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NO. 37587-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

Paul J. Rutledge, Respondent

vs.

Susan E. Beck, Appellant

Ryan Thomas and Julie Thomas, husband and wife, Respondents

vs.

Paul J. Rutledge, Respondent; and Susan E. Beck, Appellant

APPEAL FROM THE SUPERIOR COURT FOR PIERCE COUNTY

THE HONORABLE JOHN MCCARTHY AND DONALD THOMPSON, JUDGE PRO TEM

SUPPLEMENTAL BRIEF OF APPELLANT

B. STATEMENT OF ADDITIONAL FACTS/PROCEDURE

Appellant Beck (hereinafter “defendant” or “Beck”) files this Supplemental Brief in accordance with the Ruling of Commissioner Skerlec of August 27, 2008. After this appeal was filed, a hearing was held before Judge Pro Tem, Donald Thompson on July 18, 2008 to

reconsider his rulings of March 27, 2008.¹ Denying Beck's motion, Judge Thompson's view was made specific at the hearing of July 18, 2008:

JUDGE THOMPSON: I have based my previous order on the Thomas claim primarily at [sic] the ruling of the Court of Appeals that approved the sale. That's been up to the Court of Appeals and is decided. I don't think I can go beyond that.

(Emphasis added.) Hearing of July 18, 2008, p. 4. On September 12, 2008, Judge Thompson ruled, among other things, that neither Rutledge nor Thomas is entitled to an award of reasonable attorney fees.

C. ARGUMENT OF COUNSEL

1. Failure to exercise discretion is an abuse of discretion.

This explanation from Judge Thompson makes clear that Judge Thompson did not exercise his discretion to make a judgment about a just outcome in this litigation. It means that he made a judgment that he had no choice. Hence, Judge Thompson's decision cannot be supported as a reasonable exercise of discretion or be given any indulgence or presumption that it is correct. "Failure to exercise discretion is an abuse of discretion."

Bowcutt v. Delta North Star Corp., 95 Wn. App. 311, 320 (1999).

Indeed, this court has recognized the necessity for the exercise of sound discretion by public officials. We have held in several instances that a trial court may order a public official to exercise discretion, if the official

¹ The orders of Judge Thompson that form the principal basis for this appeal were entered March 27, 2008. Judge Thompson made clear at the time that he would not be available for hearing any additional matter in the case until July or August 2008. Hearing of March 27, 2008. RP 53. The orders had the effect of selling Beck's house before any motion for a stay or to reconsider could be considered. Hence, Beck filed this appeal. Beck's motion to reconsider was thus taken up by Judge Thompson on July 18, 2008.

has refused to do so. *State ex rel. Klappsa v. Enumclaw*, 73 Wash.2d 451, 453, 439 P.2d 246 (1968); *State ex rel. Stephens v. Odell*, 61 Wash.2d 476, 480, 378 P.2d 932 (1963); *State ex rel. Yeargin v. Maschke*, 90 Wash. 249, 253, 155 P. 1064 (1916).

State v. Pettitt, 93 Wn.2d 288, 296, (1980).

The trial court's failure to recognize that it has discretion is itself error. *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 332-333 (2007) (failure of the court to recognize that it had discretion to impose a mitigated exceptional sentence is a fundamental defect). A trial court abuses discretion when it refuses to consider legally available relief. When a court fails to exercise discretion it is subject to reversal. *State v. Grayson*, 154 Wn.2d 333, 342 (2005) (where a defendant has requested a sentencing alternative authorized by statute, the categorical refusal to consider the sentence, or the refusal to consider it for a class of offenders, is effectively a failure to exercise discretion and is subject to reversal).

Reply Brief of Appellant, p. 7.

2. The order of Judge McCarthy authorizing a sale of the property was subject to revision.

The order of Judge McCarthy authorizing a sale of the property *was* subject to revision.

Neither Thomas nor Rutledge has ever disputed Beck's legal authority that

an order which adjudicates fewer than all claims or the rights and liabilities of fewer than all parties is subject to revision at any time before entry of final judgment as to all claims and the rights and liabilities of all parties. . . . [A]t any time before entry of final judgment [a] trial court has plenary authority to afford such relief as justice requires); accord, O'Neill v. Southern Nat'l Bank, 40 N.C. App. 227, 252 S.E.2d 231 (1979); *Thompson v. Goetz*, 455 N.W.2d 580 (N.D. 1990).

(Emphasis added.) *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 300 – 1 (1992);

Alwood v. Aukeen Dist. Court Comm'r Harper, 94 Wn. App. 396, 400 (1999). Judge

McCarthy recognized this when on June 29, 2007 he determined to allow Beck to refinance and pay off Rutledge. Hearing of June 29, 2007, RP 21. The Washington Supreme Court

recognized this when, in responding to Ms. Beck's request to order Rutledge to provide a pay off figure it stated, "the trial court will soon regain jurisdiction, and at that point will be able to afford Ms. Beck any relief to which it might find her entitled." CP 159 – 160. By concluding that he had no choice in the matter, Judge Thompson made no decision about what would be just in the case or about to what relief Ms. Beck is entitled.

3. The decision of the trial court to order a sale of the property was not a final order; Judge McCarthy reserved several issues.

The superior court expressly reserved several issues before the case would be concluded. Specifically, in granting Rutledge's motion for a commercial sale of the property Judge McCarthy stated:

So I am going to grant the motion for summary judgment and grant an order to have the property sold. I think that, you know, I will not address the issues today as to priorities of amounts due and owing, homestead exemption, whether redemption applies or not. I think the priorities of payment can be ascertained at a later date, but I do think that the plaintiff is a tenant in common and at this point is entitled to have the property sold, and I will grant that relief.

(Emphasis added.) Hearing of September 17, 2004, CP 145 – 148. Indeed, the Order Authorizing Sale of Property dated September 17, 2004 also says: "[d]etermination of a new judgment and proceeds distribution shall be reserved." CP 8. So, the order of sale was interlocutory² and as we have just seen, any time before entry of final judgment a trial court has plenary authority to afford such relief as justice requires.

² The case law commonly describes an interlocutory order by contrasting it with a final order or judgment. See e.g., *In re Estate of Hooper*, 53 Wn.2d 262, 269 (1958) (prior to entry of final judgment, trial court had authority to vacate erroneous findings of fact and

4. A court sitting in equity retains jurisdiction for all purposes to administer justice according to law or equity.

Finally, it must be kept in mind that 27A Am.Jur.2d *Equity* §79³ provides, in pertinent part:

Equity will not, as a rule, enter a partial or incomplete decree. A court of equity which has taken jurisdiction and cognizance of a cause for any purpose will ordinarily retain jurisdiction for all purposes, decide all issues which are involved in the subject matter of the dispute between the litigants, and award relief which is complete and finally disposes of the litigation so as to accomplish full justice between the parties litigant. . . .

And,

A trial court sitting in equity has broad discretionary power to fashion equitable remedies. *In re Foreclosure of Liens*, 123 Wn.2d 197, 204, 867 P.2d 605 (1994). The goal of the court in equity is to do substantial justice and to end litigation. *Carpenter v. Folkerts*, 29 Wn. App. 73, 78, 627 P.2d 559 (1981).

Carbon v. Spokane Closing & Escrow, 135 Wn. App. 870, 878-9 (2006); *Esmieu v. Hsieh*, 92 Wn.2d 530, 534 (1979).

“Having before it at the outset a cause cognizable in equity, the court retain[s] jurisdiction over the subject matter and the parties to be affected by its decree for all purposes-to administer justice among the parties according to law or equity.” *Yount v. Indianola Beach Estates, Inc.*, 63 Wash.2d 519, 524-25, 387 P.2d 975 (1964).... Indeed, “ ‘[w]hen the equitable jurisdiction of the court is invoked ... whatever relief the facts warrant will be granted.’ ” *Ronken v. Bd. of County Comm'rs*, 89 Wash.2d 304, 313, 572 P.2d 1 (1977) (quoting *Kreger v. Hall*, 70 Wash.2d 1002, 1008, 425 P.2d 638 (1967)) (alteration in original).

conclusions of law, which were interlocutory in character). See also *Deloach v. Delchamps, Inc.*, 897 F.2d 815, 826 (5th Cir. 1990) (“Because a judgment is not final until both liability and damages are determined, a judgment awarding an unspecified amount of attorney’s fees is interlocutory in nature”). *Alwood v. Aukeen Dist. Court*, 94 Wn. App. 396, 401 (1999).

³ Previously cited in Appellant’s Brief as §103.

In re Marriage of Langham and Kolde, 153 Wn.2d 553, 560 (2005).

5. The Real Estate Purchase and Sale Agreement has no legal significance independent of the *Rutledge v. Beck* litigation and should not have been enforced.

It is elemental law that a trial court may award attorney fees only if authorized by a contract, a statute, or by recognized equitable principles. Beck made the point in her Reply Brief that she did not enter into the “contract” that Thomas claims as the basis for an award of fees; the court did. As documented in the Reply Brief, Beck signed the document because the court ordered her to do so. A trial court may have authority – in an appropriate case – to order the sale of real property. But the court may not indirectly compel a party to pay reasonable attorney fees – by directing a party to sign a contract containing a provision for the payment of legal fees – that it could not order directly because of the general prohibition of reasonable attorney fees.

Next, what was Beck’s breach of contract? Pursuing her legal rights. Since the Real Estate Purchase and Sale Agreement (“REPSA”) expired in February 2005, the “breach” of the agreement was Beck’s pursuit of her right to appeal the original ruling and the filing of supersedeas at that time. If filing her appeal had no affect on the REPSA then Thomas could have brought their lawsuit in February 2005. If the REPSA had legal significance independent of the *Rutledge v. Beck* litigation then Thomas had a right to pursue a breach of contract action regardless of whether Beck won her appeal. If so, Beck’s right to appeal was illusory because even if the original order had been set aside, the REPSA would still have been breached. Can a trial court so evade the legal process and truncate a litigant’s

legal rights? Clearly not; the REPSA was subject to the outcome of the Rutledge/Beck litigation and did not have independent legal significance.⁴

Moreover it was unnecessary for Judge Thompson to rule on the Thomas claim. Once the court determined to change Judge McCarthy's decision and compel the sale in support of Rutledge's claim, the claim of Thomas became moot. The court no longer had to determine that Thomas was entitled to specific performance since the court was selling them the property through the Rutledge claim anyway. Remember, the only reason Thomas entered the litigation in the first place was because Judge McCarthy declared that he would not compel the sale for Rutledge.⁵ It is thus ironic that Thomas entered this lawsuit due to a ruling of superior court against Rutledge; that because they did so, Thomas claims attorney fees under the contract; yet they get the house because the court later decided to rule in favor of Rutledge on Rutledge's claim. If the court had ruled in Rutledge's favor in the first instance, there would not have been a basis for legal fees. And if the court had not ruled

⁴ The REPSA provides:

IT IS AGREED BETWEEN THE SELLER AND BUYER AS FOLLOWS:
This offer is subject to court approval and the signature of Susan Beck.

⁵ From the Hearing of June 29, 2007, RP 21:

JUDGE McCARTHY: What I am inclined to do is this, is allow the defendant to refinance and pay off the judgment, which we now know is owing, plus anticipated judgment. And so in order to set that specific amount, I need specifics from plaintiff as to what you claim is due and owing and I need to make a decision on the specific amount.

I think for the sake of her moving forward with the refinance efforts, I think you should assume that, Mr. Shillito, [defendant's counsel] that it's going to be somewhere in the area of \$130,000. I am just selecting that number because I am not sure the plaintiff has provided me any better guesstimate as this point in time.

that Beck had to sign the REPSA, there would not have been a contract claim. An award of legal fees in this instance is inequitable, unwarranted and unnecessary.

On September 12, 2008, Judge Thompson agreed with Beck. He ruled that Thomas and Rutledge NOT be awarded reasonable attorney fees.

D. CONCLUSION

Judge Thompson did not exercise discretion to make a judgment about a just outcome in this litigation. Judge Thompson did not resolve the *Rutledge v. Beck* claim on the justice or equities of the case. The trial court's failure to recognize that it had discretion is error. Moreover, the Real Estate Purchase and Sale Agreement has no legal significance independent of the *Rutledge v. Beck* litigation and should not have been so enforced. Additional reasons for relief are set forth in Appellant's Brief and in her Reply Brief and the relief requested in those documents should be granted.

Dated: September 17, 2008

Respectfully submitted,



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

Signed at Gig Harbor, Washington, on September 17, 2008.


**SUSAN BECK, Pro Se
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