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56620-2-I

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

LEO C. BRUTSCHE,

Appellant.

vs.

CITY OF KENT, a Washington municipal corporation,

Respondent/Cross-Appellant

**REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT
CITY OF KENT**

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ORIGINAL

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I. INTRODUCTION

Respondent/Cross-Appellant City of Kent respectfully submits the following reply brief regarding the issue of attorney fees awarded by the trial court pursuant to MAR 7.3.

II. LEGAL ANALYSIS

A. **THE AMOUNT IN CONTROVERSY IN A CASE IS NOT THE DECIDING FACTOR IN DETERMINING WHAT CONSTITUTES A REASONABLE ATTORNEY FEE.**

Brutsche's assertion (on page 42 of his reply brief) that the amount in controversy constitutes the primary factor in determining the reasonableness of attorney fees simply misstates governing Washington law. In *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998), the Washington Supreme Court specifically stated that the amount at issue in a case, while a relevant consideration, "is not a conclusive factor" in determining the reasonableness of an attorney fee award. *Mahler*, 135 Wn.2d at 433. *See, also, Wynn v. Earin*, 131 Wn. App. 28, 44, 125 P.3d 236 (2005) (court noted that the amount of damages at issue in a case "is not a compelling factor in fixing the amount of [attorney] fees.")

In addition, Brutsche's claim that the amount in controversy in this case was between \$2,500 - \$5,000 is refuted by his own pleadings. As acknowledged by Brutsche, in addition to the \$4,921.51 property damage claim, Plaintiff's Amended Complaint sought "incidental, consequential

and punitive damages in an amount to be proven at trial” in connection with Brutsche’s constitutional claims. See, Brutsche’s Reply Brief, p. 43; Amended Complaint, CP 7. Given these claims, Brutsche’s assertion that the amount in controversy was actually only \$2,500, following King County’s settlement with him in that amount, is both disingenuous and misleading, as is the claim that the City’s request for fees “is ten times more than the economic damages in controversy” (See, Brutsche’s Reply Brief, p. 44). There is no question that Brutsche was seeking monetary compensation, in an undetermined amount, in connection with his constitutional deprivation claims.

B. THE CITY WAS NOT REQUIRED TO SUBMIT ACTUAL BILLING STATEMENTS TO SUPPORT ITS MOTION FOR ATTORNEY FEES.

Brutsche’s assertion that the City did not provide the trial court with “contemporaneous records,” because it did not submit actual billing records, is directly refuted by *Mahler v. Szucs*, 135 Wn.2d at 434. The City’s submission of two detailed declarations to the trial court, in support of its motion for attorney fees, fully satisfied the requirements of *Mahler*, *supra*, and *Bowers v. Transamerica Title Insurance Company*, 100 Wn.2d 581, 675 P.2d 193 (1983). (See, Brief of Respondent City of Kent, pp. 34-35.) Brutsche’s claim that actual billing records were required, based on

his citation to Webster's Dictionary, is meritless and directly refuted by *Mahler and Bowers*.

C. PLAINTIFF'S ATTEMPT TO USE HIS OWN BILLING RECORDS AS A BASIS FOR ASSESSING THE REASONABLENESS OF THE CITY'S ATTORNEY FEE REQUEST IS WITHOUT MERIT.

There is absolutely no authority to support Brutsche's suggested "comparative approach" of assessing the reasonableness of the City's attorney fees based on the billing statements of his own attorney. (*See*, p. 46 of Brutsche's Reply Brief.) The opinions of Brutsche's attorney regarding what is or is not reasonable attorney time are irrelevant, and should have been summarily rejected by the trial court in analyzing the City's request for fees.

D. MAR 7.3 ENTITLES THE CITY TO RECOVER ALL OF ITS COSTS AND REASONABLE ATTORNEY FEES INCURRED AFTER BRUTSCHE FILED HIS REQUEST FOR A TRIAL DE NOVO

Contrary to Brutsche's claims (found on pp. 46-47 of his Reply Brief), the City had no duty to segregate its fees incurred after April 19, 2005, the date that Brutsche filed his request for a trial de novo. All reasonable fees incurred to defend this matter, following that date, are recoverable pursuant to MAR 7.3. Brutsche's reliance on *Loeffelholz v. C.L.E.A.N.*, 119 Wn. App. 665, 82 P.3d 1199 (2004), to support his claim that the City had a duty to segregate its fees in this case, is completely

misplaced. In *Loeffelholz* defendants were entitled, pursuant to RCW 4.24.510, to recover attorney fees incurred to defend against plaintiff's defamation claim. Fees incurred to defend against other asserted claims, including a malicious prosecution claim, were not recoverable under that statute. *Loeffelholz* has no bearing whatsoever on the City's right to recover attorney fees in this case pursuant to MAR 7.3.

E. THE TRIAL COURT'S FEE AWARD WAS FATALLY FLAWED BECAUSE OF THE TOTAL ABSENCE OF ANY RECORD TO SUPPORT THE COURT'S AWARD.

In *Bentzen v. Demmons*, 68 Wn. App. 339, 842 P.2d 1015 (1993), the Division I Court of Appeals reversed an attorney fee award because there was an insufficient basis in the record to determine if the fees were properly awarded. The Court stressed the importance of entering specific findings detailing the basis for an attorney fee award, how it is calculated, and the "rationale underlying the Court's conclusion that it was reasonable[.]" *Bentzen*, 68 Wn. App. at 350. In the absence of an adequate record upon which to review a fee award, it must be remanded to the trial court to develop such a record. *Mahler v. Szucs, supra*, 135 Wn.2d at 435.

Contrary to Brutsche's assertions, the trial court did not create an adequate record upon which to assess its attorney fee award merely by "lining out the \$27,124 figure proposed by the City and writing in the

amount of \$4,050.” (See Brutsche’s Reply Brief, p. 47.) The trial court record is completely silent regarding the basis for the Court’s award, or the rationale underlying the Court’s decision to award less than 15% of the City’s requested fees. As in *Bentzen v. Demmons, supra*, the complete inadequacy of the trial court record in this regard requires that the fee award be remanded.¹

In addition, the City did not waive anything by submitting proposed findings and conclusions in connection with its motion for attorney fees. *Northwest Investment v. New West Federal Savings and Loan*, 64 Wn. App. 938, 827 P.2d 334 (1992), cited on page 48 of Brutsche’s Reply Brief, provides no support whatsoever for Brutsche’s waiver argument. In *Northwest Investment*, the court held that the defendants had waived a “D’Oench” defense when their attorney consented to the entry of a judgment without raising the defense with the trial court.² The “D’Oench” defense, and the fact that it was waived because the defense attorney consented to the entry of a judgment in

¹ It is clear from applicable Washington case law, including *Mahler* and *Bentzen, supra*, that it is the *trial court* that must enter the necessary findings to explain the basis for the court’s award. For this reason, Brutsche’s assertion that the record was sufficient because of the affidavit his attorney, filed in opposition to the City’s Motion for Attorney Fees, (see p. 48 of Brutsche’s Reply Brief), is without merit.

² As explained by the court in *Northwest Investment*, the D’Oench doctrine apparently “bars a borrower from asserting against the FSLIC [Federal Savings and Loan Insurance Company] or its assignees, any claim or defense based on any unrecorded agreement which alters the terms of a seemingly unqualified obligation to pay.” 64 Wn. App. at 943.

Northwest Investment, a case involving construction loans from a savings and loan association that became insolvent, is irrelevant to the case at bar.

Finally, the City did not prepare the one page Order on Civil Motion, signed by Judge Brian Gain on November 17, 2005, in which he summarily denied the City's motion to "reconsider and amend its award of attorney fees." CP 321. As noted in the City's initial appellate brief, the trial court ignored the City's request for oral argument in connection with its motion for reconsideration. *See*, CP 297, 310. It also ignored the City's request that, even if the full amount of fees was not awarded, the court enter an order reflecting "a revised amount, with an explanation by the Court of the reasoning for the amount awarded" CP 302. In short, as reflected in the Order on Civil Motion, the court refused to provide any explanation whatsoever for its arbitrary denial of the City's motion to amend the attorney fees award. CP 321.

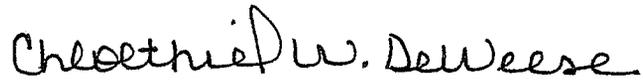
III. CONCLUSION

The trial court abused its discretion by awarding less than 15% of the attorney fees to which the City was entitled following its summary judgment victory. In addition, there is no record whatsoever to support the court's award. Under these circumstances the award should be remanded, with instructions that the trial court award a reasonable amount of attorney

fees, pursuant to MAR 7.3, and enter specific findings to support its revised award.

Respectfully submitted this 22nd day of March, 2006.

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