FILED

MAR 0 5 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 300641

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

Deep Water Brewing, LLC, Plaintiff; Robert D. Kenagy and Roberta D. Kenagy,

Plaintiffs-Respondents-Cross-Appellants,

v.

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

Defendants-Appellants-Cross-Respondents.

REPLY BRIEF OF RESPONDENTS/CROSS APPELLANTS IN SUPPORT OF CROSS APPEAL

PAUL S. KUBE, WSBA #24336
E. ROSS FARR, WSBA #32037
JULIE K. NORTON, WSBA #37874
Attorneys for Plaintiffs-Respondents-Cross-Appellants
OGDEN MURPHY WALLACE, P.L.L.C.
1 Fifth Street, Suite 200
Wenatchee, WA 98807-1606
Tel: 509.662.1954/Fax: 509.663.1553

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A. INTRODUCTION

Deep Water Brewing, LLC and Robert D. Kenagy and Roberta D. Kenagy, respondents/cross appellants, (collectively the "Kenagys"), respectfully submit this reply brief in further support of their cross appeal for all of their attorneys fees and fees for the present appeal.

B. ARGUMENT

Key Development Corporation, Jack Johnson and Key Bay Homeowners' Association (collectively "Key") fundamentally misapprehend the Kenagys' arguments on appeal. The Kenagys' arguments on cross appeal are in the alternative and follow from the premise that Key itself advances: that the trial court somehow had the discretion to amend the amount of the 2008 Judgment.[1] As the Kenagys' Response Brief explains, Key's argument fails because the Court of Appeals did not vacate the 2008 Judgment, and therefore the trial court had no discretion to perform a recalculation of the amount of the 2008 Judgment. Without discretion to alter the amount of the 2008 Judgment, interest properly runs from the date of that judgment, not the trial court's later affirmation of the judgment amount on remand.

[1] As in the Kenagys' Response Brief, the "2008 Judgment" refers to the judgment entered on March 17, 2008 at CP 480-82.

1. The Kenagys' Arguments on Cross-Appeal Are in the Alternative and Follow from Key's Own Premise.

If this Court agrees with Key's assertion that the trial court erred in calculating interest from the date of the original 2008 Judgment because the trial court somehow had discretion to recalculate and alter the judgment amount on remand, then the trial court also erred in rejecting the Kenagys' request that it recalculate the award of attorney fees based on a 1.5 multiplier under *Mahler v. Sucz*, 135 Wn.2d 398, 434-35, 957 P.2d 632 (1998).

The Kenagys' requested on remand that if the trial court was going to completely recalculate the judgment amount, it should award the Kenagys' fees based on a 1.5 multiplier. CP 591. On remand, the Kenagys' counsel filed a lengthy and detailed declaration discussing the factors justifying the multiplier. CP 597-610. The trial court rejected the Kenagys' arguments for a multiplier because the trial court believed that it was not performing an entirely new calculation, and was therefore limited by the prior arguments and its ruling on the 2008 Judgment. CP 875. However, if the trial court did in fact have discretion to recalculate the 2008 Judgment, even though the Court of Appeals did not vacate it, the trial court also had the discretion to consider and award attorneys' fees to

the Kenagys based on a 1.5 multiplier. Rejection of the Kenagys' arguments for a multiplier was therefore an error of law.

2. The Kenagys' Briefing Makes the Nature of its Cross Appeal Challenge Clear and the Challenged Finding is Argued in the Text of the Brief.

The Court of Appeals may excuse a party's failure to assign error to specific findings of fact when the briefing makes the nature of the challenge clear and the challenged finding is argued in the text of the brief. *Noble v. Lubrin*, 114 Wn. App. 812, 817-18, 60 P.3d 1224 (2003). In *Noble*, the court determined that although Noble "did not assign error to all of the findings of fact that related to the disputed issue," it was clear from the text of the brief what Noble's challenges were. *Noble*, 114 Wn. App. at 818. Our Supreme Court made a similar determination in *Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 710, 592 P.2d 631 (1979). Even though assignments of error were not in compliance with the applicable rule,

> RAP 1.2(a) makes clear that the technical violation of the rules will not ordinarily bar appellate review, where justice is to be served by such review. In these circumstances, where the nature of the challenge is perfectly clear, and the challenged finding is set forth in the appellate brief, we will consider the merits of the challenge.

Daughtry, 91 Wn.2d at 710.

RAP 1.2(a) provides that:

> These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in rule 18.8(b) [providing for extensions of time, which is not applicable here].

RAP 1.2(a).

These sound principles apply to the present case. Although the Kenagys' Response Brief did not contain a section at the beginning entitled "Assignments of Error", the Response Brief later makes clear what findings of fact and conclusions of law to which it assigns error, and even quotes from them:

> However, the trial court denied the Kenagys' request for adding a lodestar multiplier to the award, ruling that:
>
> > since Plaintiffs did not request a lodestar multiplier at trial, the Court did not consider their argument about the multiplier now. The Court holds that Plaintiff is precluded from arguing for one now because Plaintiffs did not cross appeal nor moved to reopen.

> CP 875, Additional Findings of Fact and Conclusions of Law, p. 3, ll. 13-15.

Response Brief at 15. Although this assignment of error is not at the beginning of the brief, it is sufficient to identify the specific error giving rise to the Kenagys' cross appeal. Because the nature of the Kenagys' challenge is "perfectly clear," in the parlance of the Supreme Court in *Daughtry*, the Kenagys respectfully ask that this Court also consider the merits of their argument on cross appeal.

3. The Trial Court Erred in Not Awarding All of the Kenagys' Attorney Fees on Remand.

The Court of Appeals was specific that sufficient findings must be made to support a fee award. *Deepwater v. Fairway Resources Ltd.*, 152 Wn. App. 229, 285, 215 P.3d 990 (2009). However, the trial court denied portions of the Kenagys' post-trial fees without explanation.

The trial court's award does not compensate the Kenagys for the fees incurred involving the supersedeas bond, in the amount of $6,124.00 (CP 881, ¶ 1.23) despite an exhaustive explanation of the fees incurred by the Kenagys, including declarations by Kenagys' counsel. The reasons for the litigation involving the supersedeas bond were not simply the result of the Kenagys' delay, as Key suggests, and were clearly explained to the trial court. CP 602-03. For ease of reference, the explanation for

Kenagys' attorney fees related to the supersedeas from counsel's declaration is set forth here:

> []On March 3, 2009, while review was pending with the Court of Appeals, Horizon Bank, the entity issuing the supersedeas letter of credit, was issues a Cease and Desist Order ("Order") by the Federal Deposit Insurance Corporation ("FDIC"). Pursuant to the Order, Horizon Bank was significantly undercapitalized and was required to raise substantial capital by late 2009. Accordingly, on September 24, 2009, we filed a motion with this Court to modify the supersedeas security, including cash or a bond.
>
> []The Court denied our initial motion; however, the proceedings were successful for the Plaintiffs in that the Court ordered that the Defendants file monthly declarations from representatives of Horizon Bank, confirming that the Bank could and would honor the outstanding letter of credit if/when called upon to do so.
>
> []Subsequently, on January 8, 2010, while Defendants' Petition was pending before the Supreme Court, Horizon Bank was closed by the Washington State Department of Financial Institutions, which appointed the FDIC as Receiver. Due to the closure of the bank issuing the supersedeas letter of credit, Plaintiffs filed a renewed motion to modify the supersedeas security on January 13, 2010, which motion again requested that the Defendants be required to post a more secure form of supersedeas security,

> including cash or a bond. This time, the Court granted Plaintiff's motion, and ordered that the entire supersedeas amount previously secured by the letter of credit ($700,000) be deposited, in case, in the registry of the Court.
>
> []On March 24, 2010, also while Defendants' Petition was pending before the Supreme Court, and given the Defendants' attempted appeal to the Supreme Court, the Plaintiffs filed a Motion to Increase the Supersedeas security with [the trial] Court. The motion was brought out of concern that, if the [review] was granted, the supersedeas security would be insufficient to cover the attorneys' fees, costs and interest likely to be incurred or accrue during the appeal period. Despite the unsuccessful result, the Plaintiffs acted reasonably in response to the conduct of the Defendants.

CP 602-03 (Declaration of Paul S. Kube Regarding Fees and Costs (Remand Proceedings). These circumstances were not the fault of the Kenagys, who were only attempting to protect their legitimate interests in the supersedeas bond.

Although this information was provided to the trial court, it was not even addressed in the court's denial of Kenagys fees related to this request:

> Plaintiffs incurred $6124.00 in attorney fees and costs with regard to those proceedings, for which this court makes no award.

CP 881 (Finding of Fact 1.23). The trial court erred in not even addressing the reasons for its denial, despite ample reasons in the record.

Similarly, the trial court erred in only awarding $6,098 of the $7,443.50 incurred between November 25, 2010 and April 20, 2011, without explanation. CP 882, ¶ 1.30. Yet, counsel for the Kenagys filed detailed declarations justifying fees incurred during that time. CP 833 (Declaration of Paul Kube Regarding Updated Fees and Costs Through December 2010); CP 843 (Supplemental Declaration of Paul Kube Regarding Updated Fees and Costs Through December 2010); CP 850 (Declaration of Paul Kube Regarding Fees and Costs Incurred Through January 27, 2011); CP 857 (Supplemental Declaration of Paul S. Kube); CP 869 (Supplemental Declaration of Paul S. Kube).

The trial court failed to justify why these fees were not reasonable after the Court's express direction in *Deepwater*, 152 Wn. App. at 285. The exclusion of the fees in the April 14, 2011 award is therefore unreasonable and this matter should be remanded for inclusion of those fees in a revised award, with interest running from April 14, 2011.

4. <u>The Kenagys' Arguments for a Fee Multiplier Should Be Considered on Remand by the Trial Court</u>.

As explained above, the trial court rejected the Kenagys' argument for a multiplier based on an error of law. This matter should be remanded

to the trial court for a full and fair consideration of all of the factors that the Kenagys outlined on the record below. CP 597-610. Key's factual arguments are misplaced here. *See Chuong Van Pham v. City of Seattle, Seattle City Light*, 159 Wn. 2d 527, 151 P.3d 976 (2007) (remanding to trial court to determine whether a multiplier is justified).

5. The Kenagys Are Entitled to Attorney Fees on Appeal.

The Kenagys request attorney fees and expenses for responding to this second appeal and for their cross appeal. Under RAP 18.1(a) a party can recover attorney fees and expenses, if applicable law grants the right to such recovery. Here, similar to the first appeal in this matter, the Kenagys are entitled to an award of fees based on contract and RAP 18.1(a) and (i).

C. CONCLUSION

The trial court properly calculated interest from the date of the 2008 Judgment. In the alternative, however, the Kenagys are entitled to prejudgment interest calculated from the date of the 2008 Judgment to the trial court's remand decision because the 2008 Judgment is a liquidated amount upon which to base prejudgment interest. Finally, for the reasons articulated above, the Kenagys are entitled to all of their attorney fees for the prior appeal as well as the present appeal and cross appeal.

RESPECTFULLY SUBMITTED this 1st day of March, 2012.

Respectfully submitted,

OGDEN MURPHY WALLACE, P.L.L.C.

By _____

PAUL S. KUBE, WSBA #24336
E. ROSS FARR, WSBA #32037
JULIE K. NORTON, WSBA #37874
Attorneys for Plaintiffs-Respondents-
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CERTIFICATE OF SERVICE

PAUL S. KUBE, WSBA #24336
E. ROSS FARR, WSBA #32037
JULIE K. NORTON, WSBA #37874
Attorneys for Plaintiffs-Respondents-Cross-Appellants
OGDEN MURPHY WALLACE, P.L.L.C.
1 Fifth Street, Suite 200
Wenatchee, WA 98807-1606
Tel: 509.662.1954/Fax: 509.663.1553

CERTIFICATE OF SERVICE

I, Angela T. Hyde, hereby declare as follows:

1. I am over the age of eighteen years and not a party to the within action. My business address is 1601 Fifth Avenue, Suite 2100, Seattle, Washington 98101.

2. On March 1, 2012, I served a true and correct copy of ***REPLY BRIEF OF RESPONDENTS/CROSS APPELLANTS IN SUPPORT OF CROSS APPEAL*** on the parties listed below in the manner indicated:

Stephan E. Todd 14319 15th Drive SE Mill Creek, WA 98012 (425) 585-0274 *Attorney for Jack Johnson and Key Development Corp.*	VIA U.S. MAIL
Robert B. Jackson 2100 116th Ave. NE Bellevue, WA 98004-3016 (425) 421-1400 *Attorneys for Key Bay Homeowner's Assoc.*	VIA U.S. MAIL

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

Signed this 1st day of March, 2012, at Seattle, Washington.

Angela Hyde

Angela Hyde

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