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COURT OF APPEALS
STATE OF WASHINGTON
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NO.

41676-0-II

COURT OF APPEALS

DIVISION II

OF THE STATE OF WASHINGTON

JASMEL SANGHA (aka JAS SANGHA)

and SUSHEEL SANGHA, husband and wife,

Appellants,

v.

MASCO PETROLUEUM, INC.,

a Washington Corporation

Respondent.

BRIEF OF APPELLANTS

Stephen L. Olson
Olson, Zabriskie & Campbell, Inc.
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I. ASSIGNMENT OF ERROR: The trial court abused its discretion in awarding an insufficient amount of attorney's fees and costs to the defendant Sangha.

Sub. No. 1: The trial court incorrectly believed that someone who is not a party to a contract, but who defends a contract action on that basis, cannot make a claim for attorney's fees under RCW 4.84.330

Sub. No. 2: The trial court incorrectly ruled that Masco Petroleum partially prevailed against Jasmel Sangha and Susheel Sangha when, in fact, both the arbitrator and the jury rendered defense verdicts against Masco Petroleum.

II. STATEMENT OF THE CASE

On September 27, 2005, Masco Petroleum, Inc., a Washington corporation, filed suit against Harbor Cascade, Inc., Jasmel Sangha and Susheel Sangha. Masco contended that Harbor Cascade, Inc. entered into a valid contract with it for the purchase of fuel, and that Jasmel Sangha and Susheel Sangha signed a personal guarantee of that contract contained in the one page contract. Masco contended that the personal guarantee which was incorporated into the language of the contract and on the same form was in fact signed by Jas Sangha. (Clerk's Papers, Complaint, Sub. No. 2.) Jasmel Sangha contended that he signed the contract as President of Harbor Cascade, Inc., and intended to bind Harbor Cascade, Inc., but

Jasmel Sangha and Susheel Sangha denied that they signed the portion of the contract that bound them individually on the personal guarantee portion of the contract. (Clerk's Papers, Answer to Complaint, Sub. No. 1.) Jasmel Sangha and Susheel denied that they should be personally bound. (Answer to Clerk's Papers, sub. No. 21.) This matter was heard by way of mandatory arbitration. The arbitrator ruled against Harbor Cascade, Inc., and in favor of Jasmel Sangha and Susheel Sangha. The arbitrator also awarded \$2,000 attorney's fees to Jasmel Sangha and Susheel Sangha. (Clerk's Papers, Arbitration Award, Sub. No. 44.)

Masco Petroleum appealed to the Superior Court for a *de novo* hearing. (Clerk's Papers, Request for Trial de Novo, Sub. No. 51.) The trial court eventually granted summary judgment in favor of Masco Petroleum, Inc., and awarded fees and costs against the Sanghas at this point in the amount of \$21,709.73 based on the language in the contract awarding fees and costs to Masco if the contract was breached by the defendants. (Clerk's Papers, Order Granting Summary Judgment Sub. No. 85; Clerk's Papers, Judgment in Favor of Masco Petroleum against both defendants, Sub No. 86.) Jasmel Sangha and Susheel Sangha appealed. (Clerk's Papers, Notice of Appeal to Court of Appeals Division Two, Sub. No. 87.) Harbor Cascade did not appeal. After an appeal to the Court of Appeals Division Two, the summary judgment was reversed and this matter returned for trial. (Clerk's Papers, Mandate, Sub. No. 97.)

Upon remand a jury heard the case and rendered a second defense verdict in favor of Jasmel Sangha and Susheel Sangha. (Clerk's Papers, Verdict Form B, Sub. No. 117.) Jasmel Sangha and Susheel Sangha sought reasonable attorney's fees and court costs under a unilateral attorneys' fees and costs provision. (Clerk's Papers, Declaration of Stephen Olson in Support of Fees and Costs, Sub. No. 118.) Their fees and costs totaled \$16,842.55 for all these proceedings. The trial judge awarded only \$5,000 in attorney's fees and \$664 costs to Jasmel Sangha and Susheel Sangha. (Clerk's Papers, Judgment, Sub. No. 131.) The trial court set forth its reasoning in proceedings conducted on November 17, 2010 and December 13, 2010. The trial concluded that since Jas Sangha did not intend to personally guarantee the contract that he could not seek attorney's fees under RCW 4.84.330 despite the fact that the plaintiffs were bringing an action against him and seeking attorney's fees under the same statute. Report of Proceedings, November 17, 2010, page 3.

The court further held that Masco Petroleum also partially prevailed, even though in both cases the verdict was for the defendant. The plaintiff sought damages for breach of contract and in each case received an award of \$-0- dollars. The court concluded that Masco prevailed in the trial de novo because the trial court concluded that the award by the arbitrator was not appropriate under RCW 4.84.330. Report of Proceedings, November 17, 2010, page 7. The court held this despite

the fact that the court ordered an additional \$5,000.00 in attorney's fees.

On December 13th, when the papers were presented, the court held that the attorney's fees of \$5,000 were a reasonable sum considering all the factors he discussed. Report of Proceedings, December 13, 2010, page 13.

III. ARGUMENT

A. THE TRIAL COURT ABUSED ITS DISCRETION IN ONLY AWARDING \$5,000 FEES BASED UPON UNTENABLE GROUNDS

In the present case the trial court concluded the RCW 4.84.330 did not allow an award of attorney's fees by the arbitrator or by the trial court. The defendants Sangha believe that this is a misapplication of the law and as such constitutes an abuse of discretion.

Further, the trial court held that despite the fact that both the MAR arbitration and the subsequent jury rendered defense verdicts against the plaintiffs, that the plaintiffs partially prevailed because the arbitrator should not have awarded fees pursuant to RCW 4.84.330. The defense contends that since it prevailed on the principal claim that they were the sole prevailing party pursuant to MAR 7.3 and that the trial court's holding that the plaintiffs partially prevailed was based upon untenable grounds and constitutes an abuse of discretion.

The Washington rule for what constitutes an abuse of discretion

was set forth in Mayer vs. City of Seattle, 102 Wn.App. 66 at page 79,
where the court stated:

MTCA provides for recovery of reasonable attorney fees to a prevailing party in a private cause of action. RCW 70.105D.080. The amount of a fee award is discretionary, and will be overturned only for manifest abuse of discretion. Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 65, 738 P.2d 665 (1987). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds, or if no reasonable person would take the position adopted by the trial court. Allard vs. First Interstate Bank of Wash. N.A., 112 Wn.2d 145, 148-49, 768 P.2d 998, 773 P.2d 420 (1989).

B. RCW 4.84.330 ALLOWS ATTORNEY’S FEES IN THIS CASE

The trial court incorrectly applied the law when it concluded that the defendants could not enforce the unilateral attorney’s fees and costs provision that was inserted by the plaintiffs for Masco Petroleum, in an attempt to obtain fees and costs since the defendants Sangha received a defense verdict.

In the present case, the contract provided that the customer agrees to pay any and all expenses incurred by Masco Petroleum (including fees for legal services of every kind) to collect, defend or assert the right of Masco Petroleum to obtain the payment of expenses and a debt as relating to this account.

The provision above is in the contract that the Plaintiff’s attempted to enforce against Jas Sangha and Susheel Sangha contending they signed the contract. The court in Herzog Aluminum vs. General American deals

with this issue. The court in *Herzog Aluminum v. General American*, 39 Wn.App. 188, 191, 692 P.2d 867 cites RCW 4.84.330 which reads as follows:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

In *Herzog Aluminum v. General American*, *supra*. the court concluded that no contract existed because there was no meeting of the minds. Despite the absence of a contract, the court went ahead and ordered attorney's fees to the Defendant, General American, as the prevailing party. Mr. Herzog contended that the rescission of a contract, as well as the failure to form a contract, prevents one from relying upon contractual provisions for attorney's fees. The court in *Herzog Aluminum v. General American*, 39 Wn.App. 188 dealt with the similarities between RCW 4.84.330 and the legislation in California when it stated at page 195 as follows:

The marked similarities between Section 1717 and RCW 4.84.330 strongly supports the conclusion that our legislature utilized section 1717 as a paradigm. . . . Those pre-1977 California judicial decisions interpreted Section 1717 as creating a right to attorney fees in a defendant who successfully proved that no Contract had been formed. . .

The California Supreme Court first construed section 1717 in *Reynold's Metals Co. v. Alperson*, 25 Cal. 3d 124, 128, 599 P.2d 83, 85,

158 Cal. Rptr. 1 (1979) where it agreed with the pre-1977 California appellate court's decisions:

The language of the statute is unclear as to whether it shall be applied to litigants who like defendants have not signed the contract. The section refers to "any action on a contract" thus including any action where it is alleged that a person is liable on a contract, whether or not the court concludes he is a party to that contract.

Section 1717 was enacted to establish mutuality of remedy where contractual provision makes recovery of attorney's fees available for only one party, and to prevent oppressive use of one-sided attorney's fees provisions.

Its purposes require section 1717 to be interpreted to further provide a reciprocal remedy for a nonsignatory defendant, sued on a contract as if he were a party to it, when a plaintiff would clearly be entitled to attorney's fees should he prevail in enforcing the contractual obligation against the defendant.

The court in *Herzog Aluminum vs. General American*, 39 Wn.App. 188 concluded at page 197:

We conclude that the broad language "in any action on a contract" found in RCW 4.84.330 encompasses any action in which it is alleged that a person is liable on a contract. Further, because General American obtained a judgment dismissing Herzog's cause of action General American became a "prevailing party" within the meaning of that statutory terminology.

In the present case the Plaintiffs sued the Sanghas contending they signed the personal guarantee in the contract and requested attorney's fees under the terms of the contract. As such, RCW 4.84.330 applies and since the Sanghas prevailed, they are entitled to attorney's fees and costs.

C. MAR 7.3 MAKES THE DEFENDANTS THE SOLE PREVAILING PARTY.

The trial court incorrectly applied the law when it concluded that the plaintiff partially prevailed against Jasmel Sangha and Susheel Sangha on the trial de novo, pursuant to Mandatory Arbitration Rule (MAR) 7.3. MAR 7.3 deals with the issues of costs and attorney's fees and reads as follows:

The court shall assess costs and reasonable attorney's fees against a party who appeals the award and fails to improve the parties' position on trial de novo. The court may assess costs and reasonable attorney's fees against a party who voluntarily withdraws a request for a trial de novo. Costs means those costs provided for by statute or court rule. Only those costs and reasonable attorney's fees incurred after a request for a trial de novo is filed may be assessed under the rule.

Even if the court correctly concluded that the defendants were not entitled to their attorney's fees pursuant to the contract and RCW 4.84.330, the court should have awarded attorney's fees on the basis of MAR 7.3 without an offset to the Plaintiffs. The trial court should not have given an offset to the plaintiffs because the court felt the arbitrator erred by awarding attorney's fees to the Defendants. In this regard, the defendants cite *Wilkerson vs. United Investment Inc.*, 62 Wn.App. 712, 815 P.2d 293 (1991). The court, in *Wilkerson vs. United Investment Inc.*, Supra, dealt with the issue of compensatory damages rather than an award of reasonable attorney's fees. In this regard, the court, in *Wilkerson vs. United Investment Inc.*, 62 Wn.App. 712, stated at page 716, that the Wilkerson's claim is for compensatory damages. The monetary amount is

figured by the trier of fact who has discretion to make that determination within the range of relevant evidence. *Mason vs. Mortgage Am. Inc.*, 114 Wn.2d 842, 850, 792 P.2d 142 (1990). Attorney's fees on the other hand, are awarded only pursuant to the contract, statute, or a recognized ground of equity. *Baird vs. Larson*, 59 Wn. App. 715, 720, 801 P.2d 247 (1990). In *Wilkerson vs. United Investment Inc.*, the arbitrator had awarded a total of \$21,000 in compensatory and attorney's fees. The subsequent jury verdict at the trial de novo trial, on the other hand, was only \$16,000. The jury's verdict for damages, exceeded the arbitrator's compensatory damage award. The court in *Wilkerson vs. United Investment, Inc., Supra*, stated at page 716 that:

It would be inequitable to compare the jury verdict for compensatory damages with an arbitrator's combined award for compensatory damages for attorney's fees and costs. The better approach to determine whether one's position has been improved is to compare comparables. Here, the jury's compensatory damage award exceeded the arbitrator's compensatory damage award. We find Mr. Sloan did not improve his position; the judgment is affirmed. Wilkersons are entitled to attorney's fees on appeal. *Christie-Lambert*, 39 Wn.App. at 303, 693 P.2d 161.

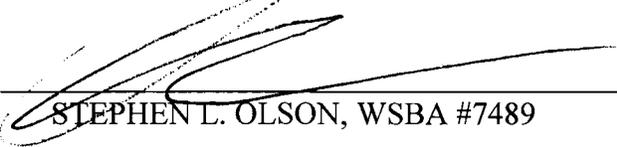
It is clear that the case law only compares comparables. In the present case, the verdict was for the defendants at each trial. It is clear that the plaintiff did not improve their position and the trial court should not have treated them as a prevailing party as to a portion of the action and in doing so constitutes an abuse of discretion.

IV. CONCLUSION

Jasmel Sangha and Susheel Sangha seek review of the attorney's fees and costs awarded as insufficient and as an abuse of discretion. The trial court erred when it ordered the attorney's fees in this case based on erroneous beliefs as to the law as set forth above and as set forth in oral statements of the court in the report of proceedings.

RESPECTFULLY SUBMITTED this 17 day of May, 2011.

OLSON, ZABRISKIE & CAMPBELL, INC.
Attorneys for Appellants Jasmel Sangha and Susheel Sangha

By: 

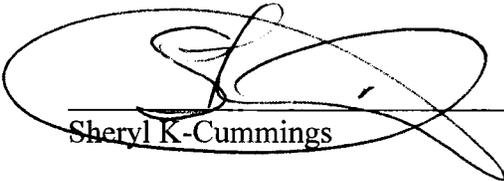
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PROOF OF SERVICE OF BRIEF OF APPELLANTS

The undersigned, under penalty of perjury under the laws of the State of Washington, declares: I am regularly employed by the law firm of Olson, Zabriskie & Campbell, Inc. On May 18, 2011, I duly served Michael Spencer, attorney for Respondent Masco Petroleum, by placing a true and correct copy of Brief of Appellants' in the United States Postal Service, proper postage affixed thereto, to:

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