

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

Court of Appeals No. 64021-6
Superior Court No. 08-2-0728-9

FRONTIER INDUSTRIES, INC.
Plaintiff/Respondent,

v.

CASCADE MOUNTAIN CORP.
Defendants/Appellant.

REPLY BRIEF OF APPELLANT

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I.
INTRODUCTION

Appellant states or reiterates the following facts pertaining to Respondent's Reply. Frontier makes issue of the character of Cascade's defense, requiring examination of the case procedure. This is a sales contract controversy initiated by Frontier Industries, Inc. (hereinafter Frontier) against Cascade Mountain Lodge Corp. (hereinafter Cascade) for \$5,518.64. (CP 2; RP 28) Frontier claimed that Cascade incurred the debt when, after lodging an initial order with incorrect information, it ordered additional goods to correct its error. (CP 2) Cascade answered that Frontier committed the initial error and made other mistakes which it was forced to cover at additional expense. (CP 5).

Cascade admitted \$2033.25 was owing on the initial order. (CP 5) It offered \$2233.00 to settle all claims. (CP 39). Mandatory arbitration was had and Frontier was awarded a total of \$12,320.13 in principle, interest, and attorney's fees. (CP 10) The award was comprised of damages of \$6,422.43 and attorneys fees of \$5,897.70. (CP 43) Frontier requested trial *de novo* where it recovered \$2033.25. Prior to trial, Cascade increased its offer to \$5,750. (CP 40).

Frontier expended considerable effort attempting to prove that a Cascade employee named John Gillette placed the additional order and had authority to do so. (RP 1 – 137) Cascade argued that Gillette did make another order, had no authority to do so, and in fact wasn't even

recognized on the invoices in question. (See RP 40 - 43). The court found that purchasing authority was expressly limited to Susan St. John. (CP 70-71)

The trial court made offsetting attorney's fees awards to Cascade for prevailing at trial and Frontier for prevailing at arbitration. (CP 71) Frontier contends that it should be awarded its entire request for fees under any construct of applicable law. In the alternative, it argues that trial should be reopened to permit it to seek additional evidence of Gillette's apparent authority to bind Cascade.

II. ARGUMENT

1. Whether Frontier or Cascade improved its position on trial de novo.

Frontier Industries' reply offers the contention that it is entitled to a full award of fees pursuant to MAR 7.3, notwithstanding that the trial court concluded Cascade Mountain Corporation was the prevailing party at trial *de novo*.

In point of fact Frontier failed to improve its position. The arbitrator awarded damages of \$6,422.43 where the trial court awarded only \$2,033.25. Plaintiff elides this problem by adding the award of attorneys fees to its recovery at trial. It cites no authority to do so and ignores the clear mandate of law, specifically, RCW 7.06.060 (1), which authorizes the Superior Court to assess costs and fees against a party which appeals and then fails to improve its position.

Under RCW 7.06.060 (1), the Court determines which party prevailed and then assesses fees. Frontier's interpretation would render the statute senseless, for the trial court obviously cannot determine the positions of the parties based on an award of attorney's fees it hasn't yet made. Frontier would have the courts first render judgment and then base an award of attorney's fees on its subsequent award of attorney's fees. Our courts have rejected such an approach and held that an award of attorney fees should not be considered in assessing whether a party has improved their position at a trial *de novo*. **Wilkerson v. United Inv., Inc.**, 62 Wash.App. 712, 717; 815 P.2d 293 (1991); cited with approval **Haley v. Highland** 142 Wn.2d 135, 154 (2000).

2. Whether Cascade made a "valid settlement offer."

Thus the only response Frontier offers to Cascade's assignment of error is that "**Singer v. Etherington** is inapposite" because Cascade never made a "valid settlement offer." The record clearly shows it did; Cascade offered to settle *all* claims of every nature by paying Frontier the sum of \$5,750. More significantly, Plaintiff takes no issue with Cascade's reading of **Singer's** larger meaning, i.e., that the party which prevails at trial prevails overall and must be awarded fees. Neither does it offer support for the formula by which the trial court awarded offsetting fees.

3. Whether the trial court should have awarded Frontier fees and costs pursuant to RCW 4.84.270.

Frontier's contention here rests on the characterization of Cascade's defense to this complaint. An issue based upon pleadings is

reviewed *de novo*. **Homeowner's Ass'n v. Island Cy., Leasing, Inc** 126 Wash.2d 22, 29, 891 P.2d 29 (1995). **C-C Bottlers, Ltd. v. J.M. Hilltop Terrace.** 78 Wash.App. 384, 896 P.2d 1309 (Div. 3,1995) A plea for a setoff to diminish or defeat a claim is a defense as distinguished from a counterclaim, which is an affirmative claim for relief. **Nancy's Product, Inc. v. Fred Meyer** 61 Wn. App. 645, 650 – 651; 811 P. 2d 250 (Div. III, 1991).

Cascade admitted to liability of \$2033.25 and expended its efforts defending a claim for \$5,518.64. Frontier demanded this sum on the grounds that Cascade incorrectly measured the dimensions of the windows in its initial order and subsequently ordered replacements. Cascade pled and sought to prove that Frontier failed to tender conforming goods; that it was forced to expend funds to cover and procure the benefit of the subject bargain; and that it should have judgment declaring the correct amount due under the facts. (CP 4-5) The controversy was thus confined to the sales contract, how and whether it was amended, and how and whether it was performed. Cascade's defense only sought to diminish or defeat Frontier's claim through litigation. (CP 68-71) It therefore participated as the "party resisting relief" as contemplated by RCW 4.86.270.

Further proof of that is given by the fact that Frontier omits to state any sum of money Cascade was seeking in counterclaim. It does not articulate a separate claim for damages that it was forced to resist. Frontier did not feel compelled to answer the supposed counterclaim. It

can't say how litigation would have continued had it accepted either of Cascade's two offers of settlement. It's fair to say that the "counterclaim" argument was conceived after-trial in hope of recovering more of the \$150,000 in fees it reported in costs.

4. Whether the trial court should have considered evidence of John Gillette's "apparent" authority, notwithstanding the trial court's finding that John Gillette lacked actual authority.

This portion of the Frontier's brief is very difficult to understand. It offers no proof to support the proposition that the trial court failed to consider any specific evidence. Frontier fails to explain clearly whether it is challenging a Finding of Fact or Conclusion of Law. If the former, Frontier neglects to delineate the trial court's supposed abuse of discretion; if the latter, it fails to explain how the court failed to follow authority. In neither event does Frontier set forth a governing standard of review. Instead, it merely offers an evidentiary summation with an invitation to this Court to speculate on what might have happened at trial.

Even more puzzling is the fact that Frontier never explains how the error in question improperly affected the outcome of trial. Instead, it simply asks this Court to reopen trial to let it fish around for unspecified evidence to make a determination of "Cascade's ratification or duty to make restitution to Frontier." (p. 28) this approach leaves Cascade to grope about and speculate about which cases or rules may or may not apply in order to respond. Appellant declines the invitation.

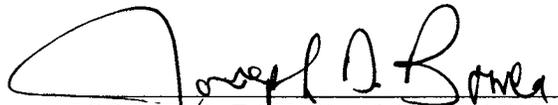
III.
CONCLUSION

Frontier Industries, Inc., offers a simple formula by which it may recover some \$150,000 as reward for recovering \$2033.25. By saying it improved its position at trial *de novo* because it was awarded more in fees, Frontier concludes that the party which billed the most time in litigation should prevail. It presents no authority to support this conclusion.

The initial briefs eliminate one issue of particular importance, which is whether the trial court may award fees for a mandatory arbitration proceeding which was superseded by the results of trial. Frontier Industries offers no argument or authority for such a result. If MAR 7.3 controls this action, Cascade is entitled to recover at least the fees for the cost of trial *de novo*, and for this appeal.

However, this is a claim for less than \$10,000. Cascade Mountain Corporation successfully resisted relief. By mandate of RCW 4.84.250 et. seq. and the applicable case law, Appellant is entitled to an award of all the fees it requested below along with fair compensation for the cost of post-trial proceedings.

DATED THIS 19th day of February, 2010.


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PROOF OF SERVICE

I certify that on the 19th day of February, 2010, I mailed a true and correct copy of this document to be served on the following person(s):

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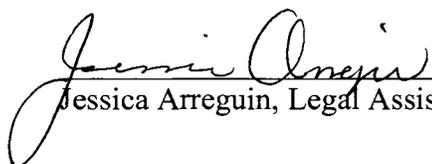
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