

AUG 09 2012

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

No. 307760

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

---

Keith B. Arndt, Trustee, Arndt Living Trust,

Respondent.

v.

Gregory Welch dba Custom Marble Granite Tiles and All Others,

Appellant,

---

**APPELLANT'S OPENING BRIEF**

---

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Attorneys for Appellant

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## INTRODUCTION

This case began when Keith B. Arndt (“Arndt”), trustee of the Arndt Living Trust, filed an unlawful detainer complaint against Gregory Welch (“Welch”) in May 2009 alleging breach of a commercial lease concerning real property in Murdock, Washington. The unlawful detainer action ended approximately seven months later when Arndt, ex parte, took a voluntary non-suit in December 2009. Welch was incarcerated in connection with matters unrelated to the lease in January 2009 and remained incarcerated at all relevant times during this action. Heather White (“Heather White”), Welch’s business assistant and girlfriend, managed his business after his incarceration until May 2009.

Welch operated a business from the leased premises. The business consisted of manufacturing and installing granite, tile and other stone products for residences and businesses. Thomas R. Nicolai (“Nicolai”) was a customer of Welch at the time the unlawful detainer action began. Nicolai’s unfinished granite products were located in the leased premises at the time of commencement of the unlawful detainer action.

Several days before filing his unlawful detainer complaint, Arndt changed the locks on the leased premises and refused access by Welch, Heather White and Nicolai for over seven months until shortly after the voluntary dismissal. In late August 2009, Nicolai first learned that a

default judgment had been entered against Welch and that Arndt was preparing for a sheriff's sale of all of Welch's business equipment and other non-exempt personal property located in the locked-out premises. Nicolai so informed Welch. Welch gave Nicolai a limited power of attorney to engage Washington counsel on his behalf in early September 2009.<sup>1</sup> In late September 2009, Nicolai engaged Washington attorney Ross R. Rakow ("Rakow") of Goldendale, Washington, to represent Welch. Rakow agreed to do so on the condition that Nicolai, under Rakow's direction and approval, handle all fact investigations, initial legal research and initial drafting of pleadings, as Rakow's existing client commitments would not permit him to perform these tasks under time constraints presented by the case. The sheriff's sale of Welch's property was scheduled for November 20, 2009. Motions were filed on Welch's behalf on November 3, 2009. On November 5, 2009, the Klickitat County Sheriff postponed the execution sale to December 20, 2009. On December 2, 2009, Arndt filed his responses to Welch's motions. On December 10, 2009, ex parte, Arndt requested and received a voluntary dismissal of the unlawful detainer action. Thereafter, the parties have engaged in litigation over Welch's entitlement to recover a prevailing

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<sup>1</sup> At that time Nicolai, an Oregon attorney, was not admitted to practice in Washington; Nicolai later became admitted on March 8, 2012.

party attorney fee and the reasonable amount thereof. Court hearings were held on August 30, 2011, and March 14, 2012. On March 14, 2012, the trial court entered a judgment awarding Welch attorney fees in the amount of \$2,000. Welch had requested fees in excess of \$26,000. This appeal ensued.

This case was filed in the Superior Court for Klickitat County. It involved no jury or live testimony by witnesses. Judge E. Thompson Reynolds heard all motions and issued all rulings through voluntary non-suit, other than in respect of the default judgment and the writ of restitution. Judge Reynolds, in his pro tem capacity, heard all motions after the voluntary non-suit and rendered judgment with respect to the attorney fee issue. Julie Vance (“Vance”), a Washington attorney located in Goldendale, Washington, represented Arndt from inception of the case through the voluntary non-suit until her withdrawal in February 2010. Carter Fjeld (“Fjeld”) of Yakima, Washington, appeared in the case as successor counsel to Arndt in June 2011.

#### **ASSIGNMENTS OF ERROR**

1. The trial court abused its discretion when it refused to award Welch prevailing party attorney fees incurred to enforce the attorney fee provision of the lease between tenant Welch and landlord Arndt.

2. The trial court abused its discretion when it refused to award Welch attorney fees attributable to necessary work performed by Nicolai that was delegated, supervised, and approved by Rakow, Welch's counsel of record.

3. The trial court abused its discretion by limiting to \$2,000 the amount of reasonable attorney fees awarded Welch under the facts and circumstances of this case.

### **ISSUES**

1. Where the lease between the parties contained an attorney fee provision entitling the prevailing party to reasonable attorney fees "at trial, on appeal and for post-judgment collection," did the trial court abuse its discretion in refusing to award Welch, the prevailing party, attorney fees incurred in connection with enforcement of such lease provision? (Assignment of Error 1)

2. Where Rakow was the sole attorney of record for Welch and delegated, supervised, and approved necessary work performed by Nicolai, an Oregon lawyer who was not then admitted to practice in Washington and did not appear of record for Welch, did the trial court abuse its discretion by excluding all time of Nicolai in determining the amount of reasonable attorney fees awarded Welch? (Assignment of Error 2)

3. Where the record shows this case involved complex issues, some novel, including issues relating to Arndt's unlawful commercial lockout and self-help eviction; noncompliance with statutory notice requirements for unlawful detainer actions; notice defects concerning show cause hearing, default judgment and writ of restitution; void or defective default judgment; showings required under CR 60 for setting aside the default judgment; showings required to postpone or avoid impending execution sale; effect of prior default judgment against tenant Welch on landlord Arndt's later voluntary non-suit; effect of voluntary non-suit on Welch's ability to recover attorney fees; and conversion of the unlawful detainer action to a civil action for breach of lease contract, did the trial court abuse its discretion in concluding in paragraph 1 of its judgment that this case "does not raise extraordinary legal issues" (CP at 305)? (Assignment of Error 3)

4. Where the record shows the pleadings and documents in this case were based on numerous unusual circumstances not commonly present in unlawful detainer actions, including such circumstances as Arndt denying Welch access to business records located in the leased premises from the time of lockout until after voluntary non-suit over seven months later; failures by Arndt to provide proper notice to Welch regarding show cause hearing, default judgment, landlord's damage

claims, and writ of restitution; time limitations imposed on Welch's defensive effort due to the impending sheriff's sale; and the incarceration status of Welch and restricted ability to communicate efficiently and timely with counsel in preparation of an effective defense, did the court abuse its discretion in ruling that this case was a "fairly straight forward Unlawful Detainer action" (RP at 25) and in concluding in paragraph 2 of its judgment that the "pleadings and documents submitted to the court on this case prior to the Order of Voluntary Nonsuit were not extraordinary" (CP at 305)? (Assignment of Error 3)

5. Where the record shows this case involved issues and circumstances and pleadings and documents going well beyond those typically present in garden-variety unlawful detainer actions, did the trial court abuse its discretion in concluding in paragraph 5 of its judgment that "to have the instant action set aside would not require extraordinary legal effort or investment of time" by Welch's counsel (CP at 305)? (Assignment of Error 3)

6. Where the trial court's application of the lodestar method, supplemented by the factors contained in RPC 1.5(a), is not supported by specific findings of fact and conclusions of law but instead materially relies unquestioningly on an opposing fee affidavit that on its face lacks credibility, was the trial court's limitation of Welch's reasonable attorney

fees to \$2,000 manifestly unreasonable and outside the range of acceptable choices? (Assignment of Error 3)

7. Is Welch entitled to an award of his fees and costs incurred in connection with this appeal?

### **STATEMENT OF THE CASE**

**General Background.** Arndt, as landlord, and Welch, as tenant, were parties to a commercial lease agreement dated December 17, 2007, for lease of space in a building in Murdock, Washington. CP at 105-107. The term of the lease began January 1, 2008, and pursuant to the first annual extension option was to expire on December 31, 2009. CP at 105. Welch operated a successful and growing business from the leased premises. CP at 88. Welch enjoyed a good social relationship with Arndt, in addition to their landlord-tenant relationship. CP at 88. In January 2009, Welch was incarcerated on charges unrelated to the subject matter of the instant case. CP at 87. Following Welch's incarceration, Heather White, Welch's girlfriend and business associate, oversaw the completion of pending customer projects and solicited and completed new projects. CP at 81, 84, 92. Following Welch's incarceration until May 2009, Arndt had a friendly social relationship with Heather White, meeting her on various occasions for morning coffee at his home and evening drinks in The Dalles and Hood River, Oregon. CP at 109, 111-112. He last met

Heather White on April 23, 2009, for drinks. CP at 112. In the days immediately following that meeting, Arndt telephoned Heather White several times, but none of his phone calls was returned. CP at 113.

**Arndt's Self-Help Eviction/Lockout.** On May 7, 2009, Arndt changed the locks on the doors to the Murdock premises leased to Welch. CP at 113. At the time of lockout, April 2009 rent had been paid (CP at 117), the 10-day grace period for payment of May 2009 rent had not expired (CP at 107), and no default notice of any kind had been received by Welch (CP at 89). On May 16, 2009, Arndt moved Welch's flatbed and cargo trailers from their long-standing outside location into the leased premises from which Welch and his agents were locked out. CP at 114. Four days later, on May 20, 2009, the Klickitat County Sheriff's Office notified Heather White that the trailers had been impounded to investigate illegal drug usage involving them. CP at 82. The investigation was requested by Arndt. CP at 114. Shortly thereafter, when Heather White sought access to the trailers, Arndt threatened trespass if she entered onto the leased premises. CP at 82. On May 26, 2009, Heather White mailed to Arndt's counsel Welch's signed and notarized Affidavit authorizing Heather White to enter the leased premises to remove his personal property and business equipment. CP at 83, 86.

Arndt claimed to have never received any such authorization by Welch as justification for denial of all access to the leased premises. CP at 96-97, 114. Welch's sole copy of the lease was kept at the leased premises along with his other business records. CP at 91.

**Unlawful Detainer Action.** Arndt filed this unlawful detainer action on May 20, 2009, 13 days after changing the locks. CP at 4-6. On May 7, 2009, Arndt mailed the 10-Day Notice of Default and the Eviction Summons to Welch to the address of the leased premises to which Welch was being denied access. CP at 1, 96. Welch never received the 10-Day Notice of Default. CP at 89. At the time of mailing to the leased premises, Arndt knew that Welch was incarcerated at the NORCOR facility in The Dalles, Oregon. CP at 84, 112. Arndt later effected personal service of the Eviction Summons and Complaint for Unlawful Detainer on Welch at NORCOR on May 22, 2009. CP at 89. Heather White filed Welch's handwritten responses to the complaint just before 5:00 p.m. on June 1, 2009, by personally obtaining the written responses from Welch at NORCOR and driving to Goldendale, Washington, for filing by hand delivery to the court clerk, who assisted Heather White with formal filing requirements. CP at 83. NORCOR's rules and restrictions regarding inmate communications adversely affected and limited Welch's

ability to respond to the complaint in a more timely and technically correct manner. CP at 89-90.

**Show Cause Hearing/Default Judgment.** Arndt effected personal service of his motion for a show cause hearing on Welch at NORCOR on June 9, 2009, less than 48 hours before the scheduled show cause hearing. CP at 90. At the show cause hearing on June 11, 2009, Arndt sought and received a ruling that Welch's handwritten responses to the unlawful detainer complaint be stricken and that a default judgment be entered against Welch. CP at 18. Subsequently, Welch was never served with notice of the default judgment or the writ of restitution, or provided any opportunity for hearing to oppose costs sought by Arndt and reflected in the default judgment. CP at 90. Nicolai first learned of the existence of the default judgment on or about August 27, 2009. CP at 119, 125. Nicolai immediately alerted Welch to the existence of the default judgment and on September 5, 2009, was given Welch's limited power of attorney to engage legal counsel on his behalf to defend against the default judgment. CP at 91, 94. The dollar amount of the default judgment consisted of a principal judgment amount of \$6,970 plus costs of \$5,914.43, plus attorney fees and interest. CP at 39-40.

**Arndt's Efforts to Execute on Default Judgment.** On September 16, 2009, Arndt obtained a Writ of Execution to enforce his

default judgment against all non-exempt personal property of Welch located in the premises leased from Arndt. CP at 41-42. The Sheriff's inventory of Welch's business property located in the leased premises consisted of over 132 listed items, including a flatbed trailer, a cargo trailer, a forklift, stone cutting tools, multiple sets of diamond-toothed cutting blades, heavy-duty tables for cutting and processing granite slabs, and related fabrication tools. CP at 149-153. Welch also kept clothing, furniture, and other personal-use items at the leased premises. CP at 150-151. Welch estimated the value of his business equipment and personal property to be in excess of \$100,000. CP at 280. The Sheriff's sale was set for November 20, 2009. CP at 145.

**Welch's Efforts to Postpone Sheriff's Sale, to Set Aside Default Judgment, and to Defend Against Unlawful Detainer Action.** On or about September 21, 2009, Nicolai engaged Rakow to represent Welch in defense against Arndt's unlawful detainer action and Arndt's default judgment. CP at 178. Rakow accepted the engagement on the condition that Nicolai handle all fact investigations, initial legal research, drafting of pleadings, and other time sensitive matters, subject to his review and approval, because his existing client commitments would not permit any other arrangement. CP at 211. Rakow agreed to handle all court appearances and other court-related matters because of his familiarity with

local and state court rules. Nicolai was not then admitted to practice in the state of Washington, but had been licensed in Oregon for over 35 years. CP at 177. On September 28, 2009, Nicolai sent a letter to Arndt's counsel notifying her that in his opinion the default judgment was void or subject to being set aside for other reasons and inviting her to call to discuss the matter. CP at 129. No response to this letter by or on behalf of Arndt was received. CP at 119. On October 23, 2009, Nicolai sent a second letter to Arndt's counsel again notifying her that the default judgment appeared void or subject to vacation and requesting a copy of the lease to the Murdock premises and certain other documents "to reduce litigation costs," including avoidance of a motion to compel their delivery. CP at 126-127. On November 3, 2009, Welch filed motions to dismiss the unlawful detainer action, to set aside the default order and vacate the default judgment, and for leave of court to file an answer, affirmative defenses, and counterclaims (CP at 49-60), and supporting legal memorandum (CP at 61-64). Upon being advised of Welch's November 3 motions, the Klickitat County Sheriff on November 5, 2009, obtained Arndt's consent to extend the sale date to a date following hearing on Welch's motions. CP at 136-137. On November 12, 2009, Arndt continued his efforts to obtain a Sheriff's sale by mailing copies of the Sheriff's Public Notice of Sale and a Property Inventory to Welch.

CP at 95. On December 2, 2009, Arndt filed his responses to Welch's motions. Arndt's pleading contained three pages of factual disputes and five pages of legal argument contesting all issues raised by Welch in his motions. CP at 96-107. On that same date Arndt filed his declaration in support of the responses. CP at 108-115. On December 7, 2009, Nicolai filed his declaration identifying falsehoods in the Arndt declaration of December 2. CP at 116-130.

**Arndt's Ex Parte Voluntary Dismissal.** On December 10, 2009, Arndt filed his ex parte motion for and received an order of voluntary non-suit. CP at 131-132. On December 11, 2009, the date set for hearing on Welch's motions, the trial court ruled that Arndt's unlawful detainer action had ended with the voluntary non-suit the day before, Welch's motions were not heard, and Welch's oral motion for time to file a motion for compensatory terms was granted. CP at 133. On December 14, 2009, the Klickitat County Sheriff filed its return of non-sale based on the Order of Voluntary Nonsuit. CP at 134-162. On December 17, 2009, Welch's agents gained access to the locked-out premises for the purpose of removing all of Welch's business tools and equipment and other items of personal property. CP at 178.

**The Attorney Fee Provision in the Lease.** The Lease contains an attorney fee provision. It reads:

In case suit or action is instituted to enforce compliance with any of the terms, covenants or conditions of this Lease, or to collect the rental which may become due hereunder, or any portion thereof, the losing party agrees to pay the prevailing party's reasonable attorney fees incurred throughout such proceeding, including at trial, on appeal, and for post-judgment collection.

CP at 107.

**Welch's Motion for Award of Attorney Fees as Prevailing**

**Party.** On January 6, 2010, Welch filed his motion for compensatory terms upon plaintiff's voluntary dismissal. CP at 163-166. On February 16, 2010, Vance filed a Notice of Withdrawal as counsel for Arndt. CP at 167. On May 4, 2011, Welch refiled his motion for compensatory terms (CP at 168-171), together with a supporting declaration requesting attorney fees of \$26,095 to the date of the motion (CP at 177-188). On June 16, 2011, Fjeld appeared as attorney for Arndt (CP at 189-190) and filed a memorandum arguing that all attorney fees requested by Welch should be denied or, in the alternative, should not exceed \$2,000 (CP at 197), relying on the Sworn Statement of Brad Mellotte ("Mellotte Statement") opining that an estimated amount of \$2,000 was a reasonable attorney fee in this case (CP at 203-204).

**August 30, 2011 Hearing on Welch's Motion for Attorney Fees.**

At the hearing on August 30, 2011, on Welch's motion for attorney fees,

the trial court orally ruled and later stated in its written judgment that Welch had timely filed his motion for attorney fees, that Welch was the prevailing party, that the case did not raise extraordinary legal issues, that the pleadings and documents filed in the case “prior to the Order of Voluntary Nonsuit” were not extraordinary, that Welch “would not require” extraordinary legal effort or time “to have the instant action set aside,” that the reasonable hourly rate in the case was \$200 per hour, that the reasonable number of hours that “would be expected” to be invested in the case on behalf of Welch was 10 hours, and that Welch be awarded attorney fees in the sum of \$2,000. CP at 304-306; RP at 25-27.

**March 14, 2012, Hearing on Welch’s Objections to Proposed Findings, on Motions to Supplement Record, to Clarify Record and for Proposed Findings of Fact and Conclusions of Law.** On December 19, 2011, Welch filed his objections to Arndt’s proposed findings together with motions to clarify the record of the August 30, 2011, hearing, to supplement the record of that hearing, and for proposed specific findings of fact and conclusions of law. CP at 238-278. On March 14, 2012, at the hearing on Welch’s objections and motions, the trial court denied all of Welch’s objections and proposed specific findings and conclusions and reaffirmed its oral decision at the August 30, 2011, hearing. RP at 49-50.

## STANDARD OF REVIEW

Trial court attorney fee awards are discretionary decisions that are subject to appellate review for an abuse of discretion. *Allard v. First Interstate Bank of Wash.*, 112 Wn.2d 145, 148, 768 P.2d 998, 773 P.2d 420 (1989); *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998) (citing *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 65, 738 P.2d 665 (1987)).

In *Ryan v. State*, 112 Wn. App. 896, 899-900, 51 P.3d 175 (2002), the court defined an abuse of discretion as follows:

A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. A decision based on a misapplication of law rests on untenable grounds.

(Internal quotation marks, citation, and footnotes omitted.)

Where the trial court bases its decision only on documentary evidence in the record, an appellate court may review such decision de novo and substitute its own judgment for the judgment of the trial court. *Jenkins v. Snohomish Cnty. PUD*, 105 Wn.2d 99, 102, 713 P.2d 79 (1986);

*Confederated Tribes v. Johnson*, 135 Wn.2d 734, 744, 958 P.2d 260 (1998) (de novo appellate review where trial court considered only documentary evidence and legal argument). De novo review in such circumstances is appropriate for the reason that the appellate court is in as good a position as the trial court to make the determination. *Am. Civil Liberties Union of Wash. v. Blaine Sch. Dist. No. 503*, 95 Wn. App. 106, 121, 975 P.2d 536 (1999).

Questions of law are reviewed de novo. *Skamania Cnty. v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 42, 26 P.3d 241 (2001). Construction of a contract is a question of law. *Noble v. Ogborn*, 43 Wn. App. 387, 390, 717 P.2d 285, *review denied*, 106 Wn.2d 1004 (1986). Interpretation of a court rule is a matter of law requiring de novo review. *Nevers v. Fireside*, 133 Wn.2d 804, 947 P.2d 721 (1997).

## ARGUMENT

- A. ***The trial court abused its discretion when it refused to award Welch attorney fees for enforcement of the lease provision authorizing recovery of reasonable attorney fees by the prevailing party.***

The attorney fee provision of the lease states:

In case suit or action is instituted to enforce compliance with any of the terms, covenants or conditions of this lease, or to collect the rental which may become due hereunder, or any portion thereof, the losing party agrees to pay the prevailing party's reasonable attorney fees incurred throughout such

proceeding, including at trial, on appeal, and for post judgment collection.

CP at 107.

This lease provision does not provide a basis for distinguishing between attorney fees incurred by Welch in defending against the unlawful detainer claims and default judgment before Arndt's voluntary non-suit on December 11, 2009, and fees incurred thereafter in seeking enforcement of the attorney fee provision of the lease. Fees for enforcing an attorney fee provision in a contract are recoverable. *Fisher Prop., Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 379, 798 P.2d 799 (1990).

At the conclusion of the August 30, 2010, hearing, the trial court awarded \$2,000 in attorney fees to Welch as prevailing party in the unlawful detainer action to the time of voluntary non-suit (RP at 27), but refused to award Welch attorney fees incurred after the voluntary non-suit in connection with efforts to enforce the attorney fee provision of the lease (RP at 28). The trial court gave no analysis or reason for its refusal. At the conclusion of the March 14, 2012, hearing, the trial court reaffirmed its position by stating merely that its earlier decision would not be changed. RP at 50.

The trial court abuses its discretion when the factual basis of its decision is unsupported by the record or when it applies the wrong legal

standard. *Ryan*, 112 Wn. App. at 899-900. Here, the trial court's decision to refuse to award fees to enforce the attorney fee provision of the lease is not supported by factual findings in the record and also is contrary to the plain language of the lease provision. The trial court abused its discretion. This Court should review de novo the trial court's decision and determine that Welch is entitled to recover reasonable attorney fees incurred to enforce the attorney fee provision of the lease after the voluntary non-suit on December 11, 2009.

***B. The trial court abused its discretion when it refused to award Welch attorney fees for work performed by Nicolai that Rakow delegated, supervised, and approved.***

In the trial court proceeding, Rakow was Welch's sole counsel of record. Though not admitted to practice in Washington, Oregon attorney Nicolai assisted Rakow pursuant to an agreement between them. RP at 6-7; CP at 211. Rakow agreed to represent Welch on the condition that Nicolai perform certain aspects of legal work essential to the case that Rakow would not be able to perform himself, but would supervise and approve. CP at 211. This condition arose from the number and complexity of issues in the case and time constraints presented by the case that conflicted with Rakow's existing client commitments. CP at 211; RP at 17. This arrangement was intended to create efficiency by virtue of

Rakow's familiarity with local court rules and procedures and with Nicolai's familiarity with the facts of the case.

Both before and after Arndt's taking a voluntary non-suit, Rakow handled most communications with Arndt's counsel; made court appearances; delegated, supervised, and approved legal research and drafting of pleadings performed by Nicolai; and conferred with Nicolai on legal issues and strategy. Before the voluntary non-suit Rakow also handled communications with the Klickitat County Sheriff regarding postponement of the impending Sheriff's sale. CP at 288-301.

Nicolai assisted Rakow in the performance of necessary work that Rakow would otherwise have had to do himself. Nicolai's principal duties included investigating facts relating to the approximately four-month period between Arndt's lockout in May 2009 and Rakow becoming counsel for Welch in September 2009, preparing relevant declarations of Welch and Heather White, performing legal research, drafting pleadings, and generally coordinating with Rakow in respect of legal issues and strategy, both before and after Arndt's voluntary non-suit in December 2009. CP at 288-298. Rakow estimated that he performed approximately 20% and Nicolai performed 80% of the work required to represent Welch. RP at 6. Rakow stated that Nicolai's assistance was necessary. RP at 17.

RPC 5.5(c) addresses circumstances under which an attorney not admitted to practice in Washington may appropriately assist or participate in litigation in Washington courts. RPC 5.5(c)(1) provides:

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter[.]

At the August 30, 2011, hearing, the trial court on three occasions took time to observe that Nicolai either had not been admitted to practice in Washington or had not sought special admission available under applicable rules. RP at 23-24, 26. The trial court did not discuss any public policy or other reason why the Rakow-Nicolai working relationship based on RPC 5.5(c)(1) should not be accorded the same respect as the alternative mechanism mentioned by the trial court. Rakow had “actively participated” in the case consistent with his responsibilities as attorney of record for Welch. Nicolai was an attorney licensed to practice in Oregon for over 35 years. CP at 177. The work performed by Nicolai was necessary for proper defense of Welch against the unlawful detainer action and default judgment and for enforcement of the attorney fee provision of the lease. The arrangement between Rakow and Nicolai satisfied the requirements of RPC 5.5(c)(1). There is nothing in that rule that prohibits

or even suggests limitations on recovery of attorney fees in Washington litigation for work performed by attorneys unlicensed in Washington but otherwise meeting the requirements of RPC 5.5(c)(1).

The trial court refused to award Welch attorney fees for work delegated to and performed by Nicolai, under Rakow's direction and supervision, because Nicolai had not appeared as counsel of record for Welch. The trial court erred in application of the correct legal standard and abused its discretion by denying attorney fees on an untenable ground. *Ryan*, 112 Wn. App. at 899-900; *Council House, Inc. v. Jeanne Hawk*, 136 Wn. App. 153, 147 P.3d 1305 (2006) (where the Residential Landlord-Tenant Act does not prohibit fees to pro bono attorneys, denial of fees to tenant's attorneys acting pro bono is untenable because it is an error of law and constitutes an abuse of discretion). This Court should review de novo the trial court's decision and determine that attorney fees for Nicolai's time are recoverable under Washington law governing the award of reasonable attorney fees.

***C. The trial court abused its discretion by limiting to \$2,000 the amount of reasonable attorney fees awarded Welch under the facts and circumstances of this case.***

***1. The trial court's determination that this case involved no extraordinary legal issues is manifestly unreasonable and unsupported by the record.***

Paragraph number 1 of the trial court's judgment reads:

1. The instant case does not raise extraordinary legal issues.

CP at 310.

At the August 30, 2010 hearing, the trial court stated that “[t]his [case] started out as a fairly routine Unlawful Detainer action . . .” (RP at 23) and that “it’s a fairly straight forward Unlawful Detainer action” (RP at 25).

Contrary to the court’s statements, the record shows this case was neither “routine” nor “straight forward” nor devoid of extraordinary legal issues. Rather, the record shows this case involved complex issues not commonly present in routine unlawful detainer actions. The extraordinary issues here included (a) the legal effect of Arndt’s unlawful lockout on Welch’s lease obligations, (b) the legal effect of Arndt’s giving less than 48 hours’ notice to Welch in respect of the show cause hearing, (c) due process issues relating to the trial court’s ruling that Welch had not appeared in the case, (d) the legal effect of such ruling on the due process sufficiency of the default judgment against Welch, (e) the legal effect of Arndt’s failure to provide notice to Welch of the default judgment and of the writ of restitution upon a lawful Sheriff’s sale of Welch’s property, (f) “good cause” and “due diligence” issues under CR 55 relating to setting aside the default judgment given the facts and circumstances of the

case, including those related to Welch's incarceration status, restricted ability to communicate efficiently with the outside world and the passage of approximately four months from Arndt's filing of the unlawful detainer action in May 2009 to Welch's engagement of legal counsel in September 2009, and (g) issues concerning void judgment, mistake, excusable neglect, irregularity, fraudulent misrepresentation and misconduct by Arndt, and other issues under CR 60 relating to vacation of the default judgment. The foregoing issues were materially related to developing a compelling legal basis to prevent a Sheriff's sale of Welch's property based on the default judgment. They were at the core of the great bulk of legal work on behalf of Welch up to the time of Arndt's voluntary non-suit.

Arndt's ex parte taking of a voluntary non-suit on December 10, 2009, introduced additional extraordinary issues. Among those were issues relating to: (a) legal authority for and effect of Arndt's voluntary non-suit after entry of a default judgment in his favor, (b) the effect of Arndt's voluntary dismissal on Welch's ability to recover attorney fees under the lease or otherwise, (c) conversion of the unlawful detainer action into an ordinary civil suit due to passage of time and absence or mootness of possession claims, and (d) collateral estoppel risks regarding mandatory counterclaims if conversion had occurred.

The trial court's determination that this case involved no extraordinary legal issues is manifestly unreasonable. The trial court's determination was based solely on documentary evidence contained in the record. Under *Jenkins*, 105 Wn.2d 99, this Court has authority to conduct a de novo review of the trial court's determination. This Court should determine that this case involved extraordinary legal issues that must be considered in determining the amount of reasonable attorney fees to be awarded Welch.

2. **The trial court's determination that this case involved no extraordinary pleadings and documents is manifestly unreasonable and unsupported by the record.**

Paragraph number 2 of the trial court's judgment reads:

2. The pleadings and documents submitted to the court on this case prior to the Order of Voluntary Nonsuit were not extraordinary.

CP at 305.

Contrary to the trial court's determination, the record shows this case involved pleadings and documents that derived extraordinary character from the complex issues and unusual circumstances they addressed.

Among the facts and circumstances pertaining to the period before Arndt's voluntary non-suit that differentiate this case from a run-of-the-mill unlawful detainer case are the following: Arndt's unlawful lockout of

Welch from the leased premises and obstructive conduct for nearly seven months running from early May 2009 through Arndt's taking a voluntary non-suit in December 2009 (CP at 119); during this extended period, Arndt refused to grant Welch and his agents access to the leased premises even to retrieve business records needed to defend against Arndt's claims (CP at 119); Arndt gave defective notices, and failed to give other required notices, to Welch in connection with obtaining and enforcing the default judgment (CP at 84, 118); Arndt ignored written notices of defective default judgment and proposals to confer and cooperate in an effort to reduce litigation costs (CP at 119, 126-129), but instead engaged in continuing efforts to obtain a Sheriff's sale of Welch's property to satisfy the default judgment (CP at 95). These actions and inactions by Arndt substantially increased the amount of fees Welch was forced to incur.

Other unusual facts and circumstances before the voluntary non-suit contributed significantly to the amount of fees incurred by Welch. At the time Rakow became legal counsel for Welch in late September 2009, the sheriff's sale was scheduled for November 20, 2009 (CP at 145), leaving a compressed timeframe of at most seven weeks to interview Welch and Heather White, investigate facts, analyze legal issues, draft pleadings, and take other actions to oppose the Sheriff's sale in order to prevent an unjustified and catastrophic loss of Welch's business

equipment and future livelihood. Under ordinary circumstances, these steps would require significant time to complete. Here, they were made more difficult due to passage of up to four months since material events had occurred of which both Heather White and Welch were uninformed, Heather White's relocation out of the area to find employment (CP at 84), and Welch having not received notices while incarcerated (CP at 89). Additionally, communication with Welch was inefficient and time-consuming due to correctional institution restrictions on inmate communications. CP at 87. Through concerted effort, these obstacles were overcome and on November 3, 2009, Welch filed his Motion to Dismiss Unlawful Detainer Action, Motion to Set Aside Default Order and Vacate Default Judgment, and Motion for Leave to File an Answer, Affirmative Defenses and Counterclaims, together with supporting legal memoranda and declarations. CP at 46-94. On December 2, 2009, Arndt filed his 12-page opposition to Welch's motions, contesting all issues. CP at 96-107. On December 10, 2009, the day before the scheduled hearing on Welch's motions, Arndt, ex parte and without notice, took a voluntary non-suit. CP at 131-132.

By its terms, Paragraph number 2 of the trial court's judgment concerns only pleadings and documents submitted "prior to the Order of Voluntary Nonsuit." CP at 305. However, pleadings and documents

submitted to the trial court after the Order of Voluntary Nonsuit were also extraordinary. They addressed additional complex issues, identified in subsection C.1 above, raised by Arndt's voluntary non-suit in the context of an existing default judgment. These pleadings included motions and supporting legal memoranda and declarations for recovery of attorney fees, to clarify the record, to supplement the record with additional analysis of attorney fees, and to adopt proposed specific findings of fact and conclusions of law. Together, the pleadings and documents addressed issues of such uncommon—some novel—character, circumstance and complexity that they cannot reasonably be regarded as not extraordinary.

The trial court's determination that the pleadings and documents submitted prior to Arndt's taking a voluntary non-suit were not extraordinary is manifestly unreasonable. The trial court made no specific factual findings to support its determination, while the record strongly supports a contrary determination. For these reasons, the trial court abused its discretion. *Ryan*, 112 Wn. App. at 899-900. Since the trial court relied only on documentary evidence in the record, this Court may review the trial court's determination de novo. *Jenkins*, 105 Wn.2d at 102. Welch asks this Court to find that this case involved extraordinary pleadings and documents both before and after the voluntary non-suit that

must be taken into account in determining a reasonable attorney fee award in his favor.

3. **The trial court's determination that the defense of Welch in this case did not require extraordinary legal effort or investment of time is manifestly unreasonable and unsupported by the record.**

Paragraph number 5 of the trial court's judgment reads:

5. The amount of time and effort needed by defendant to have the instant action set aside would not require extraordinary legal effort or investment of time.

CP at 305.

The preceding discussion in subsections C.1 and C.2 makes self-evident that this case required extraordinary effort and time on behalf of Welch. For reasons and analysis paralleling those discussed in the immediately preceding subsections, Welch contends that the trial court abused its discretion in determining otherwise. Relying on the *Ryan* and *Jenkins* cases cited above, Welch asks this Court to exercise de novo review and find that extraordinary legal effort and time investment were necessary properly to represent his interests in this case and that such extraordinary effort and time investment, both before and after Arndt's voluntary dismissal, must be taken into account in determining the amount of reasonable attorney fees to be awarded to him. Not to do so would enable a party, after putting the other party to extraordinary effort and

expense, to evade responsibility for fees that were caused by such party's own conduct. The record shows that the effort and time required to defend Welch against the unlawful detainer action and the default judgment, and then to enforce the attorney fee provision of the lease, were largely attributable to Arndt's own obstructive and stonewalling conduct before the voluntary dismissal and unreasonable opposition thereafter to a fee award reasonably related to legal efforts made necessary by Arndt's pre-dismissal conduct.

4. **The trial court's application of the lodestar method, as supplemented by the factors contained in RPC 1.5(a), to limit Welch's attorney fees to \$2,000 is manifestly unreasonable as being outside the range of acceptable choices and is unsupported by the record.**

Pursuant to Washington case law, the so-called lodestar method is used to determine reasonable attorney fees. *Scott Fetzer Co. v. Weeks*, 114 Wn.2d 109, 786 P.2d 265 (1990).

In footnote 20 in *Mahler*, 135 Wn.2d at 433, the Washington Supreme Court stated:

This [lodestar] methodology can be supplemented by an analysis of the factors set forth in RPC 1.5(a) which guide members of the Bar as to the reasonableness of a fee. *Allard v. First Interstate Bank of Wash.*, 112 Wn.2d 145, 768 P.2d 998, 773 P.2d 420 (1989). RPC 1.5(a) states:

A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) The time and labor required, the novelty and difficulty of the questions involved, the skill requisite to perform the legal service properly and the terms of the fee agreement between the lawyer and client;
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) The fee customarily charged in the locality for similar legal services;
- (4) The amount involved in the matter on which legal services are rendered and the results obtained;
- (5) The time limitations imposed by the client or by the circumstances;
- (6) The nature and length of the professional relationship with the client;
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) Whether the fee [is fixed or contingent].

Several of these factors are discussed in the following paragraphs.

**Time, Labor, Difficulty of Questions.** Preceding sections have already discussed the complexity of issues in this case, the novelty of some issues, the extraordinary character of pleadings and documents required to address these issues, and the required time, effort, skill and diligence to represent Welch and to avoid an unjust and catastrophic sale of his business equipment. The time and labor are described in detail in the billing records and analysis submitted in support of Welch's attorney

fee request. CP at 288-302. The trial court identified no basis for discounting or excluding any hours due to duplicative or other unproductive work. The division of work effort between Rakow and Nicolai was designed to avoid duplicative work justifying discounting. Arndt argues that no award of fees should be made for work on counterclaims in an unlawful detainer proceeding. RP at 40, 47. This argument ignores (i) that the requirements for vacating a default judgment under CR 60 include a requirement that at least a prima facie showing be made of defenses and (ii) that Welch's affirmative defenses were so factually intertwined with his counterclaims that the incremental time needed to state counterclaims in the pleadings was not material. Moreover, Welch contended that the amount of reasonable attorney fees should be determined as if this case had been converted to an ordinary civil lawsuit for breach of the lease contract. RP at 33-35. The issue of right to possession of the leased premises had long since ceased to be a live issue in the case due to passage of nearly seven months between Arndt's filing of the unlawful detainer complaint and his voluntary non-suit, together with the unique fact that an intervening default judgment had been entered. Also, the lease term was about to expire at the time of the voluntary non-suit in December 2009. Welch was not seeking to enforce a right to possession and, in any event, Arndt had already taken physical

possession by lockout before filing his complaint. In such circumstances, this case arguably should have been deemed converted and any time spent on counterclaims should now be deemed properly included in Welch's attorney fee request as prevailing party. *Munden v. Hazelrigg*, 105 Wn.2d 39, 45-46, 711 P.2d 295 (1985) ("Where the right to possession ceases to be at issue at any time between the commencement of an unlawful detainer action and trial of that action, the proceeding may be converted into an ordinary civil suit for damages, and the parties may then properly assert any cross claims, counterclaims, and affirmative defenses.").

**Skill, Effort.** The devastating consequences to Welch if Arndt obtained a Sheriff's sale of Welch's business property dictated an exceptionally high level of diligence and time commitment to represent Welch in the narrow 7-week window imposed by the impending Sheriff's sale. Arndt's stonewalling conduct magnified the required effort.

**Hourly Rate, Customary Fee.** An hourly rate of \$200 is undisputed as a reasonable local rate for similar legal services. However, the reliability of the Mellotte Statement to support an overall fee award of \$2,000 is strongly disputed. The Mellotte Statement is ambiguous and unspecific regarding both the scope of Mellotte's review of pleadings in the case (review limited to unspecified "pertinent parts of the file" (CP at 203)) and the extent of his understanding of the legal issues,

pleadings, and circumstances present in the case. Evaluated against the pleadings and documents in the record as of the date of the Mellotte Statement, his estimate of “approximately ten hours of legal work” (CP at 204) to represent Welch demonstrates that his understanding of the scope and complexity of the case was woefully deficient. A trial court must not “unquestioningly” accept attorney declarations in support of attorney fee requests, but rather must actively involve itself in an examination of the time records as a basis for its determination of the reasonableness of fees requested. *Mahler*, 135 Wn.2d at 434-35 (citing *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 744, 733 P.2d 208 (1987)). The rationale for trial courts to take an active role in determining what constitutes reasonable fees is to develop an adequate record on review. *Id.* at 435. The rationale should apply equally to affidavits in opposition to fee awards as well as affidavits in support. Here, the trial court did not take an active role in questioning the fee affidavit of Mellotte. The court did not inquire of Arndt’s counsel at either of the two hearings to make more specific the generalized and ambiguous statements made in the Mellotte Statement. It did not inquire as to the specific pleadings and documents given to Mellotte for review, the amount of time Mellotte spent reviewing them, the amount paid for the review, whether Mellotte asked questions or sought explanations or otherwise communicated with Arndt’s counsel in a

manner that would illuminate the depth and breadth of his review and of his understanding of the procedural and substantive issues in the case—and thus the reliability of his opinion as to the scope of work required to be performed on behalf of Welch. In fact, the presence of numerous, not run-of-the-mill, issues, as discussed in subsection C.1 above, casts substantial doubt on the reliability of Mellotte’s estimate that he would have required only 10 hours to represent Welch; one need look only at Arndt’s 12-page response to Welch’s motions, contesting all issues raised by Welch, to know that 10 hours grossly understated reality. Also, the trial court refused Welch’s offer to have the court question Nicolai regarding his time reports already in the record. RP at 20. The trial court improperly put itself in a position of being unable to make specific findings or conclusions about the competing affidavits in terms of completeness, accuracy, credibility, and bias. *Am. Civil Liberties Union of Wash*, 95 Wn. App. at 119-20.

**Amount in Controversy, Results.** The trial court believed there existed a disparity between the amount of Arndt’s default judgment of \$12,884.43 and Welch’s requested attorney fees in the amount of \$26,095 (for legal work through May 4, 2011 (CP at 178)). The trial court said:

But I certainly don’t think there was a – this is a twenty-six thousand dollar case, \* \* \*

The fact that there was a fairly small amount in controversy, the amount of work that appears to have been done in this case on the file – \* \* \*.

RP at 26.

Just because the dollar amount at stake in a civil case is small does not mean a large attorney fee award is unreasonable. *Mahler*, 135 Wn.2d at 433. More importantly, the trial court failed to recognize that for Welch the amount in controversy exceeded \$100,000 in that, had Arndt obtained a Sheriff's sale of Welch's business property, such sale would typically have yielded but pennies on the dollar, likely requiring the sale of all of Welch's business equipment to satisfy the default judgment. Had a Sheriff's sale occurred, the consequences to Welch would have been devastating: he would have had no business equipment with which to reestablish his business, and his future livelihood would have been severely and permanently impaired. Counsel's efforts on behalf of Welch produced an immensely beneficial result for him.

**Time Limitations, Circumstances.** Time limitations imposed by the Sheriff's sale, as has been previously discussed, left a narrow seven-week window to prevent Welch's business equipment from being sold. The circumstances of the case called for building the strongest legal defense in the time available. The number of court appearances in this seven-week period is not a meaningful measure of the legal work required

on behalf of Welch. In this regard, the trial court erred when stating in its oral ruling at the conclusion of the August 30, 2011 hearing:

But I certainly don't think there was a – this is a twenty-six thousand dollar case, especially the fact that there was one court appearance on behalf of Mr. Welch – not – not counting today – two if you count today.

RP at 26. Counsel's concerted efforts to produce compelling pleadings and documents on behalf of Welch proved successful, notwithstanding severe time constraints and adverse circumstances. Shortly after filing of Welch's motion to vacate the default judgment and related motions and supporting documents described herein, the Klickitat County Sheriff was persuaded to postpone the Sheriff's sale to a time following hearing on those motions. This was followed by Arndt's filing for voluntary non-suit the day before hearing on those motions, ex parte and without notice.

**Reasonable Hours.** Pre-dismissal attorney fees relating to defense against Arndt's claims and to set aside or vacate the default judgment amounted to \$17,575; fees incurred by Welch after the voluntary non-suit through the August 30, 2011, hearing to enforce the lease attorney fee provision amounted to \$12,760 (provided that \$3,300 thereof related to removal of Welch's property from the leased premises in December 2009); both fee amounts are calculated on the basis of 87.9 hours before voluntary non-suit and 63.8 hours after voluntary non-suit through the first

hearing on August 30, 2011, and an undisputed hourly rate of \$200. CP at 288-301. The trial court identified no specific hours in the detailed attorney fee statements provided by Rakow and Nicolai or in the breakdown analysis appearing in the record warranting adjustment in the fee request.

At the conclusion of the August 30, 2011 hearing, the trial court said:

I have reviewed Mr. Nicolai's attorney fee statement and I'm not disputing that maybe Mr. Nicolai spent that time on the case.

However I guess the court has to consider whether that was a reasonable amount of time to spend on this case. And I've also considered the Affidavit that was filed by the Arndt Trust, the Affidavit of Mr. Mallot [sic: Mellotte], an attorney in Yakima who is experienced in matters such as this and his opinion that . . . the attorney fees should have been somewhere in the neighborhood of \$2,000.

After reviewing Mr. Rakow's statement, Mr. Rakow again being the only attorney of record in this case for the – Mr. Welch, I find his fees to be reasonable – very reasonable. Actually Mr. Rakow's fees come under two thousand dollars. . . .

\* \* \* \*

I do find that \$2,000 is a reasonable amount for attorney fees and I will award \$2,000 as attorney fees to Mr. Welch.

RP at 25-27.

The record before the trial court at the time of the August 30, 2011, hearing shows that Rakow's fees were actually \$2,455 through the voluntary non-suit and that Rakow billed additional fees in the amount of \$800 for time spent between the voluntary non-suit on December 11, 2009, and the August 30, 2011 hearing. CP at 289-290.

The trial court erred in not explaining through specific findings and conclusions why it was discounting or disregarding Rakow's estimate that his time constituted approximately 20% of the time necessary for the case and Nicolai's time constituted approximately 80% or whether the trial court was finding all of Nicolai's time as unnecessary or unreasonable. Nor did the trial court explain or make findings as to why the court was treating the case as a relatively straightforward unlawful detainer action warranting no more than \$2,000 for an attorney fee award in the face of overwhelming contrary evidence in the record before it.

A trial court is required to make an adequate record of its fee determination that is supported by findings of fact and conclusions of law. *Mahler*, 135 Wn.2d at 435. Welch filed a motion proposing specific findings of fact and conclusions of law for the trial court's consideration. CP at 242-248. However, the trial court elected at the March 14, 2012 hearing not to adopt any of Welch's proposed findings and conclusions, but instead reaffirmed its original opinion at the August 30, 2011 hearing.

RP at 50. Welch contends that the generalized statements by the trial court at the August 30, 2011 hearing (RP at 25-27), which formed the basis for the trial court's statements in its written judgment that the case did not involve extraordinary issues, pleadings, and documents, or legal effort, do not rise to the required level of articulable grounds to support its decision. *Mahler*, 135 Wn.2d at 435. Moreover, the findings or conclusions given at the August 30, 2011, hearing by the trial court are untenable and outside the range of acceptable choices based on the record. *Ryan*, 112 Wn. App. at 899-900.

Based on the foregoing, Welch contends that the trial court abused its discretion in limiting to \$2,000 the amount of reasonable attorney fees awarded to Welch under the facts and circumstances of this case. Since the trial court relied only on documentary evidence and legal argument contained in the record, this Court is in as good a position as the trial court to determine the amount of reasonable attorney fees to be awarded Welch. Welch requests this Court to review de novo the determinations of the trial court under the applicable standards of *Fetzer*, 114 Wn.2d 109, and RPC 1.5(a) and to determine the amount of reasonable attorney fees to be awarded Welch with respect to legal services rendered on his behalf both before and after Arndt's voluntary non-suit.

**D. Welch requests that attorney fees and costs be awarded on this appeal.**

The lease agreement between Arndt and Welch expressly allows attorney fees to be awarded to the prevailing party on appeal. The attorney fee provision in the lease states:

In case suit or action is instituted to enforce compliance with any of the terms, covenants or conditions of this lease, or to collect the rental which may become due hereunder, or any portion thereof, the losing party agrees to pay the prevailing party's reasonable attorney fees incurred throughout such proceeding, including at trial, on appeal, and for post-judgment collection.

CP at 107.

Attorney fees may be awarded to the prevailing party if such fees are provided by agreement. *In re Impoundment of Chevrolet Truck*, 148 Wn.2d 145, 160, 60 P.3d 53 (2002); *Landberg v. Carlson*, 108 Wn. App. 749, 758, 33 P.3d 406 (2001) ("If such fees are allowable at trial, the prevailing party may recover fees on appeal as well."), *review denied*, 146 Wn.2d 1008 (2002); RAP 18.1 (fees allowed on appeal if provided in contract). Accordingly, Welch requests an award of his attorney fees and expenses incurred on this appeal.

**CONCLUSION**

The attorney fees requested by Welch are reasonable, considering the totality of the facts and circumstances of this case. The primary cause

for attorney fees to reach the level they did is Arndt's own conduct, beginning with his unlawful lockout and continuing thereafter with his stonewalling tactics of ignoring notices of defective default judgment and ignoring requests to confer in an effort to reduce litigation costs—until the day before the hearing on Welch's motions, when he abruptly requested and received a voluntary non-suit, ex parte and without notice. Thereafter, notwithstanding having put Welch to great effort and expense to defend against the unlawful detainer action, default judgment, and Sheriff's sale, Arndt strenuously and unreasonably argued that attorney fees requested by Welch "should be denied in full" (CP at 197)—even while admitting that "there were sufficient errors in the pleadings to set [the default judgment] aside" (RP at 21) and implicitly acknowledging that Welch was forced to unnecessary legal expense.<sup>2</sup> In the interest of efficiently ending the attorney fee dispute in this case, Welch asks this Court to review the record de novo and to make an independent determination of the amount

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<sup>2</sup> Counsel for Arndt has suggested that the amount of attorney fees incurred in this case is somehow attributable to personal animosity toward Arndt, when he asserted: "This small case—out of basically some personal animosity—has been blown way out of proportion". RP at 46. While it may be true that "personal animosity" played a role in the amount of attorney fees incurred by Welch in this case, it also may be true that the question of personal animosity could be answered with greater certainty and accuracy by inquiring into what caused Arndt's relationship with Heather White to go in two or three weeks from morning coffee and evening drinks to lockout to threats of trespass (CP at 109, 111-112, 81-82) and why Arndt apparently was willing to destroy Welch's business and sell all of his tools and equipment for such a "small case." Heather White has characterized Arndt's actions as "vindictive." CP at 84.

of reasonable attorney fees to be awarded to him. Welch requests attorney fees at the trial court level (a) in the amount of \$30,335 for legal work by Rakow and Nicolai through the August 30, 2011 hearing (CP at 288-301) plus (b) a voluntarily reduced amount of \$880 for legal work by Rakow after that hearing date to review and approve pleadings related to and give oral argument at the March 14, 2012 hearing. Welch submits that this Court has sufficient information, based on the record in this matter, and experience in attorney fee matters generally to determine the reasonableness of Welch's two-part fee request, notwithstanding that the voluntarily reduced amount under clause (b) is not based on direct information in the record. This approach would avoid any need to remand to the trial court. However, the aforesaid voluntary reduction of Welch's attorney fee request under clause (b) is not to apply if remand is considered necessary for any reason.

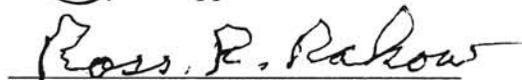
Welch also requests an award of his attorney fees and costs incurred in connection with this appeal.

DATED: August 8, 2012.

Respectfully submitted,



Thomas R. Nicolai, WSBA #44669  
Attorney for Appellant



Ross R. Rakow, WSBA #4879  
Attorney for Appellant

CERTIFICATE OF SERVICE AND FILING

I, June E. Hall, am a legal secretary for the law firm of Stoel Rives LLP, 900 SW Fifth Avenue, Suite 2600, Portland, Oregon 97204.

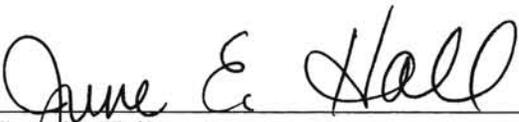
I hereby certify that on August 8, 2012, I caused the foregoing *Appellant's Opening Brief* and the accompanying *Certificate of Service and Filing* to be filed with the Court of Appeals of the State of Washington, Division III (an original and one copy) by overnight courier; and on this same date I also caused a true and correct copy of the same documents to be served on the persons listed below by mailing via U.S. First Class Mail, postage prepaid:

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

Executed this 8<sup>th</sup> day of August, 2012, at Portland, Oregon.

  
\_\_\_\_\_  
June E. Hall