

NO. 64817-9

COURT OF APPEALS, DIVISION ONE,  
OF THE STATE OF WASHINGTON

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KATIE L. WILSON,

RESPONDENT,

v.

DEBRA W. MOBELY,

APPELLANT.

2010 MAY 28 PM 3:49  
COURT OF APPEALS  
DIVISION ONE  
STATE OF WASHINGTON  
*[Handwritten signature]*

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APPELLANT'S BRIEF IN REPLY

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## **INTRODUCTION**

The terms and conditions of the Purchase and Sale Agreement were not necessary to determine Ms. Wilson's claims. As a result, her lawsuit was not "on the contract," and the attorney fees provision of that contract was inapplicable. Because R.A.P. 2.5(2) is permissive, not mandatory, Ms. Mobely should be permitted to raise the issue on appeal even though she did not raise it in the lower court.

Even if an award of attorney fees was appropriate, the trial court's statement that it was "applying the lodestar" formula was meaningless given that the court obviously did not apply it. While the trial court was permitted to take into consideration that Ms. Wilson's attorney handled her case on a contingency fee basis, it could only do so for the purpose of deciding whether to apply a multiplier to the base lodestar amount; the trial court could not simply use a "rounded-off" version of the attorney's actual contingency fee as the basis for determining the award. Ms. Wilson's argument that the "trial court's fee multiplier was within its discretion" is misleading, since there is no evidence the trial court applied a multiplier. Even if the trial court's application of a multiplier is assumed, a multiplier of 1.7911249 is unreasonable.

## ARGUMENT

**A. There is no blanket exception to the merger doctrine for actions alleging fraud, and Ms. Mobely should be able to raise the issue on appeal given the facts of this case.**

**1. Brown v. Johnson stands for the proposition that an attorney fees provision in a Purchase and Sale Agreement applies if there is an allegation of fraud *and* the action is “on the contract.”**

Ms. Wilson argues that the case of Brown v. Johnson, 109 Wn. App. 56, 34 P.3d 1233 (2001), creates a blanket exception to the merger doctrine in all cases involving allegations of fraud. The holding in Brown, however, is not so far-reaching.

In Brown, the Court stated, “If an action in tort is based on a contract containing an attorney fee provision, the prevailing party is entitled to attorney fees.” Brown, 109 Wn. App. at 58. The Court went on to hold, “An action is ‘on a contract’ if (a) the action arose out of the contract, and (b) if the contract is central to the dispute.” Brown, 109 Wn. App. at 58. Accordingly, if the action is based on an allegation of fraud *and* is “on the contract,” then the merger doctrine does not apply.

The Court in Brown relied on Edmonds v. John L. Scott Real Estate, Inc., 87 Wn. App. 834, 942 P.2d 1072 (1997). Brown, 109 Wn. App. at 58. Edmonds v. John L. Scott Real Estate, Inc. concerned a plaintiff who sued for breach of fiduciary duty and negligence claims

when her real estate broker failed to return her earnest money on termination of a transaction, and instead disbursed it to himself and to the seller. The appellate court ruled that the plaintiff's claim was "on the contract" because:

"The breach of fiduciary duty claims were based on Scott's disbursement of Edmonds' earnest money in a manner it claims was set forth in the earnest money agreement. Therefore, *the terms of the earnest money agreement* and the contractual relationship created by the agreement are central to these claims, rendering them claims 'on the contract.'"

Edmonds, 87 Wn. App. at 855-856 (emphasis added).

In Burns v. McClinton, 135 Wn. App. 285, 143 P.3d 630 (2006), the appellate court considered whether an attorney fee clause in a partnership agreement applied to a breach of fiduciary duty claim filed by one partner against another. The court held that it did not:

"The D&D Properties partnership agreement was not central to the parties' disputes, which could be resolved without referring to it. ... The D&D partnership agreement was the background out of which the disputes arose, but it was not central to them.

Burns, 135 Wn. App. at 310-311. The court went on to hold that "(b)ecause the claims in question were not brought to enforce the partnership agreement and the agreement was not central to the dispute," an award of attorney fees was inappropriate. Burns, 135 Wn. App. at 311.

The real question in the case at bar is whether Ms. Wilson's claims were "on the contract." Ms. Wilson's claim did not allege any breach of the Purchase and Sale Agreement (CP 3-14). Further, Ms. Mobely's alleged fiduciary duty to her mother was not "created under and defined by" the Purchase and Sale Agreement. Rather it was based on Ms. Mobely's filial relationship with Ms. Wilson, Ms. Wilson's age, and Ms. Wilson's lack of expertise (CP 84, Paragraph 5). Overall, the "terms" of the Purchase and Sale Agreement were not central to Ms. Wilson's claims, and her claims could be proven without reference to it.

As in Burns, the case at bar concerns a situation where Ms. Wilson's claims were not brought to enforce the agreement, and could be resolved without reference to its terms and conditions. Her claims, therefore, were not "on the contract," and the attorney fee provision of that contract was inapplicable.

**2. This Court may consider the issue of whether attorney fees should have been awarded even though Ms. Mobely did not specifically raise it before the trial court.**

R.A.P. 2.5(2) states, "The appellate court *may* refuse to review any claim of error which was not raised in the trial court (emphasis added). RAP 2.5(a) is permissive in nature and does not automatically preclude the introduction of an issue at the appellate level. Pulcino v.

Federal Express, 141 Wn.2d 629, 9 P.3d 787 (2000). Whether to review an issue that was not raised in the trial court is within the discretion of the appellate court. Obert v. Environmental Resources, 112 Wn.2d 323, 771 P.2d 340 (1989).

The appellate court may hear issues raised for the first time that deserve definitive answers (State v. Hurt, 107 Wn. App. 816, 27 P.3d 1276 [Division 3, 2001]) or that resolve questions of substantial interest (Intl. Association of Fire Fighters, Local 46 v. City of Everett, 146 Wn.2d 29, 42 P.3d 1265 [2002]). The court may also in the interests of justice hear issues not raised in the trial court. Postema v. Postema Enterprises, Inc., 118 Wn. App. 185, 72 P.3d 1122 (Division 1, 2003), as amended, (August 28, 2003), rev. denied 151 Wn.2d 1011, 89 P.3d 172 (2004).

With respect to the interests of justice, Ms. Mobely notes that her attorney's representation of her in the lower court was underwhelming, to say the least. He missed witness and exhibit deadlines, withdrew from Ms. Mobely's case immediately after the trial verdict was rendered, before Findings of Fact and Conclusions of Law were entered, and while the issue of attorney fees was pending. Ms. Mobely requested a continuance to hire new counsel to assist her in the final stages of the proceedings, including the issue of attorney fees, but her request was denied. (Ms. Mobely did timely object to the "excessive" nature of the attorney fees

request.) It is unclear from the record whether Ms. Mobely was even present when the attorney fees decision was rendered and the Findings of Fact, Conclusions of Law, and Judgment were entered against her, as her signature does not appear on any of those court documents. Under the circumstances, she should be allowed to raise the issue of the contractual award of attorney fees at this time.

**3. Ms. Mobely's attorney's cursory request for fees under the Purchase and Sale Agreement does not preclude Ms. Mobely from arguing the issue on appeal.**

Ms. Wilson asserts the general rule that "(a) party may not use theories to her advantage at trial and then argue on appeal that they were erroneously accepted by the trial court." A principal purpose of this rule is to prevent a party from inviting error at trial and then complaining of it on appeal. See Postema v. Postema Enterprises, Inc., 118 Wn. App. at 194-195. In the case at bar, Ms. Mobely's counsel's cursory request for fees in his trial brief did not rise to the level of inviting the error, nor can it be said that Ms. Mobely used this argument to her advantage during the proceedings. The issue of attorney fees was not addressed in full until almost two months after the trial, at which time Ms. Wilson, not Ms. Mobely, was propounding it.

**B. While the trial court stated in its Findings of Fact and Conclusions of Law that it applied the lodestar formula, it is clear from the record that it did not. Merely stating that one is applying the lodestar formula and then awarding an attorney's contingency rate renders "application" of the lodestar formula meaningless.**

**1. The Findings of Fact and Conclusions of Law entered in this case give lip-service, and nothing more, to the lodestar formula.**

The trial court's assertion<sup>1</sup> that it applied the lodestar formula in awarding Ms. Wilson her attorney fees is ample evidence that saying something does not make it so. A lodestar fee is determined by multiplying a reasonable hourly rate by the number of hours reasonably expended on the lawsuit. Henningsen v. Worldcom, Inc., 102 Wn. App. 828, 847, 9 P.3d 948 (2000). The court may then apply a multiplier to this base amount in a contingency case to determine a final award of attorney fees. (The issue whether the court should apply a multiplier is adequately addressed in appellant's brief.) The trial court's Findings of Fact and Conclusions of Law are bereft of any such calculation or determination.

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<sup>1</sup> Ms. Mobely recognizes that the language of contained in the Findings of Fact and Conclusions of Law was prepared by Ms. Wilson's attorney prior to the hearing in question. Nevertheless, the trial court adopted the findings proposed by counsel, and Ms. Mobely must treat them as the court's own words.

In fact, a close reading of the court's language regarding its "application" of the lodestar formula indicates the court used the lodestar formula for an improper purpose:

"Applying the lodestar formula, the amount of time plaintiff's attorneys spent on this case was reasonable, their hourly rates are reasonable considering the experience of counsel and the facts of this case."

CP 91-92, Paragraph 29. The lodestar formula is not a mechanism for determining whether the amount of time plaintiff's attorneys spent on the case or their hourly rates were reasonable. Rather, it is a mathematical calculation that provides a figure that is a presumptively reasonable amount of fees to award. The court never engaged in this mathematical calculation, so its assertion that it "applied" the lodestar formula is without import.

Instead of performing that mathematical calculation, the trial court stated, "Plaintiff's reasonable attorney's fees are \$120,000.00." This figure was based on Ms. Wilson's counsel's declaration for fees:

"If the title had not been returned, the judgment against the defendant would be \$367,000, based on the appraised value of the house; one-third of that amount is \$122,000. I therefore ask the court to award \$120,000 in fees, and enter that amount as part of the judgment against the defendant."

(CP 69, Paragraph 9).

Clearly, the trial court performed no lodestar calculation, but instead merely approved Ms. Wilson's attorney's request that his contingency rate form the basis for the award of attorney fees. This is not to say that the court didn't have the necessary information before it. But having the information before it and saying it applied the lodestar formula, doesn't mean that the court actually did so.

2. **The trial court may take into consideration the fact that a case was handled on a contingency basis, but only for the purpose of determining whether a multiplier should be applied to the base lodestar amount.**

Appellant is not arguing that the trial court may not take into consideration the fact that a case was handled on a contingency basis in determining a proper award of attorney fees. On the contrary, the court may take that fact into consideration, *but only as to the issue of whether a multiplier should be applied*. See Tribble v. Allstate Property and Casualty Insurance Co., 134 Wn. App. 163, 139 P.3d 373 (2006) (“Because Tribble's attorney was hired on a contingent fee basis, he had no assurance of receiving sufficient compensation. The risk assumed by Tribble and her attorney in pursuing Tribble's claims is a tenable basis for employing an attorney fee multiplier.” Tribble, 134 Wn. App. at 172.)

While perhaps inartfully worded in appellant's brief, appellant only objects to the trial court utilizing counsel's actual contingency fee as the basis for determining the proper amount of attorney fees to be awarded in the case.

**3. Ms. Wilson cannot argue that the multiplier used by the trial court was within its discretion when the trial court did not use a multiplier.**

Ms. Wilson's claim that the "trial court's fee multiplier was within its discretion" is disingenuous since the trial court never enunciated what, if any, multiplier it was using. In fact, the evidence shows that the court did not use a multiplier.

**4. Even if the trial court's use of a multiplier is assumed, the evidence demonstrates that the multiplier the court would have had to employ (1.7911249) was unreasonable.**

In his declaration for fees, Ms. Wilson's counsel stated that, on an hourly basis, his fees through trial would be \$63,457.00 plus costs (CP 69, Paragraph 9). Additionally, he noted he expected at least 12 more hours would be spent entering the judgment, clearing title and arranging the restitution matters (CP 69, Paragraph 9). Utilizing the lodestar method and counsel's hourly rate of \$295.00 per hour, Ms. Wilson's counsel's fees would have totaled \$66,997.00 (\$63,457.00 + [12 x \$295.00]). In

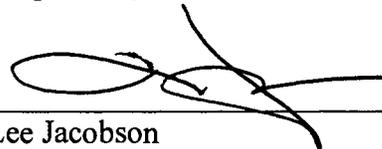
order to calculate an attorney fee award of \$120,000.00, therefore, the court would have had to employ a multiplier of 1.7911249. Such a multiplier is unreasonable on its face, and substantial evidence that it was not used at all. The trial court simply awarded Ms. Wilson her attorney's contingency fee.

### CONCLUSION

The language in the Findings of Fact and Conclusions of Law notwithstanding, the court did not calculate its award of fees using the lodestar method. Instead, the court merely awarded the plaintiff her attorney's contingency fee. If Ms. Wilson's fees are allowed, the case should be remanded to the trial court for determination of an appropriate amount of fees to award, with instructions as to the factors to be considered in determining whether a multiplier should be used to enhance the base lodestar amount.

Dated: May 28, 2010

Respectfully submitted,



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PROOF OF SERVICE

I certify that I served a copy of this Reply Brief of Appellant on respondent Katie L. Wilson by personally delivering a copy of it to the office of her attorney of record, Jeffrey T. Broihier, at 720 Third Avenue, Suite 1600, Seattle, Washington, on May 28, 2010.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct

Dated this 28<sup>th</sup> day of May, 2010, at Seattle, Washington.



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Attorney for Appellant