

COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON  
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No. 72496-7

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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JULIE ANN THOMAS, a single woman,

*Appellant,*

v.

J.R. LeVASSEUR and DONNA LOUISE LeVASSEUR,  
husband and wife, individually and the marital  
community composed thereof,

*Respondents.*

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**REPLY BRIEF OF APPELLANT**

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## **I. INTRODUCTION**

Julie Thomas (“Thomas”) respectfully submits that the trial court’s August 26, 2014 ruling awarding fees and costs pursuant to CR 11 constituted an abuse of discretion and must be reversed. On *de novo* review, this Court must also reverse the remainder of the trial court’s rulings on that date, to wit: the decision to cancel / remove the lis pendens; the decision to require Thomas to post a supersedeas bond as a condition of maintaining the lis pendens; and the decision to base the supersedeas bond on the purchase price of the real property that is the subject matter of the action.

## **II. ARGUMENT AND AUTHORITY**

### **A. The Trial Court’s Award of Fees and Costs Constituted an Abuse of Discretion.**

The LeVasseurs’ argument that Thomas’ objection to the fee and cost award is untimely – or that the award was not appealed – is without merit. The April 17, 2014 Order entered by the trial court stated that it was appropriate to award fees and costs under CR 11 or RCW 4.28.328. But, the Order expressly reserved the award of fees and costs. (CP 370-373). Thomas appealed the April 17, 2014 Order, in its entirety, and argued in its first appeal (Case No. 71845-2) that the trial court erred in determining that any fees or costs should be awarded.

The issue regarding the amount of the award of fees and costs did not arise until July 2014 – nearly three months later – when the LeVasseurs filed a motion to enter judgment for fees and costs and to remove the *lis pendens*. (CP 380-5). Thomas responded to that motion challenging, among other things, both the entitlement to fees and costs and the amount of the claimed fees and costs. (CP 452-62). The trial court’s August 26, 2014 ruling on that motion is the subject matter of this appeal. Therefore, as a procedural matter, Thomas has timely challenged and appealed the trial court’s rulings with regard to fees and costs.

Substantively, the LeVasseurs have not addressed the issues raised in Appellant’s Opening Brief regarding the award of fees and costs. Among other things, the LeVasseurs do not dispute that the fees and costs were awarded pursuant to CR 11, as opposed to RCW 4.28.328. Moreover, they offer no explanation or justification for the significant and glaring deficiencies in their billings or their charges.

Since CR 11 is the basis for the fee and cost award, it is telling that the LeVasseurs have chosen not to respond to the authority cited by Thomas to the effect that CR 11 is not to be used as a fee-shifting mechanism. *See, Biggs v. Vail*, 124 Wn.2d 193, 201, 876 P.2d 448 (1994); *MacDonald v.*

*Korum Ford*, 80 Wn.App. 877, 891, 912 P.2d 1052 (Div. 2 1996); *Miller v. Badgley*, 51 Wn.App. 285, 304, 753 P.2d 530 (Div. 1 1988). By awarding an amount identical to the request for fees and costs – without any explanation, reduction or discussion or articulation of possible lesser sanctions – the trial court undeniably engaged in impermissible fee shifting and otherwise abused its discretion.

The LeVasseurs have also conveniently ignored the innumerable issues Thomas raised regarding the substance of their request for fees and costs. For example, but not by way of limitation, the LeVasseurs have not responded to Thomas' argument that the trial court should have taken into account the disputed amount and the requested fees. *See, Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993). Nor have the LeVasseurs responded to Thomas' argument that they failed to adequately support their claims, as required by *Chambers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9<sup>th</sup> Cir. 1986); *Gagliardi v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 450, 815 P.2d 1362 (1991). Further, the LeVasseurs have not addressed the fact that they are seeking to recover fees for duplicate efforts, fees unrelated to the allegedly sanctionable filing, fees that are clearly excessive, fees for non-legal work and non-statutory costs.

Thomas timely and properly appealed the trial court's August 26, 2014 rulings regarding fees and costs, as to both entitlement and quantum. On both counts, the trial court abused its discretion and those rulings should be reversed.

**B. On *De Novo* Review, the Trial Court Erred When It Canceled / Removed the Lis Pendens.**

The LeVasseurs do not dispute that the trial court's decision to cancel / remove the lis pendens is subject to a *de novo* review by this Court. By that standard, Thomas submits that the ruling must be reversed.

The procedural posture of this case in July and August 2014 was somewhat unique. In their summary judgment motion that resulted in the trial court's April 17, 2014 rulings (the subject matter of Case No. 71845-2), the LeVasseurs did not seek to cancel or remove the lis pendens. Their motion for that relief did not come until nearly three months later. By that time, Thomas' appeal of the April 17, 2014 decisions had been filed and the trial court's powers were limited by RAP 7.2.

The LeVasseurs' have elected not to address Thomas' argument and authority that RCW 4.28.320 does not authorize the cancellation or removal of the lis pendens under these circumstances. Clearly, as of August 26, 2014, the action had not been "settled, discontinued or abated." These are the lone

predicates for an application by an aggrieved party to cancel or remove a lis pendens under RCW 4.28.320. Accordingly, to the extent the trial court's decision purported to be based on RCW 4.28.320, it was in error.

Nor is the LeVasseurs' lengthy discussion of *Beers v. Ross*, 137 Wn.App. 566, 575, 154 P.3d 277 (Div. 2 2007), either applicable or persuasive. In this case, the trial court initially advised that it was powerless to cancel or remove the lis pendens while the appeal was pending, but indicated that Thomas could file a supersedeas bond. As of that date, however, the trial court had not issued any ruling that was subject to a supersedeas.

In response to a request for clarification from Thomas' counsel, the trial court changed course by requesting briefing on the amount of the supersedeas bond. The court also tipped its hand and/or foretold its decision regarding the amount of the supersedeas bond by advising counsel that the bond should be in the amount of "... the fair market value of the property in question ..."

Ultimately, the trial court ruled on the LeVasseurs' motion to cancel / remove the lis pendens and required Thomas to post a bond in the amount of \$950,000 if she wanted the lis pendens to remain in place. On *de novo*

review, Thomas submits that this ruling was error and should be reversed.

**C. On *De Novo* Review, the Trial Court Erred When it Required Plaintiff to Post a Supersedeas Bond as a Condition of Maintaining the Lis Pendens.**

Beyond the issue of whether the trial court had the authority to cancel or remove the lis pendens, Thomas submits that the court improperly conditioned the maintenance of the lis pendens upon posting a bond. Because this subject was raised in Appellant's Opening Brief and not addressed by the LeVasseurs, only a brief mention will be made here.

Simply put, the trial court's April 17, 2014 ruling on the LeVasseurs' summary judgment motion did not obligate Thomas to pay money, nor did it order the cancellation or removal of the lis pendens. Nor did the trial court's other ruling on that date include any relief from which execution could follow.

Accordingly, Thomas submits that nothing in either of the trial court's April 17, 2014 orders would allow for "execution" such that the supersedeas procedures of RAP 8.1 would be called into play. On *de novo* review, Thomas submits that the trial court's August 26, 2014 ruling requiring her to post a supersedeas bond must be reversed.

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**D. On *De Novo* Review, the Trial Court Erred When it Required a Supersedeas Bond Based on the Purchase Price of the Real Property that Was the Subject of the Action.**

There is no doubt but that the Seattle condominium that is the subject matter of this action is worth at least \$950,000. In fact, the LeVasseurs have currently listed it for sale on the market for \$1,375,000. If the Seattle condominium sells at that price, it will have appreciated \$425,000 since it was purchased in June 2012. However, the LeVasseur's argument regarding the amount of the supersedeas bond required by the trial judge misses the mark in at least two respects.

First, it is well to remember that title to the disputed property is currently in the LeVasseurs. The essence of the claims by Thomas is that title is *incorrectly* in their names, but the reality is that Thomas cannot do anything with the Seattle condominium given the current status of title. Accordingly, there is no legitimate concern that anything will happen to the property pending appeal. Indeed, its value is likely to appreciate during that time.

Second, the trial court apparently disregarded the provisions of RAP 8.1(c)(2), which governs the amount of a supersedeas bond when real property is involved:

The supersedeas amount shall be the amount of any money judgment, plus interest likely to accrue during the pendency of the appeal and attorney fees, costs and expenses likely to be awarded on appeal entered by the trial court plus the amount of the loss which the prevailing party in the trial court would incur as a result of the party's inability to enforce the judgment during review. Ordinarily, the amount of loss will be equal to the reasonable value of the use of the property during review.

Here, with the exception of the award of fees and costs, there is no money judgment. Pursuant to RAP 8.1(c)(2), the court should then turn to "the amount of the loss which the prevailing party in the trial court would incur as a result of the party's inability to enforce the judgment during review." In this case, there is no loss either. The Seattle condominium was purchased for \$950,000 in June 2012 and is currently on the market for \$1,375,000.

Contrary to the analysis apparently undertaken by the trial court, the proper amount of the supersedeas bond in a case involving real property is not the fair market value of the property. It is the "amount of loss equal to the reasonable value of the use of the property during review." It is clear that the trial court here made no effort to determine that value, instead opting to simply set the supersedeas bond amount at the price Thomas paid for the

Seattle condominium.

Thomas respectfully submits that requiring a supersedeas bond in any amount was inappropriate. Even assuming, *arguendo*, that a supersedeas bond could be required, the trial court failed to properly establish the amount of the bond in accordance with RAP 8.1. On *de novo* review, the trial court's decision must be reversed.

#### V. CONCLUSION

For the reasons set forth above and in Appellant's Opening Brief, Julie Thomas respectfully submits that this Court should reverse the trial court's August 26, 2014 ruling in its entirety.

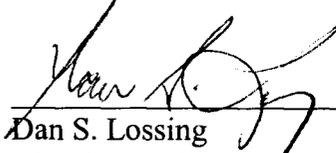
The court's decision to award fees and costs as sanctions to the LeVasseurs and the amount of that award constituted an abuse of discretion. In addition, using the *de novo* standard of review, this Court should reverse the trial court's determination to cancel / remove the lis pendens, requiring a supersedeas bond as a condition to maintaining the lis pendens and basing the amount of the supersedeas bond on the purchase price of the residential real property that was the subject of the action.

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RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of February, 2015.

INSLEE BEST DOEZIE & RYDER, P.S.

A handwritten signature in black ink, appearing to read "Dan S. Lossing", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20<sup>th</sup> day of February, 2015, I caused to be served in this matter a true and correct copy of the REPLY BRIEF OF APPELLANT on the following and in the manner noted:

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I hereby certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 20th day of February, 2015 at Bellevue, Washington.

  
Tawnya A. Sarazin