

FILED

JAN 31 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 300641

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

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,

JOINT BRIEF OF CROSS RESPONDENTS

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I. STATEMENT OF THE CASE¹

A judgment in this matter was entered on March 17, 2008 against Key Development Corporation, Jack Johnson and Key Bay Homeowners' Association (hereafter collectively "Key) awarding Robert and Roberta Kenagy ("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.² Kenagy did not appeal from that judgment. 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 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 an award of fees and costs. *Deep Water Brewing, LLC v. Fairway Resources, Limited*, 152 Wn.App. 229, 215 P.3d 990 (2009).

After remand, Kenagy moved for an award of fees and costs incurred through trial and for an award of attorneys' fees incurred by

¹ The underlying facts of this case are set forth in this Court's opinion in *Deep Water Brewing, LLC v. Fairway Resources Limited*, 152 Wn. App. 229, 215 P.3d 990 (2009)

² In the Response Brief of Respondents/Cross Appellants, Kenagy states that "The present case is the second appeal by Fairway Resources Limited, Jack A. Johnson, Key Development Corporation and Key Bay Homeowners' Association, appellants/cross appellants (sic) . . ." Fairway Resources Limited was not a party to the first appeal and is not a party to this appeal. Indeed, no judgment was ever entered against Fairway Resources Limited in this matter.

Kenagy in the first appeal. In the memorandum supporting Kenagy's request, Kenagy asked the trial court to award all of the fees Kenagy had incurred through the trial, not just the amount the trial court had originally found to be reasonable. (CP 584). In addition, Kenagy also requested the trial court to utilize a multiplier of 1.5 to increase the total fees awarded to \$598,659.00, a figure nearly 2 and ½ times the original attorneys' fee award. (CP 591).

Kenagy admits that no appeal was taken from the original judgment and that a multiplier was not requested in the original motion for attorneys' fees.

THE COURT: . . . did the plaintiff seek any Lodestar multiplier prior to March 17, '08?

MR. KUBE: Is that – what's March 17, '08?

THE COURT: The date of the judgment.

MR. KUBE: No, Your Honor, we did not. That was –

THE COURT: That was my recollection. I just wanted to confirm that.

MR. KUBE: Yeah.

THE COURT: Okay. So, let's see, here. The Court notes that the plaintiffs did not appeal the judgment entered on March 17th, '08, and the plaintiffs have not sought a new trial or moved to reopen.

(Verbatim Report of Proceedings, January 3, 2011, pages 6 – 7).

Kenagy now appeals from the new judgment entered on July 8, 2011 claiming that more attorneys' fees should have been awarded through trial, a multiplier should have been applied to the lodestar amount and that the trial court failed to award all of the fees incurred by Kenagy for the appeal. Kenagy's entire argument on these appeal issues encompasses 2 and ½ pages of the brief. See, Response Brief of Respondents/Cross Appellants, pages 14-16.³

II. ARGUMENT AND AUTHORITY IN RESPONSE TO CROSS APPELLANTS' BRIEF

A. Kenagy failed to comply with RAP 10.3(a)(4) by failing to assign error to any of the trial court's findings of fact or conclusions of law.

RAP 10.3(a)(4) provides:

(a) Brief of Appellant or Petitioner. The brief of the appellant or petitioner should contain under appropriate headings and in the order here indicated:

. . .

(4) Assignment of Error. A separate concise statement of each error a party contends was made by the trial court, together with the

³ On page 14 and again on page 16 of Response Brief of Respondents/Cross Appellants, Kenagy refers to the date April 14, 2011 as if that date has some significance. The date is apparently what Kenagy believes is the date from which Key asserts the interest on the original judgment for fees and costs should run and that is the date from which interest should run on the fees awarded for the appeal and any subsequent judgment if Kenagy's cross appeal is successful. The court docket in this matter does not indicate that anything happened on April 14, 2011. While the Additional Findings of Fact and Conclusions of Law were signed and entered on April 19, 2011 (CP 873-884), the actual Judgment on Remand was not entered until July 8, 2011. (CP 887-890). That is the date from which Key asserts is the date that interest on all the fees and costs awarded to date should run.

issues pertaining to the assignments of error.

In Kenagy's brief there is no section heading for "Assignment of Error" and no reference to any specific finding of fact or conclusion of law to which Kenagy assigns error. RAP 10.3(g) provides in relevant part:

(g) Special Provision for Assignments of Error. . . .
A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number.
The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto. (Emphasis added).

Nowhere in Kenagy's brief is there a reference to any finding of fact by number. In the body of the brief, Kenagy does not quote any finding of fact, let alone one that he claims was a result of trial court error. RAP 10.4(c) requires that "If a party presents an issue which requires study of a . . . finding of fact . . . the party should type the material portion of the text out verbatim or include them by copy in the text or in an appendix to the brief." There is no finding of fact typed out in the text of the brief and no findings of fact were appended to the brief.

An unchallenged finding of fact is a verity on appeal. *Robel v. Roundup Corp.*, 138 Wn.2d 35, 42, 59 P.3d 611 (2002). The trial court made several findings of fact regarding the fees awarded to Kenagy through the trial of this matter and for the appeal including the following:

1.6. The Court finds reasonable appropriate fees incurred by JDSA in their prosecution of this matter in the amount of \$67,057.89, after eliminating time spent on unsuccessful claims, e.g. attorney malpractice, seeking an injunction, and piercing the corporate veil, and after considering the arbitration fee award.

1.13. . . . Considering the amount in controversy, the fees incurred by opposing parties, and the fact some of the latter amount includes time spent on unsuccessful claims not readily identifiable, the Court finds \$243,000 to be a reasonable attorneys fee award to the Plaintiffs.

1.22 In total, the Plaintiffs incurred \$46,755.80 in reasonable attorneys' fees and costs defending the appeals, which attorneys' fees were calculated by multiplying the hourly rate of each attorney that worked on the matter by the respective number of hours spent working on the matter.

1.23. Following the Supreme Court's denial on April 30, 2010, but prior to issuance of the required mandate by the Court of Appeals, Defendants initiated proceedings in this Court to release to Plaintiffs a portion of the supersedeas security held in the court's registry. Plaintiffs incurred \$6124.00 in attorneys fees and costs with regard to those proceedings, for which this court makes no award.

1.30 The Plaintiffs have incurred \$7,443.50 in attorneys fees between November 25, 2010 and April 20, 2011, of which \$6,098 were reasonable. Plaintiffs are awarded \$550 in additional attorney's fees to prepare and present a Judgment on Remand.

(CP 877, 879, 881, and 882). No assignment of error was made by Kenagy to any finding of fact made by the trial court, including those

quoted above. Moreover, the trial court entered several conclusions of law regarding the award of attorneys' fees and costs, including the following:

2.8. Plaintiffs are awarded reasonable attorneys' fees and costs in the amount of \$340,122.65, which amount excludes the amounts previously award by the Supreme Court, and includes reasonable amounts incurred for these remand proceedings, incurred through presentment of a Judgment After Remand.

2.9 The original attorneys' fee and cost award of \$278,474 shall bear interest at 12% from March 17, 2008, until paid.

2.10 The additional attorney's fees and costs awarded in the total amount of \$61,648.65 ((\$46,755.80 + \$3333.85 + \$4911 + 6098 + \$550) shall bear interest at 12% beginning on the day the Judgment After Remand is entered.

(CP 854). Kenagy has not assigned error to any of these conclusions of law.

Because Kenagy did not assign error to any of the findings of fact regarding the reasonableness of the fees awarded through trial, those findings are verities and Kenagy's failure to assign error to any specific finding of fact should preclude review by this Court.

B. Kenagy's claims that the trial court erred by not awarding an additional \$6,124.00 for fees incurred by Kenagy in resisting Key's attempt to pay the damages portion of the judgment and for only \$6,098 of \$7,443.50 of fees claimed to have been incurred between November 25, 2010 and April 20, 2011 have no merit.

In Kenagy's brief one of the "Issues on Appeal" is "Whether the trial abused its discretion in not awarding all of Kenagys (sic) attorney fees for the previous appeal . . ." See, Response Brief of Respondents/Cross Appellants, page 1 – ISSUES ON APPEAL. There is no reference to any particular finding in the body of the brief nor is there even a section in the brief regarding assignments of error. Nevertheless, in the body of the brief, Kenagy claims that "[d]espite an exhaustive explanation of the fees incurred by the Kenagys, including declarations by Kenagys' counsel (CP 443, 451, 458, 461), the trial court's award does not compensate the Kenagys for the fees incurred regarding the complications involving the supersedeas bond, in the amount of \$6,124.00."⁴ The brief does refer to CP 881 which is a page of the Additional Findings of Fact and Conclusions of Law entered on April 19, 2011. That page includes Findings of Fact 1.19 through 1.24. The only finding of fact on that page that references the figure \$6,124.00 is Finding of Fact 1.23. That finding provides:

Following the Supreme Court's denial on April 30, 2010, but prior to issuance of the required mandate by the Court of Appeals, Defendants initiated proceedings in this Court to release to Plaintiffs a portion of the supersedeas security held in the court's registry. Plaintiffs incurred \$6124.00 in attorneys fees

⁴ Kenagy's reference to CP 443, 451, 458, and 461 are references to declarations by Mr. Kenagy and Paul Kube filed in January 2008. Those declarations have nothing to do with the attorneys' fees incurred in the first appeal which was not even filed until April 2008.

and costs with regard to those proceedings, for which this court makes no award.

What Kenagy refers to as a “complication” in his brief, and apparently the basis for claiming the additional \$6,124.00 in fees, was Kenagys unwarranted opposition to Key’s attempt to pay the damage portion of the original judgment, plus interest, once the Supreme Court denied Key’s petition for review. To stop the accrual of interest on the \$245,000.00 awarded Kenagy for damages, on March 31, 2010, Key prepared and submitted to Kenagy’s attorney a stipulation to have money released from the \$700,000 in the registry of the court to pay the damages with interest. (CP 485). Inexplicably, and for reasons only known to Kenagy, the release of the funds was initially opposed. Kenagy claims to have incurred \$6124.00 opposing Key’s attempt to pay the damages portion of the judgment. Key was forced to file a motion to have the funds paid (CP 483-484) and eventually an order was entered on May 12, 2010 releasing \$305,894.30 (CP 493-495).

Kenagy claims that there is no justification in the trial court’s refusal to award this extra \$6,124.00. The justification is self-evident in the finding itself: Key had to initiate proceedings to pay Kenagy part of his judgment and Kenagy incurred \$6124.00 attorneys’ in what was an unnecessary proceeding. What is not self-evident is why Kenagy would

want to incur any fees to take money Key was willing to give. Kenagy does not reference anything in the record or make any argument that would justify incurring any fees, let alone the \$6,124.00 claimed.

Similarly, the claim that Kenagy is entitled to the difference between the \$7443.50 in fees claimed to have been incurred and the \$6098.00 in fees awarded for the time between November 25, 2010 and April 20, 2011 lacks merit. Not only was no assignment of error made to any finding awarding the \$6098.00, there is no citation to the record that would otherwise justify those additional fees. As noted above, the reference to CP 443, 451, 458 and 461 does not support an award for fees on appeal or after remand.

Kenagy, as the fee applicant, has the burden of establishing the reasonableness of the attorney fee request. *Absher Const. Co. v. Kent School Dist. No. 415*, 79 Wn. App. 841, 917 P.2d 1086 (1995) (“The burden of demonstrating that a fee is reasonable always remains on the fee applicant” citing *Blum v. Stenson*, 465 U.S. 897, 105 S.Ct. 1541, 1548, 79 L.Ed.2d (1984) and *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 859 P.2d 1210 (1993)). In Kenagy’s brief there is no citation to any part of the record that would justify the additional fees claimed by Kenagy. These claims have no merit.

C. Kenagy never requested a multiplier in his initial request for attorneys' fees after trial and a multiplier would not have been justified if he had.

Kenagy concedes that no request was made for a multiplier in the initial request for fees. (Verbatim Report of Proceedings, January 3, 2011, pages 6 – 7). It is unclear what has changed since that time, but after remand Kenagy did seek, in addition to fees in excess of what was original requested for the trial work, a multiplier of 1.5. Perhaps the reason the Kenagy did not ask for a multiplier in the first instance is because Kenagy was unaware that since 1983, when *Bowers v. Transamerica Title Insurance Co.*, 100 Wn.2d 581, 675 P.2d 193 (1983) was decided adopting the lodestar method, the lodestar principles have been the preferred method of calculating attorney fees. Not one of the memoranda filed by Kenagy in support of the initial request for attorneys' fees addressed the lodestar methodology for determining the reasonableness of the fee request.

At some point Kenagy apparently read some of the relevant case law and correctly pointed out that “**on rare instances**” a multiplier can be applied to the lodestar figure under two broad categories: the contingent nature of success, and the quality of work performed. (CP 590, lines 16-18). Kenagy apparently did not actually read the case law. Kenagy

argued that an upward adjustment to the lodestar figure was justified by the fact that the Kenagy was at real risk of not prevailing in this litigation.

In this case, the complexity of the issues presented, the risk of no recovery by the Plaintiffs, renders an upward adjustment to the lodestar calculation appropriate.

(CP 590, lines 19-20). The problem with that argument is that the “contingent nature of success” factor is directed to the lawyer’s risk of not getting paid, not the risk that a party may not prevail.

As the *Bowers* court stated 28 years ago:

[T]he risk factor should apply only where there is no fee agreement that assures the attorney of fees regardless of the outcome of the cases. Moreover, to the extent, if any, that the hourly rate underlying the lodestar fee comprehends an allowance for the contingent nature of the availability of fees, no further adjustment duplicating that allowance should be made. Finally, the risk factor should be applied only to time expended before recovery is assured; for example, time expended in obtaining the fees themselves should not be adjusted.

Bowers, supra 100 Wn.2d at 599. Here, the Kenagy’s attorneys did not take the case on a contingency fee. Kenagy’s attorney apparently had a fee agreement, and based on the invoices submitted in support of the attorney fee request, the attorneys were paid as the case progressed. (CP 1-275). A multiplier based on the “risk” factor would not have been appropriate.

Likewise, adjusting the lodestar figure on a quality of work basis would not have been justified. Here is what the Washington Supreme Court had to say on the “quality of work” basis for applying a multiplier to the lodestar figure:

The second basis on which the lodestar might be adjusted is to reflect the quality of work performed. **This is an extremely limited basis for adjustment, because in virtually every case the quality of work will be reflected in the reasonable hourly rate.** The quality adjustment is appropriate **only** when the representation is unusually good or bad, taking into account the level of skill normally expected of an attorney commanding the hourly rate used to compute the “lodestar.

Bowers, supra 100 Wn.2d at 599. Relying on *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 859 P.2d 1210 (1993), Kenagy contend in his memorandum supporting the request for a multiplier that “adjustments to the award are permitted to account for a number of subjective factors.” Kenagy then went on to quote from the *Fetzer* decision describing those factors:

the time expended, the difficulty of the questions involved, the skill required, customary charges of other attorneys, the amount involved, the benefit resulting to the client, the contingency or certainty in collecting the fee and the character of the employment.

(CP 590, lines 11-15). Again, Kenagy failed to read further. The *Fetzer* court went on to state:

However, many of these factors, such as the time

expended or the customary fees, are included in, and cannot be considered separately from, the initial lodestar determination. See, e.g., *Blum v. Stenson*, 465 U.S. 886, 898-900, 104 S.Ct. 1541, 1548-49, 79 L.Ed.2d 891 (1984) (novelty and complexity of issues, skill of attorney, and results obtained subsumed in determination of reasonable fee under lodestar method).

Fetzer, supra., 122 Wn.2d at 150. This is not one of those rare instances where a multiplier would be justified. Kenagy simply does not understand the “risk factor”. There was no risk to Kenagy’s attorneys that they would not get paid. There simply would have been no basis for the trial court to apply a multiplier to the lodestar figure the court ultimately decided.

D. Key is entitled to attorneys’ fees in responding to the cross-appeal.

In each of their complaints, Kenagy sought attorney’s fees against all the defendants under the attorney fee provision in the two relevant agreements. Once Kenagy alleged an entitlement to attorney’s fees from the defendants, that triggered defendants’ right to attorney fees whether or not they were parties to the agreements that contained the contractual attorney fee provision. RCW 4.84.330 provides:

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 whose favor final judgment is rendered.

Washington courts have consistently held that this statute applies to any action in which it is alleged that a party is liable on a contract, even if no contract exists. *See Herzog Aluminum v. General American*, 39 Wn. App. 188, 692 P.2d 867 (1984); *Western Stud Welding v. Omark Indus.*, 43 Wn. App. 293, 716 P.2d 959 (1986); *Labriola v Pollard Group*, 152 Wn.2d 828, 100 P.3d 791 (2004). Because plaintiffs have alleged a right to attorney fees from defendants, Key is entitled to an award of its attorney's fees incurred on this cross appeal.

III CONCLUSION

It is unclear how seriously Kenagy takes the cross appeal. Only 2 and ½ pages of the Response Brief of Respondents/Cross Appellants were devoted to the cross appeal. Kenagy did not make any assignments of errors in the brief on the cross appeal. No reference was made to any finding of fact made by the trial court on remand. Kenagy did not quote any findings of fact in the body of the brief nor did Kenagy append any