NO. 64817-9

COURT OF APPEALS, DIVISION ONE,
OF THE STATE OF WASHINGTON

KATIE L. WILSON,

RESPONDENT,

v.

DEBRA W. MOBELY,

APPELLANT.

BRIEF OF APPELLANT

Lee Jacobson, WSBA# 20752
Attorney for Appellant
1420 5th Avenue, Suite 2200
Seattle, WA 98101
(206)-915-9698

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
ASSIGNMENTS OF ERROR	1
 <u>Assignment of Error No. 1:</u> The trial court erred when it granted plaintiff's motion for attorney fees on December 22, 2009, based on a provision in a real estate purchase and sale agreement that did not contain an anti-merger clause and was extinguished by the subsequent conveyance of a statutory warranty deed.	
 <u>Assignment of Error No. 2:</u> The trial court erred when it granted plaintiff's motion for attorney fees on December 22, 2009, based on a clause in a purchase and sale agreement when plaintiff's lawsuit did not relate to rights afforded by that agreement.	
 <u>Assignment of Error No. 3:</u> Even if the trial court did not err when it granted plaintiff's motion for attorney fees, the court erred when it failed to determine those fees in accordance with Washington law and instead awarded plaintiff her attorney's contingency fee, which resulted in an award approximately two times the lodestar amount.	
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	2
STATEMENT OF CASE	2

	Page
ARGUMENT	6
1. The attorney fees provision of the real estate purchase and sale agreement, which did not contain an anti-merger clause, was extinguished when the deed to the property was conveyed to the Ms. Mobely.	6
2. The attorney fees provision in the purchase and sale agreement only applied to rights afforded by the agreement.	7
3. Even if an award of attorney fees was appropriate in this case, the correct amount of fees to award in a contingency case is not the attorney’s contingency rate. Instead, the court is to apply the lodestar method.	9
4. The lodestar amount of attorney fees is presumed to be the reasonable fee, and a multiplier should not applied to that amount except in exceptional circumstances.	11
5. A decision to apply a multiplier to the lodestar amount must be supported by specific evidence and detailed findings.	12
CONCLUSION	14

TABLE OF AUTHORITIES

Table of Cases

Barber v. Peringer, 75 Wn. App. 248, 877 P.2d 223 (1994)	6, 8
City of Burlington v. Dague, 505 U.S. 557 (1992)	11, 12
Chuong Van Pham v. Seattle City Light, 159 Wn.2d 527, 151 P.3d 976 (2007)	12
Deep Water Brewing, LLC v. Fairway Resources Limited, Key Development Corporation, _____ Wn. App. ____ (2009), 27014-9-III, 27024-6-III	7
Failes v. Lichten, 109 Wn. App. 550, 37 P.3d 301 (2001)	6, 8, 9
Henningsen v. Worldcom, Inc., 102 Wn. App. 828, 847, 9 P.3d 948 (2000)	10
Mahler v. Szucs, 135 Wn.2d 398, 957 P.2d 632 (1998)	10, 11
Morgan v. Kingen, 141 Wn. App. 143, 169 P.3d 487 (2007), aff'd 166 Wn.2d 526, 210 P.3d 995 (2009)	10
Pennsylvania v. Delaware Valley Citizens' Counsel For Clean Air, 483 U.S. 711 (1987)	11, 12, 13
Rice v. Janovich, 109 Wn.2d 48, 742 P.2d 1230 (1987)	11, 12, 13
Xieng v. People's National Bank, 63 Wn. App. 572, 821 P.2d 520 (1991)	12

INTRODUCTION

Defendant Debra W. Mobely appeals the trial court's award of \$120,000.00 in attorney fees to plaintiff Katie L. Wilson. The award was based on an attorney fee provision in a real estate purchase and sale agreement that was not applicable to plaintiff's lawsuit, and had also been extinguished by the subsequent conveyance of a statutory warrant deed. Even if the attorney fees award was appropriate, the trial court did not calculate the amount of the award based on the lodestar formula, but instead awarded plaintiff her attorney's contingency fee.

ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The trial court erred when it granted plaintiff's motion for attorney fees on December 22, 2009, based on a clause in a real estate purchase and sale agreement that did not contain an anti-merger clause and was extinguished by the subsequent conveyance of a statutory warranty deed.

Assignment of Error No. 2: The trial court erred when it granted plaintiff's motion for attorney fees on December 22, 2009, based on a provision in a purchase and sale agreement, since plaintiff's lawsuit did not relate to rights bestowed by that agreement.

Assignment of Error No. 3: Even if the trial court did not err when it granted plaintiff's motion for attorney fees, the court erred when it failed to determine those fees in accordance with Washington law and instead awarded plaintiff her attorney's contingency fee, which resulted in an award approximately two times the lodestar amount.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is an attorney fee provision in a real estate purchase and sale agreement extinguished by the subsequent conveyance of a statutory warranty deed where the purchase and sale agreement does not contain an anti-merger clause? (Assignment of Error No. 1)
2. Does an attorney fee provision of a real estate purchase and sale agreement apply to a claim related to the sale of the property but which doesn't concern any right bestowed by that agreement? (Assignment of Error No. 2)
3. What is the proper method to determine an award of attorney fees in a contingency case? (Assignment of Error No. 3)
4. With respect to an award for attorney fees, may the court award a prevailing party the contingency rate charged by his or her attorney in lieu of fees determined by the lodestar formula? (Assignment of Error No. 3)

STATEMENT OF THE CASE

In August 2007, defendant Debra W. Mobely entered into a purchase and sale agreement with her mother, plaintiff Katie L. Wilson, for purchase of Ms. Wilson's residence for the price of \$225,000.00 (Trial Ex. 1). The parties' purchase and sale agreement contained a clause that stated, "If Buyer or Seller institutes suit against the other concerning this Agreement, the prevailing party is entitled to reasonable attorney's fees and expenses" (Trial Ex. 1, Page 4, Paragraph q). The purchase and sale agreement did not contain an anti-merger clause (Trial Ex. 1).

The sale of the home closed in September 2007, and Ms. Wilson executed and conveyed a statutory warranty deed transferring the house to her daughter (Trial Ex. 3). The statutory warranty deed did not contain an attorney's fees provision (Trial Ex. 3).

Several months after the home was conveyed to Ms. Mobely, Ms. Wilson filed a lawsuit seeking to rescind the sale on the grounds that it was fraudulently induced (CP 1-14, 6, 7 and 9). The gist of Ms. Wilson's complaint was that she was an elderly woman of limited education, and her daughter took unfair advantage of her by convincing her to sign a real estate purchase and sale agreement that she didn't understand (CP 4-6). Ms. Wilson's lawsuit also requested an award of attorney fees. (CP 9).

Ms. Mobely hired an attorney to represent her in the case (CP 23-24). That attorney never filed a witness list in the case or provided the opposing party with any of Ms. Mobely's trial exhibits. As a result, all of Ms. Mobely's exhibits were excluded at trial, as were most of her witnesses (CP 54). In his trial brief, the attorney did not object to the request for an award of attorney fees pursuant to the purchases and sale agreement, but instead argued that the request was premature because the case had not yet been resolved, and thus the court could not determine the identity of the prevailing party for purposes of applying the attorney fee provision (CP 52).

The trial lasted approximately two days (CP 54-56). At the conclusion of trial, the court issued an oral decision ruling in favor of Ms. Wilson (CP 57).

Ms. Mobely's attorney withdrew from her case several days later (CP 63-64).

On December 9, 2009, Ms. Wilson's attorney filed a motion and declaration for attorney fees (CP 65-69). In that motion and declaration, Ms. Wilson's attorney noted that he had taken the case on a contingency basis (CP 66). The declaration of Ms. Wilson's attorney concluded, "On an hourly basis, Exhibit A shows that the bill would have been \$63,457.00 plus costs, up to this date. I expect at least 12 more hours will be spent entering the judgment, clearing title and arranging the restitution matters. The hourly fees and expenses will likely exceed \$70,000. Calculating the fees on a contingent basis is more difficult, as the return of title to the house has a substantial but unliquidated value. If the title had not been returned, the judgment against the defendant would be \$367,000, based on the appraised value of the house; one-third of that amount is \$122,000. I therefore ask the court to award \$120,000 in fees, and enter that amount as part of the judgment against the defendant." (CP 69).

On December 18, 2009, Ms. Mobely filed a pleading requesting a continuance of the case so she could retain new counsel to review the

proposed findings of fact and judgment (CP 71). In that pleading, Ms. Mobely objected to the “excessive” fees requested by Ms. Wilson’s attorney (CP 71).

On December 24, 2009, the trial Court signed the proposed findings of fact and conclusions of law submitted by Ms. Wilson’s attorney without changes or additions (CP 83-94). Those findings stated that, among other things, the fair market value of the home was \$422,000.00, there was clear and cogent evidence Ms. Mobely’s purchase of her mother’s home was fraudulent, Ms. Mobely was unjustly enriched by the transaction, the sale of the home should be rescinded, and that Ms. Wilson should be awarded attorney fees (CP 87, 91-94). The trial court also entered judgments quieting title and for attorney fees in the amount of \$120,000.00 (CP 80-81). As to the issue of attorney fees, the findings of fact drafted by Ms. Wilson’s attorney and signed by the court stated only, “The plaintiff was represented by counsel in this action on a contingent fee basis, which was necessary because of plaintiff’s financial circumstances. Applying the lodestar formula, the amount of time plaintiff’s attorneys spent on this case was reasonable, their hourly rates are reasonable considering the experience of counsel and the facts of this case. The attorney’s work was of high quality, and the fee award should recognize the contingent nature of the

representation. Plaintiff's reasonable attorney's fees are \$120,000." (CP 91-92).

Ms. Mobely appeals from that award of attorney fees.

ARGUMENT

1. The attorney fees provision of the real estate purchase and sale agreement, which did not contain an anti-merger clause, was extinguished when the deed to the property was conveyed to the Ms. Mobely.

Rights contained in a purchase and sale agreement merge with a subsequent deed and are satisfied and extinguished once that deed is conveyed to a buyer. Barber v. Peringer, 75 Wn. App. 248, 877 P.2d 223 (1994). Accordingly, there was no basis to enforce the attorney fees provision of the purchase and sale agreement in the case at bar once the statutory warranty deed was executed and the property in question was transferred to Ms. Mobely.

An attorney's fee provision can survive the execution of a subsequent deed if the purchase and sale agreement contains an "anti-merger" clause. Failes v. Lichten, 109 Wn. App. 550, 37 P.3d 301 (2001). Here, the purchase and sale agreement did not contain an anti-merger clause.

The terms of a purchase and sale agreement can depend on the intent of the parties. Deep Water Brewing, LLC v. Fairway Resources Limited, Key Development Corporation, _____ Wn. App. ____ (2009), 27014-9-III, 27024-6-III. Where the intent of the parties is not clearly expressed in a deed, courts may consider parole evidence. Deep Water Brewing, supra. In this case, there was no parole evidence related to whether the parties intended the attorney's fee provision to survive execution of the statutory warranty deed. In fact, as discussed below, it is likely that the parties merely contemplated the attorney fees provision to apply to actions to enforce the rights afforded by the purchase and sale agreement.

2. The attorney fees provision in the purchase and sale agreement only applied to rights afforded by the agreement.

The general purpose of an attorney's fee provision in a purchase and sale agreement is to facilitate enforcement of rights afforded by the agreement. Whether a purchase and sale agreement was entered into as a result of fraud, at least with respect to the facts of this case (where an elderly woman claims her daughter convinced her to sign a purchase and sale agreement she didn't understand) is an issue unrelated to rights afforded by the agreement itself.

The attorney fees provision of the Wilson and Mobely's purchase and sale agreement states, "If Buyer or Seller institutes suit against the other concerning *this Agreement*, the prevailing party is entitled to reasonable attorneys' fees and expenses" (emphasis added). In Failles v. Lichten, 109 Wn. App. 550, 37 P.3d 301 (2001), the Court considered an attorney fees provision in a real estate purchase and sale agreement that stated if the buyer or seller "is involved in *any dispute relating to this transaction*, any prevailing party shall recover reasonable attorney's fees and costs (including those for appeals) which relate to the dispute." Failles v. Lichten, 109 Wn. App. at 552-553 (emphasis added). In Failles, the Court held that an action for rescission based on an allegation of fraud was a dispute related to the "transaction." Failles v. Lichten, 109 Wn. App. at 554. The phrase, "any dispute relating to this transaction," however, is much broader than "concerning this Agreement." In the case at bar, Ms. Wilson's lawsuit did not concern the purchase and sale agreement, but instead concerned the "transaction."

The Failles court reviewed the holding in Barber v. Peringer as to this very issue. In Barber, the purchase and sale agreement authorized an award of attorney fees "to a party who must commence legal action to enforce any rights contained in the REPSA." In considering this attorney fee provision, the Failles court distinguished between lawsuits brought to

enforce a right granted by a purchase and sale agreement as opposed to a right granted by law. Failles v. Lichten, 109 Wn. App. at 556-557. In the case at bar, the purchase and sale agreement's language pertaining to disputes regarding "this agreement" is closer to the one in Barber ("rights contained in the RESPA") than the one in Failles (lawsuits related to "the transaction"). Ms. Wilson's action to rescind the sale of her home on the grounds that her daughter took undue advantage of her is a suit unrelated to the rights contained in the purchase and sale agreement, and instead an independent action at law. The attorney fees provision of the purchase and sale agreement did not apply to Ms. Wilson's claim.¹

3. Even if an award of attorney fees was appropriate in this case, the correct amount of fees to award in a contingency case is not the attorney's contingency rate. Instead, the court is to apply the lodestar method.

Even if it was appropriate to award attorney's fees in this case, plaintiff's counsel's contingency fee was not a factor to consider in determining the award, let alone an appropriate amount to award.

Washington law clearly delineates the process to be used in awarding attorney fees in a contingency case. The preferred method for determining

¹ As noted above, the Failles case is further distinguishable on the grounds that the purchase and sale agreement in that case contained an anti-merger clause.

reasonable attorney fees is the lodestar method. Mahler v. Szucs, 135 Wn.2d 398, 957 P.2d 632 (1998). A lodestar fee is determined by multiplying a reasonable hourly rate by the number of hours reasonably expended on the lawsuit. Henningsen v. Worldcom, Inc., 102 Wn. App. 828, 847, 9 P.3d 948 (2000).

In determining the number of hours reasonably expended, a parties' attorney must provide reasonable documentation of their work performed, the number of hours worked, and the category of attorney who performed it. The court must limit the lodestar to hours reasonably expended, and should therefore discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time. Morgan v. Kingen, 141 Wn. App. 143, 169 P.3d 487 (2007), *aff'd* 166 Wn.2d 526, 210 P.3d 995 (2009).

In this case, while the trial court stated it was applying the lodestar method, in fact it did not. Instead, the trial court simply awarded plaintiff her attorney's contingency fee.

4. The lodestar amount of attorney fees is presumed to be the reasonable fee, and a multiplier should not applied to that amount except in exceptional circumstances.

A strong presumption exists that the lodestar amount itself, without any adjustment or multiplier, represents a “reasonable fee.” City of Burlington v. Dague, 505 U.S. 557 (1992). Once that lodestar amount is determined, the court can adjust the fee only “rare” and “exceptional” instances. Mahler v. Szucs, 135 Wn.2d at 434; Rice v. Janovich, 109 Wn.2d 48, 742 P.2d 1230 (1987), Pennsylvania v. Delaware Valley Citizens’ Counsel For Clean Air, 483 U.S. 711 (1987). When an adjustment of the lodestar amount is appropriate, a multiplier is used.

In City of Burlington v. Dague, 505 U.S. 557 (1992), however, the United States Supreme Court held that contingency multipliers should be used sparingly, if at all. The Dague court stressed that there is a “strong presumption that the lodestar represents the reasonable fee,” and that a contingency multiplier would “likely duplicate in substantial part factors already subsumed in the lodestar.” City of Burlington v. Dague, 505 U.S. at 562. The Court challenged the notion that the uncertainty of the outcome or the difficulty of establishing the merits of a claim justified the use of a multiplier in contingency cases. The Court reasoned that the risk of loss in a particular case is the product of (1) the legal and factual merits of the claim and (2) the difficulty of establishing those merits. The Court

stated that the difficulty of establishing the merits of the case is already reflected in the lodestar amount because the more difficult a case is, the more hours an attorney will have to prepare and the more skilled an attorney will have to be to succeed. Dague, 505 U.S. at 562. A contingency enhancement, the Court reasoned, will therefore often result in double payment. Dague, 505 U.S. at 562-563. The Court in Dague noted that with regard to the relative merits of a claim, the risk of losing a case is a factor that always exists to some degree. Dague, 505 U.S. at 563.

Washington courts have followed the principals articulated in Dague; see e.g., Chuong Van Pham v. Seattle City Light, 159 Wn.2d 527, 151 P.3d 976 (2007). Enhancements of the lodestar amount “should be reserved for exceptional cases where the need and justification ... [are] readily apparent ...” Xieng v. People’s National Bank, 63 Wn. App. 572, 821 P.2d 520 (1991), citing Pennsylvania v. Delaware Valley Citizens’ Counsel For Clean Air, 483 at 728, 717-31.

5. A decision to apply a multiplier to the lodestar amount must be supported by specific evidence and detailed findings.

In those “rare” and “exceptional” circumstances where application of a multiplier is appropriate, a trial court’s decision to do so “must be supported by both ‘specific evidence’ on the record and detailed findings ...” Rice v. Janovich, 109 Wn.2d 48, 742 P.2d 1230 (1987), citing

Pennsylvania v. Delaware Valley Citizens' Counsel For Clean Air, 483 U.S. 711 (1987).

In the case at bar, there was no specific evidence in the record supporting the trial court's order, nor were there the requisite detailed findings as required by Rice v. Janovich. There was no analysis of the level of risk in the litigation, no discussion of the complexity or non-complexity of the case, no review of whether any of the attorney's work was directed toward unsuccessful claims, duplicated effort or otherwise unproductive time, no distinction made between pre trial work (when the outcome of the case was arguably uncertain) and post-trial work (when the outcome of the case was known), and no consideration of what an appropriate multiplier, if any, there should be. The trial court did not even specifically reference in its findings the amount of plaintiff's attorney's fees it calculated using an hourly rate. Instead, the court simply granted the contingency fees plaintiff's attorney requested.

The evidence suggests that even had such an analysis occurred, the case at bar was not one of those "rare" and "exceptional" cases that would justify the use of a multiplier. The case presented no particularly difficult issues, nor was the theory of the case novel. The trial lasted approximately two days. The attorney representing Ms. Mobely failed to submit witness and exhibits lists, and was precluded from calling her

witnesses or submitting her documentary evidence at trial. The court found the evidence overwhelming. In sum, there was little risk plaintiff's case would be unsuccessful.

In all of the cases discussed in this brief, the maximum multiplier applied by a court, when it was used at all, was 1.5 times the lodestar amount. In the case at bar, the court awarded attorney fees in an amount nearly double the lodestar calculation. While it does not appear from the record that the court actually employed the use of a multiplier, even if it did, such a multiplier would have been unreasonable given the relative non-complexity of the case.

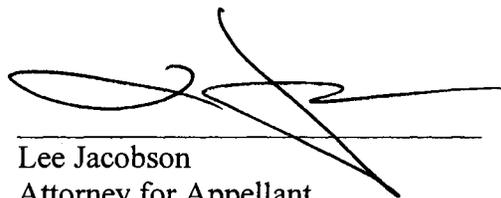
CONCLUSION

The judgment for attorney fees against Debra W. Mobely should be vacated in its entirety, or modified to the lodestar amount, i.e., \$63,457.00.

In the alternative, the matter should be remanded to the trial court for determination of a proper award of attorney fees using the lodestar method, with instructions to the court to determine whether the instant case is one of the rare and exceptional ones that merits the use of a multiplier.

Dated: April 9, 2010

Respectfully submitted,

A handwritten signature in black ink, consisting of a large, stylized 'L' followed by a horizontal line and a diagonal stroke.

Lee Jacobson
Attorney for Appellant
WSBA# 20752

PROOF OF SERVICE

I certify that I served a copy of this Brief of Appellant on respondent Katie L. Wilson by personally delivering a copy of it to the office of her attorney of record, Jeffrey T. Broihier, at 720 Third Avenue, Suite 1600, Seattle, Washington, on April 9, 2010.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct

Dated this 9th day of April, 2010, at Seattle, Washington.



Lee Jacobson, WSBA# 20752
Attorney for Appellant