COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY
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NO. 41066-4-II

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION TWO

MALCOLM J. GANDER and MELANIE M. KEENAN,

Appellants/Cross-Respondents,

vs.

ELINA YEAGER and KAREN KEEFE,

Respondents/Cross-Appellants.

RESPONDENT'S BRIEF AND REPLY BRIEF

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I. INTRODUCTION

The sole issues before this Court are whether the Kitsap County Superior Court abused its discretion in denying Appellants' request for attorney's fees, and in denying Respondent Karen Keefe's ("Keefe")[1] request for attorney's fees incurred to defend Appellants' meritless motion for attorney's fees.[2]

Appellants argue that they are entitled to an equitable award of attorney's fees because Respondents violated a 2006 Settlement Agreement by failing to arbitrate their allegations of harassment. The record clearly shows, however, that Respondents not only attempted to compel arbitration of the underlying dispute, but that Appellants explicitly stated that "this dispute is...reserved for the courts to resolve," and refused to arbitrate. As a result, after more than two years of Appellants' malicious and hostile harassment and intimidation, Respondents had no other option than to file a Petition for Order of Protection-Anti-Harassment in the Bainbridge Island Municipal Court.

When the Bainbridge Island Municipal Court entered a permanent Order of Protection against Appellants, they appealed the ruling to the Kitsap County Superior Court, arguing that the Bainbridge Island Municipal Court did not have jurisdiction because of an arbitration provision in a 2006 Settlement Agreement.

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[1] Respondent Yeager did not participate in the appeal of the Bainbridge Island Municipal Court ruling to Kitsap County Superior Court. Although she is named as a Respondent in this appeal, Ms. Yeager has never appeared.

[2] Throughout this brief, Appellants Malcolm J. Gander and Melanie M. Keenan are referred to as "Appellants" and Respondents Elina Yeager and Karen Keefe are referred to as "Respondents."

The Superior Court agreed and ordered the parties to proceed to arbitration under the 2006 Settlement Agreement, but denied Appellants' request for an award of attorneys because the facts did not support an equitable claim for attorney's fees and Appellants failed to comply with RALJ 11.2. This Court should affirm that decision.

II. RESPONDENT'S ASSIGNMENT OF ERROR

Respondent Keefe asked Appellants to strike their motion for attorney fees because it was based on factual misrepresentations and was not warranted under any legal theory. Because Appellants obstinately pursued their meritless motion for attorney fees, Ms. Keefe requested an award of attorney fees incurred to defend Appellants' motion. Did the Superior Court abuse its discretion in denying Ms. Keefe's request for CR 11 sanctions against Appellants?

III. COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANTS' ASSIGNMENTS OF ERROR.

1. The overwhelming evidence in the record below demonstrates that Appellants refused to arbitrate the underlying dispute when Respondents attempted to compel arbitration. Did the Superior Court err in denying Appellants' equitable argument for attorneys fees because the facts failed to support their claim? (Assignment No.1)

2. The Superior Court specifically found that Appellants argued that Ms. Keefe was not a successor to the Settlement Agreement and therefore could

not enforce its arbitration provision. Did the Superior Court abuse its discretion by relying on this fact in denying Appellants' equitable argument for attorney fees? (Assignment No. 2)

3. Appellants failed to devote any portion of their brief on appeal to the Superior Court to a request for attorney's fees as required under RALJ 11.2(c). Did the Superior Court err in denying Appellants' request for attorney's fees when they failed to comply with RALJ 11.2(c)? (Assignment No. 3)

IV. STATEMENT OF THE CASE

A. Respondents Sought Protection from Appellants' Harassment and Intimidation.

Contrary to Appellants' contention, the underlying dispute in this matter does not involve a longstanding property dispute dating back to 2005. Ms. Keefe did not even know Appellants or Respondent Yeager at that time. This matter started as a Petition for Order of Protection-Anti-Harassment to stop Appellants from engaging in "acts of intimidation and unlawful harassment." CP 56.

In 2005, Appellants, Respondent Yeager and the Ridings (Ms. Keefe's predecessors) were involved in a boundary line dispute that culminated in a settlement agreement ("2006 Settlement Agreement"). The following year, Ms. Keefe purchased the property owned by the Ridings. Ms. Keefe's new property adjoined Appellants' property and Respondent Yeager's property. Shortly after purchasing the property,

Respondents became the subjects of unwanted contact and harassment by Appellants. CP 56.

Because of Appellants' harassment, Respondents attempted to invoke the arbitration provision of the 2006 Settlement Agreement to address it. CP 77-79. But Appellants refused to submit to arbitration. Appellants' counsel, Dennis Reynolds, outlined several reasons why the arbitration provision in the 2006 Settlement Agreement was not applicable to Respondents' allegations of harassment. CP 46-47. He argued that Ms. Keefe had no right to seek relief under the Settlement Agreement because she was not a party to it. *Id.* Mr. Reynolds specifically stated, "this dispute is a matter beyond [the arbitrator's] purview, one reserved for the courts to resolve." *Id.* Consequently, Respondents sought protection from the Bainbridge Island Municipal Court by filing a Petition for Order of Protection-Anti-Harassment against Appellants. CP 52.

B. The Bainbridge Island Municipal Court Ruled that the 2006 Settlement Agreement Did Not Preclude Jurisdiction.

During the proceedings on the Anti-Harassment Petition, the Bainbridge Island Municipal Court addressed the 2006 Settlement Agreement and ruled that it had jurisdiction pursuant to RCW 10.14, which was not precluded by the terms of the 2006 Settlement Agreement. CP 52-57. The Court found that the 2006 Settlement Agreement was silent

with respect to the parties' remedies under RCW 10.14 and did not require arbitration for unrelated disputes that arose between the parties subsequent to, or outside the terms of the Settlement Agreement. *Id.* Moreover, Respondents' Petition did not ask the Court to interpret the respective rights and responsibilities of the parties under the 2006 Settlement Agreement or to enforce its terms. *Id.*

The Bainbridge Island Municipal Court noted that "testimony indicated **[Appellants had], for almost one year, successfully prevented, through various delaying tactics, [Respondents'] attempt to compel arbitration to enforce the Settlement Agreement**". *Id.* (Emphasis added.) The Municipal Court also recognized that if Respondents' sole remedy for alleged harassment was to compel arbitration under the Settlement Agreement, Respondents "would find themselves unable to protect themselves from unlawful harassment by [Appellants]." *Id.* As such, the Municipal Court concluded that limiting Respondents to arbitration under the 2006 Settlement Agreement "would be inequitable as well as inconsistent with the stated legislative purposes of RCW 10.14." *Id.*

C. The Bainbridge Island Municipal Court Entered a Permanent Order to Protect Respondents from Appellants' Unlawful Harassment.

After three days of hearings, spanning two months, the Bainbridge

Island Municipal Court concluded that "[t]he peace and sanctity of [Respondents'] homes and their privacy [had] been invaded repeatedly, unnecessarily and maliciously by the [Appellants.] [Respondents] were forced to live in a hostile, threatening and intimidating environment by the [Appellants], who clearly have no memory of the Golden Rule they should have learned in kindergarten." *Id.* Identifying ten separate acts of intimidation and harassment, the Bainbridge Island Municipal Court ruled that Appellants' conduct constituted unlawful harassment by a preponderance of the evidence. CP 55-56. "Based on the long, unfortunate history of hostile and intimidating acts by [Appellants]," the Municipal Court concluded that Appellants "are likely to resume their unlawful harassment of [Respondents] if the Order were allowed to expire. *Id.* As a result, the Municipal Court entered a permanent Order of Protection against Appellants. CP 57.

D. Respondent Keefe Warned Appellants Not to Seek a Meritless Motion for Attorney Fees.

After the Kitsap County Superior Court ruled on Appellants' appeal of the Bainbridge Island Municipal Court proceeding and entered its Findings of Fact and Conclusions of Law, Appellants filed a motion for attorney's fees, alleging, for the first time, that they are entitled to attorney's fees because Respondents violated the 2006 Settlement Agreement. CP 1-11. When Appellants filed their motion for attorney's fees, Ms. Keefe provided Appellants' attorney with a

letter authored by their prior attorney, which showed Appellants' counsel was taking the opposite position taken by his predecessor regarding the applicability of the arbitration provision in the 2006 Settlement Agreement. CP 46-47, 49-50 The letter acknowledges that Respondents attempted to invoke the arbitration provision to address Appellants' harassment, but their attorney argued that Ms. Keefe did not have "a status or rights under the Settlement Agreement." *Id.* Appellants' counsel concluded that the dispute was "reserved for the courts to resolve." *Id.* Because Appellants equitable argument for fees was based on fallacious facts, Ms. Keefe requested that Appellants strike their motion for attorney fees or risk CR11 sanctions. *Id.*

Appellants refused to strike their motion and continued to misrepresent the facts in support of that motion. CP 71-137. As a result, Ms. Keefe requested an award of the attorney's fees she was forced to incur defending Appellants' meritless motion. CP 167-169. The Superior Court stated that Appellants' "argument for fees was a bit of a stretch, but not unmeritorious on its face." RP 11:21-22.

V. ARGUMENT

A. Standard of Review

Review of a trial court's denial of a motion for attorney's fees is abuse of discretion. *Housing Authority of the City of Everett v. Kirby*, 154 Wn. App. 842, 849, 226 P.3d. 222, (2010). Appellants cite *Sanders v. State of Washington*,

169 Wn.2d 827, 240 P.3d 120 (2010) for the proposition that review of a trial court's denial of a motion for attorney's fees is de novo. But the Court of Appeals only reviews a decision to not award attorney's fees de novo, where the meaning of an attorney fee statute is at issue. *Kirby*, 154 Wn.App. at 858.

In *Sanders,* the award of attorney's fees was based upon RCW 42.56.550(4). Here, Appellants did not claim attorney's fees pursuant to any statute. In fact, they conceded that no statute applied. RP 3:5-9. Accordingly, Appellants' claim of attorney's fees is an equitable claim, which is reviewed for abuse of discretion.

A trial court abuses its discretion when it bases its denial of a motion for attorney's fees on untenable grounds or reasons. *Id.* There was nothing untenable regarding the Superior Court's reasons for denying Appellant's motion for attorney's fees in this matter.

B. Assignment of Appellants' Error No. 1: Appellants' Equitable Claim for Attorney's Fees is Not Supported by the Facts Because Appellants Refused to Arbitrate the Dispute, Not Respondents.

The record demonstrates that Respondents attempted to compel arbitration under the 2006 Settlement Agreement to address Appellants' harassment, but Appellants refused to arbitrate. When Respondents sought arbitration, Appellants' counsel unequivocally stated, "this dispute is a matter beyond [the arbitrator's] purview, one reserved for the courts to resolve." CP 46-47. Appellants also argued that the 2006 Settlement Agreement did not apply

to Ms. Keefe because she was not a party to it. According to Appellants' counsel, "there is no provision in the Settlement Agreement that allows the unilateral addition of bound parties, such as Ms. Keefe." *Id.* Accordingly, Appellants contended that "Ms. Keefe does not have a status or rights under the Settlement Agreement." *Id.*

Even the Bainbridge Island Municipal Court recognized that Appellants "successfully prevented, through various delaying tactics, [Respondents'] attempt to compel arbitration under the Settlement Agreement." CP53. That is exactly why the Bainbridge Island Municipal Court reasoned that to construe the Settlement Agreement to limit the parties' remedies for harassment to binding arbitration under the Settlement Agreement "would be inequitable as well as inconsistent with the stated legislative purposes of RCW 10.14." *Id.*

Because of Appellants' refusal to arbitrate, Rob Crichton, Respondents' counsel in the prior boundary line dispute, advised Respondents to file the Petition for Order of Protection-Anti-Harassment. CP 156. Mr. Crichton testified in the Bainbridge Island Municipal Court proceedings that he was retained by Respondents in January 2008 to pursue enforcement of the Settlement Agreement through arbitration. CP 150. During that time, Respondents "repeatedly contacted [Mr. Crichton] to express concerns. . . [Ms. Keefe] felt she was under surveillance [and] her son was afraid to leave the house". CP 154. Mr. Crichton then told

Respondents that the arbitrator under the Settlement Agreement "didn't have the power to make these people act like civilized neighbors." CP 155. According to Mr. Crichton, "Ms. Keefe had real fear in her voice, and [when] she asked what assurances [he] could give her that this wouldn't escalate, [he] told her that [he] couldn't give her any assurances and recommended that she seek [an order of protection from the court]." CP 156-157. Mr. Crichton advised Respondents that they were "not seeking enforcement of property rights so much as a desire to be free from harassment, [and] should resort to pursuing this relief in this court. [He] urged [Respondent] to do it because [he] thought [Appellants] were bullies." CP 156. In fact, when the Bainbridge Island Municipal Court asked Mr. Crichton whether he believed that the arbitrator, through his arbitration powers, could prevent harassment in light of paragraph 2.6 of the Settlement Agreement, Mr. Crichton testified that he "thought [the arbitrator] had the power to make a declaration as to the property rights, but 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." *Id.*

When these facts were presented to the Superior Court, Appellants' prior counsel submitted another declaration as evidence that Appellants did not refuse to submit to arbitration. Mr. Reynolds' second declaration, however, states that he was only willing to submit to arbitration on behalf

of his clients for "a simple interpretation of the easement conveyance." CP 73. Likewise, Mr. Reynolds' August 28, 2008 email attached as Exhibit K to his declaration made clear that Appellants had no intention of submitting Respondents' allegations of harassment to arbitration. CP 124-125.

Not only did Respondents attempt to invoke the arbitration provision of the 2006 Settlement Agreement to address the incidents of harassment, but when their attempts failed because of Appellants' resistance to arbitration, their lawyer advised them that their only remedy to stop the harassment was to seek an order of protection from the Bainbridge Island Municipal Court. CP 157.

Appellants were well aware of these facts. Nevertheless, they argued to the Superior Court, and again argue here, that Respondents "ignored the explicit arbitration provision of the parties' Settlement Agreement and instead hearkened to the courts." CP 5. The facts show otherwise.

C. Assignment of Appellants' Error No. 1: Appellants Misstate the Case Law They Rely Upon.

Appellants rely on inapplicable case law for their request for an equitable award of attorney's fees. First, they rely upon *Olympic Steamship* and its' progeny for the proposition that they were forced to appeal the Municipal Court ruling to obtain the benefit of the arbitration

provision in the 2006 Settlement agreement. *Olympic Steamship Co. v. Centennial Insurance Co.,* 117 Wn.2d 37, 811 P.2d 673 (1991). But *Olympic Steamship* and its progeny apply only to insureds in coverage dispute matters against their insurers, "who are forced to bring a lawsuit to obtain the benefit of [their] bargain with an insurer." *Id.*

Second, Appellants rely on *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 937 P.2d 154 (1997) for the proposition that a party may recover attorneys fees incurred in dissolving a wrongfully issued injunction or restraining order. But, as Appellants point out, a temporary restraining order is "wrongful" if dissolved by the Court at the conclusion of a full hearing on the merits. Here, the Bainbridge Island Municipal Court entered a permanent protective order after a full hearing on the merits. That order was vacated on jurisdictional grounds only. RP 2:20-23. The Superior Court did not conduct a hearing on the merits or rule on the merits in any way. The Superior Court specifically stated, it "did not address the merits of the anti-harassment dispute...ruling instead that the parties were in the wrong forum to begin with." *Id.*

Emerson v. Weilep, 126 Wash.App.930, 110 P.3d 214, (Div. III, 2005), is more on point. In *Emerso*n, the Court of Appeals denied appellant's request for attorney's fees in overturning a temporary order of protection because the Court found that the temporary order of protection

was not wrongfully issued. *Id.* at 219. The court reasoned that "allowing an award of attorney fees to those who successfully defend against a permanent order of protection would deter private parties from seeking temporary and immediate relief from harassment [which] is contrary to the legislature's expressed intent to prevent unlawful harassment." *Id.* The same reasoning applies here.

D. Assignment of Appellants' Error No. 2: The Superior Court Recognized that Appellants Resisted Arbitration.

Based on the Bainbridge Island Municipal Court proceedings, the Kitsap County Superior Court specifically found that "in the summer of 2008, the attorney for [Appellants] sent correspondence to counsel representing [Respondents] contending that the 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." CP 33-34. As noted in the Court's July 16, 2010 oral decision, the Court "was concerned that, "Appellants were resisting arbitration at the [municipal] court level and wanted to make it clear they couldn't do that again." RP 9:5-8. As a result, the Superior Court concluded that "[b]y arguing for arbitration, [Appellants] waive and [are] estopped from arguing on remand that the arbitrator may not address the anti-harassment issue on behalf of Ms. Keefe." CP 35.

E. Assignment of Appellants' Error No. 3: Appellants Have No Right Under RALJ 11.2 to Recover Attorneys Fees.

RALJ 11.2(b) is the governing law for awarding attorney's fees to a party in an appeal from a court of limited jurisdiction. RALJ 11.2 states that **statutes control** and provides that "if a statue gives a party the right to recover lawyer's fees or expenses under certain circumstances for services in a court of limited jurisdiction, a party is entitled to fees and expenses under similar circumstances for services on an appeal to the superior court." RALJ 11.2(b). No statute gave Appellants the right to recover attorney's fees in the Bainbridge Island Municipal Court.

The underlying Petition for Order of Protection-Anti-Harassment filed in the Bainbridge Island Municipal Court was based upon RCW 10.14. CP 53. RCW 10.14 does not give a party the right to recover attorney fees in a court of limited jurisdiction. RCW 10.14 only permits a court to order a respondent to pay the petitioner's costs, just as the Bainbridge Island Municipal Court ordered Appellants to do after finding they had engaged in "acts of intimidation and unlawful harassment...for at least 2 ½ years." CP 56. Because there was no basis under RCW 10.14 for an award of attorney fees to Appellants in the Bainbridge Island Municipal Court, there was no basis to award attorney's fees on appeal to the Superior Court under RALJ 11.2(b).

F. Assignment of Appellants' Error No. 3: Appellants Failed to Comply with RALJ 11.2(c).

Even if Appellants had a right to recover attorney fees under RCW 10.14, they failed to comply with the clear language of RALJ 11.2(c), which requires a party requesting attorney fees to "devote a section of the brief to the request for the fees or expenses." RALJ 11.2(c). Despite Appellants' overlength brief and addendum thereto submitted in the appeal to the Superior Court, not one sentence in either brief addressed the issue of attorney's fees or requested an award of attorney's fees. As the Superior Court found, "There was no hint of this in the materials that [the Court] reviewed at the time [it] was deciding the appeal. The first time that this theory surfaced was after [entry] of the findings and conclusions" by the Superior Court. RP 10:7-11. The Superior Court ruled that it was "not equitable" for Appellants to raise the issue of attorney's fees after the merits of the appeal had been decided. RP 10:20-22. Accordingly, the Court appropriately exercised its discretion to deny Appellants request for fees. *Id.*

Appellants improperly cite to *NEPA Pallet & Container Co.* for the proposition that the RALJ 11.2 procedures are permissive. NEPA is an unpublished opinion from Division I, which this Court should not consider.[3] *See Johnson v. Allstate*, 126 Wash.App. 510, 108 P.3d 1273 (Div. II, 2005). No other Washington case has ruled that the procedures in RALJ 11.2 are

permissive.

G. Respondent's Assignment of Error No.1: Respondent Keefe is Entitled to CR 11 Sanctions in the Form of Attorney's Fees Because Appellants Misrepresented the Facts and Misstated the Law.

The Superior Court erred in denying Ms. Keefe's request for CR 11 sanctions in the form of attorney's fees. Review of a trial court's refusal to award sanctions is abuse of discretion. *See Kirby, supra.*

CR 11 allows the trial court to impose sanctions, including reasonable expenses and attorney fees incurred because of the filing of a frivolous motion. *Manteufel v. Safeco Ins. Co.*, 117 Wn. App. 168, 175, 68 P.3d (2003). The filing of a motion is subject to sanctions if three criteria are met: (1) the motion was not well grounded in fact; (2) it was not warranted by existing law; and (3) the attorney signing the pleading failed to conduct a reasonable inquiry into the factual or legal basis of the motion. *Id.* at 176. In deciding whether to impose sanctions, the court should evaluate a party's prefiling investigation by inquiring what was reasonable for the party to have believed at the time the motion was filed. *Id.*

Here, reasonable legal and factual research would have revealed that (1) the facts upon which Appellants relied do not support their claim for an equitable award of attorney's fees; (2) *Olympic Steamship* and *Ino Ino*, the primary cases Appellants relied upon, do not support their contention that they

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[3] RAP 10.4(h) and GR 14.1(a) prohibit citing to an unpublished opinion of this Court.

are entitled to an equitable award of attorney's fees for appealing the ruling of the Bainbridge Island Municipal Court; and (3) RALJ 11.2 does not permit an award of attorney's fees because there was no basis under RCW 10.14 to award attorney's fees in the Bainbridge Island Municipal Court, and Appellants failed to comply with RALJ 11.2(c).

Appellants knew that Respondents attempted to invoke the arbitration provision of the 2006 Settlement Agreement and that, only because of Appellants' persistent resistance to arbitration, Respondents resorted to the Bainbridge Island Municipal Court for protection against Appellants harassment. On the off chance that Appellants conveniently forgot that fact, Ms. Keefe reminded them by sending their attorney a copy of their prior attorney's letter. CP 46-49. Even after Ms. Keefe reminded Appellants of the factual misrepresentations in their motion, they ignored her warning that their argument had no factual basis and her request to strike their motion for attorney's fees. Thus, it was frivolous for Appellants to seek an equitable award of attorney's fees based solely on their groundless contention that Respondents refused to arbitrate.

Appellants' motion for attorney's fees was not well grounded in fact, was not warranted by existing law and Appellants failed to conduct a reasonable inquiry into the basis of the motion.

VI. RESPONDENT KEEFE IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES ON APPEAL.

This Court should award Ms. Keefe her attorney's fees and expenses on appeal. CR 11 permits the Court to impose sanctions against Appellants, which may include an order to pay Ms. Keefe's attorney's fees incurred because of the filing of the motion for attorney's fees. The seeds of Appellants' discontent have now blossomed into an appeal that misrepresents the case law, and ignores applicable standards of review. Ms. Keefe should not be required to fund the defense of an appeal that, in equity and good conscience, should not have been pursued. A fee award will appropriately place the financial burden of this appeal where it belongs: on Appellants.

VII. CONCLUSION

Appellants' motion for attorney's fees was not supported by the facts or applicable law. This Court should affirm the Superior Court's denial of Appellants' motion for attorney's fees, but reverse the Superior Court's denial of CR 11 sanctions against Appellants because their motion misrepresented the facts and misstated the case law.

DATED this 22 day of April, 2011.

Respectfully submitted,

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COURT OF APPEALS
DIVISION II
11 APR 26 PM 3:50
STATE OF WASHINGTON
BY DEPUTY

CERTIFICATE OF SERVICE

I, Linda E. Naish, certify under penalty of perjury under the laws of the State of Washington that, on April 26, 2011, I caused true and correct copies of the foregoing document to be served on the persons listed below in the manner indicated:

Via Legal Messenger:

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Dated at Seattle, Washington this 26th day of April, 2011.

Linda E. Naish