

**FILED**

**JAN 31 2012**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 300641

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

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Deep Water Brewing, LLC, Plaintiff;  
Robert D. Kenagy and Robert D. Kenagy  
Respondents/Cross Appellants,

v.

Fairway Resources, Ltd., Defendant;  
Jack A. Johnson, Key Development Corporation and  
Key Bay Homeowners' Association  
Appellants/Cross Respondents,

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JOINT REPLY BRIEF OF APPELLANTS

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Homeowners' Association

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## I. STATEMENT OF THE CASE

The brief of the respondents' Robert and Roberta Kenagy (hereafter "Kenagy") creates some confusion about what the appellants, Key Development Corporation, Jack Johnson, and the Key Bay Homeowners' Association (hereafter collectively "Key") are seeking in this appeal. The original judgment entered on March 17, 2008 awarded Kenagy \$245,000.00 in damages, \$35,000 in costs and \$243,000.00 in attorneys' fees. (CP 480-482). Key appealed from that judgment and raised several issues on the appeal. The damage award of \$245,000.00 was affirmed by the Court of Appeals but the \$243,000.00 in attorneys' fees and 35,000.00 in costs – more than half of the total award – was not affirmed by the appellate court, but instead remanded to the trial court for analysis of the fees and costs under the lodestar method and for entry of findings of fact and conclusions of law to support that award of fees and costs. *Deep Water Brewing, LLC v. Fairway Resources, Limited*, 152 Wn.App. 229, 215 P.3d 990 (2009).

The damage award of \$245,000.00, together with interest through April 9, 2010, was paid after the Supreme Court denied Key's Petition for Review. That payment satisfied the damage award portion of the original judgment. (CP 493-495). It is not an issue in this appeal. That left only the portion of the judgment for attorneys' fees and costs unsatisfied. On

November 23, 2010, \$243,000 was paid by Key to Kenagy to satisfy the attorney fee portion of the original judgment. See, Joint and Several Judgment on Remand and Judgment Summary. (CP 887-890). That left only the amount of the original costs awarded and any interest on the attorney fee and costs portion of the judgment as issues left to be resolved. The only issue in Key's current appeal is whether interest on the original award of attorneys' fees and costs should run from the date of the new judgment – July 8, 2011 – or from the date of the original judgment – March 17, 2008. If, as Key believes, interest on the attorney fees and costs should run from the date of the new judgment, no interest would be due on the \$243,000.00 awarded by the trial court for attorneys' fees and interest on the costs would only run from the date of the new judgment – July 8, 2011. Only Kenagy is appealing from the trial court's award of \$61,648.45 in attorneys' fees for the first appeal. Key has not appealed that award and concedes that if that award is affirmed after consideration of Kenagy's appeal, interest should run from the date of the judgment – July 8, 2011.

Key will respond to Kenagy's Cross Appeal by a separate brief.

II. ARGUMENT AND AUTHORITY IN REPLY TO  
RESPONDENTS' BRIEF

A. The Court of Appeals did not affirm the award of attorneys' fees and costs, impliedly or otherwise.

It is clear that Kenagy does not have a serious response to the sole issue on Key's appeal. Kenagy's only "argument" is that this Court did not use the term "vacate" in remanding the attorney's fee and cost issue to the trial court and therefore "impliedly" affirmed the amount of attorneys' fees and costs. *See* Response Brief of Respondents/Cross Appellants, pages 5 – 14. Instead of concentrating on what words are not in this Court's earlier decision, the respondents should have read what is in the decision.<sup>1</sup> At the very outset of this Court's opinion in the first appeal, this Court stated: "We remand for the court to **revisit** the attorney fees and for entry of necessary findings and conclusions to support **any** award of attorney fees and costs." *Deep Water Brewing LLC v. Fairway Resources Limited*, 152 Wn.App. 229, 215 P.3d 990 (2009) (Emphasis added). At the very end of the Court's opinion in *Deep Water*, this Court stated: "In sum, we remand for findings of fact and conclusions of law on

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<sup>1</sup> In his brief, Kenagy resorts to arguing the meaning of the word "the" in the court of appeals opinion after the first appeal. *See* Response Brief of Respondents/Cross Appellants, pages 8-9. Of course Kenagy wants this Court to ignore all other language in that opinion that does not support his current theories. One is reminded of Bill Clinton's impeachment proceedings where the claim of perjury was dependent on what the definition of "is" is.

the question of attorney fees and costs **and** an award of fees.” *Deep Water Brewing LLC v. Fairway Resources Limited*, 152 Wn.App. at .

This Court could not affirm the award of attorneys’ fees and costs because the standard of review of such an award involves a determination of whether the trial court abused its discretion in awarding a reasonable amount of attorneys’ fees and costs. *Boeing Co. v. Sierracin Corp.*, 108 Wash.2d 38, 65, 738 P.2d 665 (1987). The cases cited by this Court in its decision in *Deep Water* clearly hold that in order for an appellate court to determine whether the trial court abused the discretion and considered the proper factors in the attorney fee and costs award, there must be adequate findings of fact and conclusions of law:

. . . Washington courts have repeatedly held that the 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. . . . Not only do we reaffirm the rule regarding an adequate record on review to support a fee award, we hold findings of fact and conclusions of law are required to establish such a record.

*Mahler v. Szucs*, 135 Wn. 2d, 398, 435, 957 P.2d 632 (1998). (citations omitted). *See also, Bentzen v. Demmons*, 68 Wn.App. 339, 842 P.2d 1015 (1993) (“In the absence of any specific findings as to the basis for the award or the rationale underlying the court’s conclusion that is was reasonable, we cannot determine whether the award here constituted an

abuse of the trial court's discretion."); *Smith v. Dalton*, 58 Wn.App. 876, 885, 795 P.2d 706 (1990) ("Here, however, because the record does not indicate how the court determined the award, we vacate and remand for reconsideration."); *State Farm Mut. Auto. Ins. Co. v. Johnson*, 72 Wn.App. 580, 595, 871 P.2d 1066 (1994) ("In the absence of such findings, we cannot evaluate whether there was an abuse of discretion. Accordingly, we remand this case for a determination of attorney fees consistent with the lodestar approach . . .").

In *Bentzen v. Demmons*, Division 1 of the Court of Appeals reversed and remanded a judgment, including an award of attorney's fees noting:

To make that determination, the trial court should multiply a reasonable hourly rate by the number of hours reasonably expended, in light of factors such as the difficulty of the questions involved, the skill required, the rate customarily charged by other attorneys, the amount involved, the certainty that fees will be collected, and the character of the employment. *Scott Fetzer Co. v. Weeks*, 114 Wn.2d 109, 124, 786 P.2d 265 (1990) (citing *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 593-602, 675 P.2d 193 (1983)). **In the absence of any specific findings as to the basis for the award or the rationale underlying the court's conclusion that it was reasonable, we cannot determine whether the award made here constituted an abuse of the trial court's discretion.**

*Id.*, 68 Wn. App. at 350 (emphasis added).

The Court of Appeals in this case could not review the trial court's decision because the trial court did not indicate in its findings that it utilized the lodestar method and considered the factors necessary to determine reasonable fees and costs under that approach. It would take a tortured reading of the decision in *Deep Water* to conclude that the Court of Appeals affirmed the amount of the attorneys' fees and costs awarded, but simply wanted additional findings to supplement the record.<sup>2</sup>

Unable to ascertain whether the trial court abused its discretion, the Court of Appeals remanded the issue to the trial court for entry of new findings of fact and conclusions of law and judgment after the trial court considered of the proper factors under the lodestar approach to arrive at an award of reasonable attorneys' fees and costs. In remanding the case, the Court of Appeals was clearly requiring the trial court to exercise discretion and document the exercise of that discretion with new findings. The exercise of the trial court's discretion is what makes the Judgment after remand a new judgment and interest should run from that new judgment from its entry date, July 8, 2011, and not from the original date of March 17, 2008.

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<sup>2</sup> It simply makes no sense that the Court of Appeals would require the parties to go back to the trial court for entry of findings and conclusions to support an award that the Court of Appeals already affirmed. Of course that is not what the Court of Appeals did. It could not affirm the award because the findings and conclusions were inadequate.

B. Kenagy's reliance on *Hadley v. Maxwell* is misplaced and the amount originally awarded as fees and costs are not liquidated amounts.

Kenagy relies heavily on this Court's opinion in *Hadley v. Maxwell*, 120 Wn.App. 137, 84 P.2d 286 (2004) to support the argument that the Court of Appeals affirmed the award of attorneys' fees and costs and that the amounts awarded are liquidated amounts. That reliance is misplaced. This is not a case where the amount of the original attorney fee and costs judgment is considered to be liquidated as in the *Hadley* case. In that case Hadley had sued Maxwell for personal injury damages arising out of a car accident. Maxwell was found liable and a damage award was entered in favor of Hadley. Maxwell appealed to the Court of Appeals, which affirmed in an unpublished opinion. Maxwell then appealed to the Supreme Court on the liability issue only. The Supreme Court reversed and expressly remanded for a new trial on liability only. *Hadley v. Maxwell*, 144 Wn.2d 306, 27 P.3d 600 (2001). After the second trial Mr. Maxwell was again found liable for the damages, but the trial court awarded interest on the damages award only from the date of the new liability judgment and not from the date of the original damages judgment. Hadley appealed and the Court of Appeals reversed holding that because the amount of the damage award had not been challenged, the amount of damages was a liquidated amount as of the date of the original

jury verdict and interest should run from that date. *Hadley v. Maxwell*, 120 Wn.App. at 147.

Here, because the amount of attorney's fees and costs awarded by the trial court after trial were challenged and were not affirmed by the Court of Appeals, the amounts are not liquidated. Because this Court could not and did not affirm the amount of fees and costs awarded because of the inadequate findings and conclusions, the matter was remanded for the very purpose of awarding fees and costs using the lodestar method which required the exercise of the trial court's discretion.

The fact that the trial court came up with exactly the same amounts of attorney's fees and costs after remand does not make those amounts liquidated. In *Fisher Properties, Inc., v. Arden-Mayfair, Inc.* 115 Wn.2d 364, 798 P.2d 799 (1990), the fact that the trial court came up with the same rationale and same award on damages after remand, did not make the amount a liquidated amount. Because the trial court had to exercise discretion after the remand, the interest on the amount awarded ran from the new judgment, not the original judgment. *Id.*, 115 Wn. 2d at 373-74.

The key point is whether the Court of Appeals directive here was simply a mere modification of the trial court award requiring no exercise of discretion by the trial court or whether the direction from the Court of Appeals required the trial court to exercise discretion. *See, Sintra, Inc. v.*

*City of Seattle*, 96 Wn.App 757, 762, 980 P.2d 796 (1999); *Fulle v. Boulevard Excavating, Inc.*, 25 Wn.App. 520, 522, 610 P.2d 387 (1980); *Coulter v. Asten Group, Inc.*, 155 Wn.App. 1, 15, 230 P.2d 169, *review denied*, 238 P.2d 503 (2010).

While the Court of Appeals here did remand with directions to enter appropriate findings of fact and conclusions of law using the lodestar method, the Court of Appeals did not direct what the findings of fact or conclusions of law should be. They left that to the discretion of the trial court.

As pointed out in Key's opening brief, this Court recently had this very issue of postjudgment interest before it in *Zink v. City of Mesa*, 162 Wn. App. 688, 256 P.3d 384 (2011). The Court of Appeals there distinguished between those cases where there is a mere modification of an award by the Court of Appeals requiring no discretion and those cases where the trial court on remand engages in fact finding and the exercise of discretion.

The Zinks also request postjudgment interest from the date of the 2008 judgment. Postjudgment interest accrues from the time of the original judgment only on those portions of the judgment that are wholly or partly affirmed on appeal. RCW 4.56.110(4); *Sintra, Inc. v. City of Seattle*, 96 Wn.App 757, 762, 980 P.2d 796 (1999). When the appellate court in reversing merely modifies the award and the only action necessary on remand is application

of a mandated mathematical formula, interest runs from the date of the original judgment. *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 373, 798 P.2d 799 (1990) (quoting *Fulle v. Boulevard Excavating, Inc.*, 25 Wn.App. 520, 522, 610 P.2d 387 (1980)); *Sintra*, 96 Wn.App. at 763. If, however, the trial court on remand must engage in fact finding or an exercise of discretion, interest runs from the new judgment. *Coulter v. Asten Group, Inc.*, 155 Wn.App. 1, 15, 230 P.2d 169 (quoting *Fisher*, 115 Wn.2d at 373), *review denied*, 238 P.2d 503 (2010). On remand here, the trial court may consider new evidence, must enter new findings of fact, and will exercise its discretion in awarding per-day penalties based on *Yousoufian* 2010. Accordingly, interest will run from the date of the new judgment on remand. *Fisher*, 115 Wn.2d at 373.

*Zink v. City of Mesa*, 162 Wn.App at 729-30.

Here the award of attorney's fees and costs was not affirmed on appeal. At the time of the remand, the amounts were not liquidated. The trial court on remand engaged in fact finding and exercised discretion in arriving at the amounts of attorney's fees. Interest should run from the date of the new judgment.

C. The arguments made by respondents in their brief were never raised by Kenagy at the trial court level.

On September 10, 2010, nearly two and a half months after the Mandate was received by the trial court, Kenagy filed a motion for attorney's fees and a Memorandum in Support of Award of Attorneys' Fees and Costs at Trial and on Appeal. (CP 581-592). No argument was

made in that Memorandum or during oral argument to the trial court that the Court of Appeals did not “vacate” the 2008 attorney’s fees and costs judgment and therefore impliedly “affirmed” the judgment. Kenagy also did not argue that the trial court had no discretion to alter the award of attorneys’ fees and costs, or that the amount of attorneys’ fees and costs awarded after trial were “liquidated” amounts. Instead, Kenagy’s asked for and argued that they should be entitled to all<sup>3</sup> the fees incurred through the entry of the original judgment and that a multiplier should be applied to that number. (CP 584). Only in response to Key’s opening brief on this appeal does Kenagy now raise these issues.

Failure to raise an issue before the trial court generally precludes a party from raising the issue on appeal *Seattle-First Nat’l Bank v. Shoreline Concrete Co.*, 91 Wn. 2d 230, 240, 588 P.2d 1308 (1978). *See also, Smith v. Shannon*, 100 Wn.2d 26, 666 P.2d 351 (1983); *Lake Air, Inc. v. Duffy*, 42 Wn.2d 478, 256 P.2d 301 (1953); RAP 2.5(a). This Court should not consider these arguments now.

### III CONCLUSION

Although the arguments made by Kenagy in response to Key’s appeal were never made to the trial court, the Kenagys cannot now

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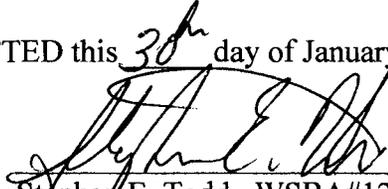
<sup>3</sup> Even Kenagy’s own expert hired to support their claim for attorneys’ fees, Lew Card, did not believe that all of the fees incurred by Kenagy through the trial were reasonable. See Declaration of Lew Card (CP 376 -379) and Second Declaration of Lew Card (CP 424 – 435).

seriously argue that the trial court's original award of attorneys' fees and costs in the judgment entered on March 17, 2008 were affirmed in the first appeal or that the trial court did not exercise its discretion when entering the new findings of fact and conclusions of law after remand. This Court remanded the case and directed the trial court to use the lodestar method to calculate the amount of the fees and costs award. The factors which the Court of Appeals directed the trial court consider in utilizing the lodestar method required the trial court to exercise discretion. After remand, the trial court again awarded plaintiffs \$243,000.00 in attorney's fees and \$35,000.00 in costs through the trial of this matter, but that does not make those amounts liquidated as of the date of the original judgment. Furthermore, the trial court's calculations used to arrive at the amounts after remand were not the same calculations used by the trial court in its original ruling indicating the trial court used a different methodology and exercised discretion in arriving at the amounts awarded as attorneys' fees and costs. Finally, the trial court entered new and different findings of fact and conclusions of law after remand. Under RCW 4.56.110(4), postjudgment interest accrues from the time of the original judgment only on those portions of the judgment that are wholly or partly affirmed on appeal. Despite Kenagy's argument to the contrary, it is clear that the portion of the original judgment for attorneys' fees and costs was not

affirmed on the first appeal. The judgment for attorneys' fees and costs entered on July 8, 2011 is a new judgment and interest should run only from that date and not from the date of original judgment.

Key is entitled to an award of attorney fees on this appeal.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of January, 2011.

  
Stephan E. Todd WSBA#12429  
Attorney for Appellants Key  
Development Corp. and Jack A.  
Johnson

  
Robert B. Jackson WSBA# 18945  
Attorney for Appellant Key Bay  
Homeowners' Association  
PURSUANT TO TELEPHONE  
AUTHORIZATION

**FILED**

**JAN 31 2012**

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

DEEP WATER BREWING, LLC., )  
et al, )  
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Plaintiffs, )  
 )  
vs. )  
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FAIRWAY RESOURCES, LIMITED, et al, )  
 )  
Defendants. )

CASE NO: 300641

DECLARATION OF  
MAILING/SERVICE  
OF JOINT REPLY  
BRIEF OF APPELLANTS  
AND JOINT BRIEF OF  
CROSS RESPONDENTS

The undersigned declares that he is a citizen of the United States and a resident of the State of Washington, living and residing in Snohomish County in said state, over the age of eighteen (18), not a party hereto, and competent to be a witness in this action; that on the 30<sup>th</sup> day of January, 2012, I caused to be served to:

Paul S. Kube, Esq.  
Ogden Murphy Wallace, P.L.L.C.  
PO Box 1606  
Wenatchee, WA 98807-1606

( ) via Hand Delivery  
(x) via U.S. Mail

a copy of the Joint Reply Brief of Appellants and a copy of the Joint Brief of Cross

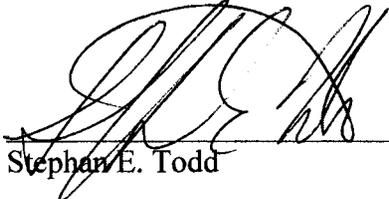
DECLARATION OF MAILING - 1

\_\_\_\_\_  
LAW OFFICE OF  
**STEPHAN E. TODD**  
14319 15<sup>th</sup> Drive SE, Mill Creek, Washington 98012  
P.O. Box 13635, Mill Creek, Washington 98082  
Office/Fax (425) 585-0274

1 Respondents.

2 I declare under penalty of perjury under the laws of the State of Washington that the foregoing  
3 is true and correct.

4 Signed at Mill Creek, Washington this 30<sup>th</sup> day of January, 2012.

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8 Stephan E. Todd

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DECLARATION OF MAILING - 2

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