

SUPREME COURT OF THE STATE OF WASHINGTON

Case No. _____ (number unknown)

Case #: 1038496

Court of Appeals of Washington, Division III
Court of Appeals No. 388778
Consolidated with No. 390641

PAULA S. NEIS, Trustee of the DANIEL L. NEIS Revocable
Trust; and GLORIA RAE FRASER,

Respondents for Discretionary Review

v.

HOWARD WOOLLETT and PETRIA WOOLLETT,

Petitioners for Discretionary Review

**RESPONDENT GLORIA RAE FRASER'S ANSWER TO
PETITION FOR DISCRETIONARY REVIEW**

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A. Designation of Responding Party

Gloria Rae Fraser, individually and as personal representative of the Estate of John Douglas Fraser, deceased (collectively “Fraser”),¹ the appellant in Court of Appeals Case No. 390641, is the responding party.

B. Basis for Reply and Relief Sought

This reply is made pursuant to RAP 13.4(d) to the Petition for Review filed by Howard and Petria Wollett (“the Woolletts”) on October 9, 2024. Fraser requests that the Petition be denied and that she be awarded her attorney fees herein by the Supreme Court pursuant to RCW 7.28.083(3) and RAP 18.1(j).

C. Trial Court and Court of Appeals Decisions

The trial court issued two decisions concerning attorney fees relevant to this appeal. First, on March 31, 2022, the trial court dismissed the Woolletts’ Third Party Complaint with

¹ John Douglas Fraser was named in the Third Party Complaint and testified at trial, but later passed away during post-trial proceedings. As his surviving spouse, Gloria is the personal representative of his estate.

prejudice, holding that Fraser was the prevailing party in the adverse possession action and awarding attorney fees to Fraser:

2. That the third party defendants John D Fraser and Gloria Rae Fraser are the prevailing parties in the Third Party action and are entitled to recover from the Woolletts their reasonable attorneys' fees and costs incurred in defending the quiet title action filed by the Woolletts.

(CP 617-19). Subsequently, on June 14, 2022, the trial court reversed its decision to award attorney fees to Fraser and awarded nothing to her, even though Fraser was the wholly prevailing party against the Woolletts:

IT IS ORDERED that Third Party Defendants Frasers Motion for an Award of Attorney Fees' and Cost is **DENIED**. The Court finds there is not an entitlement to attorney fees pursuant to RCW 7.28.083. Attorney fees are not necessary or appropriate and would not be equitable or just in this case.

CP 870-71. Fraser timely appealed. (CP 874-78.) The Woolletts initially appealed two trial court Orders of March 31, 2022 (CP 617-19) and (CP CP 613-16), but later abandoned their appeal and sought dismissal of it after the trial court's

second Order of June 14, 2022 (CP 870-71). (See, Court of Appeals letter ruling in Case No. 388788 dated July 28, 2022.)

The Court of Appeals issued an Unpublished Opinion on July 30, 2024, remanding the trial court's denial of attorney fees to Fraser because the trial court failed to give a reasoned analysis for denying attorney fees. The Court of Appeals found no basis in the record to affirm the trial court's exercise of discretion: "[W]e cannot tell from the record whether the court based its decision on tenable grounds." (See, Unpublished Opinion dated 7/30/24 at p. 28.) The Woolletts suggest that the Unpublished Opinion "did not change" the essence of the trial court's denial of attorney fees to Fraser:

The Trial Court already exercised its discretion and found that an award of attorney fees and costs would not be just and equitable – the decision in this case did not change that determination.

(See, Petition for Review at p. 7.) However, the remand provides the appellate relief Fraser requested by requiring the trial court to reconsider the whole issue of denying attorney fees

to Fraser as the prevailing party, and by instructing the trial court to determine whether trial court attorney fees should be awarded to Fraser:

Thus, we remand for the court to reconsider its denial of attorney fees to the Frasers and enter more detailed findings on whether or not to award attorney fees to the Frasers.

(Unpublished Opinion dated 7/30/24, pp. 28-29.)

The Court of Appeals noted that the Woolletts lacked standing to file a quiet title action for adverse possession and that the Third Party Complaint was unnecessary and was filed without possibility of success:

We note that the Woolletts added the Frasers as parties to this lawsuit in order to assert a separate claim of adverse possession against the Frasers. However, at the time the Frasers were added as third-party defendants, the Woolletts did not own the property and did not have standing to assert a claim for adverse possession. The Woolletts argue that their claim of adverse possession was really a defense to Neis' breach of contract claim. But the Woolletts could have raised a defense of adverse possession without filing a separate claim for which they had no standing and without adding the Frasers as a party.

(Unpublished Opinion dated 7/30/24 at p. 28.) The Woolletts did not prevail on any claims against Fraser and were granted no relief against her at trial. The Court of Appeals concurred with the trial court that Fraser was the prevailing party at trial. (See, Unpublished Opinion dated 7/30/24 at p. 27.) The Court of Appeals held that Fraser was correct that the trial court had failed to support its denial of attorney fees by a reasoned analysis and concluded that remand was necessary: “The [trial] court’s oral ruling is vague and does not explain the reasons for its decision.” (Unpublished Opinion dated 7/30/24 at p. 27.)

As to claims relating to their adverse possession defense against respondent Paula Neis, for some reason the Woolletts falsely claim they were successful at trial. (See, Petition for Review, pp. 2-5). The Woolletts argue that their Third Party Complaint was necessary because of the claims by Ms. Neis and that they proved their defense of adverse possession at trial. However, the Woolletts cite no findings by the trial court to support their allegation they had proved their adverse

possession defense against Ms. Neis – and none exist. To the absolute contrary, the trial court held against the Woolletts on the issue of adverse possession, finding that they had failed to identify any portion of the [right of way] easement area that was not subject to their claims (see, Findings of Fact No. 2 and No. 7, CP 613-16), and that they had failed to join indispensable parties (see, Finding of Fact No. 3, CP 613-16).

In their failed appellate opposition, the Woolletts vigorously opposed Fraser's appeal, argued against remand, and argued upon numerous grounds that the trial court's denial of attorney fees be affirmed and that the trial court's exercise of discretion be upheld. (See, Woolletts' appellate Response Brief, pp. 43-50.) Furthermore, the Woolletts sought and were denied appellate attorney fees against Fraser. (See, Unpublished Opinion dated 7/30/24 at p. 29.) Thus, all arguments on appeal against Fraser by the Woolletts were rejected and they obtained no relief. On the other hand, Fraser successfully argued that the trial court had failed to support its

denial of attorney fees by a reasoned analysis and were successful in obtaining a remand of the entire issue. The Court of Appeals therefore held that Fraser was the prevailing party on appeal and as such she was awarded appellate attorney fees pursuant to RCW 7.28.083(3). (Unpublished Opinion dated 7/30/24, p. 29). The Woolletts filed for Reconsideration, which was denied by the Court of Appeals on September 10, 2024. The Woolletts then petitioned for review herein.

D. Argument

1. Discretionary Review under RAP 13.4(b)(1) and (2) Is Not Warranted under the Facts and the Law of this Case.

The Woolletts seek discretionary review under RAP 13.4(b)(1) and (2). (See, Petition for Review, p. 7.) RAP 13.4(b)(1) and (2) provide as follows:

(b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals...

In attempting to fall within the mandate of the above-quoted court rule, the Woolletts mischaracterize the record, misstate the facts, fail to support allegations of fact with citations to the record, and ultimately claim to have won the adverse possession case when they lost and then failed to appeal. The Woolletts contrive conflicts that do not exist with decisions of the Supreme Court and Court of Appeals. The Woolletts attempt to evade and gloss over that Fraser was the wholly prevailing party against them both at trial and at the Court of Appeals.

Where both parties on appeal request attorney fees and one party is deemed as prevailing, the appellate court should award appellate attorney fees to the prevailing party. See, *Twin W Owners Association v. Murphy*, 26 Wn. App. 494, 515, 529 P.3d 410 (2023). Moreover, when a party files a lawsuit that as a matter of law cannot succeed, and where a court has discretionary power to award or deny attorney fees, the court

abuses its discretion when it fails to charge attorney fees against the losing party. *Barbee v. Barbee*, 134 Wash. 418, 423, 235 P. 945 (1925).

The Unpublished Opinion dated 7/30/24 does not conflict with any decision of the Supreme Court or any published decision of the Court of Appeals. The Woolletts submit only two cases that address issues relevant to the standards of RAP 13.4(b)(1) and (2) for Supreme Court review. Those cases are *McLelland v. Paxton*, 11 Wn. App. 2nd 181, 222-23, 453 P.3d 1 (2019); and *Dragt v. Dragt/DeTray, LLC*, 139 Wash. App. 560, 161 P.3d 473 (2007). A third case submitted by the Woolletts is an unpublished decision of the Court of Appeals that is inapplicable to the requirements of RAP 13.4(b)(2).²

McLelland v. Paxton, *supra*, does not support the Woolletts' position. Rather, it confirms that attorney fees should be awarded to parties who prevail. *Id.* at 222-23. A prevailing party is one who receives affirmative relief in their

² *Bian v. Smirnova*, No. 81937-2-I, slip op. at 17 (Wash. Ct. App. Oct. 18, 2021).

favor. Cf., id. at 222. Here, Fraser wholly prevailed against the Woolletts at trial, and prevailed against the Woolletts on appeal by obtaining a remand of the case over their opposition. The Woolletts were unsuccessful in seeking to have the trial court's decision affirmed. The Woolletts were unsuccessful in obtaining appellate attorney fees against Fraser. Whatever future decision the trial court may make in regard to trial court attorney fees, the Woolletts have lost their case on appeal that the case should not be remanded. The Unpublished Opinion of July 30, 2024, does not conflict with *McClellan v. Paxton*, *supra*.

Dragt v. Dragt/DeTray, LLC, *supra*, also fails to support the Woolletts' position. *Dragt* simply holds that where neither party prevails on appeal, then neither party should be awarded attorney fees. Id., 139 Wash. App. at 578. Here, Fraser prevailed on appeal by obtaining a remand opposed by the Woolletts. The Unpublished Opinion of July 30, 2024, does not conflict with *Dragt v. Dragt/DeTray, LLC*, *supra*.

2. Fraser Should be Awarded her Reasonable Attorney Fees in Opposing this Petition for Discretionary Review.

As before the Court of Appeals, so also should Fraser be awarded her reasonable attorney fees pursuant to RCW 7.28.083(3) and RAP 18.1(j) in opposing the Woolletts' petition for review.

RESPECTFULLY SUBMITTED this 7th day of November, 2024.

This document contains 2,118 words, excluding parts of the document exempted from the word count by RAP 18.17.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 7, 2024, I caused to be served a true and correct copy of the foregoing RESPONDENT GLORIA RAE FRASER'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW on the following named person(s) via Court of Appeal E-Serve Portal:

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On November 7, 2024, I caused to be served a true and correct copy of said Answer by email addressed to:

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From: Kathy Schroeder <kschroeder@wsmattorneys.com>
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Attached please find Respondent Gloria Fraser's Answer to Petition for Discretionary Review in the above matter.

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