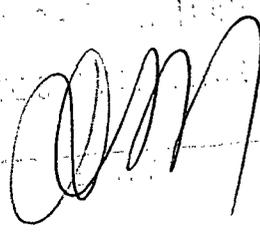


No. 45202-2-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON


BEATRIX RUFFIER and ROBERT RUFFIER,

Appellants,

v.

BRETT HAYFIELD and KATHY DAVIS-HAYFIELD,

Respondents/Cross Appellants,

CROSS APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

I. REPLY ARGUMENT. 1

 A. The Phrase “Is Entitled” is Not Permissive..... 1

 B. The Trial Court Erred Even if an Award of
 Any Attorneys’ Fees is Discretionary 5

II. CONCLUSION..... 8

TABLE OF AUTHORITIES

CASES

<i>Cosmopolitan Engineering Group, Inc. v. Ondeo Degremont, Inc.</i> , 159 Wn.2d 292, 149 P.3d 666 (2006).....	3
<i>Etheridge v. Hwang</i> , 105 Wn.App. 447, 460, 20 P.3d 958 (2001)	6
<i>Guillen v. Contreras</i> , 169 Wn.2d 769, 238 P.3d 1168 (2010).....	3
<i>Mahler v. Szucs</i> , 135 Wn.2d 398, 435, 957 P.2d 632 (1998).....	6
<i>State v. Downing</i> , 151 Wn.2d 265, 272-73, 87 P.3d. 1169 (2004).....	5
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 26, 482 P.2d 775 (1971).....	5

STATUTES

RCW 7.28.083(3)	4
RCW 10.97.110	4
RCW Chapter 18.27	3
RCW 18.27.040(6)	3
RCW Chapter 19.122	1
RCW 19.122.040	6
RCW 19.122.040(2)	7,9
RCW 19.122.040(4)	1,2,5,6,7,8,9
RCW 26.09.255(1)	4
RCW 26.33.295(4)	4
RCW 42.17A.765 (5)	4
RCW 69.50.505(6)	3

OTHER

Black's Law Dictionary (9th ed. 2009)	2
Oxford American Dictionary (3rd ed. 2005)	2
Webster's Third New Internat'l Dictionary (3d ed. 1969)	2

I. REPLY ARGUMENT

The Ruffiers acknowledge, as they must, that they violated the Underground Utility Damage Prevention Act, chapter 19.122 RCW (the “Act”), and that RCW 19.122.040(4) allows the Trial Court to award to the Hayfields their attorneys’ fees and costs. The Ruffiers argue the statutory language “the prevailing party is entitled to reasonable attorney’s fees” means such an award is “permissive” and not “mandatory.” This argument ignores the plain meaning of the statute.

A. The Phrase “Is Entitled” is Not Permissive.

The core of the Ruffiers’ argument in support of the Trial Court’s failure to award the Hayfields their reasonable attorneys’ fees is the notion that the phrase “is entitled” contained in RCW 19.122.040(4) is permissive rather than mandatory in nature. In other words, the Ruffiers contend that whether or not to award the Hayfields any attorneys’ fees was entirely within the Trial Court’s discretion. Therefore, they argue, the Trial Court did not abuse its discretion in failing to award to the Hayfields any attorneys’ fees. The Ruffiers’ ignore the plain meaning of the words that the Legislature used in an unambiguous statute.

After providing a lengthy summary of the law on statutory interpretation, the Ruffiers simply state, without any application of the law, that “a fair reading of the language of RCW 19.122.040(4) indicates a legislative intent to allow, but not to mandate, an award of attorney fees to the prevailing party. The Court thus need go no further in analyzing this case.” Response at 9. The term “is entitled” in no way has the connotation that it means “may be” entitled, as the Ruffiers imply.

The Ruffiers then seek to define the term “entitled” quoting *Black’s Law Dictionary* (9th ed. 2009), which provides that a legal definition of “entitle” is “[t]o grant a legal right to or qualify for” and *Webster’s Third New Internat’l Dictionary* (3d ed. 1969), which provides that “entitle” means to “furnish with proper grounds for seeking or claiming something.”

Using these definitions in the context of the statute, the Hayfields “are granted the legal right to their attorneys’ fees and they qualify for their attorneys’ fees.” Additionally, the Hayfields have “furnished the proper grounds for seeking or claiming their attorneys’ fees.” The Hayfields add to this the *Oxford American Dictionary* (3rd ed. 2005) definition of “entitle” which is “to give (someone) a legal right or just claim to receive or do something.” Using this definition,

the Hayfields have “a legal right or just claim to receive their attorneys’ fees.” All of these definitions, when applied to the statute, make clear that an award is mandatory and not permissive.

The Ruffiers next attempt to compare the language in the Act to the language in other statutes, specifically RCW 18.27.040(6) and RCW 69.50.505(6). The two cases cited by the Ruffiers in support of their argument are wholly inapplicable because the phrase “is entitled” was not at issue nor was it discussed. See *Guillen v. Contreras*, 169 Wn.2d 769, 238 P.3d 1168 (2010) (noting that civil forfeiture act was not a prevailing party statute and that a claimant is entitled to reasonable attorneys’ fees for any property recovered regardless of relative value); *Cosmopolitan Engineering Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 149 P.3d 666 (2006) (holding that prevailing party under the registration of contractors act, chapter 18.27 RCW, is entitled to an award of attorneys’ fees limited to amount available under applicable bond). Significantly, both the *Guillen* and *Cosmopolitan* courts affirmed the attorneys’ fees awards at issue and in no manner suggest that the phrase “is entitled” is permissive rather than mandatory.

When the Legislature has intended to vest trial courts with the discretion to determine when (or when not to) award any attorneys’

fees at all, it has known precisely how to do so. The following are merely a few representative examples of the Legislature's expression of such intent:

The prevailing party in an action asserting title to real property by adverse possession may request the court to award costs and reasonable attorneys' fees. The court may award all or a portion of costs and reasonable attorneys' fees to the prevailing party if, after considering all the facts, the court determines such an award is equitable and just.

RCW 7.28.083(3) (emphasis added).

In any suit brought to enjoin a violation of this chapter, the prevailing party may be awarded reasonable attorneys' fees, including fees incurred upon appeal.

RCW 10.97.110 (emphasis added).

The plaintiff may be awarded, in addition to any damages awarded by the court, the reasonable expenses incurred by the plaintiff . . . including, but not limited to investigative services and reasonable attorneys' fees.

RCW 26.09.255(1) (emphasis added).

An agreed order entered pursuant to this section may be enforced by a civil action and the prevailing party in that action may be awarded, as part of the costs of this action, a reasonable amount to be fixed by the court as attorneys' fees.

RCW 26.33.295(4) (emphasis added).

In any action brought under this section, the court may award to the state all costs of investigation and trial, including reasonable attorneys' fees to be fixed by the court . . . [and] if the defendant prevails, he or she shall be awarded all costs of trial, and may be awarded reasonable attorneys' fees to be fixed by the court to be paid by the state of Washington.

RCW 42.17A.765 (5) (emphasis added).

Had the Legislature intended the award of attorneys' fees to prevailing parties under RCW 19.122.040(4) to be permissive, it would have said so. It chose not to, instead mandating that a prevailing party under the Act "is entitled" to its reasonable attorneys' fees, not that they "may be" awarded at the Trial Court's discretion. The amount awarded is certainly subject to that discretion (*i.e.*, what is a reasonable amount), but that is all. The language used in the statute is unambiguous, and therefore a clear representation of the Legislature's intent. The Court need not resort to strained and contorted interpretations of the words that the Legislature chose to use to divine that intent. The statute is clear on its face.

Thus, to the extent the Trial Court viewed the decision to award any attorneys' fees as discretionary, it abused its discretion and should be reversed. Discretion can be abused if it exercised on untenable grounds or for untenable reasons, such as a misunderstanding of the meaning of a statute. *State v. Downing*, 151 Wn.2d 265, 272-73, 87 P.3d. 1169 (2004) (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

B. The Trial Court Erred Even if an Award of Any Attorneys' Fees is Discretionary.

Finally, the Trial Court committed reversible error even if the decision to award the Hayfields any attorneys' fees was entirely

within its discretion. A trial court is given broad discretion in determining a reasonable fee award, and such an award will be affirmed unless the trial court abused its discretion in determining the amount to be awarded. *Etheridge v. Hwang*, 105 Wn.App. 447, 460, 20 P.3d 958 (2001). However, appellate courts exercise a supervisory role to ensure that a trial court's discretion in making an attorney fee award is properly exercised on articulable grounds. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998). Thus, such an award must be supported by findings of fact and conclusions of law sufficient to establish an adequate record for review. *Mahler*, 135 Wn.2d at 435 (“[T]he absence of an adequate record upon which to review a fee award will result in a remand of the award to the trial court to develop such a record.”)

The Trial Court held as follows in its Conclusion of Law No. 8:

Although Defendant [Ruffier] technically violated the terms of RCW 19.122.040, notice to Plaintiffs of the excavation and/or calls to “811” would not have prevented the damage that occurred. Therefore, although Defendant is liable for common law negligence to Plaintiffs for their damages, Plaintiffs are not entitled to recover their attorney’s fees per RCW 19.122.040(4).

CP 32 – Conclusion of Law No. 8.

The Court concluded that even if the Ruffiers had complied with the Act by giving the Hayfields notice and calling “811,” the

damage still would have occurred and therefore concluded that the Hayfields “are not entitled” to their attorneys’ fees under RCW 19.122.040(4). However, the Trial Court ignored its Finding of Fact No. 21 that “Defendant Ruffier’s failure to locate the drainage pipe prior to his excavation activities in 2011 was negligent” thus violating the wholly separate and distinct duty that RCW 19.122.040(2) imposed on Mr. Ruffier to exercise reasonable care to avoid damaging the drain pipe.

RCW 19.122.040(2) provides in relevant part as follows:

An excavator shall use reasonable care to avoid damaging underground facilities.

The Ruffiers do not dispute that the Act indeed imposes a separate and distinct duty upon excavators to exercise reasonable care to avoid damaging underground utilities. Instead, they simply ignore it. In so doing, they repeat the same error the Trial Court made.

The Ruffiers suggest that the Trial Court did not abuse its discretion by concluding the Hayfields are not entitled to an attorneys’ fees award because “substantial and undisputed evidence supports the trial courts’ conclusion that the required pre-excavation notice to the Hayfields would not have prevented the damage that occurred.” Response Brief at 17. But notice to the Hayfields of Mr.

Ruffier's excavation activity, and the Hayfields' knowledge of the existence of the drain pipe, is irrelevant to the analysis as to whether Mr. Ruffier breached his duty to exercise reasonable care to avoid damaging the drain pipe. Indeed, these things must be irrelevant, because the Trial Court concluded that Mr. Ruffier breached his duty to exercise reasonable care to not damage the drain pipe even though it also found that (1) Mr. Ruffier failed to provide the required notice (and call 811), and (2) the Hayfields were unaware of the location of the pipe. CP 31 – Conclusion of Law No. 6.

By concluding that the Hayfields were not entitled to an attorneys' fees award, the Trial Court ignored the wholly independent duty the Act imposed upon Mr. Ruffier to exercise reasonable care to avoid damaging the drain pipe, and thus, the Trial Court committed reversible error.

II. CONCLUSION

The phrase "is entitled" as used in RCW 19.122.040(4) mandates that the Hayfields be awarded their reasonable attorneys' fees. The Ruffiers' attempt to stretch the plain and ordinary meaning of the word "entitle" beyond all recognition is unavailing. When the Legislature has intended an attorneys' fee award to be permissive, it has done so clearly and unequivocally by stating that such fees "may

be" awarded. In this instance, it clearly and unequivocally chose to make the award mandatory.

Furthermore, even if it was discretionary to make any award, the Trial Court erred by ignoring the independent duty under RCW 19.122.040(2) requiring Mr. Ruffier to exercise reasonable care to not damage the drain pipe at issue, and on that basis concluding that RCW 19.122.040(4) did not apply and the Hayfields were not entitled to an award of their reasonable attorneys' fees.

Dated: August 5th, 2014.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of August, 2014, I caused to be served the foregoing CROSS-APPELLANTS' REPLY BRIEF on the following individuals in the manner indicated:

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