

FILED

MAR 25 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**WASHINGTON STATE COURT OF APPEALS
FOR DIVISION III**

NO. 293955-III

CHD, INC.,

Plaintiff/Respondent,

v.

**MELVIN C. TAGGART, d/b/a TAGGART
ENGINEERING & SURVEYING,**

Defendant/Appellant.

BRIEF OF THE APPELLANT

**Mark S. Moorer, WSBA No. 18773
Attorney for Defendant/Appellant
P.O. Box 9004
Moscow, ID 83843
(208) 882-2539**

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ASSIGNMENT OF ERRORS

The trial court erred when it granted summary judgment on the issue of apparent authority.

The trial court did not err when it denied CHD, Inc. attorney fees from the previous appeal.

STATEMENT OF THE CASE

CHD, Inc. initiated an action to quiet title and determine the rights of the parties under a promissory note secured by a Deed of Trust. The Deed of Trust was recorded in Spokane County. Cross motions for summary judgment were filed and initially the trial court orally granted a motion in favor of CHD, Inc. Taggart filed a Motion for Reconsideration based on theories of agency and judicial estoppel and the trial court granted the motion for reconsideration. Further, the trial court reversed its original position on summary judgment and entered summary judgment in favor of Taggart.

CHD, Inc. filed an appeal, and the Washington State Court of Appeals, Division III reversed the trial court and remanded for further proceedings. (No. 27192-7-III). Upon receiving the mandate from the appellate division the trial court issued a scheduling order.

Shortly thereafter CHD re-filed for summary judgment on the theories of: 1) The promissory note was marked paid in full and the Plaintiff was discharged from the note; 2) The Defendant's agent had authority to act in settling the promissory note; and 3) The law of the case doctrine allows the court to grant summary judgment. (CP at 384)

Taggart filed its Memorandum in Opposition together with supporting affidavits of Mr. Taggart and a Ms. Hulvey. CHD, Inc. filed a reply memorandum and the matter was heard for oral argument. (CP at 512)

The court found that the defendant's action to recover under the promissory note and deed of trust was not precluded by an application of the statute of limitations. The court further found that the escrow holder, Waldo, Schweda & Montgomery, had apparent authority to provide a pay-off of the loan amount to Plaintiff's agent. Finally, that Plaintiff's agent could reasonably rely on the information in the note, deed of trust, and correspondence from Waldo, Schweda & Montgomery to determine a pay off figure; and, the tender of the pay-off funds did indeed discharge the plaintiff's

obligation under the deed of trust and note. The trial court did not address Plaintiff's other theories of summary judgment. (CP at 589)

The trial court also found that Plaintiff was the prevailing party and entitled to reasonable attorney fees. Plaintiff's counsel filed its motion for attorney fees which included a claim for fees for work previously completed on the first appeal. Taggart filed its opposition and the trial court only granted attorney fees for work conducted at the trial level. Taggart filed a timely notice of appeal on the issue of apparent authority. (CP at 599) Plaintiff filed a timely cross motion presumably on the issue of attorney fees. (CP at 605)

STATEMENT OF FACTS

Taggart Engineering & Surveying performed surveying work for CHD, Inc. (CP at 401) Although initially Mr. Taggart was paid on a project basis, as development projects took time to sell, he began to carry a balance on his receivables. *Id.* On October 1, 1997 CHD, Inc. executed a \$16,000.00 promissory note payable to Taggart on October 1, 1999, or upon sale of the property. (CP at

407, 408) CHD, Inc. also executed a deed of trust to secure the promissory note, naming Taggart as the beneficiary, which stated:

This deed is for the purpose of securing performance of each agreement of Grantor herein contained, and payment of the sum of Seventeen Thousand and 00/100ths Dollars (\$17,000.00) with interest, in accordance with the terms of a promissory note of even date herewith, payable to Beneficiary or order, and made by Grantor, and all renewals, modifications and extensions thereof, and also such further sums as may be advanced or loaned by Beneficiary to Grantor, or any of their successors or assigns, together with interest thereon at such rate as shall be agreed upon.

Clerk's Papers (CP at 6)

On October 2, 1997 Mr. Crosby called Mr. Taggart asking to change the amount owed from \$16,000.00 to \$17,000.00 on the deed of trust on account of additional work performed by Mr. Taggart. (CP at 402) Mr. Taggart agreed since the Deed of Trust language provided for such a situation with the language "and also such further sums as may be advanced or loaned by Beneficiary to Grantor." (CP at 6)

The terms of the note required that the note and deed of trust "shall be placed in escrow at the Law Office of Waldo and Schweda, P.S.A.", now Waldo, Schweda & Montgomery, P.S. (CP at 8)

Waldo, Schweda & Montgomery often hold original documents as a courtesy to its clients. While this practice is formally referred to as “an escrow”, in reality it is acting as a depository, and Waldo, Schweda & Montgomery has no responsibilities for receipt of payments or interest calculations. (CP at 486)

In May 2001, CHD, Inc. filed the first of two Chapter 11 bankruptcy proceedings. (CP at 402) Taggart acknowledges that CHD, Inc. disputed the amount secured by the deed of trust. (CP at 403) Taggart objected to CHD, Inc.’s reorganization plan, claiming the plan did not provide information as to when creditors would be paid, the plan was underfunded, and “the plan is not proposed in good faith.” (CP at 207) In at least two disclosure statements filed in the first bankruptcy, CHD, Inc. acknowledges a deed of trust in Taggart’s favor in the amount of \$17,000.00. The bankruptcy was dismissed in April 2003 without a reorganization plan being confirmed or implemented. (CP at 403)

CHD, Inc. filed a second Chapter 11 bankruptcy in September 2003. *Id.* Taggart filed a claim in January 2004 for \$40,987.76.

CHD, Inc. filed a disclosure statement identifying the real property at issue, which it stated was subject to a deed of trust “in favor of Taggart Engineering and Surveying in the amount of \$41,000.00.” (CP at 404) The reorganization plan notes that the claim is partially disputed. Taggart filed an objection, asserting that it requested information from CHD, Inc. regarding the nature of the disputed amount and CHD, Inc. did not respond. (CP at 404) CHD, Inc. filed a first amended disclosure statement, making the same relevant representations as in the first as well as making a general statement that “[t]he debtor has resolved all litigation issues at this time.” (CP at 192) A second amended reorganization plan was then filed that acknowledges Taggart’s claim for \$41,000 and that Taggart is a secured creditor. (CP at 404) The second bankruptcy petition was dismissed in November 2004. (CP at 403) No reorganization plan was confirmed or implemented. *Id.*

After the promissory note and deed of trust were signed, Taggart continued to perform other work for CHD, Inc. Taggart billed this work to CHD, Inc. (CP at 402)

In July 2006, CHD, Inc. refinanced the property subject to the deed of trust. As part of the transaction, the closing agent (Mr. Perednia) ordered title insurance, which indicated that the property was subject to a deed of trust in favor of Taggart in the amount of \$17,000.00. (CP at 53)

In July 2006, Crosby contacted Waldo, Schweda & Montgomery and requested a pay-off of the above mentioned promissory note. (CP at 406) Rose Hulvey, an employee of Waldo, Schweda & Montgomery, reviewed the file, and was unaware of any payments on the underlying obligation and confirmed this with Crosby. (CP at 486)

Ms. Hulvey attempted to contact Taggart to confirm that no payments were made and the principal amount owed was \$16,000.00. (CP at 486) Ms. Hulvey made multiple calls to Mr. Taggart's office in Spokane and received no response. *Id.* Ms. Hulvey went ahead and prepared a pay-off letter consistent with the terms of the October 1, 1997 Promissory Note and mailed the statement to Mr. Perednia. (CP at 495)

On August 9th, Mr. Perednia sent a trust account check (CP at 497) for \$28,847.79, the amount identified in the pay-off statement. The check was cashed. Waldo, Schweda & Montgomery provided Mr. Perednia with a copy of the note marked “paid in full.” (CP at 499)

On or about September 12, 2006, Taggart contacted Waldo, Schweda & Montgomery, stating that he disagreed with the pay-off amount. (CP at 487) Consequently on September 12, 2006, Ms. Hulvey returned to Mr. Perednia the check he previously tendered as shown by her cover letter of the same date. (CP at 487)

On September 12, Waldo, Schweda & Montgomery informed Mr. Perednia that it was “invalidating the payoff statement dated July 26, 2006.” Waldo, Schweda & Montgomery returned a check from its trust account for \$28,847.79, payable to Mr. Perednia’s trust account. This litigation followed. (CP at 487)

ISSUES ON APPEAL

Did the trial court properly find that Waldo, Schweda & Montgomery had apparent authority to settle the amount due Taggart under the Deed of Trust and Promissory Note?

Did the trial court err when it denied Plaintiff's request for attorney fees based on work previously performed in the first appeal?

ARGUMENT

A trial court properly grants summary judgment when there are no genuine issues of material fact, which entitles the moving party to judgment as a matter of law. *Poulsbo Group v. Talon Dev.*, 155 Wa.App 339, 345(2010); CR 56(c). The court draws all reasonable inferences from the evidence in a light most favorable to the non-moving party. *Id.* A grant of summary judgment is proper only if reasonable persons could come to one conclusion from the evidence presented. *Qwest Corp. v. City of Bellevue*, 161 Wash.2d 353 (2007).

The appellate court engages in de novo review of an order of summary judgment, performing the same inquiry as the trial court. *Lybbert v. Grant County*, 141 Wn 2d 29, 34, 1 P.3d 1124 (2000).

ESCROW

An escrow is "a written instrument, which by its term imports a legal obligation, deposited by the grantor, promissory, or obligor,

or his agent with a stranger or third person . . . to be kept by the depository until the performance of a condition or the happening of a certain event, and then to be delivered over to take effect.” *Lechner v. Halling*, 35 Wn 2d 903, 912, 216 P.2d 179 (1950) Further, it is essential to the construction of an escrow not only that the grantor and the grantee are at one as to the conditions under which the deposit is to be made, but that such conditions should be communicated to the depository. *Id.* At 913. When there is a deposit of instruments, allegedly in escrow, and conflict in the testimony as the understanding of the parties relative to the conditions of deposit, it is proper for the court to inquire into the facts and circumstances surrounding the transaction . . . (*Id.*)

The *Lechner* decision and the case law which followed simply amplified the 1907 decision of *Bronz Inv. Co. v. National Berth of Commerce*, 47 Wash 566, 92 P.380 (1907). There in that early Washington decision the court stated:

Whether an instrument placed with a third person is to be an escrow or a completely executed instrument depends upon the intention of the parties. If the evidence leaves any doubt upon the subject, the intention of the parties must be determined by the jury ... *Id.* at 569.

In this proceeding CHD, Inc. executed a promissory note. Within the body of that promissory note, it indicated that it would be placed in escrow at Waldo, Schweda & Montgomery. Further the escrow agent would hold a deed of trust and a request for full reconveyance. The note and deed of trust were signed by Wes Crosby on behalf of CHD, Inc.

The request for reconveyance was unexecuted. Nothing held in this depository was signed by Taggart. It is clear from this note that Waldo, Schweda & Montgomery was to be an escrow agent. But was there a true escrow? All of the documents deposited with Waldo, Schweda & Montgomery were signed by Wes Crosby on behalf of CHD, Inc. CHD, Inc. was the grantor of both the promissory note and deed of trust. Nothing was signed by Mr. Taggart. In this setting he would be a grantee or vendee. Given that there are no instruments signed by Mr. Taggart was there a true escrow? We believe not.

An escrow holder is an agent. *Radach v. Prior*, 48 Wash.2d 901, 297 P.2d 605 (1956); *Angell v. Ingram*, 35 Wash.2d 582, 213 p.2D 944 (1950); *Sanwick v. Puget Sound Title Ins. Co.*, 70 Wash.2d

438, 423 P.2d 624 (1967). Whether he be designated escrow agent or escrow holder, or both, makes little difference in law; the important thing is that as an agent, holder, or trustee for the parties (28 Am.Jur.2d Escrow § 1 (1966)), he occupies a fiduciary relationship to all parties to the escrow. As an agent, trustee or holder, the escrow holder owes a fiduciary duty to his principals in the same way that all agents are held to such standards. *Cantwell v. Nunn*, 45 Wash. 536, 88 P.1023 (1907); *Westerbeck v. Cannon*, 5 Wash.2d 106, 104 P.2d 918 (1940); 28 Am.Jur.2d Escrow § 16 (1966); Restatement (Second) of Agency § 14D, Reporter's n., Appendix (1958).

The escrow agent's duties and limitations are defined, however, by his instructions. The rule on this point is well stated at 30A C.J.S. Escrows § 8 (1965): The duties of a depository or escrow holder are those set out in the escrow agreement. . . . As a general rule, the escrow holder must act strictly in accordance with the provisions of the escrow agreement; he must comply strictly with the instructions of the parties, and it is his duty to exercise ordinary skill and diligence, and due or reasonable care in his employment.

In his fiduciary capacity, he must conduct the affairs with which he is entrusted with scrupulous honesty, skill, and diligence.

Thus, it is the rule that an escrow agent or holder becomes liable to his principals for damage proximately resulting from his breach of the instructions, or from his exceeding the authority conferred on him by the instructions. *Sanwick v. Puget Sound Title Ins. Co.*, *Supra*; *Kirby v. Woolbert*, 48 Wash.2d 141, 291 P.2d 666 (1955).

This is consistent with the law of many other jurisdictions. South Dakota has found that “[a]n escrow account is designed for a third person to hold the property of a promisor for delivery to the promisee upon the happening of a specific contingency or condition.” *American State Bank v. Adkins*, 458 N.W. 2d 807, 810 (S.D. 1990) (citing *Rushmore State Bank v. Kurylas, Inc.*, 424 N.W. 2d 649 (S.D. 1988)). That court provided further clarification when it held that “[i]t is generally accepted that an escrow agent is the agent and fiduciary of all parties to an escrow agreement.” *Id.* at 810 (citing California, Arizona, Montana, Utah, Michigan, Arizona, and 8th Circuit Cases). However, “[t]he extent of this agency and

fiduciary relationship is necessarily limited, due to the agent's obligation to act for all parties to the escrow." *Id.* The escrow agent is "obligated to act in strict accordance with the terms of the escrow agreement." *Id.* (citations removed). Further, the agent "has a fiduciary duty to disclose information about a known fraud being committed on a party to the escrow agreement." *Id.* (citing *Berry v. McLeod*, 124 Ariz. 346, 604 P.2d 610 (1979)).

For an escrow agreement to be valid several things must happen. The requirements are "there must be a contract between the seller and buyer agreeing to the conditions of a deposit, then there must be delivery of the items on deposit to the escrow agent, and the escrow agent must agree to perform the function of receiving and dispersing the items." *Hoffman v. Eight Judicial District Court in for Clark County*, 90 Nev. 267, 270, 523 P.2d 848, 853 (1974).

Further, the "agreement by the seller and buyer to all the terms of the escrow instruction and the acceptance by the escrow agent of the position of depository create the escrow." *Id.* (citing *Kennedy v. District-Realty Title Insurance Corp.*, 306 A.2d 655 (D.C.App. 1973); *House v. Lala*, 180 Cal.App.2d 412, 4 Cal.Rptr. 366 (1960);

Cloud v. Winn, 303 P.2d 305 (Okl. 1956); *Security-First Nat. Bank of Los Angeles v. Clark*, 8 Cal.App. 709, 48 P.2d 167 (1935); *Home Ins. Co. of New York v. Wilson*, 210 Ky. 237, 275 S.W. 691 (1925)).

However, when the condition on which the instrument is to take effect is performed, the nature of the dual agency changes and the depository becomes a mere agent or trustee for each party with respect to these things in escrow to which each has thus become completely entitled, and his possession is equivalent to possession by such party. *Radach v. Prior*, 48 Wn 2d 901, 906, 297 P. 2d 605 (1956). Thus, *Radach* stands for the proposition that the escrow holders dual agency can change and he/she can become an agent for one party or the other. Thus, the question in this case is whether Waldo, Schweda & Montgomery became the agent of CHD, Inc. or Taggart.

The promissory note indicated that Waldo, Schweda & Montgomery was to act as the depository. Waldo, Schweda & Montgomery had no duty to accept payments, and in fact had never accepted a payment from CHD, Inc. Nothing in the promissory note indicated that Waldo, Schweda & Montgomery was to calculate the

pay-off. Waldo, Schweda & Montgomery was asked by CHD, Inc., or Mr. Perednia to perform this act. Thus, upon this request, when Waldo, Schweda & Montgomery acted they were no longer a dual agent but acting as an agent of CHD, Inc.

Hansen v. Horn Rapids O.R.V. Park, stands for the proposition that an alleged agent must cause the party claiming apparent authority actually or subjectively to “believe that the agent has authority to act for the principal.” 85 Wash.App. 424, 932 P.2d 724 (1997) (internal citations removed). The claimant’s actual, subjective belief must be objectively reasonable. *Id.* In addition, apparent authority must be “inferred only from the acts of the principle, *not from the acts of the agent.*” (emphasis added). *Id.* (citing *Mauch v. Kissling*, 56 Wash.App. 312, 316, 783 P.2d 601 (1989)). Finally, whether the alleged apparent authority does, in fact, exist, is a question for the trier of fact. *Id.*

In the case at hand Ms. Hulvey’s actions as an employee of Waldo, Schweda & Montgomery could not have persuaded CHD, Inc. that she was Taggart’s agent because she was acting on their behalf. They were the one’s requesting a pay-off and the evidence is

that Waldo, Schweda & Montgomery simply made a calculated guess as to what the pay-off was. Taggart, upon learning what occurred, immediately rejected the pay-off amount which was communicated to CHD, Inc. (CP at 487) There is simply nothing in this record which would suggest that Waldo, Schweda & Montgomery was acting at Taggart's request or upon his authority, or that CHD, Inc. could reasonably infer that they were acting for Taggart. (CP at 404)

There were no escrow instructions telling Waldo, Schweda & Montgomery to prepare a loan pay-off. There was no mechanism short of contacting Taggart for that pay-off because the deed of trust allowed for future advances. CHD, Inc. knew this because they are the author and signator of the deed of trust. Taggart signed no written instructions. In fact, the only document he was to sign was the reconveyance which was blank and unsigned. (CP at 404)

It is clear from the evidence that the trial court could not, based on the law and logical inferences drawn from the evidence, conclude that Waldo, Schweda & Montgomery had apparent authority to act on Taggart's behalf. Further, when an instrument

placed in escrow is thereafter delivered by the escrow holder in violation of, or without compliance with, the terms or conditions of the escrow agreement, such attempted delivery is inoperative and no title or rights pass. For the reason that in legal contemplation there has been no effective delivery. *Lechner* at 916, 216 P.2d 179 (1950) Citing *Angell v. Ingram*, 35 Wn 2d 582, 213 P.2d 944 (1950).

Again, it was error for the court to grant summary judgment on the issue of apparent authority. Although, Waldo, Schweda & Montgomery was at one time arguably a dual agent of the parties, their role converted to being an agent of CHD, Inc. when they sought a pay-off. Waldo, Schweda & Montgomery was not acting on behalf of Taggart but rather CHD, Inc. (CP at 486) Thus, Mr. Perednia could not have reasonably relied on the pay-off amount because the agent was not Mr. Taggart's but rather his own client. Mr. Taggart did timely reject and repudiate any attempted pay-off amount. (CP at 487) Consequently there was not acceptance and the parties should have gone to trial on the issue of what amount is owed to Mr. Taggart. The trial court's decision was clearly wrong and should be reversed.

ATTORNEY FEES

The trial court granted attorney fees to the Plaintiff at the time it granted the motion for summary judgment. However, the Court did not grant all the fees requested. It is anticipated that CHD, Inc. will raise on appeal the issue of the un-granted attorney fees.

In the State of Washington, attorney fees may be awarded where authorized by a contract, a statute, or a recognized ground in equity. *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 106 Wash.2d 826, 849, 726 P.2d 8 (1986). In fact, “absent a contractual provision, statutory provision, or a well-recognized principle of equity to the contrary, a court has no authority to award attorney fees to the prevailing party.” *Herzog Aluminum, Inc. v. General American Window Corp.*, 29 Wash.App. 188, 692 P.2d 867 (citing *North Pacific Plywood, Inc. v. Access Road Builders, Inc.*, 29 Wash.App. 228, 236, 628 P.2d 482 (1981)).

The Plaintiff seeks attorney fees under RCW 4.84.330. It reads:

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.

RCW 4.84.330. It should be noted that 'RCW 4.84.330 is not a fee-shifting statute. A fee-shifting statute is designed to "punish frivolous litigation and encourage meritorious litigation."

Wachovia SBA Lending, Inc. v. Kraft, 165 Wn.2d 481, 489, 200 P.3d 683 686 (2009) (citing *Brand v. Department of Labor and Indus.*, 139 Wash.2d 659, 667, 989 P.2d 1111 (1999)). Essentially, "the purpose of RCW 4.84.330 is to make unilateral contract provisions bilateral. The statute ensures that no party will be deterred from bringing an action on a contract or lease for fear of triggering a one-sided fee provision." *Id.* The statute expressly awards fees in a contract action containing a clause awarding attorney's fees to the prevailing party. *Id.* A "prevailing party" under the statute is that party that receives a final judgment. *Id.* That same language "must be read into a contract that awards fees to one party any time an action occurs, regardless of whether that party prevails or whether there is a final judgment." *Id.* (citing *Touchette v. Northwest Mutual*

Insurance Co., 80 Wash.2d 327, 335, 494 P.2d 479 (1972)). RCW 4.84.330 essentially makes a “unilateral attorney fees provision bilateral when a contracting party receives a final judgment.” *Id.* at 494, 200 P.3d at 689.

For a party seeking attorney’s fees under RCW 4.84.330, that party’s “failure to expressly plead 4.84.330 is not fatal to its claim.” *West Coast Stationary Engineers Welfare Fund v. City of Kennewick*, 39 Wash.App. 466, 475, 694 P.2d 1101 (1985). “There is absolutely no authority supporting the position that one must specifically plead RCW 4.84.330 in order to recover attorney’s fees under that statute.” *Id.* at 476, 694 P.2d at 1107.

Additionally, “[a] contractual provision for an award of attorney’s fees at trial supports an award of attorney’s fees on appeal under RAP 18.1.” *Id.* at 477, 694 P.2d at 1107 (citing *Draper Machine Works, Inc. v. Hagberg*, 34 Wash.App. 483, 490, 663 P.2d 1141 (1983)). In that case, because the court “concluded that the [party] was entitled to attorney’s fees in the trial court, we find that it is entitled to attorney’s fees on appeal.” *Id.* Where the trial court granted partial summary judgment, which required further

proceedings, it was held there was no determination as to attorney's fees, because at that point, there was no determination as to the prevailing party. *Scott v. Wall*, 55 Wn.App. 404, 777 P.2d 581 (1989). Further, a contract providing for attorney's fees at trial also supports an award of attorney's fees on appeal. *Marine Enters. v. Sec. Pac. Trading Corp.*, 50 Wash.App. 768, 750 P.2d 1290 (1988). 'Attorney fees will be reversed only if "manifestly unreasonable or based upon untenable grounds or reasons.' *Metropolitan Mortg. & Securities Co., Inc. v. Becker*, 64 Wash.App. 626, 634, 825 P.2d 360, 364 (1992) (citing *Progressive Animal Welfare Society v. University of Washington*, 114 Wash.2d 677, 688-89, 790 P.2d 604 (1990)).

As for the Plaintiff's request for the fees associated with the Appeal, Under Rule of Appellate Procedure 12.7(c), "[t]he appellate court retains the power after the issuance of the mandate to act on questions of costs as provided in Title 14 and on questions of attorney fees and expenses as provided in rule 18.1." RAP 12.7(c). Thus, "[i]f applicable law grants to a party the right to recover reasonable fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or

expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.” RAP 18.1(a). Further, the party requesting attorney fees must “devote a section of its opening brief to the request for the fees or expenses.” RAP 18.1(b). Such requests made at the Court of Appeals will continue on to the Supreme Court, and such requests must not be made in the cost bill. *Id.* Upon the filing of a decision awarding a party the right to reasonable attorney fees and expenses, that party awarded attorney fees must “serve and file in the appellate court an affidavit detailing the expenses incurred and the services performed by counsel.” RAP 18.1(d). Any objection to this filing may be made “by serving and filing an answer with appropriate documentation containing specific objections to the requested fee.” RAP 18.1(e). It “must be served and filed within 10 days after service of the affidavit of fees and expenses upon the party. A party may reply to an answer by serving and filing the reply documents within 5 days after the service of the answer upon that party.” *Id.* Finally, “[t]he appellate court may direct that the amount of fees and expenses be determined by the trial court after remand.” RAP 18.1(i).

Further, “[u]nder RAP 18.1 a party can recover reasonable attorney fees or expenses if applicable law grants the party that right and the party devotes a section of its opening brief to request fees or expenses.” *Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wash.2d 489, 503, 210 P.3d 308, 314 (2009) (citing RAP 18.1(a), (b)). In *Haselwood*, the appellant “did not comply with RAP 18.1 because it did not devote a section of its opening brief to attorney fees.” *Id.* Although it did “request[] attorney fees in its supplemental brief . . . [it was] not entitled to attorney fees,” although possibly it would be if it prevailed on remand. *Id.*

In *Keller Supply Co., Inc. v. Lydig Const. Co., Inc.*, a similar situation occurred. One party “requested attorney’s fees on appeal,” and the court noted that “[t]he right to attorney’s fees below entitles [the party] to attorney’s fees on appeal, *but that right is contingent on compliance with RAP 18.1.*” 57 Wash.App. 594, 601, 789 P.2d 788, 791 (1990) (emphasis added). As the court noted, “[t]he rule allows a party to recover attorney’s fees and costs if he (1) requests attorney’s fees in his brief, (2) 7 days Before [*sic*] oral argument serves and files an affidavit detailing the expenses and services

performed by counsel, and (3) *requests attorney's fees at oral argument.*" *Id.* (emphasis added). In that case, the court did not award attorney fees because the party requesting them "failed to comply with the rule." *Id.* "Although briefed, [the party] failed to request attorney fees at oral argument or to file the affidavit 7 days prior to oral argument. Under these circumstances [the party] has failed to comply with RAP 18.1 and is not entitled to attorney fees on appeal." *Id.* (citing *Kreidler v. Eikenberry*, 111 Wash.2d 828, 841, 766 P.2d 438 (1989)).

The trial court did not abuse its discretion by denying CHD, Inc. appellate attorney fees. CHD, Inc. failed to comply with the appellate rules, failed to request attorney fees in the first appeal and was properly denied fees by the trial court. This part of the trial court's grant for summary judgment should be upheld on appeal.

APPELLANT ATTORNEY FEES

Based on the case law in Washington and the contractual provision provided in the Deed of Trust, this court should grant appellant attorney fees under RAP 12 and RAP 18; assuming the court finds in favor of the appellant.

CONCLUSION

The trial court erred when it found that Waldo, Schweda & Montgomery were agents of Taggart with apparent authority to provide a loan pay-off to CHD, Inc. Where CHD, Inc. requested the pay-off from Waldo, Schweda & Montgomery and never communicated with Taggart until after the fact, it is clear they could not have been said to be working as an agent for Taggart. Therefore, summary judgment should be reversed. Additionally, CHD, Inc. did not properly ask for attorney fees on the first appeal and the decision to deny those fees at the trial court level should be upheld. Finally, the court should grant reasonable attorney fees to appellant.

Respectfully submitted this 24 day of March, 2011.



Mark S. Moorer, WSBA No. 18773
Attorney for Defendant/Appellant

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**IN THE COURT OF APPEALS OF THE STATE
OF WASHINGTON DIVISION III**

CHD, INC.,

Plaintiff/Respondent,

vs.

MELVIN C. TAGGART, D/B/A
TAGGART ENGINEERING &
SURVEYING,

Defendant/Appellant.

Appellate Court Case No.: 293955-III

Spokane County Superior Court Case No.:
07-2-01042-9

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of March, 2011, I served a true and correct copy of the corrected Brief of the Appellant by mailing the same, postage prepaid, by regular U.S. mail to the following:

Timothy W. Durkop
Attorney for the Plaintiff
2312 N. Cherry Street, Ste. 100
Spokane Valley, WA 99206

Dated this 24th day of March, 2011.



Mark S. Moorer, WSBA No. 18773
Attorney for Defendant/Appellant