NO. 41066-4-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION TWO

MALCOLM J. GANDER & MELANIE M. KEENAN

Appellants,

v.

ELINA YEAGER and KAREN KEEFE,

Respondents.

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY
DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Russell W. Hartman, Judge

CORRECTED OPENING BRIEF OF APPELLANTS

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TABLE OF CONTENTS

Page

A. ASSIGNMENT OF ERROR.....1

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR.....1

C. STATEMENT OF THE CASE.....1

1. Procedural History.....1

2. Relevant Terms of the Settlement Agreement.....5

3. RALJ Appeal on the Merits.....5

A. Evidence Presented.....5

B. Court's Written Findings and Conclusions.....7

4. Evidence Presented on Attorney's Fees Issue.....10

A. Motion for Attorney's Fees and Supporting Declarations.....10

B. Opposition to Motion for Attorney's Fees.....12

C. Second Declaration of Dennis D. Reynolds in Support of Motion for Attorney's Fees.....13

D. Gander-Keenan's Motion for CR 11 Sanctions.....16

E. Keefe-Yeager's Opposition to Motion for CR 11 Sanctions and Declaration of Karen R. Bertram in Support of Opposition to Motion for Attorney's Fees.....17

F. Keefe-Yeager's Opposition to Motion for CR 11 Sanctions.....18

5. **Oral Argument on Attorney's Fees Issue and the Court's Oral Decision**.....18

D. **THE SUPERIOR COURT ERRED IN REFUSING TO AWARD ATTORNEY'S FEES WHERE GANDER-KEENAN WAS FORCED TO INTIATE APPEAL TO DISSOLVE A WRONGFULLY ISSUED ANTIHARASSMENT ORDER**...19

1. **Attorney's Fees are Proper because Keefe-Yeager Violated the Terms of the Settlement Agreement by Resorting to the Courts Rather than Pursuing Arbitration**.....20

A. Keefe-Yeager Violated the Terms of the Settlement Agreement by Improperly Resorting to the Courts.....20

B. As Gander-Keenan was Forced to Appeal the Wrongfully Issued Restraining Order, Attorney's Fees are Proper..... 22

2. **The Superior Court Improperly Relied Upon its Findings of Fact on the RALJ Appeal to Deny Attorney's Fees**.....27

3. **Failure to Strictly Comply with RALJ 11.2 is not Jurisdictional**.....28

E. **CONCLUSION**.....32

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Alderwood Assocs. v. Washington Envtl. Council,
96 Wn.2d 230, 247, 635 P.2d 108 (1981).....24

Cecil v. Dominy, 69 Wn.2d 289, 291-92, 418 P.2d 233 (1966).....24

Duke v. Boyd, 133 Wn.2d 80, 87, 942 P.2d 351 (1997).....30

Ethridge v. Hwang, 105 Wn.App. 447, 460, 20 P.3d 958 (2001).....20

Federal Way Family Physicians, Inc. v. Tacoma Stands Up For Life,
106 Wn.2d 261, 268-69, 721 P.2d 946 (1986).....25

Ino Ino, Inc. v. City of Bellevue,
132 Wn.2d 103, 143, 937 P.2d 154 (1997).....24-25

ML Park Place Corp. v. Hedreen,
71 Wn.App. 727, 862 P.2d 602 (1993).....9

NEPA Pallet & Container Co., Inc. v. CHEP USA,
2003 WL 21143351 (Div. 1, 2003).....30-31

Olympic Steamship Co. v. Centennial Insurance Co.,
117 Wn.2d 37, 52-53, 811 P.2d 673 (1991).....26

Panorama Village Condominium Owners Ass'n Bd. of Directors v.
Allstate Ins. Co., 144 Wn.2d 130, 43, 26 P.3d 910 (2001).....22, 26

Sanders v. State, ---Wn.2d----, 240 P.3d 120, 140
(filed September 16, 2010).....19-20

Seattle Firefighters Union Local No. 27 v. Hollister,
48 Wn.App. 129, 138, 737 P.2d 1302 (1987).....24-25

State v. Roth, 78 Wn.2d 711, 715, 479 P.2d 55 (1971).....29-30

TABLE OF AUTHORITIES—cont'd

Page

Trummel v. Mitchell,156 Wn.2d 653, 677, 131 P.3d 395 (2006).....25

Weyerhaeuser Co. v. Commercial Union Ins. Co.,
142 Wn.2d 654, 687 n.15, 15 P.3d 115 (2000).....26

STATUTES, RULES, AND OTHERS

82 C.J.S. Statutes s 348 (1953).....30

Chapter 7.04A RCW.....7

RCW 7.04A.210.....10-11, 23

Chapter 10.14 RCW.....8

RCW 10.14.140.....6

CR 11.....4, 5, 16, 17, 18, 32

MAR 3.2.....11, 24

RAP 18.....29

RALJ 1.2(a).....30

RALJ 1.2(b).....1, 12, 29, 30-31

RALJ 11.....29

RALJ 11.2.....1, 11, 12, 19, 28-31

Kitsap County LMAR 3.2.....11, 24

A. ASSIGNMENT OF ERROR

1. The Superior Court erred in denying Gander-Keenan's[1] Motion for Attorneys' Fees. CP 174-75.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Whether the Superior Court erred in finding that there is no factual basis for the equitable argument in support of attorneys' fees where Keefe-Yeager[2] refused to enter into mandatory arbitration under the unequivocal terms of the parties' Settlement Agreement, improperly resorted to the courts, and forced the Gander's to appeal the Bainbridge Island Municipal Court's incorrect ruling?

2. Whether the trial court erred in relying on its Finding of Fact No. 7, which states that in 2008, Gander-Keenan asserted that as a successor in title but not as a successor to the Settlement Agreement, Ms. Keefe could not enforce the provisions of the Settlement Agreement, in denying attorney's fees?

3. Whether the Superior Court erred in finding that attorneys' fees are inappropriate because Gander-Keenan failed to strictly comply with RALJ 11.2 where RALJ 1.2(b) explicitly states: "Cases and issues will not be determined on the basis of compliance or noncompliance with these rules"?

C. STATEMENT OF THE CASE

1. Procedural History[3]

This case involves a longstanding property dispute between Gander-Keenan and their neighbors in their rural Bainbridge Island neighborhood dating back to 2005, when the Yeagers and the Ridings, Ms.

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[1] For ease of reference, rather than referring to Mr. Gander and Ms. Keenan separately or collectively referring to them as "appellants," we refer to them as Gander-Keenan.
[2] For the same reasons, we refer to Ms. Yeager and Ms. Keefe as Keefe-Yeager.
[3] Much of this section is derived from CP 220-22.

Keefe's predecessors-in-interest, initiated a series of legal proceedings in the attempt to gain portions of the Gander's land. While the Ridings were able to obtain a temporary antiharassment order, the Yeager's Petition was dismissed. Gander-Keenan prevailed in the property dispositions (05-2-01835-8; 05-2-02377-7).

This land dispute led to mediation, which resulted in the parties' Settlement Agreement. See CP 80-87. Most importantly, for the purposes of this Appeal, the Settlement Agreement contains: (1) an antiharassment provision, CP 82 at ¶ 2.6; (2) a binding arbitration clause with full enforcement powers, including injunctive relief, CP 83 at ¶ 5.1; and (3) a provision granting the arbitrator authority to award arbitrator's fees to the substantially prevailing party. CP 83 at ¶ 5.1.

Despite the Settlement Agreement and the parties' efforts to schedule the arbitration, on October 16, 2008, Ms. Yeager filed a Petition against the Ganders for an antiharassment protection order. The Petition repeated many of the same allegations which the Kitsap County District Court found lacking on the merits in 2005, and added a new series of allegations dating to July of 2007.

A Temporary Protection Order and Notice of Hearing was signed on October 16, 2008. The Order restrained Gander-Keenan from engaging in surveillance of or contacting their neighbors or entering their property.

On October 29, November 18, and December 10 of 2008, the Bainbridge Island Municipal Court conducted hearings on Yeager's application for a permanent antiharassment order.

On December 23, 2008, the trial court issued its Memorandum Opinion granting issuance of a permanent restraining order substantially curtailing Gander-Keenan's rights in its own property. Also on December 23, 2008, trial counsel for Gander-Keenan filed a timely notice of appeal to the Kitsap County Superior Court. On January 5, 2009, trial counsel filed a timely amended notice of appeal.

On February 2, 2009, John Henry Browne of the Law Offices of John Henry Browne, P.S. entered a notice of appearance in the Kitsap County Superior Court.

After a series of various motions and continuances, on March 19, 2010, the parties presented argument before the Honorable Russell W. Hartman of the Kitsap County Superior Court. On May 14, 2010, the Court issued its Written Findings of Fact and Conclusions of Law, concluding that the lower court had no jurisdiction in light of the Settlement Agreement and vacated the antiharassment order. CP 32-35.

In the interim, on May 6, 2010, Gander-Keenan filed a Motion for Attorney's Fees and Supporting Declaration, CP 1-27, which is the sole subject of this appeal.

On May 10, 2010, Karen Bertram of Kutscher, Hereford, Bertram, Burkart, PLLC, entered a Notice of Appearance on behalf of Ms. Keefe. On June 10, 2010, Keefe-Yeager filed its Opposition to Motion for Attorney's Fees, alleging that Gander-Keenan resisted and refused arbitration. CP 37-70.

Based upon misrepresentations in Keefe-Yeager's opposition, on June 11, 2010, Gander-Keenan filed the Second Declaration of Dennis D. Reynolds in Support of Attorney's Fees. CP 71-137. As part of his submission, Mr. Reynolds included substantial documentation of Gander-Keenan's efforts to arbitrate.

Again based upon Keefe-Yeager's misrepresentations in their Opposition that Gander-Keenan refused to arbitrate, on July 6, 2010, Gander-Keenan filed a Motion for CR 11 sanctions. CP 138-142.

Keefe-Yeager, in turn, then filed a Surreply in Support of Opposition to Motion for Attorney's Fees on July 14, 2010. CP 143-46. Also on July 14, 2010, Keefe-Yeager filed its Opposition to Motion for CR 11 Sanctions. CP 171-73.

On July 16, 2010, the Superior Court heard argument on the attorney's fees and sanctions issues. RP.[4] Also on July 16, 2010, the

[4] The sole Report of Proceedings (RP) relevant to this issue is the actual July 16, 2010 hearing on the attorney's fees and sanctions issues.

Superior Court entered its Order Denying Appellant's Motions for Attorney's Fees and CR 11 Sanctions. CP 174-75.

Finally, on August 12, 2010, Gander-Keenan filed a timely Notice of Appeal. CP 176-205.

2. Relevant Terms of the Settlement Agreement

The parties' March 16, 2006 Settlement Agreement mandates that:

> ¶2.6 Gander/Keenan shall not disparage [Keefe-Yeager], or otherwise engage in conduct intended to harass, annoy, incite or insult [Keefe-Yeager]. [Keefe-Yeager] shall not disparage Gander/Keenan, or otherwise engage in conduct intended to harass, annoy, incite or insult [Gander/Keenan]. CP 82.
>
> ¶5.1 The parties hereto hereby appoint Mr. Maron, or if he is unavailable, his designee, as arbitrator and agree that he or his designee shall have authority to resolve any and all disputes arising out of or otherwise relating to the enforcement of this Agreement. The parties agree that Mr. Maron or his designee shall have all powers granted by law to arbitrators, including injunctive relief, to interpret and enforce this Agreement. Said relief, if necessary, may be enforced by judgment obtained from the Superior Court of Washington, County of Kitsap. Mr. Maron has authority to award arbitrator's fees to the substantially prevailing party in such dispute. Id.

3. RALJ Appeal on the Merits

A. Evidence Presented

While Gander-Keenan challenged the lower court's Memorandum Opinion on numerous bases, including sufficiency of the evidence and that entry of a permanent restraining order was error, the most important

assignment or error for the purposes of this Appeal is Gander-Keenan's contention that the lower court erred in finding that it had jurisdiction to even consider the Petition for an antiharassment order in light of the parties' Settlement Agreement and its binding arbitration clause. CP 219. More specifically, the issue raised was whether the lower court had jurisdiction pursuant to RCW 10.14.140 where the parties' Settlement Agreement contained a prohibition against "conduct intended to harass, annoy, incite, or insult" as well as a binding arbitration clause stating that the arbitrator "shall have authority to resolve any and all disputes rising out of or otherwise relating to enforcement" of the Agreement. Id.

Towards the end of asserting the lower court's lack of jurisdiction, Gander-Keenan noted that Keefe-Yeager's former counsel, Rob Crichton, who assisted Keefe-Yeager in enforcing the terms of the Settlement Agreement, testified in the lower court proceeding that he did not believe that arbitration would achieve his clients' goal- a restriction on Gander-Keenan's rights in its own property. CP 241. Crichton, moreover, testified that he thought the arbitrator possessed authority to make a declaration as to property rights, but he "never gave thought to his having the power of issuing the equivalent of injunctive relief or- in the nature of what is being sought here." CP 241.

Gander-Keenan then highlighted that Crichton's lower court testimony was less than forthcoming his prior suggestion:

> Finally, we call your attention to section 5.1 of the Settlement Agreement whereby Andy Maron was granted authority to enforce the Settlement Agreement and award arbitrator's fees to the prevailing party in the event of any dispute arising out of the Settlement Agreement. Unless these issues are promptly resolved, our clients intend to seek Mr. Maron's intervention *and suitable injunctive relief.* CP 240-41 (adding emphasis).

Gander-Keenan thus contended that under the guise of a civil restraining order, Keefe-Yeager improperly hearkened to the courts to gain relief otherwise unobtainable under the clear terms of the Settlement Agreement. Because the trial court had no jurisdiction to consider the matter- let alone reform the provisions of the Settlement Agreement by imposing restraints on Gander-Keenan's use of its own property- the antiharassment order should be vacated.

B. Court's Written Findings and Conclusions

In its Findings of Fact and Conclusions of Law entered on May 14, 2010, the Superior Court agreed that the lower court had no jurisdiction and thus vacated the antiharassment order. CP 32-36.

The Court found that: Gander-Keenan assigned error to the lower court's decision to even consider the matter and should have referred the case to arbitration under Chapter 7.04A RCW pursuant to the parties'

March 16, 2006 Settlement Agreement; the parties to the Settlement Agreement are the same parties involved in the antiharassment proceeding, except Ms. Keefe; the property dispute which led to the Settlement Agreement involved reciprocal allegations of the same types of conduct at issue in the antiharassment proceeding; the parties obtained reciprocal Chapter 10.14 RCW antiharassment orders; Paragraph 2.6 of the Settlement Agreement mandates that the parties "shall not disparage" or "otherwise engage in conduct intended to harass, annoy, incite, or insult" the other parties; Paragraph 5.1 of the Settlement Agreement designates Mr. Andy Maron as arbitrator- with authority to resolve any and all disputes arising out of or otherwise relating to enforcement of the Agreement- and confers upon him "all powers granted by law to arbitrators, including injunctive relief, to interpret and enforce" the Agreement; and finally, Finding No. 7 states that Gander-Keenan argued below that the conduct provisions of Paragraph 2.6 of the Agreement is personal to the original signators so that Ms. Keefe- as a successor in title but not a successor to the contract- could not enforce such provisions in arbitration. CP 32-34.

The Court then concluded: "Paragraph 2.6 of the March 16, 2006 settlement agreement clearly addresses the conduct currently at issue. Paragraph 5.1 of the March 16, 2006 settlement agreement, in turn,

contain a very broadly drafted arbitration provision. CP 34, Conclusion No. 6. Based upon the principles enunciated in ML Park Place Corp. v. Hedreen, 71 Wn.App. 727, 862 P.2d 602 (1993), the leading case in addressing the factors a court considers in determining whether a contractual dispute must be arbitrated, the Court concluded that: the parties made reciprocal promises about future conduct; the kind of misconduct governed by the antiharassment statutes in within the scope of Paragraph 2.6 of the Settlement Agreement; Paragraph 5.1 of the Agreement mandates that any such dispute be referred to arbitration; and the arbitrator has full authority to craft decisions enforceable in the Superior Court and which may include any remedy provided by the antiharassment statutes, including injunctive relief. CP 34-35

Under the terms of the Settlement Agreement, therefore, this matter should have been referred to arbitration. CP 35.

The Agreement, though, does not forbid assignment of contract so that Ms. Keefe is a successor in contract. On remand, then, Gander-Keenan is estopped from arguing that the arbitrator cannot address the antiharassment issue on Ms. Keefe's behalf. Id.

The Court, finally, directed the trial court to vacate the perpetual antiharassment orders and directed the parties to proceed to arbitration under the terms of the Settlement Agreement. Id.

These Findings and Conclusions are unchallenged.

4. Evidence Presented on Attorney's Fees Issue

A. Motion for Attorney's Fees and Supporting Declarations

On May 6, 2010- prior to entry of the Court's Findings and Conclusions on May 14, 2010- Gander-Keenan filed its Motion for Attorney's Fees and Supporting Declarations. In this pleading, Gander-Keenan asserted that because Keefe-Yeager resorted to the courts to solve a dispute properly covered by the parties' Settlement Agreement, attorney's fees are warranted. CP 1-2. Rather than submitting to mandatory arbitration under the explicit terms of the Settlement Agreement, Keefe-Yeager sought judicial relief. Id. Keefe-Yeager thus forced Gander-Keenan to bear the costs of the appeal to the Superior Court, which never should have occurred and would not have occurred had Keefe-Yeager not violated the harassment and arbitration provisions of the Settlement Agreement. Id.

Gander-Keenan first argued that attorney's fees are warranted because the Settlement Agreement specifically confers upon the designated arbitrator all powers granted by law to arbitrators as well as the authority to award arbitrator's fees to the substantially prevailing party in any such dispute. CP 2. Under RCW 7.04A.210, an arbitrator's powers includes the rights to award attorney's fees and other reasonable expenses

of arbitration and other such remedies as the arbitrator considers just and appropriate under the circumstances. CP 3. Kitsap County LMAR, moreover, provides that in addition to the authority granted to arbitrators under MAR 3.2, "an arbitrator has the authority to award fees, as authorized by these rule, by a contract, or by law ..." Id.

Washington courts, in addition, have consistently recognized that a party may recover attorney's fees "reasonably incurred in dissolving a wrongfully issued injunction or restraining order." Id. A temporary restraining order is wrongful, in turn, if dissolved by the court at the conclusion of a full hearing. Id. Gander-Keenan also noted that attorney's fees are appropriate where- as here- an appeal was required to dissolve an effective restraining order. CP 4.

Gander-Keenan thus argued that it is entitled to attorney's fees because Keefe-Yeager violated the terms of the Settlement Agreement by resorting to the courts. CP 4-5. Gander-Keenan was then forced to appeal the Bainbridge Island Municipal Court's decision, which was ruled to be incorrect for lack of jurisdiction. Id.

After delineating the relevant considerations in determining the amount of the attorney's fees under the lodestar method, which includes work performed by non-attorney personnel, Gander-Keenan asserted that failure to strictly comply with RALJ 11.2 is not jurisdictional. CP 9.

While Gander-Keenan noted that pursuant to RALJ 11.2, the party requesting attorney's fees *should* make such request in the opening brief, RALJ 1.2(b) unequivocally declares: "Cases and issues will not be determined on the basis of compliance or noncompliance with these rules ..." Id. Gander-Keenan then cited to a directly analogous unpublished decision in which the court found that because RALJ 11.2 is permissive, it was appropriate to grant an award of attorney's fees to a party which- like Gander-Keenan- was forced to pursue a RALJ appeal to the Superior Court, which vacated for lack of jurisdiction, but neglected to include its request for attorney's fees in its opening brief. CP 10-11.

Also included in Gander-Keenan's pleading were declarations by John Henry Browne, CP 12-13, and Dennis D. Reynolds, CP 14-27, as to the amount of labor their respective offices invested in the case.

B. Opposition to Motion for Attorney's Fees

In its Opposition filed on June 10, 2010, CP 37-70, counsel for Keefe-Yeager, Karen Bertram, contended that attorney's fees are inappropriate because Gander-Keenan allegedly refused to arbitrate and because RALJ 11.2 does not provide a basis for such an award in this case; Keefe-Yeager thus requested sanctions.

In support of its position, Keefe-Yeager attached a letter dated June 6, 2008 from Gander-Keenan's former counsel, Dennis D, Reynolds,

which stated his position that the issues between Gander-Keenan and Keefe-Yeager are not subject to arbitration. CP 38; 46-47. Counsel for Keefe-Yeager also attached a letter she sent to counsel for Gander-Keenan in which she threatened to seek sanctions if Gander-Keenan pursued attorney's fees- as based upon Mr. Reynolds' June 6, 2008 letter. CP 38-39; 49-50. Keefe-Yeager also included the Bainbridge Island Municipal Court's Memorandum Opinion. CP 40; 52-57.

Keefe-Yeager, finally, argued- in spite of the Superior Court's final order that the lower court lacked jurisdiction- that the lower court's issuance of the orders for protection was not wrongful. CP 40-41. But, given that the court had no jurisdiction, the Superior Court had no reason to delve into the substantive merits.

C. Second Declaration of Dennis D. Reynolds in Support of Motion for Attorney's Fees

On June 11, 2010, Gander-Keenan submitted the Second Declaration of Dennis D. Reynolds in Support of Motion for Attorney's Fees- basically in direct response to Keefe-Yeager's Opposition. CP 71-137. Mr. Reynolds, who represented Gander-Keenan during the arbitration and in the lower court proceedings, documented the correspondence between himself, counsel for Keefe-Yeager, and Mr. Maron, the arbitrator designated by the Settlement Agreement.

First, on April 8, 2008, Rob Crichton, counsel for Keefe-Yeager, wrote to Mr. Maron to invoke arbitration pursuant to the parties' Settlement Agreement. CP 71-72; 77-87. Then, on April 10, 2008, Reynolds received a facsimile from Mr. Maron acknowledging receipt of Crichton's letter and suggesting scheduling of a telephonic pre-hearing conference. CP 72; 89-90. In email correspondence between Reynolds, Crichton, and Maron on April 21 and 22, 2008, they discussed the telephonic pre-hearing conference and actually scheduled the conference. CP 72; 92-94.

On May 28, 2008, Maron requested- via email- that Reynolds and Crichton submit short letters delineating their respective positions as to whether Maron's authority was triggered and what authority he possesses to decide the question of arbitrability. CP 72; 96-97. On June 6, 2008, Reynolds submitted his letter. CP 72; 99-100. Reynolds specifically notes that his letter merely states his position- and the position of his clients- that arbitration was improper; it was not- as Keefe-Yeager purport- a refusal to submit to arbitration.[5] Also on June 6, 2008, Crichton submitted the letter requested by Maron. CP 73; 102-104.

By letter dated June 12, 2008, Maron conveyed to the parties his determination that Keefe-Yeager properly invoked arbitration pursuant to

[5] This is the letter cited by Keefe-Yeager as "proof" that Gander-Keenan refused to arbitrate.

the Settlement Agreement and suggested that the parties meet and confer to schedule for the arbitration and any pre-hearing issues. CP 73; 115-16.

After Reynolds raised the issue of Maron's apparent conflict of interest to no avail, CP 73; 118-21, on July 30, 2008, he received an email from Crichton proposing a half-day arbitration hearing on Bainbridge Island with telephonic testimony. CP 73; 123-24. Reynolds replied that due to a death in Ms. Keenan's family, he would have to confer with his clients about scheduling, but he saw no need for any testimony given that the limited issue for the arbitrator would be a simple interpretation of the easement conveyance. Id. Reynolds thus avers: "My clients clearly intended to participate in the proposed arbitration." CP 73.

As further evidence of arbitration, Reynolds included Maron's bill for arbitration services from April through July of 2008 and Maron's query whether the parties would like his assistance further processing the arbitration. CP 74; 126-27.

After speaking with Crichton on August 29, 2008, Reynolds emailed Gander-Keenan to relate the contents of such conversation. CP 74; 129-30. Reynolds told Crichton that Gander-Keenan was not ready to complete the arbitration until October- and maybe even November. Reynolds closed his communication by asking for proposed dates to complete the arbitration. CP 129-30.

Without any notice- or any further discussions about scheduling the arbitration- on October 16, 2008, Keefe-Yeager petitioned the Bainbridge Island Municipal Court for an antiharassment order, which the court subsequently granted. See CP 74. During the lower court proceedings, Crichton was a witness for Keefe-Yeager. CP 74; 132. When Reynolds asked Crichton whether he or his clients had taken any steps to schedule the arbitration, Crichton replied in the negative. CP 132.

Reynolds thus concludes that Mr. Gander and Ms. Keenan "were fully prepared to proceed through arbitration, but were prevented from doing so because Ms. Keefe and Ms. Yeager in the opinion of my clients violated the terms of the March 2006 Settlement Agreement by resorting to the courts and requesting an antiharassment order." CP 74-75.

D. Gander-Keenan's Motion for CR 11 Sanctions

On July 6, 2010, Gander-Keenan filed a Motion for CR 11 Sanctions, based upon counsel for Keefe-Yeager's misrepresentation that Gander-Keenan refused arbitration, which is contrary to fact. CP 138-42. In Keefe-Yeager's Opposition to Motion for Attorney's Fees, counsel attached Reynolds' June 6, 2008 as evidence that Gander-Keenan refused to arbitrate. CP 139. As revealed in the Second Declaration of Dennis D. Reynolds in Support of Motion for Attorney's Fees, however, there is substantial evidence that Gander-Keenan intended to arbitrate- and that

but for Keefe-Yeager's request for judicial relief, the arbitration would have been completed. Id. Gander-Keenan also noted that opposing counsel threatened sanctions as based upon Reynolds' June 6, 2008 letter, which opposing counsel misrepresented. CP 139-40. As opposing counsel represented Keefe-Yeager in the lower court proceedings and even called as a witness former counsel Crichton, who testified that neither he nor his clients took any steps to schedule the arbitration, she should have known that her position was indefensible. CP 141. Bertram thus not only misrepresented facts, but also requested sanctions with no legitimate basis. CP 142.

E. Keefe-Yeager's Opposition to Motion for CR 11 Sanctions and Declaration of Karen R. Bertram in Support of Opposition to Motion for Attorney's Fees

On July 13, 2010, Keefe-Yeager filed its Surreply in Support of Opposition to Motion for Attorney's Fees. CP 143-46. Also on July 13, 2010, Keefe-Yeager filed the Declaration of Karen R. Bertram in Support of Opposition to Motion for Attorney's Fees. CP 147-66. The gist of these pleadings is Keefe-Yeager's contention that although Gander-Keenan was willing to submit to arbitration on the issue of the easement conveyance, Gander-Keenan was not willing to arbitrate the alleged harassment. CP 143.

As evidence, Keefe-Yeager attached the testimony of its former counsel, Crichton, in the lower court proceedings. CP 144-45; 147-66. First, Keefe-Yeager noted that Reynolds had asked about mediation- not arbitration.[6] CP 143-44. Then, Keefe-Yeager highlighted that Crichton testified that he actually advised Keefe-Yeager to resort to the courts because he did not believe that the designated arbitrator had the power to issue injunctive relief. Id.[7]

F. Keefe-Yeager's Opposition to Motion for CR 11 Sanctions

On July 14, 2010, Keefe-Yeager submitted its Opposition to Motion for CR 11 Sanctions. CP 171-73. The sole argument was that despite all of the evidence to the contrary, Gander-Keefe refused to submit to arbitration. CP 171-72.

5. Oral Argument on Attorney's Fees Issue and the Court's Oral Decision

On July 16, 2010, before the Honorable Russell W. Hartman of the Kitsap County Superior Court, the parties presented argument on the attorney's fees issue. See RP 1-13.

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[6] As the parties' Settlement Agreement did not contemplate mediation, it seems that this was a simple misstatement and that Reynolds was referring to the arbitration.

[7] As noted above at Section 3(A) at p.7, Crichton previously wrote Gander-Keenan to insist that unless certain issues are resolved, he would invoke arbitration and seek injunctive relief. See CP 240-41.

As to attorney's fees, the Court first found that at Paragraph No. 7 of the Findings of Fact,[8] Gander-Keenan is precluded from contesting arbitrability on remand. The Court stated that it based this conclusion on Reynolds' June 6, 2008 letter delineating his position towards arbitration and the Court's attendant concern that Gander-Keenan was resisting arbitration. RP 8-9. The Court thus found no factual basis for attorney's fees. RP 9. The Court then found that there is no basis for attorney's fees by statute, contract, settlement agreement, or even the equitable ground relied upon by Gander-Keenan. Id.

The Court then specifically held that the failure to comply with RALJ 11.2- despite its loose language- forecloses Gander-Keenan's request for attorney's fees. RP 9-10. The Court, finally, held that is was not equitable for Gander-Keenan to request attorney's fees because the Court was unable to consider such request in conjunction with the overall merits of the RALJ appeal. RP 10-11.

D. THE SUPERIOR COURT ERRED IN REFUSING TO GRANT ATTORNEY'S FEES WHERE GANDER-KEENAN WAS FORCED TO INTIATE APPEAL TO DISSOLVE A WRONGFULLY ISSUED ANTIHARASSMENT ORDER

As an initial matter, a court's decision whether to award costs and attorney's fees "is a legal issue reviewed *de novo*." Sanders v. State, ---

[8] As noted above, the Court must be referring to Conclusion of Law No. XI.

Wn.2d----, 240 P.3d 120, 140 (September 16, 2010); accord Ethridge v. Hwang, 105 Wn.App. 447, 460, 20 P.3d 958 (2001).

1. Attorney's Fees are Proper because Keefe-Yeager Violated the Terms of the Settlement Agreement by Resorting to the Courts Rather than Pursuing Arbitration

Given that Keefe-Yeager improperly hearkened to the courts to resolve disputes covered by the parties' Settlement Agreement, Gander-Keenan was forced to bear the costs of appealing the Bainbridge Island Municipal Court's wrongfully issued antiharassment protection order. Attorney's fees are thus warranted.

A. Keefe-Yeager Violated the Terms of the Settlement Agreement by Improperly Resorting to the Courts

As evidenced by the Second Declaration of Dennis D. Reynolds in Support of Motion for Attorney's Fees, Gander-Keenan had every intention of resolving their disputes with Keefe-Yeager through arbitration. CP 71-137. In fact, in July and August of 2008, counsel for the parties corresponded regarding proposed dates for the arbitration, its location, and its format. CP 123-24; 129-30.

First, as is abundantly clear, the Settlement Agreement contains an antiharassment provision as well as a binding arbitration provision conferring upon the arbitrator "all powers granted by law to arbitrators, including injunctive relief." CP 83 at ¶5.1. Next, Keefe-Yeager's former

counsel, Rob Crichton, actually negotiated the Settlement agreement- as evidenced by both his testimony and letters he composed- so that he should be intimately familiar with its provisions. In fact, in a January 14, 2008 letter to Mr. Gander and Ms. Keenan, which was admitted in the Municipal Court proceedings as Respondent Exhibit #10 and included in the record of the RALJ appeal at CR 235-42, Mr. Crichton alleged that Gander/Keenan was in violation of the Agreement and threatened pursuing arbitration with the specific goal of injunctive relief:

> Finally, we call your attention to section 5.1 of the Settlement Agreement whereby Andy Maron was granted authority to enforce the Settlement Agreement and award arbitrator's fees to the prevailing party in the event of any dispute arising out of the Settlement Agreement. Unless these issues are promptly addressed, our clients intend to seek Mr. Maron's intervention and suitable injunctive relief.

See CP:240-41.[9]

Crichton thus misled- at best- the Municipal Court when he stated that he "never gave thought" to Mr. Maron's "having the power of issuing the equivalent of injunctive relief," for he previously requested precisely such injunctive relief. Crichton, moreover, seems to also have shirked his legal duties in advising his clients to resort to the courts despite the

[9] Crichton submitted a follow-up letter to Mr. Maron on April 8, 2008,which states that he and his firm assisted the Ridings and the Yeagers in their property dispute with Gander-Keenan; cites to the provision in Section 5.1 of the Settlement Agreement that Mr. Maron has "all powers granted by law to arbitrators, including injunctive relief; and actually sought injunctive relief. CR 248-58

unequivocal provision of the Settlement Agreement that Mr. Maron or his designee shall possess "all powers granted by law to arbitrators, including injunctive relief, to interpret and enforce this Agreement."

Under any factual scenario, then, Keefe-Yeager hearkened to the courts to resolve disputed subject to mandatory arbitration under the unequivocal terms of the Settlement Agreement.

B. As Gander-Keenan was Forced to Appeal the Wrongfully Issued Restraining Order, Attorney's Fees are Proper

Where, as here, a party is forced to initiate appeal in order to dissolve a wrongfully issued restraining order, an award of attorney's fees is proper.

Washington follows the American rule "that attorney fees are not recoverable by the prevailing party as costs of litigation unless the recovery of such fees is permitted by contract, statute, or some recognized ground in equity." Panorama Village Condominium Owners Ass'n Bd. of Directors v. Allstate Ins. Co., 144 Wn.2d 130, 43, 26 P.3d 910 (2001).

Here, the parties' Settlement Agreement, the provisions of which the Superior Court found controlling, explicitly states in Paragraph 5.1 that: dispute resolution is to be by arbitration; the arbitrator possesses all powers granted by law to arbitrators, including injunctive relief; and the arbitrator has the authority to award arbitrator's fees to the substantially

prevailing party in any such dispute. This provision, however, obviously presumes the parties would act pursuant to the Agreement and seek arbitration to resolve disputes. The same rationale would thus seem to apply to a party who breaches the terms of the Agreement and improperly resorts to the courts. As this matter should have been referred to arbitration, during which the arbitrator could award arbitrator's fees to the prevailing party, attorney's fees are warranted where a party prevails in the judicial action.

In any event, included in an arbitrator's powers are the rights to: award attorneys' fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding and also order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding RCW 7.04.210, Remedies-Fees and Expenses of Arbitration Proceeding, §§ (b) & (c).

MAR 3.2 further delineates the authority of arbitrators, while Kitsap County LMAR 3.2 provides: "In addition to the authority given to arbitrators under MAR 3.2, an arbitrator has the authority to award fees, as authorized by these rules, by a contract, or by law except CR 11 sanctions."

Even notwithstanding the Settlement Agreement's mandatory arbitration provision, Washington courts have consistently recognized that "[o]n equitable grounds, a party may recover attorneys' fees reasonably incurred in dissolving a wrongfully issued injunction or restraining order." Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 143, 937 P.2d 154 (1997) (citing Alderwood Assocs. v. Washington Envtl. Council, 96 Wn.2d 230, 247, 635 P.2d 108 (1981); Cecil v. Dominy, 69 Wn.2d 289, 291-92, 418 P.2d 233 (1966). A temporary restraining order is "wrongful" if dissolved by the court at the conclusion of a full hearing. Id. (citing Cecil, 69 Wn.2d at 293-94).

The rationale supporting this "equitable rule permitting recovery for dissolving a preliminary injunction or restraining order is to deter plaintiffs from seeking relief prior to trial on the merits." Id.

With respect to the award of attorneys' fees on appeal, courts consistently permit recovery where- as here- appeal was necessary to dissolve a currently effective temporary restraining order. Id. at 144-45 (citing Alderwood, 96 Wn.2d at 247) (allowing fees on appeal because the wrongfully issued temporary restraining order was not previously dissolved by trial, motion, or hearing); Seattle Firefighters Union Local No. 27 v. Hollister, 48 Wn.App. 129, 138, 737 P.2d 1302 (1987) (allowing fees on appeal because the defendant incurred the fees in order to dissolve

temporary injunctions which were still effective prior to appeal); Federal Way Family Physicians, Inc. v. Tacoma Stands Up For Life, 106 Wn.2d 261, 268-69, 721 P.2d 946 (1986) (allowing fees incurred on appeal to dissolve a temporary restraining order that was still effective prior to appeal, conditioned on the trial court's decision to deny a permanent injunction after a hearing on the merits).

Here, in like manner, Gander-Keenan was the subject of a wrongfully issued anti-harassment order, which the Superior Court dismissed on appeal due to the lack of subject matter jurisdiction by the Bainbridge Island Municipal Court. Rather than proceed through arbitration- as required by the Settlement Agreement- Keefe and Yeager applied for and received antiharassment protection orders. As Gander-Keenan was forced to resort to the Superior Court to dissolve the order restraining their conduct on their own land, equitable considerations require that they receive an award for attorneys' fees.

While the Court in Trummel v. Mitchell refused to award attorney's fees pursuant to the equitable ground recognized in Ino Ino, this was primarily because the Court affirmed- not vacated- most of the original antiharassment order. 156 Wn.2d 653, 677, 131 P.3d 395 (2006).

Here, by contrast, Keefe-Yeager ignored the explicit arbitration provision of the parties' Settlement Agreement and instead improperly

hearkened to the courts, which had no jurisdiction, for relief. Gander-Keenan, therefore, never should have had to contest the petition for antiharassment order in either the municipal court or in this Court.

In Panorama, supra, moreover, the court relied upon a similar, recognized equitable ground in awarding attorneys' fees: "When insureds are forced to file suit to obtain the benefit of their insurance contract, they are entitled to attorneys' fees." 144 Wn.2d at 143 (quoting Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wn.2d 654, 687 n.15, 15 P.3d 115 (2000) (quoting Olympic Steamship Co. v. Centennial Insurance Co., 117 Wn.2d 37, 52-53, 811 P.2d 673 (1991).

Here, by analogy, Gander-Keenan was forced to file suit/ appeal to obtain the benefit of the explicit arbitration clause in the Settlement Agreement. In such a situation, attorneys' fees are appropriate.

Under the crystal clear terms of the Settlement Agreement, allegedly harassing conduct is prohibited and must be resolved through arbitration- as the Superior Court reiterated. In addition, under the terms of the Agreement, if arbitration is invoked, the arbitrator has the right to award attorney's fees to the substantially prevailing party.

Here, rather than invoke arbitration, Keefe-Yeager improperly hearkened to the courts. Gander-Keenan was thus forced to appeal the

determination of the Municipal Court, which had no jurisdiction, to the Superior Court. Attorney's fees are thus proper.

2. The Superior Court Improperly Relied Upon its Findings of Fact on the RALJ Appeal to Deny Attorney's Fees

Given that the Superior Court vacated the wrongfully issued antihrassment orders, it improperly relied on its Finding of Facts to deny an award of attorney's fees.

As mentioned above, an award of attorney's fees is warranted where a party is forced to appeal a wrongfully issued restraining order. And, such order is "wrongful" where- as here- it is dissolved by a court after a full hearing. Given this clear equitable basis for attorney's fees, the Superior Court erred in denying to award attorney's fees.

In its oral ruling on the Motion for Attorney's Fees, as one basis to deny the motion, the Superior Court cited to its Finding of Fact No. 7, which states:

> In the summer of 2008, the attorney for Gander-Keenan sent correspondence to counsel representing Yeager/Keefe contending that the conduct provisions of the March 16, 2006 settlement agreement- Paragraph 2.6, were personal to the original signators so that Ms. Keefe- as a successor in title but not as a successor to the contract- could not enforce such provisions in arbitration.

RP 8; see CP 33-34.

While the court clarified that it was not "addressing the issue specifically of how people were responding to arbitration at the time,"

because it wanted to ensure that Gander-Keenan would not resist arbitration on remand, it also concluded that Gander-Keenan may not contest arbitrability on remand. RP 8-9; see CP 35. And, the court based such finding and conclusion on the content of Dennis Reynolds' June 6, 2008 letter.

The court, however, also should have considered the documents attached to the Second Declaration of Dennis D. Reynolds in Support of Motion for Attorney's Fees, which amply demonstrate that Gander-Keenan was more than willing to enter into arbitration and had even discussed proposed dates for the arbitration and its format. CP 71-137.

As Gander-Keenan agrees with the court that arbitration is the sole forum to resolve the pending disputes, Gander-Keenan did not appeal any of the courts findings or conclusions. But, the fact remains that Keefe-Yeager violated the terms of the Settlement Agreement by resorting to the courts and forcing Gander-Keenan to appeal the wrongfully issued order.

Attorney's fees are thus warranted.

3. Failure to Strictly Comply with RALJ 11.2 is not Jurisdictional

While the granting of attorneys' fees is generally governed by RALJ 11.2, given its permissive language, failure to strictly comply with

its dictates is not jurisdictional and does not waive Gander-Keenan's right to request attorneys' fees.

Although RALJ 11.2 provides that the party requesting attorneys' fees: "should" devote a section of the brief to such argument; "should" make such request by affidavit filed at or before oral argument; and "should" at oral argument repeat such request and reference to the previously filed affidavit, there is, however, no requirement of strict compliance with the Rules for Appeal of Decisions of Courts of Limited Jurisdiction.

First- and most importantly- RALJ 1.2(b) unequivocally declares: "Cases and issues will not be determined on the basis of compliance or noncompliance with these rules ..."

While there is a paucity of case law interpreting RALJ 11.2, a comparison with the Rules of Appellate Procedure (RAP) reveals that the RALJ 11.2 procedures are permissive. First, prior to their 1990 amendment, the RAP governing fee awards on appeal were identical to the RALJ provisions. In 1990, however, the Supreme Court replaced the permissive word "should" with the mandatory "must" throughout RAP 18.

The Supreme Court, by contrast, did not alter RALJ 11, which to this day contains the permissive "should" verbiage. If the Supreme Court intended differently, it would also have amended RALJ 11. See, e.g.,

State v. Roth, 78 Wn.2d 711, 715, 479 P.2d 55 (1971) ("Where different language is used in the same connection in different parts of a statute, it is presumed that a different meaning was intended") (citing 82 C.J.S. Statutes s 348 (1953)).

Where, therefore, as here, "the language of a provision is clear and unequivocal, courts must assume it means exactly what it says and apply the provision as written." Duke v. Boyd, 133 Wn.2d 80, 87, 942 P.2d 351 (1997).

The RALJ 11.2 procedures are thus clearly permissive.

The unpublished decision in NEPA Pallet & Container Co., Inc. v. CHEP USA, 2003 WL 21143351 (Div. 1, 2003) is illustrative- and directly on point. In NEPA, as here, the superior court reversed the decision of the court of limited jurisdiction for lack of subject matter jurisdiction and also ordered costs and reasonable attorneys' fees to CHEP as the prevailing party. NEPA, in turn, contested that such award was improper because CHEP failed to comply with the procedures delineated in RALJ 11.2.

Parsing the specific language of RALJ 11.2, the NEPA Court determined that its provisions are permissive. First, RALJ 11.2 uses the permissive word "should." RALJ 1.2(a), in turn, pronounces that the RALJ are to be liberally interpreted while RALJ 1.2(b) specifically states

that "... issues will not be determined on the basis of compliance or noncompliance with these rules." The NEPA Court also engaged in a comparison between the applicable RALJ and correlative RAP provisions, finding that the RAP explicitly require strict compliance whereas there is no such directive in the RALJ. There are, in addition, no cases requiring strict compliance with RALJ 11.2.

The NEPA Court, in language apropos to this case, thus concluded:

> NEPA argues that not requiring strict compliance will produce a flood of requests for attorney fees filed after their appeals are decided. We disagree. NEPA fails to cite to any authority to support this argument. Because RALJ 11.2 is permissive and the courts have interpreted it that way, the flood should already have begun.

As there is no authority that the RALJ are to be interpreted in anything other than permissive fashion, the fact that Gander-Keenan did not move for attorney's fees in its opening brief is immaterial.

As Gander-Keenan was forced to appeal the wrongfully issued orders by the lower court, an award if attorney's fees is appropriate.

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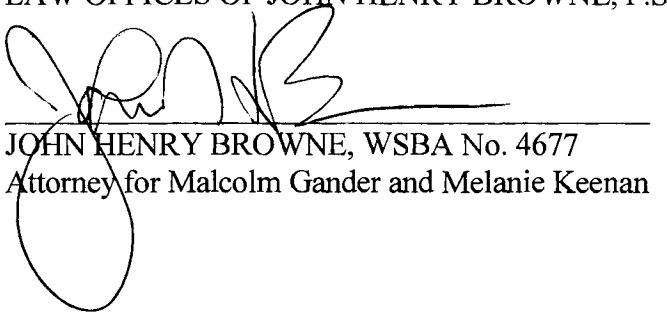
E. CONCLUSION

For the reasons stated above, Mr. Gander and Ms. Keenan respectfully request that this Court vacate the trial court's Order Denying Appellants' Motion for Attorney's Fees and CR 11 Sanctions.

DATED this 18th day of February, 2011.

Respectfully submitted,

LAW OFFICES OF JOHN HENRY BROWNE, P.S.



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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

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

MALCOLM J. GANDER & MELANIE M. KEENAN,	)	
	)	No. 41066-4-II
Appellants,	)	
v.	)	
	)	DECLARATION OF SERVICE
KAREN KEEFE & ELINA YEAGER,	)	
Respondents.	)	

I certify under penalty of perjury under the laws of the State of Washington that I sent a copy of (1) Appellants' Motion to Withdraw and Replace Opening Brief of Appellant and (2) Corrected Opening of Appellants to:

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via ABC Legal Messenger Service on this day.

DATED at Seattle, WA this 22nd day of February, 2011

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