

Court of Appeals No. 333329-III and 338258-III (CONSOLIDATED)

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION III

WATER WORKS PROPERTIES, L.L.C.,

Appellant

v.

WILLIAM DAN COX. et ux

Respondents

FILED

APR 11 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

REPLY BRIEF OF RESPONDENTS/CROSS-APPELLANTS
WILLIAM DAN COX et ux ON CROSS-APPEAL

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I. ARGUMENT ON CROSS-APPEAL

A. The trial court erred by failing to award Cox mandatory attorneys' fees.

RCW 4.84.330 provides that where a contract states that one party shall be awarded attorneys' fees and costs, whoever is the prevailing party "shall be entitled to reasonable attorneys' fees in addition to costs." Courts have consistently held that the award of fees under this statute is mandatory and not subject to discretion. *Nw. Cascade, Inc. v. Unique Const., Inc.*, 187 Wn. App. 685, 704, 351 P.3d 172 (2015); *CHD, Inc. v. Boyles*, 138 Wn. App. 131, 140, 157 P.3d 415 (2007); *Farm Credit Bank of Spokane v. Tucker*, 62 Wn. App. 196, 207, 813 P.2d 619 (1991); *Singleton v. Frost*, 108 Wn.2d 723, 729, 742 P.2d 1224 (1987). Accordingly, this Court reviews the trial court's determination under a de novo standard, not for abuse of discretion, as WWP contends. *Hawkins v. Diel*, 166 Wn. App. 1, 10, 269 P.3d 1049 (2011) (citing *Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wn. App. 697, 706, 9 P.3d 898 (2000)) (whether party is prevailing party reviewed "under an error of law standard").

WWP advances a number of arguments about why Cox was not the prevailing party, all of which necessarily fail. First, WWP briefly asserts that Cox is not the prevailing party because the attorney fee provision was contained in the promissory note, and Cox did not prevail on WWP's claim under the note. This is irrelevant, because RCW 4.84.330 "does not define the prevailing party as one who prevailed on a claim which authorized attorney fees. The statute focuses instead on the relief afforded to the parties for the entire suit whether or not the underlying claim provides for fees." *Hertz v. Riebe*, 86 Wn. App. 102, 105, 936 P.2d 24 (1997).

Second, WWP asserts that Cox was not the prevailing party because he abandoned a number of claims prior to trial. In determining whether a party is a prevailing party pursuant to RCW 4.84.330, the trial court may only consider those claims upon which a final judgment was rendered. RCW 4.84.330. The trial court did not render any judgment on those claims that were abandoned prior to trial. Thus, WWP cannot be considered the prevailing party on Cox's abandoned claims. *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn. 2d 481, 492, 200 P.3d 683 (2009).

WWP further asserts that this Court must take into consideration all claims for which no affirmative relief was awarded, including Cox's Consumer Loan Act claim. If so, then this Court must likewise consider

WWP's claims on which no affirmative relief was awarded. This includes WWP's "fruit theft" claim, valued by WWP at \$600,000;¹ its claims for conversion of building materials, tires, appliances, tools, and equipment; and a timber trespass claim on which WWP sought treble damages. CP 1731-32.

Claims on which no affirmative relief was rewarded should *not* be considered under RCW 4.84.330, however. As the Court of Appeals has held, a party with a valid claim for attorneys' fees under RCW 4.84.330 is not precluded from recovering fees when the other party has not obtained affirmative relief. *Hawkins*, 166 Wn. App. at 12. In *Hawkins*, the trial court dismissed both of the plaintiffs' negligence claims and declined to award them anything in the way of general damages. *Id.* at 6. The Court of Appeals held that the plaintiffs were nevertheless entitled to attorneys' fees because they were the only party to obtain affirmative relief. *Id.* at 12. Here, Cox obtained affirmative relief on at least six claims. Cox was awarded the net affirmative judgment in the amount of \$287,717.01. CP 2846-48, 3401-04. The amount awarded to WWP was completely offset by the Cox judgment.

Finally, WWP contends that because Cox initially requested a much higher amount in damages, Cox cannot be considered the substantially prevailing party. Again, this argument is not consistent with the law. As the

¹ WWP claimed Cox misappropriated \$200,000 in fruit, and that it was entitled to treble damages. CP 1731.

Court stated in *Transpac Dev., Inc. v. Oh*, 132 Wn. App. 212, 220, 130 P.3d 892 (2006), the amount of attorneys' fees due should not be "determined by comparing the amount of damages sought by each party." Rather, the determination is made by examining "the extent of the relief afforded the parties." *Id.* at 217. Cox prevailed on multiple claims and obtained a net judgment of almost \$300,000. WWP's one valid claim was completely offset by the damages it caused to Cox and it obtained nothing in the way of damages. The trial court should have found that Cox was the substantially prevailing party and entitled to recover attorneys' fees.²

II. CONCLUSION

An award of attorneys' fees under RCW 4.84.330 is mandatory. Cox obtained affirmative relief on numerous claims and was the only party to obtain an affirmative judgment, totaling nearly \$300,000. This Court should REVERSE the trial court's determination that Cox was not the prevailing party and remand for the trial court to award Cox his attorneys' fees.

² WWP offers no response to Respondents' argument that Twin W should have been considered the prevailing party on the claims it asserted. The Court should deem that this issue has been conceded and award Twin W its attorneys' fees.

RESPECTFULLY SUBMITTED this 8th day of April, 2016.

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