

65122-6

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No. 65122-6

Court of Appeals,
Division I,
State of Washington

DONALD E. HILLIARD and CINDY HILLIARD, husband and wife,
Appellants,

vs.

SHELLEY GUNDERSON, Respondent.

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STATE OF WASHINGTON
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Brief of the Respondent

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ORIGINAL

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I. Statement of the Case

The Respondent, Shelley Gunderson, in 2007 offered her real property for sale. The property was large enough to allow for a short plat sub-division. That is it could be divided into two separate lots. She was only offering the potential lot for sale. She wanted to keep the “home site” for herself. She never promised any guarantee as to the successful outcome of any particular buyer actually gaining a new lot from her property.

On June 19, 2007, the Hilliards, a married couple, offered to purchase, for \$170,000.00, the potentially developable lot. Shelley Gunderson accepted the offer. CP 8 – Exhibit 1. The offer was conditioned upon the Hilliards doing their own feasibility study, which they did. At the completion of the feasibility study the Hilliards could either rescind their offer or confirm it. They confirmed their offer on or about August 1, 2007. CP 8 – Exhibit 1: Front Page. Under the terms of their offer, they had until December 31, 2007 or sooner to close. CP 8 – Exhibit 1: Front Page. By early December 2007, Hilliards realized they would not meet the closing deadline. Many adjustments were attempted but never mutually agreed to. CP 8 – Exhibit 1: Back Pages.

The Hilliards did not complete their short sub-division before December 31, 2007. Unbelievably in an effort to frustrate Gunderson, the

Hilliards came to the closing table with documents that would transfer all of Gunderson's property – the home site and the potential lot – to the Hilliards for \$170,000.00. CP 2 – Allegation No. 6 in the Complaint. The home site, at that time, was worth over \$400,000.00 and was never a part of the purchase agreement. Gunderson refused to transfer the home site and potential lot (in total estimated value in excess of \$570,000.00) to the Hilliards for the purchase and sale price of the potential lot for \$170,000.00. The transaction did not close.

The Hilliards then filed a lawsuit for specific performance. CP 2. In the lawsuit the Hilliards did not claim a right to all of Gunderson's property. They wanted the potential lot and claimed Gunderson refused to transfer that which did not exist. That is to say, because the Hilliards had not yet successfully completed the sub-division of Gunderson's property, there was no "additional" lot. There was still only a potential lot. No one, under Washington law, can transfer a lot that does not exist. RCW 58.17 et seq.

This nonsense was now costing Gunderson legal fees. In an effort to bring some sanity to this stupidity, Gunderson, on August 8, 2008, agreed to continue to sell the potential lot to the Hilliards. CP 8 – Exhibit 2. However, she believed, and rightly so, that the Hilliards could not complete the desired short plat. There are reasons for this belief. First,

the Hilliards did not do it in the first place. Second, the firm they hired to do the work, Orca Land Surveying, had at its head, an unlicensed surveyor. CP 32. Third, the Snohomish County officials told Gunderson that the Hilliards were horribly absent in following County regulations. CP 10. But, to get the property sold and the Hilliards off her back, Gunderson agreed to amend the purchase and sale agreement. CP 8 – Exhibit 2.

In the amended agreement, Gunderson took on a work load that was never contemplated in the original purchase and sale agreement. CP 10. Gunderson agreed to be the lead in finishing the preliminary short plat. There were cost share agreements made, which, with limited exception, the Hilliards ignored. But, in order to avoid additional legal challenges, Gunderson incurred substantial legal fees. She was in the throws of a lawsuit and, not being legally trained, needed legal assistance to perform her duties under the amendment. CP 32. These fees she was willing to waive only upon closing on the property. Then the Hilliards – after Gunderson qualified the property for preliminary short plat approval – decided: 1) not to close; 2) not to pay fees they had agreed to pay; and 3) not to release the Lis Pendens they had filed against Gunderson’s property, or 4) do anything else to get out of Gunderson’s life.

The Hilliards claim for not closing was that their financing fell through. However, their agreement to purchase was not contingent on financing. CP 8 – Exhibit 1. At that point, Gunderson requested to be released from the lawsuit. Again, the Hilliards refused to dismiss their complaint. They had a Lis Pendens recorded against Gunderson's property, which they also refused to remove. Gunderson's property was being held hostage by people who had no intent of fulfilling their contractual agreement. CP 8 – Exhibit 3. Having no other choice to relieve her property from the burden of the Lis Pendens and lawsuit, Gunderson filed a motion for summary judgment. CP 11. In that motion, she made a claim for damages. CP 10.

In order to escape the motion for summary judgment and the legitimate attorney's fees, costs and expenses Gunderson was due under the purchase and sale agreement, the Hilliards filed a CR 41 motion for dismissal to be heard on the same day as Gunderson's summary judgment motion. CP 12 and CP 14. The Trial court, being bound by precedence, heard the CR 41 motion first. The Trial court then heard the Defendant's Motion for Summary Judgment. CP 19 and CP 22.

Again, being bound by precedence, the Trial court granted Hilliards CR 41 motion. CP 21. In granting the voluntary dismissal, the Trial court would not consider Gunderson's Answer, Affirmative Defenses and

Request for Relief as seeking an “affirmative relief” under RCW 4.56.120. CP 22. But the Trial court did find that an award of attorney’s fees and costs was appropriate stating the Plaintiff (sic – the Trial court meant the Defendant) needed to note a request for attorney fees. CP 22. It also granted relief from the Lis Pendens and a full dismissal of the Plaintiffs’ complaint which is not consistent with the CR 41 Rule.

However, under existing case law and under the PSA as stated in the Order, Gunderson was allowed her reasonable attorneys’ fees and costs. She was denied her other contractual costs, expenses and damages, which were reserved for future litigation. CP 21 – Case dismissed with prejudice. No one has ever asserted that Gunderson is not due these costs, expenses, fees or damages. The only assertion is that she failed to counterclaim against the Hilliards. Rather, Gunderson introduced her arguments as affirmative defenses to the Hilliards’ claim for specific performance. The trial court found that the affirmative defenses, although legitimate enough to be reserved for future litigation, were not sufficient enough to form a basis of a counterclaim. CP 22.

The Hilliards then moved for reconsideration of the award for attorney’s fees. CP 27. The matter was fully briefed, again at great expense to Gunderson. CP 23, 24, 25, 26 and 27. That motion was heard on December 18, 2009. The trial court denied the Hilliards’ motion. CP

30 and CP 31. The trial court's reasoning was that the contract provisions (wherein Gunderson would pay her own fees) was "contingent upon closing" and the trial court found it was the intent of the attorneys that upon closing the parties would be responsible for their own fees. CP 31. But since the Hilliards failed to close without legal excuse (i.e. there was no condition of financing in the contract) they should pay Gunderson's legal fees.

Gunderson filed a third declaration for attorneys' fees in order to meet the conditions of the Lodestar test. CP 32. The justification for fees is clearly set out in that Declaration (CP 32) and the Defendant's Reply Brief to Plaintiffs' Response to Defendant's CR 54(d) Motion Re.: Attorneys' fees. CP 34. The trial court accepted the argument presented in CP 34 and awarded fees. CP 36. However the trial court also specifically eliminated a number of fees reducing the attorneys' fee claim by over \$6,500.00.

Gunderson's points were again stated in CP 41. That is: even though Gunderson's motion for summary judgment was denied, she got specific relief. The case by Hilliard was dismissed with prejudice, but Gunderson's damages claims were allowed to survive. The Lis Pendens was released. Gunderson was granted her attorneys' fees. CP 43

In short, equity demanded relief for Gunderson. She was the innocent victim of the Hilliards' failure to complete their duties under the Purchase and Sale Agreement (PSA), and thereafter, the Settlement Agreement. Through no fault of hers she has incurred substantial legal fees merely because the Hilliards desired her property and entered into contract (PSA) to purchase the potential lot; and then, the Hilliards breached the contract on multiple occasions. The PSA, settlement agreement amendment, RCW 4.84 and CR 56(d) are the authority for her equitable award of fees.

II. Argument

A. Standard of Review: The Court is reviewing the reasonableness of attorney fees paid involved in two orders. In the Notice of Appeal the Appellant has assigned error on the following: 1) the Findings of Fact and Order on Defendant's CR 54(d) Motion; and 2) the Order Denying Plaintiffs' Motion for Reconsideration. The Respondent's court papers have addressed the issues raised by the Appellant. CP 8, 9, 10, 15, 16, 22, 23, 25, 34, 36, 38, and 41.

In their brief, the Appellants, in a sideways manner, are asking this Court to review the trial court's decisions on a prior summary judgment motion and voluntary dismissal motion. Those decisions and orders have not been properly brought before the Court and the Respondent hereby

objects to this Court's review of those decisions as the Hilliards did not timely make an appeal of those decisions.

In considering the award of attorney's fees made by the trial court the question on review is the reasonableness of the trial court while recognizing its discretionary authority. An award of fees should not be overturned on appeal unless the award constitutes an abuse of the trial court's discretion. Allard v. First Interstate Bank, 112 Wn.2d 146, 768 P.2d 998, 773 P.2d 420 (1989). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. Mayer v. Sto Indus., Inc., 156 Wash.2d 677, 684, 132 P.3d 115 (2006). The trial court made the award of attorneys fees based on 1) the language of the Purchase and Sale Agreement (PSA); 2) the trial court's determination that the PSA language controlled the award of attorney's fees prior to closing; 3) RCW 4.84.330; and the fact that Gunderson essentially prevailed in this lawsuit (i.e. the suit was dismissed, her property was freed of the encumbrance of the Lis Pendens, and she was awarded most of her fees).

The trial court used the Lodestar method in determining reasonableness of fees. In general the lodestar test is as follows:

The determination of a reasonable attorney fee to award at trial is made independently by the trial court. The court begins by calculating a lodestar figure. The lodestar figure is determined by

multiplying the number of hours reasonably expended in the litigation by the attorney's reasonable hourly rate of compensation. Chuong Van Pham v. The City of Seattle, Seattle City Light 122 Wn.App 716 (2004)

In the present case the court reviewed the fees line by line and made deductions of over \$6,500.00 for what it considered duplicative and unproductive fees. Although this may be the standard, it could be claimed that the trial court abused its discretion by not awarding Gunderson her full costs and attorney fees under the contract.

B. Abuse of discretion for award of Fees under Summary

Judgment Motion: Appellants claim “the trial court abused its discretion by awarding Gunderson fees for her unsuccessful summary judgment motion...” At page 4 of their Brief, the Appellants claim that Gunderson did not make a claim for reasonable attorney fees. Although Gunderson did plead for reasonable attorney fees in her Answer, she further pled for “full costs and attorney’s fees as allowed under the PSA” in her Summary Judgment Motion. Appellants are factually in error about an award by the trial court under the summary judgment motion. The trial court’s order simply denies the summary judgment motion, and makes no mention of an attorney fees award. CP 20.

The Hilliards argued back that Gunderson’s Summary Judgment Motion did not contain provision for an award of fees and costs. The

Hilliards also argued that because the attorney fee claim only showed up in the reply, they did not have time to fully brief a response. CP 13. But contrary to Hilliards' representation to the trial court, provision was made in the motion for summary judgment for fees and costs, removal of the lis pendens, and dismissal of the case. CP 8. The Hilliards were given fair notice that Gunderson was seeking her damages, both by her Answers, Affirmative Defenses and Requests for Relief (CP 4) caused by their own choice to litigate rather than rescind the PSA they had breached. (See Pac N.W. Shooting Park Assoc. v. City of Sultan, 158 Wash.2d 342, 352, 144 P.3d 276 (2006).)

It is important to note that Gunderson's Summary Judgment motion is what made the Hilliards finally respond to her demands to be released from the lawsuit if they were going to renege on the deal. And, because the Hilliards responded with a voluntary dismissal under CR 41, Gunderson in essence got part of the relief she wanted. In addition, she did receive confirmation of her right to preserve her other claims and a right to be reimbursed her attorney's fees and a release of the Lis Pendens.

Nevertheless, the trial court did not abuse its discretion because it made no decision other than denying the summary judgment motion. It made no decision to award fees under the summary judgment motion.

C. Abuse of Discretion for Award of Fees under Voluntary

Dismissal Motion: Appellants claim “the trial court abused its discretion by awarding Gunderson fees for ... her unsuccessful resistance to the motion for voluntary dismissal.” Appellant’s Brief, pages i & 6. In reply to Hilliards’ Memorandum in Opposition to Defendant’s Summary Judgment Motion, Gunderson moved for fees and costs under the Purchase and Sale Agreement as applicable under RCW 4.84 et seq and enforceable by the court under CR 54(d). CP 16. The trial court’s order granting the voluntary dismissal also grants an award of attorney fees to Gunderson with the amount to be determined at a future hearing upon motion. CP 21 and CP 22.

Gunderson does believe the trial court unreasonably abused its discretion by denying her claim under RCW 4.56.120 that she had in effect counterclaimed with her answer, affirmative defenses and requests for relief. Gunderson also believes the trial court abused its discretion by not considering her claim under CR 8(c) which states

“When a party has mistakenly designated ... a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleadings as if there had been a proper designation.”

It is clear from the record that Gunderson always was seeking affirmative relief under the PSA for attorney fees. Nonetheless, Gunderson opted not to appeal the trial court’s discretionary decision. She had substantially

prevailed on what she wanted – release from the lawsuit, an award of fees, release of the Lis Pendens, and the right to bring litigation against the Hilliards for her other damages while the Hilliards complaint was dismissed with prejudice. The issue at hand was not whether the Hilliards had prevailed on their CR 41 Motion. The issue was whether or not Gunderson’s efforts demonstrated by filing her Summary Judgment motion were meritorious regardless of the CR 41 Motion. CP 41. The trial court decided that she should be granted fees for the successful results she obtained. CP 38.

The trial court reviewed the time sheets for unnecessary and wasteful time, and made what in its opinion were appropriate deductions. CP 38. The trial court did not abuse its discretion in awarding Gunderson attorneys’ fees and costs under the Order granting the voluntary dismissal motion because Gunderson had demonstrated her right to the fees.

D. Abuse of Discretion for award under amended purchase and sale agreement. The Appellants claim “the trial court abuse[d] (sic) its discretion by awarding Gunderson \$3,807.40 in attorney fees relating to her performance of her obligations under the amended purchase and sale agreement.” Appellant’ Brief, pages i & 8. The Hilliards claim Gunderson should not be awarded her fees and costs because an amendment had been made to the Purchase and Sale Agreement in the

form of a Settlement Agreement. The trial court recognized the Settlement Agreement did say each party would be responsible for its own attorney's fees, but found the intent of the Settlement Agreement was to close the sale of the property, not to amend the remedies for default under the Purchase and Sale Agreement. CP 23 and 30.

The trial court did hold that the Settlement Agreement was applicable as to the fees and costs only upon dismissal of the lawsuit with prejudice at the time of closing. CP 30. Closing had not occurred. The Settlement Agreement authorized Gunderson to incur reimbursable attorney fees on the Hilliards' behalf to get the preliminary plat approved. CP 8 – Exhibit 2.

E. A CR 41 Dismissal is Usually Granted Without Prejudice Yet Gunderson even Prevailed on This Issue. A CR 41 dismissal is a dismissal without prejudice, but in this case the trial court made a dismissal with prejudice. Given the persuasiveness of Gunderson's argument the trial court really had no choice. The Gunderson property was encumbered by a Lis Pendens, which, even within their CR 41 motion, the Hilliards refused to release. And, since the Hilliard's had sued for specific performance, a dismissal without prejudice meant that the Hilliards could again initiate their specific performance action in the future. Such an open ended license precluded Gunderson from being able to sell her property and warrant

clear title. Also, even under the Settlement Agreement, Gunderson was due her reimbursable expenses from the Hilliards which they also refused to pay to her. The court reserved Gunderson's right to re-litigate for her unreimbursed expenses, costs and damages. The trial court did eventually order the Lis Pendens released. CP 38.

F. Request for Attorney Fees on Appeal. The Appellants are requesting attorneys fees based on the Purchase and Sale Agreement. The problem is they rescinded the Purchase and Sale Agreement after breaching both the contract and Settlement Agreement amendment. They have claimed Gunderson cannot be paid her attorney fees under the Purchase and Sale Agreement, because the Settlement Agreement provides for each party to pay their own fees.

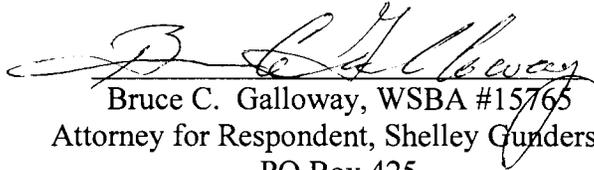
It seems quite ironic for them now to turn around and request fees under the Purchase and Sale Agreement rather than recognizing their theory that the Settlement Agreement controls fee awards. The Hilliards have already made an election of remedy in the Settlement Agreement. They may not now turn around and ignore that election.

The Hilliards should be denied their request for attorney fees. Gunderson requests her attorneys' fees and costs on the Hilliards' appeal.

III. Conclusion

The Appellant's appeal should be denied. The Appellants should be denied their attorneys fees for appeal. The Respondent should be awarded her attorneys' fees and costs granted by the trial court and those incurred on this appeal.

Dated this 27th day of September, 2010.



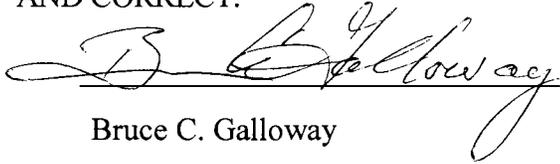
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Proof of Service

I certify that on September 27, 2010 at Lake Stevens, Washington, I caused to be served by Cascade Courier & Delivery Service a true and correct copy of the foregoing document to Appellants' attorney:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF
THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE
AND CORRECT.


Bruce C. Galloway

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