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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

No. 330371

IN THE COURT OF APPEALS
STATE OF WASHINGTON

DEBORAH BURKSFIELD and LSL PROPERTIES, LLC,
Plaintiffs/Appellants,

v.

COLUMBIA ASPHALT & GRAVEL, INC., COLUMBIA READY-MIX, INC., DELETA SALI, GAYLE SALI, LARRY SALI and STEVEN SALI,
Defendants/Respondents.

RESPONDENTS' JOINT REPLY BRIEF

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I. INTRODUCTION

Plaintiffs' reply brief relies on rhetoric rather than substance or authority in an apparent attempt to deflect the Court's focus from the deficiencies of their position. Substantively, Plaintiffs' reply brief fails to dispute the analysis and argument provided by the Defendants. Plaintiffs' reply brief offers no legally tenable argument or factual basis why the decisions of the trial court denying the motion for prejudgment interest and awarding Defendant Columbia Asphalt & Gravel, Inc. ("CAG") $39,000 under RCW 4.84.185 were erroneous and should be reversed.

Instead, Plaintiffs rely on the incorrect standard of review and arguments that are unsupported by any law or fact, and in some cases directly are contradicted by the record (*i.e.*, the spoliation argument). Plaintiffs' reply brief glosses over the key facts that (1) their damage calculations relied on approximations and expert testimony, which render the damages unliquidated, and (2) they never presented any evidence or argument at trial to

support the claim against CAG. Reviewing the case law and evidence, the trial court did not abuse its discretion, and the Court should affirm both decisions.

This Court, however, should reverse and vacate the trial court's award under the derivative claim statute. Plaintiffs' reply merely highlights the insufficiently of evidence supporting that claim, and demonstrates that Plaintiffs failed to meet the requirements of the derivative claim statute. The Court should reverse the trial court's decision and the resulting award of fees.

II. ARGUMENT IN REPLY

A. THERE WAS NEVER A FINDING OF SPOLIATION, AND THE COURT SHOULD IGNORE PLAINTIFFS' UNFOUNDED ARGUMENT

In an apparent attempt to excuse the insufficiency of evidence to support their prejudgment interest claim, Plaintiffs continue to argue that CAG and CRM spoliated evidence by failing to keep track of records. *Plaintiffs' Reply Brief 4-5, 8, 17.* Plaintiffs' brief repeatedly uses the terms "spoliation" and "spoliated" and other variants, *id.*, and thus this argument is not

by accident. The Court should reject this "red herring" argument because it is legally and factually incorrect. Indeed, given the prior comments on this issue at the trial court level, the argument borders on being disingenuous.

Spoliation is "the intentional destruction of evidence." Hickly v. Bare, 135 Wn. App. 676, 145 P.3d 433 (2006). "[T]o remedy spoliation, courts may apply a rebuttable presumption that shifts the burden of proof to a party who destroys or alters important evidence." Id. Where the trial court finds evidence of spoliation, it provides a spoliation instruction to the jury. Id.

Here the trial court never gave a spoliation instruction to the jury. Further, the trial court never made any finding that spoliation occurred. The issue of spoliation was never decided by the jury or the trial court. Thus, it is simply incorrect for Plaintiffs to argue spoliation.

This is made abundantly clear by the trial court record. Plaintiffs' counsel made a similar spoliation argument to the trial court at the December 5, 2014 hearing. As here, Plaintiffs'

court at the December 5, 2014 hearing. As here, Plaintiffs' counsel argued that the Defendants had spoliated evidence, forcing Plaintiffs to rely on survey data. (12/5/14 RP 11). Importantly, at the hearing Mr. Trujillo actually recognized there was no finding of spoliation and agreed with the trial court on that important point:

> MR. TRUJILLO: . . . So, we suggest that because of the spoliation, the Court should find that had they—
> THE COURT: Who made the finding of spoliation?
> MR. TRUJILLO: No one has made a finding yet. I'm—I'm just arguing it, your Honor.

(12/5/14 RP 11-12).

In fact, no such finding was ever made at the trial court level. Thus, Plaintiffs' argument is without support, is inappropriately raised on appeal, and should be ignored.

B. THE TRIAL COURT CORRECTLY HELD THAT PLAINTIFFS ARE NOT ENTITLED TO PREJUDGMENT INTEREST

Plaintiffs' reply on this issue is not easy to follow. Plaintiffs appear to acknowledge that their calculation of

prejudgment interest is based on the application of discretion. *Plaintiffs' Reply Brief 6-7*. But they then argue that the use of discretion is not fatal because the calculation was within a range of readily ascertainable market values. *Id.*

There is no factual or legal basis for that argument in this case. The law is established that prejudgment interest may only be awarded on a claim that can be calculated with exactness and without reliance on opinion or discretion. Here, the amount of the judgment depended on the jury's discretion after hearing disputed and competing expert opinions. That is a classic example of an unliquidated amount.

Plaintiffs rely on Polygon Nw. Co. v. Am. Nat. Fire Ins. Co., 143 Wn. App. 753, 189 P.3d 777 (2008) and Egerer v. CSR W., LLC, 116 Wn. App. 645, 653 P.3d 1128 (2003) for the proposition that discretion suffices for prejudgment interest. Those cases, however, are inapposite and have no impact here.

In Polygon, Division One only addressed whether "the subsequent need to equitably apportion such a settlement

obligation necessarily converts it into an unliquidated sum such that a trial court abuses its discretion by awarding prejudgment interest on its award." Id. at 791. The Court of Appeals held that a "settlement made in an underlying lawsuit is generally liquidated with respect to subsequent indemnity claims." Id. Thus, the Court of Appeals narrowly held that in the context of equitably allocating a settlement, it can be acceptable for the trial court to use discretion.

In Egerer, Division One noted that "[t]he fact that a claim is disputed does not render the claim unliquidated, so long as it may be determined by reference to an objective source such as fair market value." Egerer, 116 Wn. App. at 653-54. However, it went on to state that "when determining the *measure* of damages requires the exercise of discretion by the factfinder, the claim is unliquidated." Id. (emphasis in original). That case is inapposite because the measure of damages was not left to the discretion of the fact-finder; it was fixed by statute.

In the case at bar, however, the calculation was not fixed by statute or based on an objective source, such as the market rate—it was based on the disputed opinion of Plaintiffs' expert Bruce Moorer. Unlike Egerer, the measure of damages was not determined outside of discretion. The conversion factor was a factor involving discretion and opinion as to whether it would be 2.0 or 2.5 or higher or lower and that conversion factor would be used to convert cubic yards to tons, among other factors.

Plaintiffs' argument runs counter to established law that prejudgment interest is not recoverable where the award cannot be determined without resort to discretion. See King Aircraft Sales, Inc. v. Lane, 68 Wn. App. 706, 846 P.2d 550 (1993) ("A claim is liquidated if it may be readily determined by a fixed standard without the exercise of discretion or reliance on expert opinion."). Plaintiffs' reply does nothing to counter this established law and merely reinforces the legitimacy of the trial court's decision denying prejudgment interest.

C. THE TRIAL COURT PROPERLY AWARDED FEES TO CAG UNDER RCW 4.84.185

Plaintiffs make several incorrect procedural arguments that should be addressed initially. First, they state the wrong standard on appeal, arguing that the Court should treat Defendants' motion for fees under RCW 4.84.185 as a summary judgment motion and apply a *de novo* standard of review. *Plaintiffs' Reply 13-14.*

That argument is erroneous and wholly unsupported. Defendants did not bring a summary judgment motion; they brought a motion for fees under RCW 4.84.185. It is the unambiguous law of this State that this Court must "review a trial court's award under RCW 4.84.185 for an abuse of discretion." Dave Johnson Ins., Inc. v. Wright, 167 Wn. App. 758, 275 P.3d 339 (2012). The case Plaintiffs cite to the contrary, Bryant v,. Joseph Tree, Inc., 119 Wn.2d 210 (1992) does not support a *de novo* standard and has no application here.

Second, they argue that the trial court failed to make the requisite findings under RCW 4.84.185. *Plaintiffs' Reply 11.* That is also incorrect. The trial court made the requisite findings, and they are clearly included on page 2 of the December 5, 2014 *Judgment Summary and Judgment re CAG.* There is no basis to attack the trial court's ruling on that basis.

Substantively, Plaintiffs' arguments in reply likewise fail. They argue the claim against CAG was voluntarily eliminated, but that is clearly not the case. Plaintiffs maintained that claim as part of the complaint throughout the trial and simply failed to present any evidence or testimony at all to support it. If they had voluntarily dismissed the claim via a CR 41 motion prior to the trial, this likely would be a different issue. But that is not what they did. They chose to proceed with a claim for which they had no support despite years of discovery and for which they

presented no support at trial. That is exactly what RCW 4.84.185 is designed to prevent.[1]

The argument that Plaintiffs provided support for the claim against CAG via Ms. Burksfield's declaration is spurious and also fails. *See Plaintiffs' Reply 11*. The point to keep in mind is that the declaration was submitted after the trial and after Defendants filed their motion for fees, and after Plaintiffs became aware of the complete dearth of evidence presented at trial supporting the claim. It is undisputed that Plaintiffs presented no evidence or argument whatsoever at trial to support the claim, despite having over three years prior to trial to complete discovery.[2] Contrary to Plaintiffs' argument, the uncontested evidence did not show a basis for suing CAG: Plaintiffs presented no debatable issues at trial because they

[1] The argument that Defendants should have been sanctioned under RCW 4.84.185 for not pursing their counterclaims is irrelevant and not properly before this Court. *See Plaintiffs' Reply 10*. It goes without saying that Plaintiffs did not move for fees at the trial court level. They cannot fault the trial court for not doing something they never asked it to do.

[2] Plaintiffs sued the Salis, CAG, and CRM on April 11, 2011; the matter went to trial in October, 2014. Plaintiffs' insinuation that the trial court should not have awarded fees because discovery as to CAG was incomplete borders on the ridiculous. *See Plaintiffs' Reply 16*.

presented no evidence at all at trial. That is the essence of a RCW 4.84.185 violation. Plaintiffs cannot resurrect a meritless claim after the fact to attempt to avoid fees, and they cite no authority suggesting that it is proper to do so. The relevant time period is at the time of trial, not after Plaintiffs realized their mistake when it was too late to correct it.

Even considering Ms. Burksfield's post-trial, self-serving attempt to inject (for the first time) testimony on this issue, the claim against CAG is factually and legally unsupportable. The only claim that was tried was whether CRM underpaid for material removed from the pits under the leases. It is undisputed that the only parties to the leases are CRM and LSL. It is undisputed that CAG has/had no ownership interest in the pits and has/had no connection whatsoever to the leases.

The dispositive, unavoidable fact is that Plaintiffs never provided any evidence that CAG owed a duty to Plaintiffs or had any relationship with Plaintiffs that would justify an expectation that CAG would look after Plaintiffs' interests with regard to the

leases. Simply alleging in a self-serving declaration, after the fact and without support, that CAG, CRM, and the Salis were operating without regard to corporate formalities, *Plaintiffs' Reply 15-16*, does not salvage a claim that was never supported at trial and that should never have been alleged.

In sum, the trial court had tenable grounds for making the award, and this Court should affirm its decision under the abuse of discretion standard.

D. THE TRIAL COURT ERRED BY AWARDING ATTORNEY'S FEES AND COSTS UNDER WASHINGTON'S DERIVATIVE ACTION STATUTE

The trial court erred by awarding attorney's fees and costs to Plaintiffs under Washington's derivative action statute, because the claims were both procedurally improper and unsubstantiated by the evidence presented at trial. The insufficiency of evidence to support the derivative claim is even more pronounced following the submission of the Plaintiffs' Reply Brief. It is now clear that there was insufficient evidence presented at trial to establish one of the most important

procedural restrictions for a derivative suit—the shareholder demand.

In Washington, shareholders must do more than simply assert a corporation's rights. A shareholder is required to show that he has exhausted all means within his reach to obtain within the corporation action in conformity with his wishes, and that the managing body of the corporation has refused to sue or defend. In re F5 Networks, Inc., 166 Wn.2d 229, 207 P.3d 433 (2009). A shareholder is required to make "an earnest, not a simulated effort with the managing body of the corporation to induce remedial action on their part, and this must be made apparent to the court." Elliott v. Puget Sound Wood Prods. Co., 52 Wn. 637, 101 P. 228 (1909). A shareholder must show that "he has exhausted all means within his reach to obtain within the corporation . . . action in conformity with his wishes, and that the managing body of the corporation has refused to sue or defend." Williams v. Erie Mountain Consol. Min. Co., 47 Wn. 360, 91 P. 1091 (1907).

Plaintiffs are now apparently aware of the insufficiency of evidence presented at trial, so they are left to rely on a series of out-of-context statements by several witnesses, nearly all of whom are neither managers nor shareholders of LSL, in an attempt to show that the shareholder demand occurred. Having not presented any testimony of her own, Plaintiffs have no choice but to rely on a smattering of testimony from four witnesses: Larry Sali, John Rothenbueler, Bruce Moorer, and Robert Jones.[3]

1. The Trial Testimony of Mr. Sali Did Not Satisfy the Derivative Action Statute

Ms. Burksfield contends that she "sufficiently tried" to bring her concerns to the managers/shareholders of LSL, and that anything more would have been futile. *Plaintiffs' Reply 25*. The evidence does not support Plaintiffs' contention. In fact, the only evidence that Plaintiffs presented regarding an attempt to bring

[3] Aside from the fact that many of the statements upon which Plaintiffs rely are from individuals that were neither a manager nor shareholder of LSL (*i.e.*, Mr. Rothenbueler, Mr. Jones, Mr. Moorer), Plaintiffs' briefing also contains several statements that, when read in the context of the complete testimony, do not actually support their argument. For the sake of brevity, the complete and accurate testimony will not be quoted in this reply brief; however, the Respondents encourage the Court to review the record of proceedings for an accurate representation of the testimony at trial.

Ms. Burksfield's claims to the attention of the managers/shareholders of LSL was the testimony of Larry Sali. Mr. Sali is the only shareholder of LSL that testified at trial. His testimony in no way supports Plaintiffs' position.

Mr. Sali testified that Ms. Burksfield merely asked him a question (*i.e.*, did not demand litigation) about whether she was owed additional money based on what she thought was an underpayment of $.10 per ton for a limited amount of material. Mr. Sali testified that after receiving Ms. Burksfield's question he contacted his attorney to discuss the matter further.

Following that discussion, Mr. Sali then made an informed business decision that the additional money was not due and owing to Ms. Burksfield. (RP at 492-493). There is no evidence that Mr. Sali disregarded Ms. Burksfield's inquiry, or that he did not use sound business judgment in making the decision. There is no evidence other than rhetoric that Ms. Burksfield "exhausted all means," or that her question was for anything other than her own personal benefit. And, although she had the opportunity,

Ms. Burksfield failed to provide any of her own testimony regarding the important procedural requirement of shareholder demand.

2. The Trial Testimony of John Rothenbueler, Robert Jones and Bruce Moorer Did Not Satisfy the Derivative Action Statute

Further, the testimony of Mr. Rothenbueler, Mr. Jones, and Mr. Moorer in no way supports Plaintiffs' position. As an initial matter, neither Mr. Rothenbueler, Mr. Jones, nor Mr. Moorer are managers or shareholders of LSL, and thus there is no reason why their testimony would be relevant to whether Ms. Burksfield made a shareholder demand as required by RCW 25.15.370 and CR 23.1.

At any rate, Mr. Rothenbueler did not testify regarding specific complaints by Ms. Burksfield, but rather he confirmed that Ms. Burksfield never complained to him about underpayment for materials removed from the LSL gravel pit. (RP 430). Likewise, the testimony of Mr. Jones and Mr. Moorer is not helpful regarding whether Ms. Burksfield brought the

claims to the attention of the managers/shareholders of LSL prior to resorting to litigation. As the Court can see from the testimony Plaintiffs cite, their testimony has no relevance to the issue of compliance with the derivative claim procedures.

In short, the trial court should not have allowed the derivative claim and should have dismissed that claim upon the motions to dismiss and motions for a new trial. Accordingly, this Court should reverse and vacate the trial court's award of attorney's fees and costs under RCW 25.15.385.

III. CONCLUSION

This Court should affirm the decision of the trial court denying prejudgment interest on the claims for additional volumes of materials for which Plaintiffs claimed no royalties were paid, as those claims were not liquidated. This Court should also affirm the decision of the trial court awarding $39,000.00 to CAG under RCW 4.84.185.

But this Court should reverse and vacate the trial court's decision awarding attorney's fees and costs under Washington's

derivative action statute. After reviewing Plaintiffs' reply, the evidence is even clearer that Plaintiffs failed to satisfy the statutory requirements for a derivative claim.

Respectfully submitted this 29th day of December, 2015.

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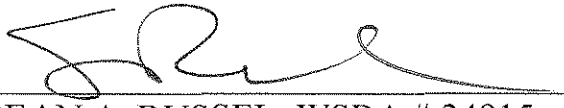

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