

NO. 293955

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

CHD, INC.,

Respondent/Cross-Appellant,

v.

MELVIN C. TAGGART, d/b/a TAGGART
ENGINEERING AND SURVEYING,

Appellant/Cross-Respondent.

OPENING BRIEF OF THE RESPONDENT/CROSS-APPELLANT

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ASSIGNMENT OF ERROR ON CROSS APPEAL

1. The trial court erred by partially denying the Plaintiff's request for attorney fees pursuant to RCW 4.84.330, by misapplying RAP 18.1.

STATEMENT OF THE CASE

On October 1 or 2, 1997, CHD, Inc. (CHD) signed a promissory note and deed of trust naming Melvin C. Taggart (Taggart) as payee and beneficiary. CP 388-391.¹ The promissory note contained the following language:

This Note and the Deed of Trust securing same, together with a Request for Full Reconveyance, shall be placed in escrow at the Law Office of Waldo and Schweda, P.S., North 2206 Pines Road, Spokane, Washington 99206, without fee to said agent. Upon completion of payments hereunder, the original Note, Deed of Trust and signed Request for Full Reconveyance shall be delivered to the Maker for reconveyance of the security interest.

CP 407.

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1. The face of the promissory note indicates a date of October 1, 1997, and the notary on the deed of trust indicates that it was signed on October 2, 1997.

Taggart participated in the formation of the note and deed of trust. CP 402. The property listed in the deed of trust was located at 4th Avenue within Spokane County. CP 60.

In 2006, CHD enlisted the services of Richard Perednia to close the refinance the obligation secured by the 4th Avenue property. CP 60-61. On about July 26, 2006 Mr. Perednia requested a payoff statement from the Law Office of Waldo and Scheda, P.S. (Waldo and Schweda). CP 61. The payoff statement was sent by Waldo and Schweda to Perednia indicating a payoff of \$28,847.79. CP 61. On August 9, 2006, Perednia sent the funds and received a copy of the note marked "PAID IN FULL". CP 61-62.

Over a month later on September 12, 2006, Waldo and Schweda sent a letter purporting to invalidate the payoff. CP 61. As a result of the purported invalidation, on March 8, 2007, CHD filed a declaratory judgment to settle the issue and quiet title to the property. CP 1-9

During the course of the lawsuit, CHD filed an appeal based on Judge Austin's ruling regarding judicial estoppel. CP 368. This Court reversed Judge Austin's ruling, vacated the judgment, and remanded the case for further proceedings. CP 368.

On August 30, 2010, Judge Plese signed a judgment resulting from CHD's motion for summary judgment. CP 595-597. Judge Plese also granted CHD's request for attorney fees and costs. *Id.* Judge Plese reduced the fees requested by CHD by \$6,382.00 because she disallowed fees which were incurred during the time the case was before this Court. CP 595-597. *Report of Proceedings*, p. 25.

Taggart filed a notice of appeal. CP 599. CHD cross appealed as well. CP 605.

SUMMARY OF THE ARGUMENT

1. Responsive Argument.

The trial court's grant of summary judgment was appropriate. The undisputed facts indicate that CHD owed a

debt to Taggart which was secured with a deed of trust. The Promissory Note indicated on its face that it would be “placed in escrow at the Law Office of Waldo and Schweda, P.S.” The language in the note was approved by the Appellant. The language in the Promissory Note was sufficient to create apparent authority on the part of Waldo and Schweda on which a real estate closing agent, Perednia, reasonably relied to obtain a pay-off figure and pay the note.

Taggart’s arguments on actual authority are irrelevant because the Court did not base its ruling on actual authority.

2. *Argument on Cross-Appeal.*

The trial court erroneously excluded a full award of attorney fees. The trial court did not allow CHD its attorney fees which were incurred during the first appeal.

The basis for the attorney fee award is RCW 4.84.330. This statute allows a trial court to award reasonable attorney fees to the prevailing party, i.e. the one who obtains a judgment. There is no question of law or fact that CHD was the prevailing

party. The trial court did not allow fees incurred during the first appeal because of its erroneous application of RAP 18.1. RAP 18.1 is procedural and does not operate to prohibit a trial court from awarding fees during the entire lawsuit, even on appeal. CHD did not waive its right to collect fees because it did not possess the right to be awarded fees at the end of the first appeal. The Court should modify the judgment to allow attorney fees for the entire lawsuit.

ARGUMENT

This matter was decided upon CHD's motion for summary judgment. The factual allegations in the record are taken as true, and factual issues, if any, raised in the record before this Court are read in a light most favorable to the Taggart. Therefore, the trial court's decision and the error claimed by the Appellant are questions of law and are reviewed *de novo*. This Court makes the same inquiry as the trial court with no weight given to its decision. *Wilson v. Steinbach*, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982).

Equally, the applications of RCW 4.84.330 and RAP 18.1 are questions of law. These issues are reviewed in the same manner.

I. THE LAW OFFICE OF WALDO AND SCHWEDA HAD APPARENT AUTHORITY TO PROVIDE A PAY OFF FIGURE ON THE NOTE.

The case of *King v. Riveland*, 125 Wn.2d 500, 886 P.2d 160 (1994) provides a comprehensive summary of agency law.

An agent's authority to bind his principal may be of two types: actual or apparent. Actual authority may be express or implied. Implied authority is actual authority, circumstantially proved, which the principal is deemed to have actually intended the agent to possess. *Deers, Inc. v. DeRuyter*, 9 Wash.App. 240, 242, 511 P.2d 1379 (1973) (citing 3 Am.Jur.2d Agency § 71 (1962)). Both actual and apparent authority depend upon objective manifestations made by the principal. *Smith v. Hansen, Hansen & Johnson, Inc.*, 63 Wash.App. 355, 363, 818 P.2d 1127 (1991), review denied, 118 Wash.2d 1023, 827 P.2d 1392 (1992) (citing Restatement (Second) of Agency § 7 cmt. b, at 29 (1958)). With actual authority, the principal's objective manifestations are made to the agent; with apparent authority, they are made to a third person. *Smith*, 63 Wash.App. at 363, 818 P.2d 1127. Such manifestations will support a finding of apparent authority only if they have two effects. First, they must cause the one claiming apparent

authority to actually, or subjectively, believe that the agent has authority to act for the principal. Second, they must be such that the claimant's actual, subjective belief is objectively reasonable. *Smith*, at 364, 818 P.2d 1127.

One authority states that the most usual example of implied actual authority is found in those instances where the agent has consistently exercised some power not expressly given to the agent and the principal, knowing of the same and making no objection, has tacitly sanctioned continuation of the practice. Harold G. Reuschlein and William A. Gregory, *Agency and Partnership* § 15, at 40-41 (1979). In addition, this court has stated that "[a]uthority to perform particular services for a principal carries with it the implied authority to perform the usual and necessary acts essential to carry out the authorized services". *Walker v. Pacific Mobile Homes, Inc.*, 68 Wash.2d 347, 351, 413 P.2d 3 (1966).

King, 125 Wn.2d, at 507.

These principals are solidly entrenched in the jurisprudence of agency law, and have not been materially altered by any decisional law in Washington. The foregoing establishes the three elements that must be addressed. Apparent authority is established through objective manifestations made by the principal and relied upon by third parties. The person

claiming reliance on the authority of the agent must meet two requirements. He must actually, or subjectively, believe that the agent has authority to act for the principal, and he must demonstrate that his subjective belief is objectively reasonable.

**A. THE MANIFESTATION OF AUTHORITY
CAME FROM THE PROMISSORY NOTE.**

The promissory note in this matter forms the basis for the parties' transaction. The Appellant devotes a great deal of time addressing the requirements of establishing an escrow, and how the facts herein demonstrate that the parties did not establish a true or legal escrow. The discussion for the most part is irrelevant. The relevant legal question presented is whether the language on the documents provided to the closing agent (Perednia) convey a message or manifestation from the lender (Taggart), that the agent (Waldo and Schweda) had authority to provide a pay-off figure and accept funds to satisfy the debt. The language in the Note reads as follows:

This Note and the Deed of Trust securing same, together with a Request for Full Reconveyance, shall be placed in escrow at the Law Office of Waldo and Schweda, P.S., North 2206 Pines Road, Spokane, Washington 99206, without fee to said agent. Upon completion of payments hereunder, the original Note, Deed of Trust and signed Request for Full Reconveyance shall be delivered to the Maker for reconveyance of the security interest.

CP 407.

These express terms are manifested by the lender. In general, the lender never signs a promissory note because his participation in the note has already occurred. He lent or will lend the money or provide services, thus completing his obligation under the note or contract. The obligor signs the note to guarantee his future performance i.e. payment.

Presumably, the lender would not lend money or provide services if he was not satisfied with or did not approve of the form of the promissory note. Indeed, the undisputed facts in this case indicate that the Appellant participated in the formation of the documents:

So on October 1, 1997 I drove to the office of Waldo, Schweda & Montgomery, where Mr.

Crosby executed a Promissory Note and a Deed of Trust. However, the Deed of Trust was lacking a legal description so I had to provide one for them which I did a couple of days later.

Declaration of Melvin Taggart, CP 402.

The undisputed facts demonstrate that the manifestation of authority was derived from the principal, Taggart.

B. MR. PEREDNIA HAD THE ACTUAL BELIEF THAT WALDO SCHWEDA WAS GRANTED AUTHORITY TO PROVIDE A PAY-OFF FIGURE.

The undisputed evidence is within the record. Mr. Perednia is a seasoned real estate attorney who was acting as the closing agent for the refinance of the property. CP 60, 61. Mr. Perednia requested a payoff statement from Waldo and Schweda on July 26, 2006. CP 61. On August 9, 2006, Mr. Perednia sent payment to Waldo and Schweda consistent with the payoff figure provided by them. CP 61. He received a copy of the Note that was marked "Paid in Full". CP 62. In a letter dated September 12, 2006, Waldo and Schweda attempted to invalidate the payoff statement. CP 61.

The record is undisputed and demonstrates that Mr. Perednia acted consistently as a person who believed he was dealing with an agent with actual authority. The acts of the agent were consistent with one who has authority to bind the principal.

**C. MR. PEREDNIA’S BELIEF IN THE
AUTHORITY OF WALDO SCHWEDA WAS
OBJECTIVELY REASONABLE.**

The final element for consideration is the reasonableness of Mr. Perednia’s actions. While the record demonstrates that Mr. Perednia subjectively believed in the authority of Waldo and Schweda, this belief must be objectively reasonable.

The instructions on the Note would lead a reasonable person to only one conclusion – Waldo and Schweda was an agent appointed to finalize the transaction between Taggart and CHD. The instructions state that the Note and Deed, along with a Request for Reconveyance will be placed in “escrow”. It appoints “The Law Office of Waldo and Schweda” as the “agent” who will act “without fee”. These instructions lead to

one conclusion with respect to the involvement of Waldo and Schweda in this transaction. The Law Office of Waldo and Schweda is holding the Request for Reconveyance which they will release “upon completion of payments” on the Note. It was reasonable for Mr. Perednia to seek a payoff from Waldo Schweda, and they provided that payoff and acted consistently as an agent with full authority.

Whether there were deficiencies in the escrow process is irrelevant, i.e. an unsigned Request for Reconveyance. Mr. Perednia would have no possible way of knowing the deficiencies unless Waldo and Schweda communicated those deficiencies to him. There is nothing in the record to suggest he had this knowledge. On pages 11 to 18 of the *Brief of the Appellant*, Taggart discusses the nature of escrow in some detail. The argument is prefaced by framing the issue: “Given that there are no instruments signed by Mr. Taggart was there a true escrow? We believe not.” *Brief of the Appellant*, page 11. The Appellant then makes the only statement relevant for

analysis in this matter: “An escrow holder is an agent” (along with many citations.) *Id.* This point of law is the only relevant point of analysis in this section of the brief. By using the term “escrow” on the promissory note, it communicates to any reasonable person that the Law Office of Waldo and Schweda is a reliable agent regarding matters related to the Note.

The fact that the Note lists a law office as an agent is significant. Had the Note appointed Fred’s TV Repair as an escrow agent, then it would not be reasonable to rely on this manifestation, and apparent authority would be defeated. The attorney-client relationship is a vital part of our legal system. The trust of the general public in the agency of attorneys at law is a principal well recognized in the law. See, Washington State Bar Association, Ethics Opinion 140 (1969), (Attorneys held responsible for litigation costs with third parties based on agency principals.) In addition, attorneys at law are exempt from the rigors of licensing as an escrow agent. RCW 18.44.021. Because of the general policy of placing confidence

in the agency of attorneys at law, the finding of apparent authority makes perfect sense.

The Court made no error in concluding as a matter of law that Waldo and Schweda was an agent with apparent authority to provide a payoff figure and satisfy the Note. This portion of the Court's ruling should not be disturbed on appeal.

II. THE CROSS APPELLANT IS ENTITLED TO RECOVERY ATTORNEY FEES FOR THE ENTIRE LAWSUIT.

Upon granting the Respondents/Cross-Appellant's motion for summary judgment, it moved for an award of attorney fees based on RCW 4.84.330. The Superior Court concluded as a matter of law, that the undisputed facts triggered the application of RCW 4.84.330:

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.

Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorney's fees is void.

As used in this section 'prevailing party' means the party in who's favor final judgment is rendered.

RCW 4.84.330. (Emphasis added).

The express language of the statute requires a finding that the Respondent/Cross Appellant established the following elements:

1. The underlying action must be based on a contract entered into after September 21, 1977;
2. The contract must contain a provision allowing the recovery of attorney's fees and costs to one party to the contract; and
3. The Respondent/Cross Appellant must be the prevailing parties in the underlying action, i.e. one "in who's favor final judgment is rendered."

In this matter the undisputed facts indicate that the note and deed of trust were entered into on October 1 or 2, 1997. CP 388-391. The note and deed of trust both contain an attorney fee clause which operates in favor of one party. *Id.* CHD had a final judgment entered in its favor. CP 595-597. There was no error committed by the trial court with respect to this ruling, and no error is claimed by the Taggart.

The trial court denied the CHD's fee award for the work done during appeal number 271927 which was brought in this Court. The Court based its denial of fees on an application of RAP 18.1. This was an erroneous application of RAP 18.1 and the CHD should have been able to recover fees for this work.

RAP 18.1(a) provides:

Generally. If applicable law grants to a party the right to recover reasonable attorney 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).

It is important to note that RAP 18.1 is a procedural statute. There is nothing in the rule that gives a litigant the substantive right to obtain fees. It is also important to recognize that the rule was significantly modified in 1990. In this matter, the substantive law that allows the award of attorney fees is RCW 4.84.330.

The first time this matter came before this Court was in appeal # 27192-7-III. CP 369. The appeal was based on an erroneous application of the doctrine of judicial estoppel. CP 369-381. This Court remanded the case for further proceedings. CP 381. Because of the status of the case at that time, CHD was not a prevailing party as defined in RCW 4.84.330. CHD, therefore, had no substantive right to claim attorney fees.

Wachovia SBA Lending, Inc. v. Kraft, 165 Wn.2d 481, 200 P.3d 683 (2009) deals squarely with this issue. In that matter the plaintiff voluntarily dismissed the matter under CR 41. *Id.* at 484. The Supreme Court accepted review in part to

determine the applicability of RCW 4.84.330 upon an order of dismissal without prejudice:

The crux of the issue Before us, then, is whether a plaintiff's voluntary dismissal without prejudice is a final judgment rendered in favor of the defendant, entitling the defendant to attorney fees. We must therefore determine the meaning of "final judgment" for purposes of RCW 4.84.330.

Id. at 490. The analysis concludes with this simple statement: "RCW 4.84.330 requires a final judgment to operate." *Id.* at 491.

Therefore, at the conclusion of the first appeal before this Court, CHD did not hold a final judgment and was not a prevailing party within the meaning of RCW 4.84.330. It did not possess a substantive right to seek attorney fees at that time. Since RAP 18.1 is by nature procedural, it is irrelevant that CHD did not follow the procedure to seek fees that it was not entitled to. The time to seek fees was at the conclusion of the case when a "final judgment" was entered, and CHD became the "prevailing party." The trial court had authority to award

fees for the entire action, including time spent prosecuting the first appeal. It erred by concluding otherwise.

RAP 18.1 contemplates such a result: “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.” Although the statute does not expressly state that the trial court shall award the fees, it is implicit that any award for attorney fees is brought before the court in which the final judgment is entered, or on appeal, when the final judgment can be affirmed. In this matter, the trial court was the first court that made the ruling which gave CHD the right to seek fees.

The argument against awarding attorney fees for time spent on the first appeal appears to take the form of a waiver. *Report of Proceedings*, p. 23. However, this is an unsustainable position. Waiver is an intentional relinquishment of a known right. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). If CHD did not possess the right

to seek attorney fees, there is no way for it to voluntarily give up that right.

The trial court erred as a matter of law. Taggart attempts to subvert the standard of review when he states: “The trial court did not abuse its discretion by denying CHD, Inc. appellate attorney fees.” *Brief of the Appellant*, p. 25. Because the trial court did not exercise discretion in the reasonableness or necessity of the fees, the trial court did not exercise any discretion. It determined as a matter of law that CHD was not entitled to fees related to prosecuting the first appeal. *Report of Proceedings*, p. 25 This error is reversible on a *de novo* standard.

This Court should correct the error in one of two ways. First the Court could simply award CHD the attorney fees from the record on from the first appeal in the amount of \$6,382.00. CP 590. Second, the Court could remand to the trial court for consideration of whether that amount is reasonable. In the interest of judicial economy the CHD suggests the first option.

III. CHD IS ENTITLED TO FEES ON APPEAL.

Based on the analysis in the foregoing section of this brief, the CHD is entitled to attorney fees related to this appeal pursuant to RCW 4.84.330. CHD will remain the prevailing party within the definition of RCW 4.84.330 upon affirmation of the trial court's decision.

If the Court remands for reconsideration without vacating the judgment, CHD will continue to be a prevailing party. The only way CHD would not be entitled to fees is a reversal of the final judgment. Therefore, CHD requests fees herein in compliance with RAP 18.1.

CONCLUSION

The trial court properly applied the doctrine of apparent authority when it granted summary judgment. However, the trial court should have allowed CHD to recover its attorney fees for the entire lawsuit because it became the party in who's favor a final judgment was granted. This Court should affirm the ruling on summary judgment and modify the ruling on the

attorney fee order and judgment to correct the trial court's error
to allow CHD to recover fees for the entire lawsuit.

Respectfully Submitted, on
May 4, 2011,

A handwritten signature in black ink, appearing to read 'TWD', with a long horizontal line extending to the right.

Timothy W. Durkop, WSB #22985
Attorney for CHD, Inc. the
Respondent/Cross-Appellant