FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 37605-9-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

DONALD R. THOMPSON and SHERI D. NIMMO,
husband and wife,

Appellants,

v.

MARY C. LENNOX,
a single person,

Respondent,

REPLY BRIEF OF APPELLANTS

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A. INTRODUCTION

The superior court lacked authority to award Mary Lennox appellate fees and costs months after the Court of Appeals unconditionally terminated review of the case.

Appellants Donald Thompson and Sheri Nimmo reply to Respondent's Brief, with respect to Lennox's factual and legal allegations, as follows:

B. ARGUMENT

1. Title 17 RAP provides the procedure to seek an award of fees in the appellate court.

A party seeks relief in the appellate court, other than a decision of the case on the merits, by motion. RAP 17.1(a). Under the procedure set forth in Title 17 RAP, a party may file a motion at any stage of the appellate proceeding – whether or not the appeal has been fully prosecuted. The availability of the established motion procedure belies Lennox's argument that she "did not have the opportunity to request attorney fees from the appellate court." Br. of Resp't at 9.

Lennox simply failed to avail herself of the proper procedure for seeking relief.[1]

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[1]As Lennox notes, RAP 18.1 specifically addresses requests for attorney fees made in an opening brief or motion on the merits. Br. of Resp't at 5. The rule, however, in no way precludes a party from seeking a fee award by motion in other circumstances.

2. Lennox's claim that no court rule prohibits the trial court from awarding appellate fees is baseless.

Lennox claims the Thompsons "have not pointed to any authority that prohibited the trial court from making a supplemental fee award in this matter." Br. of Resp't at 4. But her assertion completely ignores the special rule for costs and attorney fees and expenses that controls this case:

> The appellate court retains the power after the issuance of the mandate to act on questions of costs as provided in Title 14 and on questions of attorney fees and expenses as provided in rule 18.1.

RAP 12.7(c).[2]

Without express direction by the appellate court, the trial court does not have authority to award appellate fees and costs. Under the special rule, Lennox is required to move the appellate court for any award of fees and costs she incurred on appeal – even after the mandate issues.

3. Lennox provides no authority to support her position.

A very limited number of decisions address the issue of jurisdiction to award appellate fees. Br. of Appellants at 12-13. Arguably, the rules have been routinely applied without need of interpretation by the appellate courts.

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[2] RAP 12.7(c) was presented in the Thompsons' opening brief. Br. of Appellants at 12.

Lennox argues that cases dismissed without briefing are to be distinguished from those where briefs are filed. Br. of Resp't at 6. The appellate rules recognize no such distinction, and Lennox provides no authority to support her position.[3]

In place of controlling authority, Lennox makes unfounded attacks on the Thompsons. Her characterization of their appeal as "merely a bargaining tactic" is offensive. Br. of Resp't at 13. Her allegation that she "has repeatedly been victim to the Thompsons' litigiousness" is similarly objectionable. *Id.* at 14. According to Lennox, "[n]one of the fees sought would have been incurred if the Thompsons' [*sic*] had not appealed and had simply paid the judgment when it was issued." *Id.* at 3.

The Thompsons are not obliged to passively accept an unfavorable outcome at trial. They have properly sought review – as a matter of right. There is no evidence in the record that they have appealed for any improper purpose.

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[3] Lennox's proposal allows a supplemental award by the trial court even months after an appeal has been dismissed. Under the rules, however, when the appellate court awards fees and costs to a party in its opinion, the party has only ten days to file its affidavit and cost bill. RAP 14.4, 18.1(d).

Lennox's assertion that the trial court is in a better position than the Court of Appeals to determine the reasonableness of appellate attorney fees is nonsense. Br. of Resp't at 10. And her statement that the Thompsons do not contest her entitlement to a fee award is patently false. *Id.*

In sum, established appellate motion procedure provides Lennox the opportunity to seek attorney fees incurred on appeal. Under RAP 12.7(c), the Court of Appeals retains the power to act on the question of attorney fees – even after issuance of the mandate. Lennox offers no authority to support her proposition that the attorney fee award in an appeal dismissed before briefing is to be treated differently from a case decided on the merits. Her contention that the trial court had authority to make its supplemental award for attorney fees, absent direction from the appellate court, is unfounded.

C. CONCLUSION

The Court should vacate the supplemental judgment in its entirety and should award the Thompsons the costs and reasonable attorney fees they incurred in opposing the award.

DATED this 20th day of October, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 20, 2008, I sent a true and correct copy of the foregoing Reply Brief of Appellants by first class mail, postage prepaid, to:

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