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King Co. Superior Court No. 07-2-23856-5 SEA

No. 66052-7-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

City of Bothell, Appellant

v.

Robert Wallace, Respondent

REPLY BRIEF OF APPELLANT

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A. Argument

1. RESPONDENT'S RELIANCE ON MALTED MOUSSE IS MISPLACED BECAUSE (1) THERE IS VALID CASELAW WHICH DEMONSTRATES THE APPELLATE COURTS' AUTHORITY TO DETERMINE FEES AT THE TRIAL COURT LEVEL, AND (2) MALTED MOUSSE IS NOT FACTUALLY ANALOGOUS AS THERE ARE INSUFFICIENT FACTS CONTAINED WITHIN THE OPINION, OR WITHIN THE FOOTNOTE ON WHICH RESPONDENT RELIES, TO BE OF ANY PRECEDENTIAL OR PERSUASIVE VALUE.

The Washington Supreme Court has exercised jurisdiction over a determination of an award of attorney fees by a trial court. Scott Fetzer Co. v. Weeks, 122 Wn.2d 141, 143-144, 859 P.2d 1210 (1993). In Fetzer, the following occurred.

The trial judge granted \$116,788. We reversed that award as excessive and remanded the issue for the trial judge to re-evaluate both the hourly rate and the number of hours claimed. On remand, the trial judge reduced the total award of fees and costs to \$72,746.38. The sole issue before us is whether the trial court properly calculated those fees. We hold that it did not, and further reduce the total award of fees and costs to \$22,454.28.

Id.

Contrary to respondent's argument, Washington Appellate Courts can exercise and have exercised jurisdiction over the award of attorney fees by a trial court. Id. To say that this court's jurisdiction is limited to appellate fees in the Washington Courts of Appeals contradicts valid, precedential caselaw. Id.

Of note in Fetzer is that the Washington Supreme Court first remanded the case to the trial court for re-examination, but ultimately the

Supreme Court itself decided to examine the proposed expenses and made a ruling regarding the amount of the award. Id. In the case at bar, this court had the respondent's proposed fees for all levels of appeal for its review and, after reviewing the information, denied the request to award attorney fees.

Also, while the Fetzer court initially remanded the case to the trial court for a determination of fees, this court did no such thing. This court, after having reviewed the requested fees, noted that the decision does not award Wallace the right to attorney fees and denied the request.

This court ruled on the matter. No fees were authorized, and because this court has the authority over fees awarded in the trial court, the matter should have been final.

In the respondent's brief, respondent states that the Washington Supreme Court, in Malted Mousse, Inc. v. Steinmetz, 150 Wn.2d 518, 79 P.3d 1154 (2003), "recognized RAP 18.1 applies only to fees incurred on appeal." Brief of Respondent 6:12-13.

No such "recognition" exists. Instead, the Washington Supreme Court, in a footnote, notes that Malted Mousse argues on reconsideration that the Washington Supreme Court should have awarded fees pursuant to MAR 7.3, as Steinmetz did not improve his position on appeal. Malted Mousse, 150 Wn.2d at 535. The Court denied the request but mentions

that Malted Mousse is not precluded from seeking reasonable attorney fees on remand. Id. However, the court does not provide a basis for this statement, and it would be completely speculative and ludicrous to believe that this single statement found in a footnote, related to a completely different set of facts from those found in this case, is a holding by the Washington Supreme Court meant to limit the scope of authority of RAP 18.1 in all cases and place a limit where none existed before.

The Washington Supreme Court has “previously disapproved of overruling binding precedent sub silentio.” Broom v. Morgan Stanley DW, Inc., 169 Wn.2d 231, 238, 236 P.3d 182 (2010). (Citing State v. Studd, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999)). Further, the Supreme Court has held that “ [t]he doctrine of stare decisis “requires a clear showing that an established rule is incorrect and harmful before it is abandoned.” ’ ’ State v. Devin, 158 Wn.2d 157, 168, 142 P.3d 599 (2006) (quoting Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (quoting In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970))). Id. at 239.

Additionally, there is an absence of relevant, analogous facts in the opinion, upon which a party would need to rely, that would make any inference proper. Specifically, there is no mention as to whether Malted Mousse properly requested attorney fees at the trial court level.

Further, respondent's reliance on Hedlund v. Vitale, 100 Wn. App. 183, 39 P.3d 358 (2002), citing Estate of Haselwood v. Bremerton Ice Arena, Inc., 166 Wn.2d 489, 210 P.3d 308 (2009), is misplaced.

Again, there is no "recognition" that RAP 18.1 applies only to fees incurred on appeal. The Hedlund court discusses an entirely separate issue: whether a trial court has the authority pursuant to MAR 7.3 to make an award for fees incurred at the Court of Appeals and Supreme Court when such fees were not requested pursuant to RAP 18.1.

That is not the issue in the case at bar. This case is not subject to MAR 7.3, and the respondent did not request appellate costs at the trial court level. Moreover, there is also a factual void in Hedlund opinion regarding whether a party properly made a request for attorney fees at the trial court level.

Citing no valid contrary authority, the City respectfully requests (1) that this court find that its prior decision, which denied respondent's attorney fees, is binding on all levels and (2) reverse the trial court's abuse of discretion in awarding attorney fees.

2. THE CITY NEVER ARGUES THAT STRICT COMPLIANCE WITH RALJ 11.2 IS MANDATORY. RESPONDENT HAS MISSTATED THE CITY'S CLAIM IN THIS REGARD.

The City argues that respondent failed utterly to follow any of the procedures associated with making a claim for an award of attorney fees. In other words, statutory entitlement by itself is insufficient to justify an award.

RCW 69.50.505(6) states, in relevant part, that “[i]n any proceeding to forfeit property under this title, where the claimant substantially prevails, the claimant is entitled to reasonable attorneys' fees reasonably incurred by the claimant.” This statute limits itself to an entitlement, nothing more. There is a noticeable absence of any language, mandating a calculation and automatic award. “When the words in a statute are clear and unequivocal, this court is required to assume the Legislature meant exactly what it said and apply the statute as written.” Duke v. Boyd, 133 Wn.2d 80, 87, 942 P.2d 351 (1997). “Although the court should not construe statutory language so as to result in absurd or strained consequences, neither should the court question the wisdom of a statute even though its results seem unduly harsh.” Id. (Citations omitted.)

Had the legislature intended to create a mandatory, automatic award instead of an entitlement which must be redeemed or requested, it would have done so. Here, even if this court finds the legislature's intent harsh, it would be improper for the court to question that wisdom. Further, the combination of an entitlement followed by a request is supported by caselaw. "Reasonable attorney fees are recoverable on appeal only if allowed by statute, rule, or contract and the request is made pursuant to RAP 18.1(a). (Emphasis added.) Malted Mousse, 150 Wn.2d at 535. Also, at the appellate level, the court requires strict compliance with RAP 18.1 for a prevailing party to recover reasonable attorney fees. Costanich v. Washington State Dept. of Social and Health Services, 164 Wn.2d 925 (2008), citing Zuver v. Airtouch Commc'ns, Inc., 153 Wn.2d 293, 321 n. 21, 103 P.3d 753 (2004).

Next, even assuming, without conceding, that the respondent is correct that strict compliance is not required, the respondent recognizes that some compliance is required by acknowledging that "should," as provided in RAP 1.2 (b), refers to an act a party or counsel for a party is under an obligation to perform.

It stands to reason, then, that if a party is seeking fees for an appeal at the superior court level, that fees would be recoverable only if allowed by statute, rule, or contract and the request is made pursuant to RALJ 11.2.

As stated before, even if respondent has a statutory entitlement to attorney fees, the entitlement is not automatic and requires something more.

This court should not allow the side-stepping of the proper notice that is required to fulfill that obligation. The respondent failed in any way to timely perform. In response to his failure to comply in any way with RALJ 11.2, respondent relies on RALJ 1.2(b). However, RALJ 1.2(a) requires that the rules be liberally interpreted to promote justice. As argued in its opening brief, the City contends that failure to provide any sort of timely notice is patently unjust.

3. RESPONDENT MISLEADS THIS COURT BY IMPERMISSIBLY CITING TO UNPUBLISHED CASE LAW IN STATING THAT THE UNPUBLISHED CASE SHOULD HAVE PUT THE CITY ON NOTICE OF THE POSSIBILITY OF AN AWARD OF ATTORNEY'S FEES ON REMAND. RESPONDENT FURTHER COMPOUNDS AND EXACERBATES THE IMPROPER CASE CITATION BY IMPLYING THAT THE FACTS OF THAT CASE ARE ANALOGOUS TO THE CASE AT BAR TO SUPPORT SUCH AN INFERENCE.

In reference to the prejudice suffered by the City, respondent first claims that Malted Mousse put the City of notice that a determination of fees was possible. Brief of Respondent 10:n 8. This is false. Fetzer clearly grants this court jurisdiction to determine any award for attorney

fees incurred at the trial court level. See argument in section 1 of this brief.

Next, in violation of General Rule 14.1(a), the respondent cites to unpublished case allegedly “only for the purpose of demonstrating what information was available to the City.” Brief of Respondent 11:n 10. The City was aware of this case, but pursuant to the aforementioned rule, did not cite to it.

First, the City requests sanctions against the respondent pursuant to the holding in Johnson v. Allstate Ins. Co., 126 Wn. App. 510, 108 P.3d 1273 (2005).

Second, to the extent that this court infers from respondent’s improper reference to unpublished caselaw that the aforementioned case is somehow sufficiently, factually analogous for purposes of influencing its ruling in the case at bar, the City respectfully requests that all mention and inference be struck.

Third, to the extent that this court wishes to rely on the aforementioned case as persuasive, the City would welcome the opportunity to brief any and all relevant differences, which distinguish that case from the case at bar.

In response to the prejudice suffered by the City due to lack of proper notice, respondent mistakenly relies on the holding in Malted

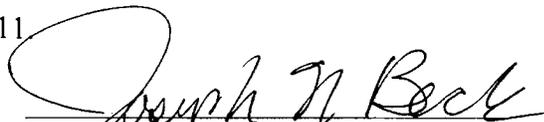
Mousse, as the holding in Fetzer controls. Respondent also improperly cites to unpublished caselaw. Because both arguments presented to this court fail, the City respectfully requests that this court (1) find that the City was not given proper notice of respondent's intent to request fees, (2) find that as a result of the lack of notice, the City was substantially prejudiced, and (3) find that the trial court abused its discretion and reverse the award of attorney fees.

B. Conclusion

The trial court abused its discretion by awarding attorney fees to the respondent (1) by failing to follow the ruling of this court, which was effective and binding on the parties to the review, and (2) by failing to require the respondent to give the City proper notice of the respondent's request for fees.

As a result, the City of Bothell respectfully requests that the trial court's award of attorney fees be vacated.

Dated this 23rd day of February, 2011


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Bothell Associate City Attorney

No. 66052-7-1

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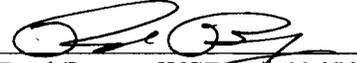
DECLARATION OF SERVICE

I, Paul Byrne, declare under penalty of perjury under the laws of the State of Washington that the enclosed copy of the City of Bothell's Reply Brief in the above-referenced case was served on this date, February 23rd, 2011 on the following party:

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United States

DATED this 23rd day of February, 2011, at Bothell, Washington.

JOSEPH BECK
Bothell City Attorney


Paul Byrne, WSBA # 41650
Associate City Attorney

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DIVISION I