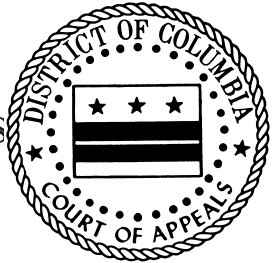


IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. 23-CV-747



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JOHN D. MUSSELLS, et al.,

Appellants,

v.

1305 RHODE ISLAND AVE NW LLC, et al.,

Appellees.

**BRIEF OF APPELLANTS JOHN D. MUSSELLS  
AND PREMILA M. MUSSELLS**

ON APPEAL FROM THE SUPERIOR COURT OF  
THE DISTRICT OF COLUMBIA (CIVIL DIVISION)  
2016 CA 008570 B

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**STATEMENT OF JURISDICTION AND**  
**ISSUES PRESENTED FOR REVIEW**

This Court has jurisdiction pursuant to D.C. Code § 11-721(a)(1). The issues presented for review are:

1. Whether the trial court erred in awarding Appellee 1305 Rhode Island Ave. NW, LLC its attorneys' fees from Appellants under a statute designed to protect tenants;
2. Whether the trial court erred in awarding the owner of the subject real property its attorneys' fees from Appellants under the facts of this case; and
3. Whether the trial court abused its discretion in granting such fee-shifting in this particular case.

## STATEMENT OF THE CASE

This is an appeal from a final order and judgment of the trial court which awarded the recovery of attorneys' fees by Appellees against the Appellants. This lawsuit originated over a dispute as to which party, Appellants or Appellee 1305 Rhode Island Ave. NW, LLC ("1305 LLC") had a valid and enforceable contract to purchase the subject property located at 1305 Rhode Island Avenue, NW, Washington, D.C. (the "Property"). Appellants claimed a superior right by virtue of their earlier contract to purchase, while 1305 LLC claimed a superior right as the assignee of the tenants' rights under the District of Columbia Tenants Opportunity to Purchase Act, D.C. Code § 42-3401, *et seq.* ("TOPA"). Appellants prevailed at the trial level; however, that decision was overturned on an appeal by 1305 LLC. 1305 Rhode Island Ave. NW, LLC v. Mussells, 292 A.3d 212 (D.C. 2022).

Following the decision of the Court of Appeals, both 1305 LLC and the owners of the Property, Laurie Ann Furman and Michael Jude Grippo, Trustees of The Michael John Furman Living Trust (the "Trustees") sought to recover their attorneys' fees from Appellants under a specific TOPA statute. The trial court granted both parties' motions for such fees. This appeal is from those judgments.

## STATEMENT OF RELEVANT FACTS

1. In 2016, Trustees, the owners of the Property, entered into contracts of sale with first Appellants, then with 1305 LLC as the purported assignees of the tenants' rights to purchase under TOPA.

2. On December 22, 2016, Appellants filed an Amended Complaint seeking to enforce their contract to purchase the Property and to nullify 1305 LLC's contract. [APX 23-29]

3. On July 31, 2017, the Trustees filed an Amended Counterclaim in this lawsuit seeking a declaratory judgment as to which other party, Appellants or 1305 LLC, held the contractual right to purchase the Property. As part of its Counterclaim, the Trustees claimed entitlement to recover their "costs, including reasonable attorneys' fees incurred herein". [APX 30-40]

4. On February 9, 2017, 1305 LLC filed a Counterclaim and Crossclaim, also seeking a Declaration along with Specific Performance. The Counterclaim of 1305 LLC did not contain a request for attorneys' fees and costs, nor did it make any reference to an entitlement to attorney's fees under D.C. Code § 42-3405.03. [APX 41-51]

5. On March 19, 2019, the trial court entered a judgment in favor of Appellants as well as a declaration regarding the competing contractual rights as requested by all parties.

6. On April 5, 2019, the Trustees filed a motion for award of attorneys' fees from 1305 LLC as an aggrieved owner pursuant to D.C. Code § 42-3405.03, which was granted as part of a final Judgment Order issued on May 1, 2019.

7. 1305 LLC did not oppose the Trustees' motion or otherwise raise the issue of attorneys' fees on their own behalf, as the alleged assignee of the tenants' rights or otherwise, until after the subsequent appeal and over a month after the judgment was reversed by the Court on December 2, 2022. [APX 56-62]

8. On December 2, 2022, the D.C. Court of Appeals issued an Order (amended on December 22, 2022) reversing the judgment of May 1, 2019, and remanding the case to the trial court "for further proceedings consistent with this order, including consideration of *pending* counterclaims and requests for attorneys' fees and costs." (the "Mandate") (emphasis added). The Mandate specifically referenced both D.C. Code § 42-3405.03 and D.C. Super. Ct. R. Civ. Pro. 54(d)(2)(B)(i) as part of its instruction regarding pending counterclaims and requests for attorneys' fees. [APX 52-55]



9. On January 26, 2023, 1305 LLC filed its Motion for Attorneys' Fees and Costs based on the Mandate's reversal of the trial court's judgment. [APX 56-62]

10. On February 10, 2023, over two months after the judgment was reversed in favor of 1305 LLC, the Trustees filed their Motion for Attorneys' Fees against Appellants. [APX 63-69]

11. Appellants filed Oppositions to the Motions for Attorneys' Fees pursuant to the trial court's scheduling order. [APX 70-78]

12. On August 7, 2023, the trial court (Judge Maurice A. Ross presiding) held a hearing, at which 1305 LLC and the Trustees were instructed to file proposed judgments in their favor regarding their motion for attorneys' fees. [APX 79-89]

13. On August 8, 2023, judgments were issued from which this appeal was taken. [APX 90-93]

## ARGUMENT

### **I. THE TRIAL COURT ERRED IN HOLDING THAT THE 1305 LLC WAS ENTITLED TO RECOVER ITS ATTORNEYS' FEES PURSUANT TO TOPA.**

1305 LLC's assertion that it is entitled to recover its attorneys' fees from Plaintiffs as the assignee of the tenants' rights under D.C. Code § 42-3405.03, which expressly applies only to an "aggrieved owner, tenant, or tenant organization", was both untimely and legally incorrect.

#### A. 1305 LLC's motion for attorneys' fees was untimely under the applicable Court Rules as well as the Appellate Court's Mandate.

Appellant has claimed throughout this litigation to be the assignee of the tenants' rights under the TOPA statutes, and to therefore be standing in the shoes of the aggrieved tenants. However, it both failed to seek attorney fees in its Counterclaim and it also failed to move for recovery of attorney fees under the applicable TOPA statute (D.C. Code § 42-3405.03) within fourteen days of the reversal of the trial court's judgment on December 2, 2022, as required under D.C. Super. Ct. Civ. R. 54(d)(2)(B)(i). Moreover, the Mandate of this Court issued on December 2, 2022 is clear that it applied only to *pending* counterclaims for attorney fees and it specifically referenced both the applicable TOPA statute and the applicable Superior Court rule regarding the timing of such a motion. [APX 52-55]

In a recently decided case, the Court of Appeals considered a ruling by the trial court barring an award of attorneys' fees and costs by the prevailing party under the District's Wage Payment and Collection Law and Minimum Wage Revision Act because the motion requesting the award was not filed within fourteen days of the judgment pursuant to D.C. Super. Ct. Civ. R. 54(d)(2)(B)(i). The Court of Appeals upheld that ruling, stating that "the trial court did not err by denying, as time-barred, appellants' motion for those costs and attorneys' fees to which they were entitled..." Zuniga v. Whiting-Turner Contracting Co., 270 A.3d 897, 905 (D.C. 2022). While the Court did allow the prevailing party in that case to seek interest on the judgment under a separate statute, it denied their request for attorneys' fees and costs under D.C. Code § 32-1308(b)(1) as being untimely under Rule 54(d)(2)(B).

Another case dispositive of 1305 LLC's claim is District of Columbia v. Jackson, 878 A.2d 489 (D.C. 2005), which, as in this case, involved the reversal of the trial court's judgment. While the Jackson decision suggests that a new 14-day period may arise where the appeal results in a reversal of the trial court's judgment, it still strictly requires timely action:

There is no indication in the record, and Jackson does not argue, that Jackson filed a motion for attorney's fees within fourteen days of the July 29, 1999 judgment, that during that fourteen-day period she requested a court order enlarging the fourteen-day time limit, or that she filed a motion under Rule 6(b) alleging "excusable neglect." There is no indication that the trial

court, sua sponte, entered an order extending the fourteen-day time limit. Any of these events would have put the District on notice that Jackson would be seeking attorney's fees, and thus satisfied one of the stated purposes of Rule 54(d)(2)(B)... Jackson followed none of these procedures. Thus, her motion for attorney's fees was untimely, and the trial court was not in a position to rule upon its merits. The trial court's order awarding attorney's fees is therefore reversed.

Id. at 494. *See also*, Note 6: “[W]hile the 14-day period is not jurisdictional, the failure to comply should be sufficient reason to deny the fee motion, absent some compelling showing of good cause.”). In fact, in the only TOPA case cited by 1305 LLC in its motion for fees, Malik Corp. v. Tenacity Group, LLC, 961 A.2d 1057 (D.C. 2008), the Court stated that “[o]ur rules require Tenacity [the third-party purchaser] to file with the Clerk an itemized and verified bill of costs and fees, accompanied by proof of service, within fourteen days from entry of judgment.” Id. at 1063.

Additionally, 1305 LLC is barred from seeking its attorneys’ fees and costs by its failure to plead for such relief in its Counterclaim [APX 41-51] and to preserve any such claim on appeal. “[W]e have indicated that filing the attorney fees motion within the fourteen day time frame set forth in Rule 54(d)(2)(B) (or within the time frame specified by the court) was sufficient to preserve the request pending appeal.” Purcell v. Thomas, 28 A.3d 1138, 1142 (D.C. 2011). Also, in Van Leeuwen v. Blodnikar, 144 A.3d 565 (D.C. 2016), the trial court ruled on its own initiative that the Blodnikars, as third-party purchasers who were assignees of

the tenants' TOPA rights, were *not* entitled to their attorneys' fees from the owner of the property. Because the Blodnikars failed to file a timely motion or otherwise object to the trial court's ruling, the Court of Appeals upheld the decision. "Under the circumstances, we do not view the Blodnikars as having properly preserved this procedural objection in the trial court." *Id.* at 570. 1305 LLC was likewise silent on the issue until January 26, 2023, well past the reversal of the trial court's decision on December 2, 2022.

Finally, the Court's Mandate in this case contained no mention or instruction regarding a request for attorney's fees by 1305 LLC, because there was none. It included only the Trustees' request for such an award made in their counterclaim. "On remand, the trial court may also undertake such further proceedings consistent with this opinion as may in the trial court's discretion be appropriate, including consideration of the Trust's counterclaim for attorney's fees and costs against the Mussells." 1305 Rhode Island Ave. NW, LLC v. Mussells, 292 A.3d 212, 220 (D.C. 2022)

- B. 1305 LLC's claim to its attorneys' fees is not authorized by the express language of the statute or any other conclusive authority.

In interpreting a statute such as the TOPA statute upon which 1305 LLC's claim relied, "[w]e start, as we must, with the language of the statute." Bailey v. United States, 516 U.S. 137, 144, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995). "The

primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used." Peoples Drug Stores, Inc. v. District of Columbia, 470 A.2d 751, 753 (D.C.1983) (en banc) (internal quotation marks and citation omitted). "Moreover, in examining the statutory language, it is axiomatic that 'the words of the statute should be construed according to their ordinary sense and with the meaning commonly attributed to them.'" Tippett v. Daly, 10 A.3d 1123, 1127 (D.C. 2010) (internal citations omitted); *see also* Davis v. United States, 397 A.2d 951, 956 (D.C. 1979). Here, the applicable statute, D.C. Code § 42-3405.03 is limited by its express language to only "[a]n aggrieved owner, tenant or tenant organization" and does allow for any other party to be entitled to recover attorneys' fees, such as an investor in real estate like 1305 LLC.

TOPA also contains a detailed description of its purpose, as intended by the legislature, none of which includes or suggests any consideration of the purely financial interests of an unrelated business entity that is neither a tenant nor an owner:

D.C. Code § 42-3401.02. Purposes.

In enacting this chapter, the Council of the District of Columbia supports the following statutory purposes:

(1) To discourage the displacement of tenants through conversion or sale of rental property, and to strengthen the bargaining position of tenants toward that end without unduly interfering with the rights of property owners to the due process of law;

- (2) To preserve rental housing which can be afforded by lower income tenants in the District;
- (3) To prevent lower income elderly tenants and tenants with disabilities from being involuntarily displaced when their rental housing is converted;
- (4) To provide incentives to owners, who convert their rental housing, to enable lower income non-elderly tenants and tenants without disabilities to continue living in their current units at costs they can afford;
- (5) To provide relocation housing assistance for lower income tenants who are displaced by conversions;
- (6) To encourage the formation of tenant organizations;
- (6a) To balance and, to the maximum extent possible, meet the sometimes conflicting goals of creating homeownership for lower income tenants, preserving affordable rental housing, and minimizing displacement; and
- (7) To authorize necessary actions consistent with the findings and purposes of this chapter.

There is no expression of legislative intent to preserve, protect or promote the interests of anyone other than tenants and owners. TOPA is remedial in character, and any ambiguity in the legislation should be construed “toward the end of strengthening the legal rights of tenants or tenant organizations to the maximum extent permissible under law.” D.C. Code § 42-3405.11. “Enabling tenants to enjoy such benefits promotes the goals of ‘creating home ownership for lower income tenants, preserving affordable rental housing, and minimizing displacement.’” Richman Towers Tenants' Ass'n Inc. v. Richman Towers LLC, 17 A.3d 590, 619 (D.C. 2011). *See also* 1618 Twenty-First St. Tenants' Ass'n, Inc. v.

The Phillips Collection, 829 A.2d 201, 203 (D.C. 2003). (The “overarching purpose [of the statute] is to protect tenant rights.”).

By its plain and clear language, neither § 42-3401.02 (carefully defining the purpose of TOPA) nor § 42-3405.03 (allowing for fee-shifting despite the American Rule) encompass *assignees* of an aggrieved party where such assignees have no other standing or entitlement. Again, the entire structure of the TOPA statutes is designed to protect tenants and facilitate their access to judicial relief where needed, not outside investors in real estate opportunities who need no such protection or aid through recovery of legal expenses. TOPA is clearly not designed to benefit such companies, nor is it designed to punish potential purchasers of real property such as Appellants who never violated TOPA in any way.

Considering the clear statutory purpose, it bears repeating that the tenants in this case were not aggrieved, in that they were never named as parties and instead voluntarily accepted a substantial payment from 1305 LLC to *not* be involved in litigation. Once they accepted their payments, they no longer had any claims or grievances to enforce. As such they never asserted any claims in this lawsuit and thus were never able to be a prevailing party. Their rights to recover any legal expenses under § 42-3405.03 were nullified at the time of assignment.



In the Malik case cited by 1305 LLC, the trial court considered the owner's apparent lack of good faith bargaining when exercising its discretion in awarding legal fees to the third-party purchaser. "TOPA directs the owner to provide tenants a copy of the contract with the third party, D.C. Code § 42-3404.03, and considers that any owner is bargaining without good faith when he offers any third party a property for less than ninety percent of the sales price offered to the tenant. D.C. Code 42-3404.05(a-1). Here, Malik failed to provide Tenacity with a finalized copy of the third-party contract...". Malik, *supra* at 1062. Also, "[t]he trial court stated that Malik's respective prices to Bogden Builders and Tenacity, 'raises serious concerns' about Malik's good faith." Id. at footnote 1.

The issue of bad faith was also raised in Blodnikar, where the Court commented that "the Blodnikars argue for the first time in their reply brief that a prevailing party in a TOPA action should presumptively be awarded attorney's fees, even in the absence of bad faith on the part of the losing party." Blodnikar at 570. The Court declined to answer the question. So, between Blodnikar and Malik, where bad faith was also discussed in the context of the judge's discretion, it appears to remain an open question. What is known is that Appellants in this case operated only in good faith throughout this process and there have been no allegations otherwise.

Finally, there are certainly no cases in the District of Columbia where a third-party assignee of tenant rights was held to be *automatically* entitled to recover attorneys' fees under TOPA, regardless of whether such assignee was considered an "aggrieved party". The opinion in Wallasey Tenants Ass'n, Inc. v. Varner, 892 A.2d 1135 (D.C. 2006) is also noteworthy:

In a separate action, the Fairbairn Parties appeal claiming that the trial court erred when it determined that they were not "aggrieved" and, thus, were not entitled to attorneys' fees. The decision to award attorneys' fees is reserved to the sound discretion of the trial court and will be reversed only upon a showing of abuse... The issue before us is whether the trial court erred in refusing to award attorneys' fees to the Fairbairn Parties pursuant to D.C.Code § 42-3405.03.

The trial court was correct in determining that the Fairbairn Parties were not "aggrieved" parties, and were thus outside of the Act's allowance of attorneys' fees. The Act states that, "[a]n aggrieved owner, tenant, or tenant organization may seek enforcement of any right or provision under this chapter through a civil action in law or equity, and, upon prevailing, may seek an award of costs and reasonable attorney fees." D.C.Code § 42-3405.03. A plain reading of the statute indicates that the right to collect attorneys' fees is only available to the party that brought the suit. If the Council intended to allow defending parties to recover attorneys' fees simply by prevailing in the suit, then they would have done so.

In this case, the Fairbairn Parties' were not seeking to enforce their own rights; rather, they were defending against an action brought by the Tenants. As such, the Fairbairn Parties had no basis to request attorneys' fees and the trial court did not err in denying the request.

In this case, it is true that 1305 filed a Counterclaim and were not merely defending against Appellants claims. Again, however, 1305 made no claim for

attorneys' fees or otherwise preserved the issue on appeal while the other parties did. 1305 LLC should also not be considered a prevailing party under the reasoning of the Court in Varner.

Considering the facts and circumstances of the parties and claims in this case, the legislative intent and purpose of TOPA, the precise wording of the operable statute and the case law described above, 1305 LLC is not entitled to recover its attorneys' fees from Appellants. The trial court's unconsidered award in this regard was erroneous and should be reversed.

**II. THE TRIAL COURT ERRED IN RULING THAT THE TRUSTEES ARE ENTITLED TO RECOVER THEIR ATTORNEYS' FEES.**

- A. The Trustees' motion for attorneys' fees was untimely and should have been denied on that basis alone.

Following the Court's reversal of the trial court's judgment on December 2, 2022, the Trustees did not move for attorney's fees and costs until February 10, 2023, which was well beyond the fourteen days allowed under D.C. Super. Ct. Civ. R. 54(d)(2)(B)(i). Their motion was therefore untimely and should have been denied. The trial court erred and/or abused its discretion by not considering the argument or explaining its reasoning for overlooking this procedural requirement.

In a recently decided case, the Court considered a ruling by the trial court barring an award of attorneys' fees and costs by the prevailing party under the

District's Wage Payment and Collection Law and Minimum Wage Revision Act because the motion requesting the award was not filed within fourteen days of the judgment pursuant to D.C. Super. Ct. Civ. R. 54(d)(2)(B)(i). The Court of Appeals upheld that ruling, stating that "the trial court did not err by denying, as time-barred, appellants' motion for those costs and attorneys' fees to which they were entitled..." Zuniga v. Whiting-Turner Contracting Co., 270 A.3d 897, 905 (D.C. 2022). While the Court did allow the prevailing party in that case to seek interest on the judgment under a separate statute, it denied their request for attorneys' fees and costs under D.C. Code § 32-1308(b)(1) as being untimely under Rule 54(d)(2)(B).

In District of Columbia v. Jackson, 878 A.2d 489 (D.C. 2005), which, as in this case, involved the reversal of the trial court's judgment, the Court also strictly required timely action in seeking to recover attorneys' fees:

There is no indication in the record, and Jackson does not argue, that Jackson filed a motion for attorney's fees within fourteen days of the July 29, 1999 judgment, that during that fourteen-day period she requested a court order enlarging the fourteen-day time limit, or that she filed a motion under Rule 6(b) alleging "excusable neglect." There is no indication that the trial court, sua sponte, entered an order extending the fourteen-day time limit. Any of these events would have put the District on notice that Jackson would be seeking attorney's fees, and thus satisfied one of the stated purposes of Rule 54(d)(2)(B)... Jackson followed none of these procedures. Thus, her motion for attorney's fees was untimely, and the trial court was not in a position to rule upon its merits. The trial court's order awarding attorney's fees is therefore reversed.

Id. at 494. *See also*, Note 6: “[W]hile the 14-day period is not jurisdictional, the failure to comply should be sufficient reason to deny the fee motion, absent some compelling showing of good cause.”). The Trustees’ motion was filed over two months after the reversal of the judgment and the order for the Property to be conveyed to 1305 LLC, without any compelling showing of good cause, and therefore should have been denied as being time-barred.

B. The Trustees are not a “Prevailing Party” as defined by applicable case law.

Throughout this case, it was known and conceded by all parties that the Trustees would ultimately be ordered to convey the Property to either the Appellants or to 1305 LLC. The true case and controversy existed only between those other two parties, that being the dispute over which would be entitled to purchase the Property. The Trustees were basically passive stakeholders, analogous to an interpleader action where their only role was to hold the property and await the court’s determination regarding its ultimate distribution. The Trustees had no separate claims of their own.<sup>1</sup> The Trustees were first ordered to convey the Property to the Plaintiffs, then to the 1305 LLC, but gained nothing themselves and cannot be deemed to have achieved a successful outcome. Their position remained unchanged from the outset of the litigation to its final judgment.

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<sup>1</sup> The Trustees did attempt to assert monetary claims at one point through an Amended Counterclaim, but those claims were dismissed with prejudice by Order dated May 2, 2018.

“This conclusion comports with our case law defining a prevailing party. This court has held that a party prevails if he ‘succeed[s] on any of the significant issues in the litigation which achieved some of the benefits sought by bringing the suit.’” District of Columbia v. Patterson, 667 A.2d 1338, 1345 (D.C.1995) (*quoting Henderson v. District of Columbia*, 493 A.2d 982, 999 (D.C. 1985)); *see also Farrar v. Hobby*, 506 U.S. 103, 111-12, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992) (“[A] plaintiff ‘prevails’ when actual relief on the merits of his claim materially alters the legal relationship between parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.”). In this case, again, the Trustees achieved no benefit and their legal relationship with the other two parties was not modified to gain a direct benefit, they merely waited until being ordered to convey the Property to one of the other two parties under the same contractual terms.

In Farrar, the issue before the Court was whether a plaintiff who wins damages in a suit for violation of his civil rights was a prevailing party for purposes of the applicable statute. The Court held he was because “a judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay.” Id. at 113, 113 S.Ct. at 574. The “otherwise would not pay” language is significant, because the Trustees were *always* going to have to convey the property to one of the other two parties in this

case. They had signed contracts of sale with both parties. Therefore, they gained no additional benefit from the result of the litigation.

The same analysis applies to a declaratory judgment action, as the Trustees brought in their Counterclaim. “Likewise in a declaratory judgment action: if the defendant, under pressure of the lawsuit, alters his conduct (or threatened conduct) towards the plaintiff that was the basis for the suit, the plaintiff will have prevailed. That is the proper equivalent of a judicial judgment which would produce the same effect; a judicial statement that does not affect the relationship between the plaintiff and the defendant is not an equivalent.” Hewitt v. Helms, 482 U.S. 755, 761, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987).

“We conclude that a favorable judicial statement of law in the course of litigation that results in judgment against the plaintiff does not suffice to render him a prevailing party”. Id. at 482 U.S. 763. The Trustees’ legal relationship with the other parties was already defined by the contracts of sale, and the judgment to convey to one or the other did not affect the legal relationship created by the prevailing contract.

Notably, after Appellants prevailed at the trial court, the Trustees proceeded to seek their attorneys’ fees from 1305 LLC. After the Court reversed the trial court’s judgment, the Trustees switched to seeking their fees from Appellants. Again, the Trustees were passive and unwilling participants in the litigation and

simply wanted a determination of which contract was enforceable and, hopefully, to recover their attorneys' fees from one party or the other. The Trustees were always to receive the declaration they asked for either way.

Other authorities support the view that a party which achieves no actual success in its favor cannot be considered a "prevailing party". "The most recent edition of Black's [Law Dictionary] defines 'prevailing party' to mean '[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded.'..." Merriweather Post Bus. Tr. v. It's My Amphitheater, Inc., No. 2594, at Footnote 19 (Md. App. Aug 06, 2020). The Trustees received no judgment in *their favor*, and thus were not a prevailing party. The trial court erred not only in its ruling, but in failing to consider Appellants arguments on this issue.

### **III. THE TRIAL COURT'S AUTOMATIC APPLICATION OF THE TOPA ATTORNEYS' FEE PROVISION WITHOUT CONSIDERATION OF APPELLANTS' ARGUMENTS IN OPPOSITION WAS AN ABUSE OF DISCRETION.**

The trial court's decision to not even consider Appellant's arguments on the issue of attorneys' fees and to simply rubber-stamp the other parties' request, while stating that it was an issue for the Court of Appeals to decide, was an abuse of discretion. As described above, the decision was also legally incorrect.

It is well settled that any award of attorney's fees, even those based upon a statute providing for such an award, is not made automatically but is subject to the



trial court's discretion. This rule applies with equal force to cases involving TOPA. See Malik, *supra*, 961 A.2d at 1060. In another recent case the Court confirmed this point:

We review the judge's decision for an abuse of discretion. 'This court generally defers to the broad discretion of the trial judge in the calculation and award of attorney's fees.' 'Therefore, it requires a very strong showing of abuse of discretion to set aside the decision of the trial court [regarding the awarding of attorney's fees].'

Khan v. Orbis Bus. Intelligence, 21-CV-0283, 21-CV-0440 (D.C. Apr 13, 2023). See also William J. Davis, Inc. v. Tuxedo LLC, 124 A.3d 612, Note 13 (D.C. 2015) (an award of attorney fees under D.C. Code § 42-3405.03 is to be discretionary and decided "separately on its merits".)

At the final hearing on the motions for attorney's fees of 1305 LLC and the Trustees, it was clear that Judge Ross had already made his decision before any arguments, and had only briefly considered, if at all, the oppositions filed by Appellants. The judge's position was that "we'll proceed down the line" (meaning this appeal) [APX 82] and that Appellants "will have to take it up again with the Court of Appeals." [APX 86-87]. The movants were instructed to submit proposed orders, then "you can take it back up to the Court of Appeals" [APX 87].

In other words, there was no real consideration of the arguments and no findings of fact or detailed reasons given from which to appeal, or from which to specifically identify any errors of the trial court beyond its perfunctory, pre-

determined judgements. The motions for attorney's fees were considered a mere formality, while the case law shows that such determinations were not to be automatic but were discretionary and thereby subject to some degree of reasoned consideration. In this case, Appellants assert that the absence of proper consideration and the mere instruction to simply to take it up with the Court of Appeals was an abuse of discretion by the trial court.

An absence of full consideration, findings and/or explanation has been the basis for this Court's finding of an abuse of discretion. "Given the trial judge's sparse explanation for his denial of attorneys' fees, and the nuanced nature of this case, we remand to the trial judge to consider the issue anew and provide a fuller explanation of what factors guide his exercise of discretion... In the present circumstances, we direct that the trial judge consider these concepts and in his discretion, articulate a basis for the conclusions reached." Bsa 77 P Street LLC v. Hawkins, 983 A.2d 988, 997 (D.C. 2009). The facts of this case indicate a "strong showing of abuse of discretion" in addition to errors of law.

### **CONCLUSION**

This Court should reverse the decision of the trial court to award attorneys' fees to 1305 LLC and the Trustees.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 31, 2024, a copy of the foregoing Brief of Appellants John D. Mussells and Premila M. Mussells was served electronically upon:

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## **D.C. Code § 42-3401.02**

### **§ 42-3401.02. Purposes.**

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In enacting this chapter, the Council of the District of Columbia supports the following statutory purposes:

- (1) To discourage the displacement of tenants through conversion or sale of rental property, and to strengthen the bargaining position of tenants toward that end without unduly interfering with the rights of property owners to the due process of law;
- (2) To preserve rental housing which can be afforded by lower income tenants in the District;
- (3) To prevent lower income elderly tenants and tenants with disabilities from being involuntarily displaced when their rental housing is converted;
- (4) To provide incentives to owners, who convert their rental housing, to enable lower income non-elderly tenants and tenants without disabilities to continue living in their current units at costs they can afford;
- (5) To provide relocation housing assistance for lower income tenants who are displaced by conversions;
- (6) To encourage the formation of tenant organizations;
- (6a) To balance and, to the maximum extent possible, meet the sometimes conflicting goals of creating homeownership for lower income tenants, preserving affordable rental housing, and minimizing displacement; and
- (7) To authorize necessary actions consistent with the findings and purposes of this chapter.

## **D.C. Code § 42-3405.03**

### **§ 42-3405.03. Civil cause of action.**

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An aggrieved owner, tenant, or tenant organization may seek enforcement of any right or provision under this chapter through a civil action in law or equity, and, upon prevailing, may seek an award of costs and reasonable attorney fees. In an equitable action, the public policy of this chapter favors the waiver of bond requirements to the extent permissible under law or court rule.

## **D.C. Code § 42-3405.11**

### **§ 42-3405.11. Statutory construction.**

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The purposes of this chapter favor resolution of ambiguity by the hearing officer or a court toward the end of strengthening the legal rights of tenants or tenant organizations to the maximum extent permissible under law. If this chapter conflicts with another provision of law of general applicability, the provisions of this chapter control.

## D.C. Code § 42-3404.05

### § 42-3404.05. Contract negotiation.

**(a) Bargaining in good faith.** — The tenant and owner shall bargain in good faith. The following constitute prima facie evidence of bargaining without good faith:

**(1)** The failure of an owner to offer the tenant a price or term at least as favorable as that offered to a third party, within the periods specified in §§ 42-3404.10(4) and 42-3404.11(4), respectively, or within 90 days of delivering an offer of sale to an elderly tenant or a tenant with a disability pursuant to § 42-3404.09(c), without a reasonable justification for so doing;

**(2)** The failure of an owner to make a contract with the tenant which substantially conforms with the price and terms of a third party contract within the time periods specified in §§ 42-3404.10(4) and 42-3404.11(4), respectively, or within 90 days of delivering an offer of sale to an elderly tenant or a tenant with a disability pursuant to § 42-3404.09(c), without a reasonable justification for so doing; or

**(3)** The intentional failure of a tenant or an owner to comply with the provisions of this subchapter.

**(a-1) Reduced price.** — If the owner sells or contracts to sell the accommodation to a third party for a price more than 10% less than the price offered to the tenant or for other terms which would constitute bargaining without good faith, the owner shall comply anew with all requirements of §§ 42-3404.09(c), 42-3404.10, and 42-3404.11, as applicable.

**(a-2) Financial assurances.** — The owner may not require the tenant to prove financial ability to perform as a prerequisite to entering into a contract. The owner may not require the tenant to pay the purchase price in installments unless the owner provides deferred purchase money financing on terms reasonably acceptable to the tenant. The owner may require the tenant to prove that the tenant, either alone or in conjunction with a third party, has comparable financial ability to the third-party contractor before the owner will be required to grant deferred purchase money financing to the tenant on the same terms and conditions agreed between the owner and the third-party contractor. If the tenant can prove comparable financial ability alone, the owner may not require the tenant to secure a third-party guarantor. This proof cannot be required as a prerequisite to contracting. It may be required only as a prerequisite to the owner granting deferred purchase money financing at settlement.

**(a-3) Transfers of interest in a partnership or corporation and master leases.** — In the event of a transfer of interest in a partnership or corporation or in the event of a master lease or agreement that is considered a sale within the meaning of § 42-3404.02, but which does not involve a transfer of record title to the real property, the owner shall be bargaining in good faith if the owner offers the tenant the opportunity to acquire record title to the real property or offers the tenant the opportunity to match the type of transfer or agreement entered into with the third party. With respect to either type of offer, all provisions of this subchapter apply.

**(b) Deposit.** — The owner shall not require the tenant to pay a deposit of more than 5% of the contract sales price in order to make a contract. The deposit is refundable in the event of a good faith failure of the tenant to perform under the contract.

## **Rule 54. Judgment; Costs**

(a) **DEFINITION; FORM.** "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment should not include recitals of pleadings, a master's report, or a record of prior proceedings.

(b) **JUDGMENT ON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES.** When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

(c) **DEMAND FOR JUDGMENT; RELIEF TO BE GRANTED.** A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

(d) **COSTS; ATTORNEY'S FEES.**

(1) **Costs Other Than Attorneys' Fees.** Unless an applicable statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party. But costs against the United States, the District of Columbia, or officers and agencies of either may be imposed only to the extent allowed by law. The clerk may tax costs on 14 days' notice. On motion served within the next 7 days, the court may review the clerk's action.

(2) **Attorneys' Fees.**

(A) **Claims to Be by Motion.** A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.

(B) **Timing and Contents of the Motion.** Unless a statute or a court order provides otherwise, the motion must:

(i) be filed no later than 14 days after the entry of judgment;

(ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;

(iii) state the amount sought or provide a fair estimate of it; and

(iv) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.

(C) **Proceedings.** Subject to Rule 23(h), the court must, on a party's request, give an opportunity for adversary submissions on the motion in accordance with Rule

12-I or 43(f). The court may decide issues of liability for fees before receiving submissions on the value of services. The court must find the facts and state its conclusions of law as provided in Rule 52(a).

(D) Reference to a Magistrate Judge or a Master. The following rules govern reference to a magistrate judge or a master:

(i) The Chief Judge may refer a motion for attorney's fees to a magistrate judge under Rule 73 as if it were a dispositive pretrial matter.

(ii) The court may refer issues concerning the value of services to a special master under Rule 53 without regard to the limitations of Rule 53(a)(2).

(E) Exceptions. Rule 54(d)(2)(A)–(D) do not apply to claims for fees and expenses as sanctions for violating these rules.



# District of Columbia Court of Appeals

## REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a “CV” docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

- An individual’s social-security number
- Taxpayer-identification number
- Driver’s license or non-driver’s’ license identification card number
- Birth date
- The name of an individual known to be a minor
- Financial account numbers, except that a party or nonparty making the filing may include the following:

- (1) the acronym “SS#” where the individual’s social-security number would have been included;
- (2) the acronym “TID#” where the individual’s taxpayer-identification number would have been included;
- (3) the acronym “DL#” or “NDL#” where the individual’s driver’s license or non-driver’s license identification card number would have been included;
- (4) the year of the individual’s birth;
- (5) the minor’s initials; and
- (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.
3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.
4. Information about protection orders, restraining orders, and injunctions that “would be likely to publicly reveal the identity or location of the protected party,” 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining “protection order” to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).
5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.
6. Any other information required by law to be kept confidential or protected from public disclosure.

  
\_\_\_\_\_  
Signature

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23-CV-747  
Case Number(s)

1/31/24  
Date