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STATE OF WASHINGTON

No. 37605-9-II

COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON

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

Appellants,

v.

MARY C. LENNOX,  
a single person,

Respondent.

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RESPONDENT'S BRIEF

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## **I. Introduction**

Appellants have presented two primary issues in their opening brief:

**1. Trial Court's Authority.** An appellate court's remand to the trial court states that the case is returned "for further proceedings in accordance with the determination of that court;" the trial court has the authority to take the steps necessary to dispose of the case. Despite the clear mandate, appellants argue—based on a strained reading of the Rules of Appellate Procedure—that the trial court did not have the authority to make a supplemental fee award to Ms. Lennox. Did the trial court lack the authority to make a supplemental fee award after jurisdiction of the case was returned to it?

**2. Abuse of Discretion.** The amount of an attorney fees award is clearly within the trial court's discretion. Appellants have not pointed to a single act of the trial court that constituted an abuse of discretion. Should an attorney fees award be altered when no abuse of discretion has been claimed, let alone proved?

## II. Statement of the Case

Mary Lennox purchased property from the Thompsons in 2004.<sup>1</sup> As part of the deal, the parties agreed that a restrictive covenant would run with Ms. Lennox's land; accordingly, the Thompsons (and their attorney) drafted a covenant.<sup>2</sup> The covenant limited the height of Ms. Lennox's home.<sup>3</sup> Ms. Lennox complied with the terms of the restriction.<sup>4</sup> But after she started building, the Thompsons objected and filed suit against Ms. Lennox.<sup>5</sup> After trial, the court determined that Ms. Lennox's interpretation of the covenant was the more reasonable one and that her house did not violate the covenant.<sup>6</sup>

Because the parties' contract contained an attorney's fees clause, Ms. Lennox was entitled to—and received—the bulk of the costs, including attorney fees, she had incurred up through trial.<sup>7</sup> Judgment was entered in favor of Ms. Lennox, awarding her substantial attorney fees. The Thompsons continued to litigate the matter. They filed a notice of appeal.<sup>8</sup> They refused to post an adequate bond.<sup>9</sup> They filed a motion to

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<sup>1</sup> Notice of Appeal to Court of Appeals, February 2, 2007 ("Notice of Appeal"), CP 82: 14-16.

<sup>2</sup> Notice of Appeal, CP 83: 1-15.

<sup>3</sup> *Id.*

<sup>4</sup> Notice of Appeal, CP 86: 22-24.

<sup>5</sup> Summons and Complaint ("Complaint"), CP 1-9.

<sup>6</sup> Notice of Appeal, CP 86: 22-24.

<sup>7</sup> Notice of Appeal, CP 87: 1-7.

<sup>8</sup> Notice of Appeal, CP 77-97.

extend the time allowed for them to file their opening brief.<sup>10</sup> They engaged Ms. Lennox in settlement discussions.<sup>11</sup> But the Thompsons never filed an opening brief. As a result, this Court dismissed the Thompsons' appeal for their failure to prosecute.<sup>12</sup>

Responding to and dealing with the Thompsons took time. It took Ms. Lennox's time and her attorneys' time. Once the case was remanded to the Superior Court, Ms. Lennox requested a supplemental fee award to reimburse her—pursuant to the contract—for the post-trial activities she her attorneys had to undertake.<sup>13</sup> None of the fees sought would have been incurred if the Thompsons' had not appealed and had simply paid the judgment when it was issued. The trial court agreed that Ms. Lennox was entitled to her additional fees and made a supplemental award of \$6,200, which the Thompsons have now appealed.<sup>14</sup>

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<sup>9</sup> Defendant's Reply in Support of Supplemental Motion for Attorney Fees and Costs ("Reply in Support of Supplemental Motion"), CP 142: 18-23.

<sup>10</sup> Reply in Support of Supplemental Motion, CP 143: 1-5.

<sup>11</sup> Verbatim Report of Proceedings of February 2, 2008 ("February 2 Verbatim Report"), p. 6-7.

<sup>12</sup> Ruling Dismissing Appeal and Mandate ("Ruling Dismissing Appeal"), CP 100-102.

<sup>13</sup> Defendant's Supplemental Motion for Attorney's Fees and Costs ("Supplemental Motion"), CP 111-115.

<sup>14</sup> Notice of Appeal to Court of Appeals, April 10, 2008 ("Second Notice of Appeal"), CP 165.

Ms. Lennox had requested approximately \$8,000 in supplemental fees.<sup>15</sup> Judge Woolard, the trial court judge, evaluated Ms. Lennox's bills and concluded that the time incurred was reasonable, as was the rate charged for the primary attorney.<sup>16</sup> Judge Woolard determined that the rate charged for a legal assistant was not reasonable, and reduced the award accordingly.<sup>17</sup> Ultimately, the trial court exercised its discretion and found an awarded of \$6,200 to be reasonable.<sup>18</sup>

### **III. Argument**

#### **A. The trial court had the authority to make a supplemental fee award.**

##### **1. No court rule or common law prohibited the trial court from making a supplemental fee award.**

On remand, the trial court has the authority to do whatever is necessary to make a final disposition of the case, so long as it is not inconsistent with the decision by the Court of Appeals. Appellants have not pointed to any authority that prohibited the trial court from making a supplemental fee award in this matter. Appellants' argument is based on a strained interpretation of the Rules of Appellate Procedure. Appellants also cite three cases, but none addressed the present question.

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<sup>15</sup> Defendant's Additional Brief in Support of Supplemental Motion for Attorney's Fees and Costs ("Additional Brief"), CP 157: 14-15.

<sup>16</sup> Second Notice of Appeal, CP 165.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

The RAPs cited by appellant did not prohibit the trial court from making a supplemental fee award to Ms. Lennox. RAP 18.1 is titled "Attorney Fees and Expenses." It states, "the party must request the fees or expenses as provided in this rule." The rule then provides that the party, "must devote a section of its opening brief to the request for the fees or expenses." Under RAP 18.1, the only other method to obtain fees is in a motion on the merits.<sup>19</sup> No other method for obtaining an award of attorney fees is given.

Thus, under the plain terms of RAP 18.1, fees on appeal are obtained only by a request in the opening brief or in a motion on the merits. But because the Thompsons never filed an opening brief, and because this Court dismissed the appeal *sua sponte*, Ms. Lennox never had the opportunity—or the obligation—to file any opening brief on appeal or any motion on the merits. Thus, she never had an opportunity to ask this Court for an award of attorney's fees. In fact, because the Thompsons never filed an opening brief, this court dismissed the action without ever being made aware that there was an attorney's fees provision between the parties.

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<sup>19</sup> The rule on motions on the merits is found in RAP 18.14.

Next, appellants cite RAP 17.1: "A person may seek relief, other than a decision of the case on the merits, by motion as provided in Title 17." RAP 17.1 does not mention nor purport to address attorney fees. Appellants have not explained why RAP 17.1 is applicable when RAP 18.1 states that the parties must request fees on appeal pursuant to RAP 18.1. Because there is a rule that specifically addresses attorney fees, RAP 17.1 is not applicable to the question of how attorney fees may be requested. Moreover, nothing in this rule divests the trial court of authority to award supplemental fees after an appeal is dismissed for want of prosecution.

Finally, appellants rely on RAP 12.7(c). RAP 12.7(c) specifically states that the appellate court retains the ability, post-mandate, to decide on "questions of attorney fees and expenses *as provided in rule 18.1.*" It does not alter the RAP 18.1 rule on attorney fees, which—as discussed above—directs parties requesting fees on appeal to make that request in the opening brief or in a motion on the merits. RAP 12.7(c) does not create an independent method for acquiring attorney fees if no opening briefs or motions on the merits are filed. It also does not divest the trial court of jurisdiction, after remand, to make a supplemental fee award when the issue has not been addressed by the Court of Appeals.

Taken together, the rules do not provide any more direction on attorney fees than the text of 18.1, which applies when an appeal has been fully prosecuted. Neither 18.1, 17.1 nor 12.7(c) prohibit the trial court from making a supplemental fees award, as the court did in this case. Instead, the rules direct the parties how to proceed when an appeal is fully prosecuted.

Appellants also cite three cases in support of their argument. The first, *State ex rel. Fosburgh v. Ronald*,<sup>20</sup> was decided more than 60 years ago, and 30 years before the current Rules of Appellate Procedure were adopted. Thus, it is of questionable precedential value. Moreover, that case is easily distinguishable. *Fosburgh* relied on an older rule that required the prevailing party to file a motion to tax costs "within ten days after the filing of the opinion in a cause."<sup>21</sup> The party received some costs, under a default provision, from the Supreme Court, but then asked the Superior Court to award even more costs incurred on the appeal. Not surprisingly, the appellate court found it was error to allow this type of "double-dipping" for appellate costs.

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<sup>20</sup> 25 Wn.2d 276 (1946).

<sup>21</sup> *Id* at 277.

The second case cited by appellants, *Spokoiny v. Washington State Youth Soccer Ass'n*,<sup>22</sup> merely states a proposition that Ms. Lennox does not contest: that the appellate court has authority to make an attorney fees award on appeal. Ms. Lennox has never asserted that the appellate court did not also have the authority to make an attorney fees award, if it had not dismissed the appeal for want of prosecution.

Finally, appellants cite *Mestrovac v. Dep't of Labor & Indus.*<sup>23</sup> *Mestrovac*, however, does not address the trial court's ability to make a supplemental fee award when the appeal is not ultimately prosecuted. The party requesting fees in *Mestrovac* filed a brief with the appellate court but failed to request attorney fees at that time.<sup>24</sup> Further, the party requesting attorney fees was not the prevailing party on appeal.<sup>25</sup> Thus, the fact that the party's fee request was denied in *Mestrovac* does nothing to aid the Thompsons on this appeal.

Neither the rules nor the cases cited by appellants support appellants' argument that the trial court is divested of authority to make a supplemental attorney fees award when, as here, the appeal was not fully

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<sup>22</sup> 128 Wn. App. 794 (2005).

<sup>23</sup> 142 Wn. App. 693 (2008).

<sup>24</sup> *Id.* at 711.

<sup>25</sup> *Id.*

prosecuted and the prevailing party did not have the opportunity to request attorney fees from the appellate court.

**2. The appellate rules are to be construed liberally to serve justice.**

The appellate rules are not to be construed to cause injustice. Thus, when existing rules are not adequate in a given situation, the appellate rules provide for leniency of interpretation. RAP 1.2(a) specifies that, "[t]hese rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits." Further, "cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in rule 18.8(b)." Finally, RAP 1.2(c) explicitly provides for waiver of the rules, "[t]he appellate court may waive or alter the provisions of any of these rules in order to serve the ends of justice." The rules are clear: a just result is the ultimate goal.

Here, to interpret the rules as appellants suggest would result in a gross injustice. The appellants' logic, if applied, would deprive the non-moving party of the ability to recover attorney fees if no opening brief or motion on the merits is filed. Appellants' theory would allow a party to file notice of appeal as a pure bargaining tactic, confident that no negative

ramifications would result. The party can engage the opponent in a variety of activities, under the guise of a pending appeal, and then escape contractual liability for attorney fees because the opponent never has the opportunity to request them. This is not a just result, as it would deprive a deserving party of its right to recover attorney fees.

On the other side of the ledger, the Thompsons have not suffered any injustice as a result of the trial court's supplemental fee award. The Thompsons knew there was an attorney's fee clause, and they had already paid a substantial judgment of fees. The Thompsons had fair notice and a full opportunity to challenge Ms. Lennox's supplemental fee request in the trial court. The trial court was in a perfect position to address the parties' arguments and to make a determination of the reasonable fee.

In fact, the Thompsons do not contest that Ms. Lennox is entitled to some award of fees—they simply claim that this Court, and only this Court, had the authority to hear that request. Not only is it more efficient for the trial court to consider such requests, but it is particularly efficient here because of the trial court's extensive experience with the case, which could inform its decision regarding a reasonable fee. In sum, the Thompsons suffered no prejudice, but Ms. Lennox would suffer severe prejudice if she were not entitled to collect the trial court's award of fees.

**B. The fees awarded by the trial court are reasonable.**

The reasonableness of a trial court's award of attorney fees is reviewed for abuse of discretion.<sup>26</sup> Abuse of discretion occurs "only when the exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons."<sup>27</sup> This is a "deferential" standard of review.<sup>28</sup> In sum, the reasonableness of an attorney fees award should only be overturned by the appellate court in extreme circumstances, when the award is manifestly unreasonable.

The trial court—in a common, straightforward exercise of its discretionary power—evaluated Ms. Lennox's request for attorney fees. Ms. Lennox requested a total of approximately \$8,000 in attorney fees and costs.<sup>29</sup> The trial court judge, Judge Woolard, concluded that the actions by Ms. Lennox were undertaken in reasonable anticipation of and reaction to the other side's actions.<sup>30</sup> Judge Woolard reviewed Ms. Lennox's bills and found that the time incurred was reasonable; she also evaluated the rates of Ms. Lennox's attorneys and determined these rates were

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<sup>26</sup> *The Boeing Company v. Heidy*, 147 Wn.2d 78, 90 (2002); *Diamaco v. Mettler*, 135 Wn. App. 572, 576 (2006).

<sup>27</sup> *Boeing*, 147 Wn.2d at 90.

<sup>28</sup> *Dianna v. Labor*, 136 Wn. App. 295, 313 (2006).

<sup>29</sup> Additional Brief, CP 157: 14-15.

<sup>30</sup> Verbatim Report of Proceedings, February 22, 2008 ("February 22 Verbatim Report"), p. 11-12.

reasonable.<sup>31</sup> Judge Woolard did conclude that the rate charged for a legal assistant's time was not reasonable, and reduced the award accordingly.<sup>32</sup> Thus, out of a total request of approximately \$8,000,<sup>33</sup> Judge Woolard awarded \$6,200,<sup>34</sup> which is roughly 77.5% of the amount requested. In sum, the judge reviewed the materials provided by Ms. Lennox and exercised its inherent authority to determine a reasonable fee award.

Appellants cite, in support of their argument, factors for determining attorney fees awards as laid out in *Allard v. First Interstate Bank*.<sup>35</sup> But the appellants do not apply the *Allard* factors to Judge Woolard's fee award; nor do they explain why the *Allard* factors support their assertion that the attorney fees award made here was unreasonable. Instead, appellants offer one reason why the attorney fees award was unreasonable—namely, that Ms. Lennox incurred greater fees than did the Thompsons. But such a comparison is not one of the *Allard* factors, and it provides no basis for finding the trial court abused its discretion.

Further, it should be expected that Ms. Lennox would incur more fees during the time period in question than did appellants: she did not

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<sup>31</sup> Second Notice of Appeal, CP 165.

<sup>32</sup> *Id.*

<sup>33</sup> Additional Brief, CP 157: 14-15.

<sup>34</sup> Second Notice of Appeal, CP 165.

<sup>35</sup> 112 Wn.2d 145 (1989).

know that the appeal was merely a bargaining tactic and would not be prosecuted. Appellants state, "[e]xperienced appellate advocates know that filing a notice of appeal in the trial court does not guarantee a full proceeding in the Court of Appeals."<sup>36</sup> In fact, Ms. Lennox did nothing wrong: she proceeded as though the appeal would be prosecuted. She did not anticipate that the Thompsons would waste the appellate court's time or resources by filing a notice of an appeal they did not intend to prosecute. As noted above, Judge Woolard determined that all actions taken by Ms. Lennox were in reasonable reaction to the Thompsons' actions.<sup>37</sup>

Finally, the Thompsons accuse Ms. Lennox of being "litigious" because she sought to execute on the judgment, she sought an adequate supersedeas bond, she engaged in settlement negotiations initiated by the Thompsons, and she prepared to address the Thompsons' appeal. The trial court did not find any of these actions to be unreasonable,<sup>38</sup> and neither should this Court. In fact, these were prudent steps for a judgment creditor to take. If anyone here is "litigious," it is the Thompsons. They sued Ms. Lennox, lost at trial, filed a motion of appeal, abandoned that

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<sup>36</sup> Appellants' Opening Brief at 13.

<sup>37</sup> February 22 Verbatim Report, p. 11-12.

<sup>38</sup> *Id.*

appeal, and now appeal an award of \$6,200 in attorney fees and costs.

Appellants have not shown that the trial court abused its discretion in determining the supplemental attorney fees award amount. Absent a showing that the award was manifestly unreasonable or that the trial court abused its discretion, it is not proper to disturb the amount of fees awarded by the trial court.

**C. Ms. Lennox should be awarded her fees on this appeal.**

Courts can award attorney's fees when authorized to do so by contract, statute, or a recognized ground of equity.<sup>39</sup> Here, the terms of the restrictive covenant between Ms. Lennox and the Thompsons provided for an award of attorney fees and costs to the prevailing party.<sup>40</sup>

Ms. Lennox hereby requests an award of fees and costs incurred on appeal, pursuant to the terms of the restrictive covenant between the parties and RAP 18.1.

**IV. Conclusion**

Ms. Lennox has repeatedly been victim to the Thompsons' litigiousness. Once again, she finds herself in court defending litigation she did not initiate. This time, the sole issue is a supplemental award for

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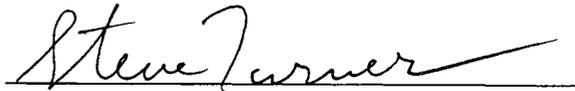
<sup>39</sup> *Dayton v. Farmers Insurance Group*, 124 Wn.2d 277, 280 (1994).

<sup>40</sup> Notice of Appeal, CP 87: 1-7.

attorney fees and costs of \$6,200. The Court should affirm the trial court's award and award Ms. Lennox her costs and attorney fees on this appeal.

Dated this 17<sup>th</sup> day of September, 2008.

MILLER NASH LLP

A handwritten signature in cursive script that reads "Steven E. Turner". The signature is written in black ink and is positioned above a horizontal line.

Steven E. Turner  
WSB No. 33840  
Kathryn E. Smith  
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CERTIFICATE OF SERVICE CLERK OF COURT OF APPEALS DIV II  
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I hereby certify that I served the foregoing Respondent's Brief on:

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by the following indicated method:

- by **mailing** full, true, and correct copies thereof in a sealed, first-class postage-prepaid envelope, addressed to the attorney as shown above, the last-known office address of the attorney, and deposited with the United States Postal Service at Vancouver, Washington, on the date set forth below.

Dated this 17<sup>th</sup> day of September, 2008.

  
Steven E. Turner