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COURT OF APPEALS
STATE OF WASHINGTON
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Court of Appeals No. 64021-6
Superior Court No. 06-02-00229-9

COURT OF APPEALS, DIVISION I OF THE STATE OF
WASHINGTON

FRONTIER INDUSTRIES, INC.

Plaintiff/Respondent / Cross Appellant

v.

CASCADE MOUNTAIN CORP.

Defendants/Appellants.

REPLY BRIEF OF RESPONDENT / CROSS APPELLANT

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ORIGINAL

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**REPLY BRIEF OF RESPONDENT /
CROSS APPELLANT
(RAP 10.3 (c))**

**1. WHETHER FRONTIER OR CASCADE IMPROVED ITS
POSITION ON TRIAL DE NOVO (REPLY BRIEF OF
APPELLANT (CASCADE) PAGE 5 OF 10).**

Cascade argues (page 5 of 10) as follows:

“In point of fact, Frontier failed to improve its position. The arbitrator awarded damages of \$6,422.43 where the trial court only awarded \$3,033.05. Plaintiff elides this problem by adding the award of attorney fees *to its recovery at trial*. (Emphasis supplied)”

To the contrary, Frontier clearly improved upon the position awarded by the arbitrator. The key point is that the trial court awarded Frontier its full costs and attorney fees for the *arbitration proceedings* whereas the arbitrator did not do so. There were *two* arbitration awards. The first arbitration award was for principal and interest in the amount of \$6,422.43 (CP 105, Attachment G). The second arbitration award was for costs and attorney fees incurred at the arbitration proceeding in the amount of \$5,897.70 (CP 105, Attachment H). Thus, the combined arbitration award was in the amount of \$12,320.13. Frontier filed an appeal for trial de novo. The trial court awarded Frontier \$3,466.51 for principal and interest and *also* awarded \$65,831.74 for costs and attorney fees incurred at *the arbitration proceeding*: NOT FOR COSTS OR FEES INCURRED AT THE TRIAL COURT PROCEEDINGS FOLLOWING FRONTIER’S APPEAL FOR TRIAL DE NOVO. Thus, *Wilkerson v. United Investment, Inc.* 62 Wash. App. 712 (1991) applies

because “the better approach to determine whether one’s position has been improved is to compare comparables”. *Wilkerson* at p. 717. Because the trial court’s judgment for principal, costs and attorney fees exceeded the combined arbitrator’s awards for principal, and costs / attorney fees *incurred at the arbitration proceedings*, Frontier clearly improved its position upon trial de novo. Conversely, Cascade did not improve its position upon trial de novo, and therefore was not entitled to recover its attorney fees at the trial de novo pursuant to RCW 7.06.060(1). The trial court erred in awarding Cascade costs and attorney fees pursuant to RCW 7.06.060(1).

II. WHETHER CASCADE MADE A VALID SETTLEMENT OFFER (REPLY BRIEF OF APPELLANT (CASCADE) PAGE 6 OF 10)

In order to qualify as a “defendant or party resisting relief” pursuant to RCW 4.84.270, a party need not make a counterclaim. But, a party who *has* made a counterclaim against the party *seeking* relief, must plead a specific amount in order to adequately advise the party seeking relief of the risks or rewards of accepting the defendant’s offer of settlement made pursuant to RCW 4.84.250 et. seq. *State v. Tush*, 83 Wash.App. 158, 165 (1996); *Reynolds v. Hick* 134 Wn.2d 491, 502 (1998); or *Woodruff v. Spence* 76 Wash.App. 76 (1994). Cascade’s offer of settlement for \$5,750.00 was not a valid offer of settlement

because Cascade failed to plead a specific amount in its counterclaim and therefore Frontier was not properly advised, or apprised regarding the risks of acceptance / rejection of Cascade's offer of settlement. That is the policy and reason behind the case law cited above.

Moreover, even if Cascade has properly pled a specific dollar amount in its counterclaim, Frontier recovered at trial an amount of principal, interest, costs and attorney fees for the *arbitration proceedings* (\$69,298.25) which was *more* than Cascade's offer of settlement for principal, interests, costs and attorney fees (\$5,750.00). Had Cascade's offer of settlement been restricted or limited to *principal* only, then Cascade would have been in a position to claim entitlement to attorney fees and costs pursuant to RCW 4.84.270. But, Cascade instead made an offer of settlement which included principal, interest, costs and attorney fees and, in this case, Frontier's recovery for principal, cost and attorney fees (for the arbitration proceeding) was for \$69,298.25 which was an amount greater than that which was offered in settlement by Cascade. Thus, Cascade cannot recover attorney fees and costs pursuant to RCW 4.84.270. Furthermore, pursuant to RCW 7.06.060(3), the trial court erred in not awarding Frontier its costs and disbursements otherwise allowed under RCW Ch. 4.84 for both the arbitration and the trial court proceedings. The trial court erred pursuant to RCW 7.06.060(3) because Frontier prevailed at both the arbitration and trial

court's proceeding, notwithstanding the trial court's finding that Frontier (the appealing party) failed to improve its position at the trial.

SUMMARY

The trial court erred in awarding Cascade attorney fees at the trial de novo on the basis that Cascade improved its position upon trial de novo. Frontier, rather than Cascade was the party who improved its position on trial de novo.

The trial court correctly determined that Cascade's offer of settlement made pursuant to RCW 4.84.250 et seq. was invalid for the reason that Cascade made a counterclaim against Frontier, but did not plead a specific dollar amount of its counterclaim. Moreover, Frontier's recovery upon trial de novo exceeded the amount of Cascade's offer of settlement.

Cascade's only remaining basis to recover costs and attorney fees would have been pursuant to the terms of the credit application (Ex 5). Cascade did not seek recovery of costs and attorney fees on this basis in either the trial court or upon appeal. The terms of the credit application provide for recovery of costs and attorney fees only to the "prevailing party", which is defined in RCW 4.84.330 as the party in whose favor a net monetary judgment is awarded. It was Frontier, rather than Cascade, in whose favor a net monetary judgment was awarded.

DATED this 10th day of March, 2010.

A handwritten signature in black ink, reading "Lawrence B. Linville". The signature is written in a cursive style and is positioned above a horizontal line.

Lawrence B. Linville, WSBA 6401
Attorney for Respondent / Cross Appellant,
Frontier Industries, Inc.

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON, DIVISION I

FRONTIER INDUSTRIES, INC. d/b/a Frontier)
Building Supply, a Washington corporation,)

Plaintiff/Respondent,

v.

CASCADE MOUNTAIN CORPORATION,)
d/b/a Cascade Mountain Lodge, a Washington)
corporation. and SUSAN ST. JOHN,)
individually,)

Defendants/Appellants.

) NO. 640216
)
) SUPERIOR COURT NO. 06-2-00229-9
)
) AFFIDAVIT OF MAILING

I, Alicia Wallace, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am employed by Linville Law Firm PLLC.

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date set forth below I served in the manner noted:

REPLY BRIEF OF RESPONDENT / CROSS APPELLANT

on the following persons:

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Joseph D. Bowen
Attorney for Defendant/Appellant
401 South Second Street
Mount Vernon, WA 98273

VIA U.S. MAIL
 VIA FACSIMILE
 VIA MESSENGER
 VIA EMAIL

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE
STATE OF WASHINGTON THE FOREGOING IS TRUE AND CORRECT.

DATED this 19th day of March, 2010 at Seattle, Washington.



Alicia Wallace

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