

70895-3

70895-3



No. 708953-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

Robert Dahlgren, Respondent

v.

Northwest Trustee Services, Inc.,
and Chase Home Finance LLC,
successor by merger to
Chase Manhattan Mortgage, Defendants,

and

Omega Paulite, Appellant

REPLY BRIEF OF APPELLANT

Omega Paulite, Pro Se
P.O. Box 7265
Bellevue, WA 98008
(425) 351-1066
megpaulite@hotmail.com

TABLE OF CONTENTS

I.	BACKGROUND	1
II.	PAULITE'S REPLY TO ISSUES RELATED TO ASSIGNMENT OF ERROR	3
III.	CONCLUSION	16

TABLE OF AUTHORITIES

CASES CITED

<u>Bowles v. Wash. Dep't of Ret. Sys</u> , 121 Wash.2d 52, 847 P.2d 440 (1993)	10
<u>Brock v. Robbins</u> , 830 F.2d 640 (7 th Cir 1987)	4
<u>Cagle v. Southern Bell Tel. and Tel. Co.</u> , 143 Ga.App. 603, 239 SE2d 182 (1977)	4
<u>Covell v. City of Seattle</u> , 127 Wash.2d 874, 905 P.2d 324 (1995)	10
<u>International Brotherhood v. Duval</u> , 925 F.Supp. 815 (DDC 1996)	15
<u>Mahler v. Szucs</u> , 135 Wash.2d 398, 957 P.2d 632 (1998)	13
<u>Mayer v. City of Seattle</u> , 102 Wash.App. 66, 10 P.3d 408 (2000)	8
<u>Mira v. Nuclear Measurements Corp.</u> , 107 F.3d 466 (7 th Cir. 1997)	4
<u>Pub. Util. Dist. No. 1 v. Kottsick</u> , 86 Wash.2d 388, 545 P.2d 1 (1976)	10
<u>Ramallo v. Reno</u> , 931 F.Supp 884 (DDC 1996)	15
<u>Scott Fetzer Co. v. Weeks</u> , 122 Wash.2d 141, 859 P.2d 1210 (1993)	8
<u>Tao v. Freeh</u> , 27 F.3d 635 (DDC 1994)	16
<u>Village of Clarendon Hills v. Mulder</u> , 663 N.E.2d 435 (1996)	11

RULES CITED

CR 56(c)	5
----------	---

OTHER AUTHORITIES

Monique Lapointe, <i>Attorney's Fees in Common Fund Actions</i> , 59 Fordham Law Review 843 (1991)	9
Black's Law Dictionary (6 th Ed. 1990)	4

I. INTRODUCTION

Keeping with the tradition which Dahlgren perfected in the lower court, a substantial portion of Dahlgren's brief was spent in personal attacks against Paulite; the smear campaign that formed a part of each and every document submitted by Dahlgren, no matter the tribunal, predictably made its way into this appeal. Dahlgren's strategy, which has been successful to date, is to attempt to invoke the ire of the court against Paulite, while at the same time painting himself as a "victim".

In his brief, Dahlgren went to great lengths to detail the "tortured process" he has been put through as a result of the actions of Paulite. Conveniently lost on Dahlgren was the "torture" he put Paulite through by stealing the equity in her homestead, and evicting her from her own home, all because his credit score went down.

When complaining about the tortured process, Dahlgren does so with unclean hands: his efforts to have Paulite incarcerated via a contempt proceeding is testimony to his ruthlessness; having his counsel show up at Paulite's home on a Sunday evening during a family birthday party is testimony to Dahlgren's callousness; and asking the lower court for even more

attorney fees is testimony to his greed. If and when this matter is remanded, the evidence will show who tortured whom, and who the victim really was.

The misstatements and mischaracterizations made by Dahlgren in his brief, as illustrated in the following examples, should serve as a red flag when this Court considers the arguments he sets forth and the conclusions he makes:

- On page 1, Dahlgren states “She did not pay the mortgage”. Such a statement could easily be construed by this Court that Paulite never made any payments on the mortgage after being awarded the subject property in the property settlement agreement (PSA). To the contrary, Paulite paid on the mortgage for over three years, even paying more than what was due so as to pay off the mortgage early.
- On page 4, Dahlgren suggests to this Court that all that Paulite had to do was sign a form to release Dahlgren from liability under the terms of the note/deed of trust with Chase. Dahlgren conveniently omitted information that the well-documented policy of Chase, and every other mortgage lender in existence, is to allow an ex-spouse to refinance a mortgage only on a showing of creditworthiness, after a

consideration of income, assets, and liabilities. When Paulite attempted to refinance, she was rejected.

- On page 5, Dahlgren stated that “a low credit rating can disqualify him from being awarded work.” Missing from such a statement is the failure of Dahlgren’s proof that his credit rating *did* disqualify him from being awarded work.
- On page 25, Dahlgren makes the statement “The lower court properly found that Paulite was obtaining the benefit of the Subject Property without paying anything for it...”. This statement is not accurate. The Subject Property was awarded to Paulite as a part of an equitable disposition of the marital estate. Dahlgren was awarded other assets of equal or greater value. Not only did Paulite pay for the Subject property, quite possibly she overpaid for it.

II. PAULITE’S REPLY TO ISSUES RELATED TO ASSIGNMENTS OF ERROR

Dahlgren’s Assignment 1 pertains to that part of the hearing held in October 2011 which dealt with the limited issue of liability for damages. Dahlgren asserts that Paulite did not oppose the motion, and the validity of the PSA and breach were undisputed.

Paulite contends that, to prevail on a claim of breach of contract, it is not enough that Dahlgren establish a valid contract and a breach of that duty; he must also establish damages caused by breach.

Paulite does not contest the validity of the PSA, nor does she contest that the PSA was breached when she failed to remove Dahlgren from the promissory note/deed of trust with Chase. She does contest that Dahlgren established that he was damaged in any way by her breach.

The issue of damages is an important one, in that not all breaches of contract result in damages. "It is a longstanding principle in civil law that there can be no monetary recovery unless the plaintiff has suffered harm." *Mira v. Nuclear Measurements Corp.*, 107 F.3d 466, at 473 (7th Cir. 1997) (citing *Brock v. Robbins*, 830 F.2d 640, 647 (7th Cir.1987)). "[M]ere breach without proof of monetary loss is *injuria absque damno*," *Cagle v. Southern Bell Tel. & Tel. Co.*, 143 Ga.App. 603, 604, 239 S.E.2d 182, 183 (Ga.Ct.App.1977) i.e., "a wrong which results in no loss or damage, and thus cannot sustain an action." *Mira*, 107 F.3d at 473 n. 7 (citing *Black's Law Dictionary* 785 (6th ed.1990)).

Pursuant to CR 56(c), a summary judgment may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages.

Paulite's interpretation of this rule as it relates to this case is that the October 2011 summary judgment decided the issue of liability for damages, while the determination of amount of damages was saved for a later time. That "later time" was the summary judgment hearing held in April 2013, when Dahlgren presented his tax returns as proof of his lost business income. Dahlgren did not submit any evidence regarding causation for damages at the April 2013 hearing, so the lower court had nothing before it to make any findings relating thereto.

If the April 2013 hearing resolved only the amount of damages, when did Dahlgren prove up on everything but the amount of damages, like for example, causation and foreseeability? It either had to be at the October 2011 hearing or not at all. Paulite asserts it was not at all.

Paulite invites this Court to review the transcript of the 2011 hearing to find any discussion regarding damages. It does not exist. The only thing that does exist is a few ambiguous sentences in the written Order, which stop far short of finding the existence of

actual damages, and which stop even shorter of finding proximate causation.

Regarding the issue of foreseeability, Dahlgren asserts in his brief some kind of admission by Paulite that she knew a great deal about Dahlgren's business. Even the most liberal reading of Paulite's declaration would not support Dahlgren's claim. The bottom line is that Paulite did not have reason to foresee as a probable result of her breach that negative changes to Dahlgren's credit report could result in lost business income to him.

As for the hearing that was held in October 2011, Paulite pointed out in her brief (page 12) the dialogue that took place between Dahlgren's attorney and the lower court, wherein the court was advised "...it's not a summary judgment motion, so you don't have the same summary judgment rules that you would otherwise have." Such a statement is tantamount to an admission by counsel that the evidence that he submitted did not rise to a level which would support a summary judgment.

In addition, as to Paulite's failure to appear at the summary judgment hearing, this did not excuse Dahlgren from meeting his burden of proof that he was entitled to judgment as a matter of law.

Dahlgren's Assignment 2 takes the position that Paulite did not assign error to the imposition of a constructive trust.

Two different rulings came out of the October 2011 hearing: first, a constructive trust was imposed based upon unjust enrichment; and second, the court held for Dahlgren on the limited issue of liability for damages. Paulite devoted a significant of argument attacking the lack of pleading and proof of unjust enrichment, as well as the issuance of a constructive trust (Appellant's Brief, pages 18-22).

The position taken by Dahlgren that there was no assignment of error regarding the imposition of a constructive trust is quizzical at best, and disingenuous at worst. More likely, when Dahlgren could offer no tenable response to the issues raised by Paulite, he opted for the long shot of being dismissive of Paulite's assignment(s) of error as not being worthy of his response.

Dahlgren's Assignment 3 deals with the issue of over \$176,000 in attorney fees awarded to Dahlgren. He sets forth three separate arguments to support his position that the award was proper, hoping one of them will stick: 1) this is not a Lodestar case; 2) this is a common fund case; and/or 3) the attorney fees award was proper because of Paulite's alleged bad faith.

Paulite has pointed out to this Court that, at the time of this award, Dahlgren was not the prevailing party; there was no offer of proof or finding that the attorney fees award was reasonable; the trial court did not perform the appropriate Lodestar analysis in determining the award; and the trial court did not make an adequate record for review of its award.

As detailed in Paulite's brief, Dahlgren had the burden of proving the reasonableness of the attorney's fees being requested. *Scott Fetzer Co. v. Weeks*, 122 Wash.2d 141, 859 P.2d 1210 (1993). Dahlgren attempted to meet this burden solely through the submission of over 125 pages of legal billings.

Also as detailed in Paulite's brief, submission of fee affidavits or billing records alone are insufficient to support an attorney's fee award. *Mayer v. City of Seattle*, 102 Wash.App. 66, 10 P.3d 408 (2000).

Paulite was never given the opportunity to undertake a line-by-line analysis of over 125 pages of legal billings to identify to the lower court which items should not have been included in the fee award; Paulite cannot envision any set of circumstances under which this Court would want to entertain such an analysis. Paulite did provide this Court with examples of items which were so clearly

unrelated to the enforcement of the PSA as to preclude the award for such services in the first place. By doing so, Paulite attempted to illustrate that the lower court did not conduct any analysis, much less the proper analysis, prior to making the award.

Dahlgren, apparently not fond of the Lodestar method for determining attorney fees awards, would rather this Court indulge him that this is more appropriately a “common fund” case, which requires an analysis different from Lodestar. It should be noted that Dahlgren’s common fund theory is being advanced for the first time on appeal, and was never argued to or considered by the lower court.

As to what the common fund doctrine is, Paulite finds some guidance in the following language:

One of the best known exceptions to the American rule is the "common fund" or "fund-in-court" doctrine. When an attorney in a class action suit helps to create, increase or maintain a fund or benefit for all class members, the attorney may receive fees and expenses directly from that common fund. Common funds arise in a variety of contexts, ranging from securities class actions to products liability cases to antitrust litigation. In addition, cases brought under statutes containing fee shifting provisions are frequently converted into common fund cases, provided the court releases the defendant from both damage and statutory fee liability upon payment of the settlement. Monique Lapointe, *Attorney's Fees in Common Fund Actions*, 59 Fordham L. Rev 843 (1991)

Washington courts have awarded attorney's fees under the common fund doctrine "where litigants preserve or create a common fund for the benefit of others as well as themselves." *Covell v. City of Seattle*, 127 Wash.2d 874, 891, 905 P.2d 324 (1995) (citing *Bowles v. Wash. Dep't of Ret. Sys.*, 121 Wash.2d 52, 70-71, 847 P.2d 440 (1993); *Pub. Util. Dist. No. 1 v. Kottsick*, 86 Wash.2d 388, 390, 545 P.2d 1 (1976)).

Paulite contends that an action to enforce a PSA has nothing in common with those types of cases wherein the common fund doctrine is appropriately used, such as security class actions, products liability, and antitrust litigation.

According to Dahlgren, however, "The present case is a common fund case because the court found Dahlgren was acting not only for himself, but the benefit of others."

As to whom the "others" were that Dahlgren acted for the benefit of, the only person or entity Dahlgren could identify was Chase. Just to remind this Court, Dahlgren sued Chase, and received a substantial monetary settlement from Chase long before the subject property was sold. Clearly Dahlgren's actions were not designed to benefit Chase. Not only that, but Chase had a valid first deed of trust secured by the subject property, and was

substantially “oversecured” in that the value of the subject property far exceeded the amount owed to Chase

The state appellate court in Illinois dealt with a similar issue involving the attempted use of the common fund doctrine in the case of *Village of Clarendon Hills v. Mulder*, 663 N.E.2d 435 (1996). In this case an attorney obtained a settlement in a condemnation suit on behalf of his client. He argued that he was entitled to fees from the payoff of the mortgage because the mortgage holder directly benefitted as a result of his legal work in creating the fund used to satisfy the mortgage. The court, in denying the applicability of the common fund doctrine, held that the benefit to the mortgage holder was merely incidental to the primary purpose of obtaining compensation for the condemned property; as the mortgage holder’s claim existed ***irrespective of the outcome*** of the condemnation case, the mortgage holder did not benefit from the attorney’s efforts.

Despite the fact that the *Mulder* case was decided in the Illinois state court system, the reasoning of that court is sound. Applying the court’s reasoning to this case, the claim of Chase to the proceeds from the sale of the subject property existed irrespective of the efforts of Dahlgren. As such, Dahlgren did not

create or preserve a common fund for the benefit of Chase (*Covell*, supra).

Applying Washington law, Dahlgren's reliance on the common fund doctrine is misplaced, and is designed to conceal the fact that the lower court did not conduct **any** analysis as to the reasonableness and necessity of the attorney's fees claimed by Dahlgren.

For the reasons set forth above, the common fund theory does not apply in this case. Rather, the Lodestar method is the method which should have been used, but was not used, by the lower court to determine the attorney fees award.

Unable to resort to Lodestar, and realizing that his common fund argument was destined for failure, Dahlgren's final attempt was to argue that the attorney fees award was proper because of Paulite's bad faith.

In support of this argument, Dahlgren made the following statement: "Although the lower court did not **specifically** (emphasis added) grant Dahlgren his legal fees based on Paulite's bad faith...the court did find such bad faith..." (Dahlgren's brief, page 42).

First of all, Dahlgren never argued bad faith in requesting attorney fees. In addition, there is absolutely nothing in the record to suggest that the lower court even remotely considered Paulite's alleged bad faith in making its ruling. While Dahlgren may be correct about the lower court having the ability to award attorney fees because of bad faith, the argument is moot because this did not happen in this case..

Noticeably absent from Dahlgren's brief is Paulite's assignment of error that the lower court failed to make an adequate record for review of its fee award decision, whether through findings of fact and conclusions of law, or otherwise. Citing numerous authorities, Paulite pointed out in her brief that the lower court must create an adequate record for review of fee award decisions, and that the absence of an adequate record upon which to review a fee award will result in a remand of the award to the trial court to develop such a record. *Mahler v. Szucs*, 135 Wash.2d 398, 957 P.2d 632 (1998).

By failing to submit any law or argument to contest this assignment of error, Dahlgren has obviously conceded the point that an adequate record was not made in this case, which is grounds for remand.

Dahlgren's Assignment 4 deals with the April 2013 Summary Judgment hearing which awarded Dahlgren damages in the amount of \$56,000. Dahlgren attacked Paulite's declaration submitted in opposition to his motion as being "a combination of speculation, hearsay, and irrelevant material."

By way of example, Paulite submitted information derived from official government publications which addressed issues raised by Dahlgren. As such, it is relevant to this case. Paulite has established, and Dahlgren apparently concedes, that such information is an exception to hearsay.

The only point left to be made by Dahlgren is that this information is not probative because it requires "wild speculation." Paulite disagrees, and submits to this Court that the information set forth, and the reasonable inferences drawn therefrom, allow a reasonable person to make more than one conclusion as to why Dahlgren lost business and the income derived therefrom.

By law, summary judgment should only be granted if, from all the evidence, reasonable persons could reach but one conclusion. Since more than one conclusion can be reached after considering all of the evidence and inferences drawn therefrom in

the light most favorable to Paulite, a question of material fact exists. As such, summary judgment was improper.

In evaluating a motion for summary judgment, the court may not weigh the evidence or make credibility determinations.

International Brotherhood for Painters & Allied Trades Union & Industry Pension Fund v. Duval, 925 F. Supp. 815, 821(D.D.C. 1996); *Ramallo v. Reno*, 931 F. Supp. 884, 888 (D.D.C. 1996).

The bottom line is that Dahlgren did not submit any direct evidence that his credit caused him lost business income. This evidence would have taken the form of declarations from clients who either terminated the services of Dahlgren's company because of Dahlgren's credit report, or declarations from prospective clients who refused to hire Dahlgren's company because of his credit report.

All of Dahlgren's evidence concerning damages was circumstantial, which required inferences to be drawn. By law, all inferences were to be drawn in a light most favorable to Paulite. For this reason, summary judgment for damages was improper.

As to what Dahlgren refers to as "undisputed facts", case law is very clear that, even where facts are undisputed, if reasonable minds could differ on the inferences which might be made,

summary judgment is improper. *Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994).

III. CONCLUSION

Plainly and simply, this is a case of David vs Goliath: a pro se litigant, surviving on a limited income, versus an experienced legal team, backed by the substantial family wealth of Dahlgren. This “fight” was started by Dahlgren, trying to crush Paulite at every chance. Dahlgren obviously expected Paulite to give up and give in a long time ago. To the contrary, Paulite has continued this fight to the Court of Appeals, firmly believing that she has not been treated fairly by the lower court.

In her opening brief, Paulite assigned error arising from three separate rulings of the lower court: the October 2011 summary judgment ruling, which imposed a constructive trust, and held for Dahlgren on the limited issue of liability; the March 2013 order, which awarded Dahlgren over \$176,000 in attorney fees; and the April 2013 summary judgment ruling, which awarded Dahlgren a money judgment in the amount of \$56,300.

In his response brief, Dahlgren spent more time attacking Paulite than addressing the issues. For those issues that Dahlgren

did address, Paulite offered responses based on fact and law sufficient to resolve the matter(s) in her favor.

Paulite reaffirms her request that the Court of Appeals reverse all three rulings, and remand the matters back to the trial court for further proceedings.

Respectfully submitted this 16th day of May, 2014.



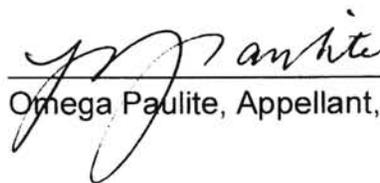
Omega Paulite, Appellant, Pro Se
P.O. Box 7265
Bellevue, WA 98008

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on May 16, 2014 I emailed a true and correct copy of "REPLY BRIEF OF APPELLANT" to mclausen@clausenlawfirm.com and mblackbourn@clausenlawfirm.com, and also by mailing same via regular United States Mail, addressed as follows:

Clausen Law Office
Attn: Mark A. Clausen
Attn: Morgan Blackbourn
701 5th Avenue, Suite 7230
Seattle, WA 98104
Attorneys for Respondent

Signed in Bellevue, WA this 16th day of May, 2014.



Omega Paulite, Appellant, Pro Se

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 MAY 16 AM 11:34