IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ROBERT K. JOHNSON and NANCY JOHNSON, husband and wife,	)	**No. 27739-9-III (consolidated with No. 27740-2-III)**
Respondents,	)	
v.	)	
CITY OF LEAVENWORTH, a Washington Municipal Corporation,	)	
Defendant,	)	**Division Three**
PUBLIC HOSPITAL DISTRICT NO. 1 OF CHELAN COUNTY, a Washington Municipal Corporation; STEPHEN H. DEMAREST and DEBORAH A. DEMAREST, husband and wife,	)	
Appellants.	)	**UNPUBLISHED OPINION**

Korsmo, J. — After successfully defending a lawsuit concerning a vacated street, the appellants sought attorney fees for frivolous litigation. Despite determining that the action was not well-founded in fact or law, the court declined to award attorney fees. We

discern no abuse of discretion and affirm.

BACKGROUND

Robert and Nancy Johnson, owners at different times of various parcels along Main Street in Leavenworth, sued to contest a forty-year-old city ordinance that had vacated the street. They were represented by attorney Robert Dodge. The defendants were the City of Leavenworth (City), Public Health District No. 1 of Chelan County (District), and Stephen and Deborah Demarest. The Demarests owned a parcel of land along Main Street that at one time had been owned by the Johnsons.

In 1968, the City of Leavenworth passed Ordinance 491 which vacated Main Street between Eighth Street and Ninth Street; the City retained an easement over the vacated property. The mayor of Leavenworth at the time also happened to be the chairperson of the District. On behalf of the District, he signed the petition to vacate the street. The City approved the petition.

At the time of the street vacation, the block on the north half of the street was owned by the District, except for the eastern end which was owned by Cascade Hospital.[1] The southern half was owned by the estate of Robert Fields (Estate). The Estate sold its interest in the street to the District on the same day that Ordinance 491 passed. The

[1] While Main Street does not run truly east and west, for ease of description it will be treated in this opinion as if it does.

Cascade Hospital property was sold to the Johnsons in 1979. The Johnsons subsequently conveyed that land to the District, which later sold it to Larry and Lynelle Langston, who eventually sold the land in 2007 to the Demarests. The Johnsons eventually purchased the former Estate property. By the time of this litigation, the Johnsons had replaced the Estate and the Demarests had replaced the hospital as owners of the affected land. The District retained its western portion of the northern half of the vacated street.

Even after the 1968 vacation, the public continued to use the street. In 1989, apparently in response to plans by both the District and the Johnsons to use their portions of the vacated street, the City Attorney sent both parties a letter stating that the 1968 ordinance was invalid. His stated reasons for the invalidity were those later asserted by the Johnsons in this litigation.

In an apparent attempt to benefit their new property and to block future hospital expansion plans, the Johnsons filed suit on December 4, 2007. They sought declaratory and injunctive relief. The essence of their complaint was that the Ordinance was invalid due to failure of the Estate to sign the vacation petition and because the mayor had a conflict of interest. In their respective answers, both the Demarests and the District asserted, *inter alia*, the statute of limitations as a defense. Both also sought attorney fees for responding to frivolous litigation. The Demarests also counterclaimed for attorney

fees under the statutory warranty deed for their property.

Counsel Dodge filed a notice of intent to withdraw from the case on April 3, 2008. The three defendants filed motions for summary judgment on April 7, 8 and 9. The Johnsons, proceeding *pro se*, filed their own motion for summary judgment. All of the motions were heard on May 7, 2008.

The trial court dismissed the Johnsons' claims and permitted the defendants to move for CR 11 sanctions as long as they gave notice to Mr. Dodge. New counsel appeared for Mr. Dodge and the Johnsons. On August 20, 2008, the trial court denied the request for CR 11 sanctions and attorney fees under RCW 4.84.185. The court determined that while the Johnsons' legal arguments lacked merit, the lawsuit was not brought for an improper purpose. Mr. Dodge did conduct an investigation and did not solely rely upon his clients' representations. The court also noted the unique factual circumstances of the case. The court declined to impose sanctions and award attorney fees. The District and the Demarests moved for reconsideration. It was denied on December 3, 2008.

The trial court granted the Johnsons' motion for summary judgment on the Demarests' counterclaim. After a motion to reconsider that ruling was denied, the Demarests and the District appealed to this court.

ANALYSIS

The District and the Demarests both argue that the trial court erred when it declined to award them attorney fees in this litigation. The Demarests also challenge the summary judgment ruling that dismissed the counterclaim. This opinion will first address the joint issue before turning to the counterclaim ruling.

Attorney Fees

Both appellants challenge the trial court's decision not to award attorney fees for frivolous litigation under either RCW 4.84.185 or CR 11. They also ask for attorney fees under those standards in this appeal.

The first sentence of the statute provides:

> In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense.

RCW 4.84.185.

A trial court has discretion under RCW 4.84.185 both to impose sanctions for frivolous litigation and to determine the amount of reasonable attorney fees. *Fluke Capital & Mgmt. Servs. Co. v. Richmond*, 106 Wn.2d 614, 625, 724 P.2d 356 (1986); *Zink v. City of Mesa*, 137 Wn. App. 271, 277, 152 P.3d 1044 (2007), *review denied*, 162

Wn.2d 1014 (2008). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The trial court declined to find the action met the statutory requirement of "frivolous and advanced without reasonable cause." The court expressly stated that the action had not been filed for an improper purpose. This court recently concluded that a trial court does not have to find bad faith or improper purposes before imposing sanctions under this statute. *Highland Sch. Dist. No. 203 v. Racy*, 149 Wn. App. 307, 202 P.3d 1024 (2009) (upholding determination that litigation was frivolous in light of controlling Washington Supreme Court holding in case argued by counsel in the current case). That does not mean, however, that the absence of bad faith or improper purpose *requires* the trial court to impose sanctions when it finds litigation lacked merit.

The absence of bad faith or improper purpose, as well as the "unique facts" involving the City's inconsistent opinions about the validity of the vacation ordinance, were tenable reasons for declining to find the litigation frivolous. We find no abuse of discretion in concluding that sanctions were inappropriate.

Similar to the statute, CR 11 permits sanctions, including attorney fees, when an attorney advances litigation lacking a legal or factual basis without adequate

investigation. *Roeber v. Dowty Aerospace Yakima*, 116 Wn. App. 127, 141, 64 P.3d 691, *review denied*, 150 Wn.2d 1016 (2003). A trial judge likewise has discretion under CR 11 both to impose sanctions and to set the amount of any sanction that is imposed. *Skimming v. Boxer*, 119 Wn. App. 748, 754, 82 P.3d 707, *review denied*, 152 Wn.2d 1016 (2004).

Here, trial counsel relied on historic facts in crafting his pleadings. While the complaint ultimately lacked merit, we agree with the trial court that it was not inadequately investigated. In particular, counsel relied upon the 1989 opinion of the City Attorney. There was a tenable basis for bringing suit given the City's varying views about the validity of its own ordinance over the years. Accordingly, the court did not err in denying CR 11 sanctions.

The Johnsons' claims were not strong, but they were not frivolous and were supported by rational arguments. The trial court did not abuse its discretion when it declined to award attorney fees under RCW 4.84.185 or CR 11.

Counterclaim

This court reviews a summary judgment ruling *de novo*, performing the same inquiry as the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). The facts, and all reasonable inferences to be drawn from them, are viewed in the

light most favorable to the nonmoving party. *Id*. If there is no genuine issue of material fact, summary judgment will be granted if the moving party is entitled to judgment as a matter of law. *Id*.

The moving party bears the initial burden of establishing that it is entitled to judgment because there are no disputed issues of material fact. *Young v. Key Pharm.*, *Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If a defendant makes that initial showing, then the burden shifts to the plaintiff to establish there is a genuine issue for the trier of fact. *Id.* at 225-226. The plaintiff may not rely on speculation or having its own affidavits accepted at face value. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Instead, it must put forth evidence showing the existence of a triable issue. *Id.*

The Demarests argued that the Johnsons are required to pay their attorney fees under the statutory warranty deed they had issued in 1989 to a predecessor. A statutory warranty deed obligates the grantor to "defend the title thereto against all persons who may lawfully claim the same." RCW 64.04.030.

Assuming that the Demarests can assert a claim under the warranty deed given by the Johnsons to the District, a contested issue we do not decide, they are not entitled to recover their attorney fees for at least three reasons. The first reason is that there was no

tender of the defense to the grantor. "The warranty to defend is a future covenant that no lawful, outstanding claims against the property exist." *Mastro v. Kumakichi Corp.*, 90 Wn. App. 157, 164, 951 P.2d 817, *review denied*, 136 Wn.2d 1015 (1998). The duty to defend or pay only arises when the grantee effectively tenders the action to the grantor. *Id.*; *Double L. Props.*, *Inc. v. Crandall*, 51 Wn. App. 149, 156, 751 P.2d 1208 (1988). That was not done here. The Demarests argue that it would be absurd for them to tender defense to the party suing them. We do not agree. Tendering the defense might have encouraged the Johnsons to drop the Demarests from the suit, or dismiss the case in its entirety, thus saving litigation costs. It also would have allowed them to choose different counsel rather than one who was also a party to the action.[2]

Secondly, and most fundamentally, the statutory warranty deed is not a guarantee of litigation expenses for a grantee that is forced to defend title. Rather, it is a guarantee that if the title is not good, then the grantor will pay damages to the grantee, including attorney fees. Invariably, where attorney fees have been awarded to the grantee, it has been in the situation where the grantor did not convey good title.[3] As was explained in *Double L Properties*:

These cases make clear that a grantee is not entitled to attorney fees expended in the

[2] Stephen Demarest is an attorney.

[3] In essence, the Johnsons would have had to pay damages if they had won the lawsuit because they would have proven they had sold land they did not have title to.

successful defense of third party *title* claims. The rationale is that in such a situation there is no breach of covenant of title which may serve as a basis for the recovery of damages of any kind. . . . If the third party's claim is invalid, then the grantor's warranty of title has not been breached.

51 Wn. App. at 156.

The final reason that the warranty deed does not extend to this situation is that it is a guarantee protecting the purchaser from claims of third parties. It is not intended to provide for litigation expenses if the purchaser and seller become involved in a title fight with each other.[4] *Barber v. Peringer*, 75 Wn. App. 248, 254, 877 P.2d 223 (1994) (RCW 64.04.030 does not authorize attorney fees for a seller's breach of covenants contained in a warranty deed). Typically, other provisions of the sales agreement would apply to that situation.

For all of these reasons, we agree with the trial court that the statutory warranty deed given by the Johnsons in 1989 did not entitle the Demarests to attorney fees for the successful defense of their title. The trial court correctly granted summary judgment to the Johnsons on the Demarests' counterclaim.

Fees on Appeal

The Johnsons seek attorney fees on appeal under the theory that the appeal is

[4] This fact would also explain the tender of defense requirement and avoid the "absurdity" of tendering defense of a case to the plaintiff.

frivolous. As with their trial court action, we conclude that although this appeal was without merit, it was not entirely frivolous. Attorney fees are not in order. *Zink*, 137 Wn. App. at 279. As the prevailing party, the Johnsons are entitled to their costs. RAP 14.1; RAP 14.2.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, J.

WE CONCUR:

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Schultheis, C.J.

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Brown, J.