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NO. 72114-3-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

ALGO, INC., a Washington corporation and ALLEN R. GRANT, individually and his marital community, and JANE DOE GRANT, her marital community

Appellants and Cross-Respondents,

vs.

WASHINGTON FEDERAL SAVINGS, a United States Corporation,

Respondent and Cross-Appellant.

BRIEF OF APPELLANTS/CROSS-RESPONDENTS

Miles A. Yanick, WSBA #26603
Sarah Gohmann Bigelow, WSBA #43634
SAVITT BRUCE & WILLEY LLP
1425 Fourth Avenue Suite 800
Seattle, WA 98101-2272
(206) 749-0500

Attorneys for Appellants/Cross-Respondent

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I. INTRODUCTION

This appeal case is about the proper remedy for a breach of contract. The contract is a one-page term sheet negotiated and agreed in the course of the underlying litigation. The term sheet provided for a cash payment by the defendants, Allen Grant and his company, Algo Inc., in exchange for mutual releases. Payment was due in five years.

There was no interest due under the settlement term sheet; instead, the amount due was stepped up periodically over the course of the five years, depending on when it was paid. If paid at any time before August 1, 2014, the payment due was $850,000. If not paid until the end of the full five-year term, the amount due was $1 million. Thus, there was an incentive but no obligation to pay before the end of the five-year term.

The settlement term sheet contemplated that the parties would agree to a more detailed settlement agreement, promissory note, deed of trust, and other documents incorporating its terms and setting forth such additional terms as the parties might agree to. But the parties never got to that. Instead, the settlement term sheet is the only written agreement between the parties.

In order to provide the security contemplated by the settlement term sheet, Mr. Grant had to make certain arrangements with his business partner (not a party to this case) in an unrelated venture. But the business

partner proved unwilling to enter into these arrangements. As a result, Mr. Grant was not able to provide the security contemplated in the settlement term sheet.

Washington Federal's initial response was to disregard the settlement and resume litigation on the underlying claims. Washington Federal moved for summary judgment on those claims and lost: the motion was denied. Washington Federal then went to plan B, amending its complaint to state a claim for breach of the settlement term sheet. Washington Federal eventually won summary judgment on that claim. Mr. Grant does not agree with that result but chose not to appeal it. Instead, the issues on Mr. Grant's appeal concern the amount awarded by the trial court.

It is a bedrock principle of the law of contract remedies that they should put the non-breaching party in the position that it would have been in but for the breach. Here, not only the breach but entry of final judgment happened well within the initial period set forth in the settlement term sheet during which payment due was $850,000. Both at the time of the breach and at the time of the judgment, this was all Washington Federal was entitled to under the settlement term sheet. This amount could have been paid up until August 1, 2014 with no additional interest,

penalties, or payments of any kind. Nonetheless, the trial court initially awarded Washington Federal $1 million, with no prejudgment interest.

On cross-motions for reconsideration, the trial court corrected this error and changed the principal amount of the judgment to $850,000. However, inexplicably, the court tacked prejudgment interest on to this amount from the date on which Mr. Grant was deemed to have breached.

Prejudgment interest should compensate a party for being deprived of a liquidated sum of money from the date of the breach to the date of judgment. Here, Washington Federal was not deprived of any sum of money over that time period. To the contrary, Mr. Grant could have waited another 2 months after the date of the judgment and still owed no more than $850,000 under the parties' agreement. Indeed, the breach that Washington Federal complained of was not—and could not have been—the failure to pay money; instead, the breach was the failure to provide security. While a breach of that nature certainly is material (and allowed Washington federal to sue for breach before payment was due), it did not deprive Washington Federal of a liquidated sum of money and therefore could not support an award of prejudgment interest.

The trial court also awarded Washington Federal attorneys' fees incurred in its action for breach of the settlement term sheet, even though the term sheet did not provide for recovery of attorneys' fees. It is not as

though such recovery was implicit or overlooked. To the contrary, the settlement term sheet expressly addressed attorneys' fees but provided that they could only be recovered in the event of a default under the note to be negotiated—i.e., for failure to pay within the five-year term.

Not only did the trial court have no basis to award attorneys' fees for enforcement of the settlement term sheet in the absence of the statute or contract providing for them: it went further, awarding Washington Federal fees incurred in its attempt to win summary judgment on its underlying claims—work that was unrelated (and indeed, contrary) to the settlement term sheet pursuing claims on which Washington Federal did not prevail.

Accordingly, Mr. Grant and Algo (collectively referred to as "Mr. Grant" or "Appellants") appeal the trial court's award of prejudgment interest and attorneys' fees.

II. ASSIGNMENTS OF ERROR

1. Prejudgment Interest. Prejudgment interest is to compensate a plaintiff for being improperly deprived of the use value of money. Here, the alleged breach did not deprive Washington Federal of any money. The trial court erred in nonetheless awarding prejudgment interest.

2. Right to Recover Attorneys' Fees. The parties' agreement provided that fees could be recovered in an action to enforce its payment terms. No payments were ever due or missed; instead, Washington Federal sued on claims for nonperformance of other provisions. The trial court erred in nonetheless awarding attorneys' fees.

3. Amount of Fee Award. A significant portion of the fees requested by Washington Federal were incurred (a) before there was any action to enforce the parties' settlement agreement and (b) before any breach of the settlement agreement was alleged to have occurred. The trial court erred in nonetheless awarding Washington Federal the full amount of the attorneys' fees it claimed.

4. Failure to make findings and conclusions. The trial court's order awarding fees allowed Washington Federal's request without exception, adopted the order proposed by its counsel without modification, and failed to explain its reasoning or address the arguments raised by the defendants addressed in this brief. This error requires reversal and remand if the fee award is not reversed entirely (Assignment of Error 2).

III. STATEMENT OF THE CASE

A. The Underlying Litigation[1]

Defendant Allen Grant is a long-time and successful real-estate developer. Over the last forty years, he has earned many awards and constructed more than 5,000 homes in Arizona, California, Oregon, and Washington. In 2006, Mr. Grant learned of an opportunity to purchase and develop property in Sequim, Washington overlooking the Strait of Juan de Fuca into large-lot single-family residences (the "Bell Woods Property"). Mr. Grant's company, ARG Development, LLC, purchased the Bell Woods Property with a $3,600,000 loan from Washington Federal. Mr. Grant and his company, Algo, Inc. signed personal guarantees securing the bank loan.

Over the next couple of years, Mr. Grant devoted significant time and money to developing the Bell Woods Property. But in 2008, with the Great Recession, Mr. Grant ran into trouble. Mr. Grant worked closely and proactively with the bank, but on March 6, 2009, the bank mailed a notice of default to the guarantors.

From that point forward, the parties' stories differ, as set forth in the original pleadings (CP 1–4 & 5–11). Briefly, Mr. Grant maintains that, through email correspondence and telephone conferences, he and

[1] The facts in this part are provided for context and were not at issue in the summary judgment and fee award on appeal. They are set forth in more detail at CP 59–85.

Washington Federal's Ron McKenzie negotiated a deal whereby the bank would accept a deed in lieu of foreclosure—an agreement that Mr. Grant partially performed and acted in reliance on. Washington Federal denies that the parties reached such an agreement. There was ample evidence corroborating Mr. Grant's version, including emails, internal bank records, and even draft deed-in-lieu paperwork prepared by the bank. (*See* CP 66–74.)

Nonetheless, Washington Federal conducted a trustee sale in February 2010 and, a year later, commenced this action seeking a deficiency judgment against Mr. Grant and Algo as co-guarantors. CP 1–4.) Under RCW 61.24.100(7), a deed in lieu of foreclosure would have eliminated Washington Federal's right to seek a deficiency judgment against the guarantors. Accordingly, Mr. Grant counterclaimed for breach of the deed-in-lieu agreement between him and the bank.

B. The Settlement

1. Terms

The parties reached an agreement settling their respective claims and defenses at a mediation on August 1, 2012. (CP 211, at ¶ 9.) The terms of the agreement were set forth in a Settlement Term Sheet executed the same day. (CP 228–29.) The material portions of the agreement are set forth verbatim here, with emphasis added:

Washington Federal Savings ("Washington Federal") and Allen Grant and Algo, Inc. ("Defendants") agree to settle the claims asserted in the pending litigation between them (King County Superior Court Case No. 11-2-07772-1) on the following terms. While the parties contemplate ***that these terms will be incorporated into a more detailed settlement agreement and release, promissory note, deed of trust, and related documents***, it is understood and agreed that this document is itself a binding and enforceable agreement.

1. Defendants agree to pay Washington Federal $1 million in the form of a promissory note under the following terms:

    a. ***Payment shall be due in 60 months*** from the date of this agreement;

    b. ***Interest shall be 0%*** for the five-year term;

    c. Interest shall accrue at 12% per annum in the event of default;

    d. ***In any action to enforce the note***, the prevailing party shall be entitled to recover its reasonable costs, including attorneys' fees;

    e. The following discounts shall apply if the discounted amount is paid in full within the time periods set forth below:

        If paid within 24 months: 15%
        If paid within 36 months: 10%
        If paid within 48 months: 5%

2. The note shall be secured by a first position deed of trust encumbering one or more

> properties owned by GO Merced GP (either the 145-acre parcel or the 56-acre parcel), to be determined and effectuated as follows….

There are several aspects of this settlement term sheet that are material to this appeal:

a. No payment was due before August 2017

The terms of the promissory note included that payment was due in 60 months. Because no payments were to be due under the note before the 60-month period (i.e., August 1, 2017), there could be no "default" under the note's default-interest provision before then. This is how Mr. Grant understood the default-interest provision as well. (CP 211, at ¶ 9.)

b. The interest rate was 0% before August 2017

Nor do any of the general provisions of the Settlement Term Sheet allow for recovery of attorneys' fees or interest. (*See* CP 228–29.) There is no provision, for instance, stating that fees or prejudgment interest are recoverable in the event of any breach of the agreement generally. Such terms were not overlooked; they merely were not included—for instance, there is a provision for arbitration of any disputes regarding the terms of the settlement agreement generally, but it does not contain a prevailing-party fee provision. (*Id.* ¶ 5.)

c. Attorneys' fees were recoverable only for failure to pay

Paragraph 1 of the settlement term sheet addresses payment terms, to be memorialized in a promissory note. That paragraph provides that attorneys' fees may be recovered "in any action to enforce the note"—i.e., for breach of a payment obligation. No payments were due before August 1, 2017. Thus, there could be no action to "enforce" the payment obligations of note (or of the settlement term sheet) before then. This is how Mr. Grant understood the attorneys'-fee provision as well. (CP 211.)

In contrast, the obligation to provide security under paragraph 2 of the settlement term sheet—the breach alleged by Washington Federal and on which it prevailed—makes no provision for attorneys' fees. Nor is there any general provision for attorneys' fees in an action to enforce the settlement term sheet generally.[2]

d. Default interest was due only for failure to pay

In the event of "default" under the note, interest would be 12 percent.

[2] The parties did negotiate general enforcement remedies, however: the settlement term sheet provided for arbitration to resolve disputes in drafting, for instance. These remedies just did not include fees.

2. Mr. Grant's attempt to perform his obligations regarding security

Over the next several months, Mr. Grant took steps to arrange to provide the first-position deed of trust encumbering one of the properties in California (the "Merced" and "Oakdale" properties) pursuant to paragraph 2 of the settlement term sheet. (CP 211–12, at ¶¶ 10–14.) Indeed, a significant amount of work was involved before the mediation as well, to confirm the viability of this option. (CP 210–11, at ¶¶ 5–8.) But as the bank knew, providing this security would require the participation of Mr. Grant's partner in these properties, Don Olmsted. (CP 213, at ¶ 15.) Don Olmsted is not a party to this case, and the loan from Washington Federal did not relate to the Merced or Oakdale properties.

Mr. Grant and Mr. Olmsted agreed in principle that they would partition the Merced property into two parcels of equal value and distribute a parcel to each partner. (CP 212, at ¶ 13; CP 307, at ¶ 5.) But while Mr. Grant and Washington Federal were working out other issues related to carrying out the settlement, Mr. Olmsted informed Mr. Grant that a judgment was being or soon would be entered against Mr. Olmsted personally in a lawsuit pending in Stanislaus County Superior Court. (CP 213, at ¶ 15; CP 307, at ¶ 6.) As a result, Mr. Olmsted was no longer willing to have property distributed to him personally as he and Mr. Grant had initially contemplated. (CP 307, at ¶ 6.) Without Mr. Olmsted's

cooperation, Mr. Grant was not able to make the arrangements necessary to provide the security contemplated under the settlement term sheet. (CP 213, at ¶ 15.)

Mr. Grant remained willing to honor the rest of the terms of the settlement term sheet, including preparing and executing a note and finding other suitable security. (CP 213, at ¶ 17.) But an alternative arrangement also needed to address Mr. Grant's other major creditor, Union Bank. (*Id*.) Mr. Grant wanted to ensure that any alternative reached was part of a global settlement that included Union Bank. (*Id.*)

Washington Federal rejected Mr. Grant's offer to discuss an alternative agreement regarding security for the settlement terms and instead resumed the litigation on the underlying claim for a deficiency judgment. (CP 20–24.)

3. The parties do not negotiate or agree to additional documentation

The parties never executed a "more detailed settlement agreement and release, promissory note, deed of trust, and related documents" as contemplated by the settlement term sheet. Counsel did prepare draft documents. (CP 281, at ¶ 4, CP 292–305.) However, by that time Mr. Grant had run into hurdles in making the arrangements with Mr. Olmsted, and the documents were never revised, finalized, or agreed to. Thus, the

settlement term sheet—which the parties "understood and agreed… is itself a binding and enforceable agreement"—is the sole written agreement. The only agreed terms of the parties' contract are there.

C. Washington Federal's Unsuccessful Attempt to Win Summary Judgment on Underlying Claim for Deficiency Judgment

Washington Federal gave notice that it was withdrawing the settlement agreement in February 2013. (CP 20–24.) Four months later, the bank filed a motion for summary judgment on its claim for a deficiency judgment based on the personal guaranties of the original loan. (CP 32–58.) On July 17, 2013, Judge John Erlick denied the motion. (CP 86–88.)[3]

D. Washington Federal's Alternative Claim for Breach of the Settlement Term Sheet Agreement

The day after losing its motion for summary judgment, Washington Federal filed a motion for leave to amend its complaint in order to stay claims for breach of the settlement term sheet. (CP 89–97.) Although Mr. Grant did not oppose the motion, Washington Federal did not file an amended complaint until six months later, in January 2014. (CP 98–104.) Then in March 2014, Washington Federal filed a motion for

[3] The trial court denied the bank's request for summary judgment but granted summary judgment dismissing some of Mr. Grant's counterclaims (but not his claim for breach of contract against the bank). (CP 86–88.)

summary judgment for breach of the settlement term sheet. (CP 175–189.) The motion asked for judgment awarding Washington Federal $1 million plus "default interest" from February 2013 (when the bank withdrew the certificate of settlement), and attorneys' fees. (CP 176.)

E. The Trial Court's Orders and Motions for Reconsideration

The trial court granted Washington Federal's motion in part at an oral ruling, for the principal amount of $1 million, without default interest and without attorneys' fees. But on cross-motions for reconsideration, the court changed the amount of the judgment, added prejudgment interest (which had not been requested in the initial motion), and reversed itself on the right to fees.

1. Initial ruling at oral argument

At oral argument on April 18, 2014, Judge Reina Cahan granted Washington Federal's motion. (*See* CP 541.) Initially, she ruled that damages were $1 million and that the bank was not entitled to attorneys' fees. (*Id*.) Because Washington Federal had not asked for prejudgment interest in its motion (but raised it at oral argument), the Court asked the parties to brief that issue. (*Id*.)

2. Order following cross-motions for reconsideration

As instructed by the Court at oral argument, the parties submitted further briefing addressing the issue of prejudgment interest. (CP 144–

151, 142–44.) In addition, both parties moved for reconsideration of the Court's oral ruling. (CP 144–151, 140–150.) Mr. Grant asked the Court to reconsider the award of $1 million, arguing that Washington Federal was only entitled $850,000 under the terms under the settlement term sheet. Washington Federal asked the court to reconsider its order denying attorneys' fees.

The trial court ended up reversing itself on both counts. The court reduced the amount of the damage award $850,000 but ordered that Washington Federal was entitled to attorneys' fees. (CP 540–42.) In addition, the court ordered that Washington Federal was entitled to prejudgment interest. (CP 542.) The latter two issues (attorneys' fees and prejudgment interest) are the subject of Mr. Grant's appeal.

3. Award of attorneys' fees and costs

Washington Federal subsequently filed a motion for attorneys' fees and costs and entry of a final judgment. (CP 543–560.) The bank sought over $150,000 in fees and costs. (CP 566.) This was the total fees and costs incurred from after August 1, 2012 (the date of the mediation). Thus, Washington Federal's request included fees and costs incurred between February and July of 2013 in pursuit of its unsuccessful motion for summary judgment on the underlying loan guarantees. (CP 564, 600–

645.) It also included fees incurred before the alleged breach of the settlement term sheet on February 11, 2013. (*Id*.)

Mr. Grant objected that the settlement term sheet did not provide for an award of attorney fees for an action to enforce its terms and that, in any event, the amount requested included fees and costs incurred in unrelated and unsuccessful work. (CP 649–660.) Yet the trial court adopted the bank's findings and conclusions in its order verbatim, awarding at the full amount requested without explanation. (CP 694–698.)

IV. ARGUMENT

A. Standard of Review

"The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court." *Smith v. Safeco Ins. Co*., 150 Wn.2d 478, 483, 78 P.3d 1274 (2003). This standard applies to the first assignment of error, addressed in part IV.D.

Where the parties dispute the legal conclusions resulting from the facts, and not the facts themselves, the issues can be decided as a matter of law and reviewed de novo as well. *Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.*, 126 Wn. App. 352, 357–58, 110 P.3d 1135 (2005). This rule applies to attorney-fee awards where the question is the right to recover them as a matter of law, as opposed to the proper amount. *See id*. (applying de novo review and reversing award of attorneys' fees on

summary judgment). This standard applies to the second assignment of error, addressed in part IV.E.1, regarding the right to attorneys' fees under the terms of the parties' agreement.

The standard of review for the amount of an attorney-fee award is abuse of discretion. *Berryman v. Metcalf*, 177 Wn. App. 644, 656–57, 312 P.3d 745 (2013). "Discretion is abused when the trial court exercises it on untenable grounds or for untenable reasons." *Id*. This standard applies to the review of the amount of the trial court's fee award, addressed in part E.2.

B. The Trial Court Correctly Determined the Principal Amount of the Judgment

Damages for breach of contract should place the party in as good as position as the party would have been in had the contract actually been performed and should serve as a substitute for the promised performance. *Rathke v. Roberts*, 33 Wn.2d 858, 879–80, 207 P.2d 716 (1949); *McFerran v. Heroux*, 44 Wn.2d 631, 644 & 646, 269 P.2d 815 (1954). A party is not entitled to more than what they would have received had the contract been fully performed. *Rathke*, 33 Wn.2d at 879–80; *McFerran*, 44 Wn.2d at 642 (quoting 5 CORBIN ON CONTRACTS 3, at § 990).

Here, the settlement term sheet expressly provided that, as of the date of the judgment (and until August 1, 2014), the amount due to

Washington Federal was $850,000. The trial court correctly determined that this is the proper amount of the judgment. A judgment for more would have placed the bank in a better position than it would have been had the contract been performed.[4]

C. The Trial Court Correctly Determined that Washington Federal is not Entitled to Default Interest

Interpretation of an unambiguous contract is a question of law. *Mayer v. Pierce Cty. Med. Bureau*, Inc., 80 Wn. App. 416, 420, 909 P.2d 1323 (1995). The settlement term sheet is unambiguous. Paragraph 1 of the agreement and subparagraphs (a)–(e) provide for payment under specific terms. Paragraph 1(c) provided that "[i]nterest shall accrue at 12% per annum in the event of ***default***." (Emphasis added.) Security for the payment is addressed separately in paragraph 2, which says nothing about interest.

As the trial court agreed, "default" in paragraph 1 clearly refers to default on the payment obligations to be set forth in the promissory note, and that interest is only due upon such default. The dictionary definition

[4] Washington Federal's claim to $1 million as of the date of the judgment ignores the fact that $1 million was not due until August 2017—more than three years in the future at the time. At most, the bank would have been entitled only to the present-day value (as of the date of judgment) of $1 million on August 1, 2017. *Cf. McFerran*, 44 Wn.2d at 644, 646 (discounting damage award to present value where payment was not yet due at the time of the judgment). In this case, the parties' agreement set this discount rate as 15 percent ($850,000) if paid by August 1, 2014.

of "default" bears this out. "Default" is defined as "[t]he omission or failure to perform a legal or contractual duty; esp., ***the failure to pay a debt when due***." BLACK'S LAW DICTIONARY 428 (7th ed. 1999) (emphasis added).

Equally clear was that fact that there has been no "default" under the payment terms: payment was not due until August 2017. Rather, the breach that Washington Federal alleged and ultimately prevailed on was a breach of the provisions of paragraph 2 requiring Mr. Grant to provide certain security. There is no doubt that such security for the note was material, but it does not follow that any breach of the settlement terms triggered the default interest provision; had that been the intent, the agreement would have said so.

Thus, the trial court correctly ordered that the judgment amount should not include default interest.

D. The Trial Court Erred In Awarding Prejudgment Interest

Prejudgment interest is appropriate only where the defendant wrongfully "retains funds rightfully belonging to another." *Palermo at Lakeland, LLC v. City of Bonney Lake*, 147 Wn. App. 64, 87, 193 P.3d 168 (2008) (internal quotations and citations omitted). "The touchstone for an award of prejudgment interest is that" the defendant has improperly

retained "the 'use value' of the money" to which the plaintiff was entitled. *Id.* (quoting *Mahler v. Szucs*, 135 Wn.2d 398, 429–30, 957 P.2d 632 (1998)).

Because the purpose of prejudgment interest is to compensate the plaintiff for the lost use of money wrongfully withheld, interest is properly computed from the time the money ***should have been paid*** to the plaintiff. *See Prier v. Refrigeration Engineering Co.*, 74 Wn.2d 25, 34–35, 442 P.2d 621 (1968); *Olsen Media v. Energy Sciences, Inc.*, 32 Wn. App. 579, 585–86, 648 P.2d 493 (1982). This rule is well illustrated in *Olsen*, in which the parties executed a service contract under which the plaintiff was entitled to monthly payments of $400 for six months and which automatically renewed for one year. *Id.* at 581–82. When the defendant cancelled the contract, the plaintiff sued for the monthly payments due and unpaid as well as for payments that would have been due in the future under the contract. *Id.*

The trial court found in favor of the plaintiff and awarded prejudgment interest on the sum total of all of the unpaid monthly payments from the date of the cancellation/breach forward. *Id.* at 583. In effect, this meant that interest was applied on some payments from a date (date of cancellation) before they were actually due. The court of appeals reversed, finding that the trial court erred in its calculation of prejudgment

interest because "interest is due on each payment only from the time it is due." *Id.* at 586.

Olson makes clear that prejudgment interest cannot accrue ***before*** a payment is actually due. Thus, where a breach occurs before payment is due, prejudgment interest can accrue only from the date on which the plaintiff would have been entitled to payment had the contract been performed.

Here, Washington Federal was not entitled to payment under the settlement term sheet for another 38 months after judgment was entered—no payment had been missed, and Washington Federal had not been deprived of the use of any money. To the contrary, Washington Federal's claim for breach was that Mr. Grant breached the obligation to provide security. (*See* CP 183–85.)

Under *Prier*, and *Olsen*, because no payment is yet due under the contract, no prejudgment interest is allowed.

E. The Trial Court Erred In Awarding Attorneys' Fees

Where a contract "specifically provides for" the recovery of attorneys' fees "incurred to enforce the provisions of such contract," fees are to be awarded to the "prevailing party," defined as "the party in whose favor final judgment is rendered." RCW 4.84.330. Unless specifically

authorized by "contract, statute, or recognized ground of equity providing for fee recovery" each litigant is responsible for paying its own fees. *Dayton v. Farmers Ins. Grp.*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994).

Here, the trial court abused its discretion by not only awarding fees absent any basis in the parties' agreement to do so but also by awarding fees and costs for work that was unrelated to enforcement of the settlement term sheet, unsuccessful, or both. The trial court compounded these errors by failing to make findings and conclusions explaining its award.

1. Under the parties' agreement, fees were only recoverable in an action to enforce the payment terms

To recover fees under a contact, a party must not only "prevail" but must prevail specifically on its claim for breach of the provision that authorizes a fee recovery. *C-C Bottlers, Ltd. v. J.M. Leasing, Inc.*, 78 Wn. App. 384, 389–90, 896 P.2d 1309 (1995). Numerous cases illustrate this point. For instance, in *Hindquarter Corp. v. Property Development Corp.*, 95 Wn.2d 809, 631 P.2d 923 (1981), a tenant sought a declaratory judgment establishing its right to exercise a lease-renewal option. *Id*. at 810. The Washington Supreme Court affirmed the trial court's dismissal of the tenant's complaint because the tenant's failure to pay rent made the option unenforceable. *Id*. at 815. But the court reversed the trial court's award of attorney's fees to the landlord because "[t]he terms of the lease

authorized attorney's fees ***only for curing defaults***," not for defending against the tenant's claim for breach of the option provision. *Id*. at 815 (emphasis added); *see also Belfor USA Grp., Inc. v. Thiel*, 160 Wn.2d 669, 160 P.3d 39 (2007) (where a contract only allowed for recovery of fees incurred in collecting amount due under a contract, the plaintiff could ***not*** recover fees expended to enforce contract's arbitration clause.)

In *C-C Bottlers, Ltd*., the plaintiff sued to collect on two notes that contained provisions for the recovery of fees incurred to compel payment of the notes. 78 Wn. App. at 386. The defendant counterclaimed alleging securities fraud. *Id*. The court entered summary judgment in favor of the plaintiff and dismissed the defendant's counterclaims following trial. The defendant appealed the award of fees and costs to the plaintiff, which was based on fees and cost incurred both to enforce the notes and to defend against the counterclaims. *Id.* Even though the trial court had found the defendants' counterclaims to be "substantially interwoven and inseparable from [the plaintiff's] action to obtain judgment on the notes" the Court of Appeals reversed and remanded with instructions to segregate those fees incurred in prosecuting the notes from those incurred in defending the counterclaims, reasoning that the contract's clear language limited recovery to fees to collect on the notes. *Id*. at 387, 389 (internal citations and quotation marks omitted). The court held that

> "[t]he prevailing party should be awarded attorney fees only for the legal work completed on the portion of the claim permitting such an award," because while collateral claims may well be related to the contract claim and therefore conveniently tried together, they need not be resolved in order to decide the primary claim. ***Allowing recovery of fees for actions which do not authorize attorney fees would also give the prevailing party an unfair and unbargained for benefit***.

Id. at 389 (internal citations omitted; emphasis added).

Here, Washington Federal prevailed only on an action to enforce the settlement term sheet. The settlement term sheet provided that fees could be recovered in an "action to ***enforce the note***"—i.e., to enforce the payment terms. (CP 228, at ¶ 1.d) (emphasis added).[5]

The note was to provide for payment of up to $1 million within 5 years. There were no installment payments. Thus, even as of the date of judgment, there were no payments due—payment became due as part of the remedy for the failure to provide security.

Because there was no breach of the payment terms, Washington Federal never took action to enforce them. Neither the bank's amended

[5] Appellants do not rely here on the fact that the actual note was never finalized or executed. To the contrary, this argument assumes that there was a note, but one that incorporated the payment and enforcement terms of the settlement term sheet—the only terms the parties actually agreed to. Those include the right to recover fees to enforce the note, but do not include, for instance, an acceleration clause or other terms that might have been but never were agreed to.

complaint nor its motion for summary judgment alleged that the payment terms had been breached or sought to enforce them. (CP 98–104, 175–189.) Thus, the bank has not even undertaken much less prevailed on any "action to enforce the note."

Likewise, the trial court recognized this in refusing to award "default interest" (*see* CP 541)—there had been no default of any payment obligation. Just as Washington Federal was not entitled to default interest based on an alleged breach of paragraph 2 of the settlement term sheet (regarding security), it cannot recover attorneys' fees and costs for an action to enforce paragraph 2 either. The trial court initially agreed, denying Washington Federal's request for fees (and for default interest). (*See* CP 541.) But in reducing the principal amount of the judgment to $850,000, the court also reversed itself on fees (and added prejudgment interest). (CP 698.) This was an abuse of discretion.

If this Court agrees that fees were not recoverable at all under the settlement term sheet, then there is no need to remand for a determination of the proper fee award—the award can simply be reversed. Otherwise, for the reasons set forth below, the award was excessive, and the Court should reverse and remand to the trial court for determination of the proper amount.

2. The amount of the fee award included fees that were not recoverable under the settlement term sheet

Washington Federal filed its original complaint against Mr. Grant and Algo as guarantors of the ARG Development loan. The parties reached a settlement agreement that included a full release of those claims. When Mr. Grant was not able to perform, the bank did not immediately seek to enforce the agreement. Instead, the bank withdrew the certificate of settlement the parties had filed and resumed litigation of the original action on the loan guaranties, seeking summary judgment on those claims. Only when that motion failed did Washington Federal file its amended complaint to allege breach of the settlement term sheet.

The dates of these key events are as follows:

February 23, 2011:	Complaint filed to enforce personal guaranties securing loan from Washington Federal to ARG Development. (CP 1–4.)
August 1, 2012:	Settlement term sheet executed.
February 11, 2013:	Date of alleged breach of settlement term sheet.
February 22, 2013:	Motion to withdraw certificate of settlement. (CP 20–24.)
February 27, 2013:	Carney Badley Spellman withdraws as counsel for Washington Federal, and Nold Muchinsky appears as substitute counsel. (CP 25–26.)
June 21, 2013:	Washington Federal files motion for summary judgment on the underlying claim

	to enforce the personal guaranties. (CP 32–58.)
July 18, 2013:	After its motion for summary judgment is denied, Washington Federal moves for leave to amend its complaint to allege breach of the settlement term sheet. (CP 89–97.)
January 13, 2014:	Washington Federal files amended complaint alleging breach of the settlement term sheet. (CP 98–104.)
March 21, 2014:	Washington Federal files motion for summary judgment alleging breach of the settlement term sheet on February 11, 2013. (CP 175–189.)

These facts make two things clear:

First, there was no action to enforce the settlement term sheet before July 18, 2013.

Second, the fees incurred before July 18, 2013 were not for work related to the claims on which the bank prevailed. Instead, they were incurred (a) pursuing an unsuccessful motion for summary judgment on its original action on the loan guaranties or (b) before the breach of the settlement term sheet was alleged (and found by the trial court) to have occurred.

Washington Federal nonetheless asked for all of the fees and costs incurred from the date of the settlement term sheet through the conclusion of the case. Without exception or explanation, the trial court granted the

entire amount, awarding the bank $157,328.02 in fees and costs. (CP 694–98.)

a. Fees and costs incurred before any action to enforce the settlement term sheet had commenced were not recoverable

An "action" to enforce a legal right refers to a judicial proceeding or a proceeding judicial in nature. *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 40–41, 42 P.3d 1265 (2002). Washington Federal did not commence a judicial proceeding to enforce the settlement term sheet until July 18, 2013, when it sought leave to amend its complaint to assert such a claim. In January 2014, the bank filed the amended complaint.[6] Before July 18, 2013, there was no "action" to enforce the settlement term sheet. Thus, there was no basis for it to recover any fees and costs incurred before this date.

The fees incurred before July 18, 2013 were $41,619 for Nold Muchinsky (*see* CP 661, 664–67)[7] and $14,483 for Carney Badley (*see* CP 566, 601–623), for a total of **$56,102** in fees that are **not recoverable**.

[6] The bank took no action to pursue the claim in the intervening six months.

[7] This and other citations regarding Nold Muchinsky fees and costs refer to the declaration of Miles Yanick submitted in opposition to the fee/cost request and the attached exhibits identifying and totaling non-recoverable fees and costs as reflected in the invoices submitted with the fee request, at CP 624–645.

The costs incurred before July 18, 2013 were $1,891.57 by Nold Muchinsky (*see* CP 662, 669) and $4,938.79 by Carney Badley (CP 566, 600–623), for a total of **$6,830.36** in costs that are **not recoverable**.

b. Fees and costs incurred for work that was unrelated to the claims on which the bank prevailed are not recoverable

The fees and costs incurred before July 18, 2013 are not recoverable for a second, independent reason. Just as there was no action to enforce the settlement term sheet before this date, the fees and costs incurred before this date were spent on work unrelated to the alleged breach, much of it devoted to a unsuccessful motion for summary judgment on the underling loan-guaranty claims.

The bank claims—and the trial court agreed—that the breach of the settlement term sheet happened on February 11, 2013. Between the date of the settlement (August 1, 2012) and February 11, 2013, fees and costs were incurred in preparing the final documents, resolving a dispute that arose about the bank's obligation to provide a copy of an appraisal it had obtained of the property to be provided as security, and communications regarding the parties' progress in carrying out their respective obligations. (*See* CP 601–15.) This was the work done by Washington Federal's former counsel, Carney Badley Spellman, for which the bank was charged **$13,150.50** in fees and **$4,910.79** in costs

that are **not recoverable**. (*See* CP 661–62, 671, 673.) This work cannot have been occasioned by the breach of, or in an "action" to enforce, the settlement because there was no breach.

After February 11, 2013, the first strategy Washington Federal's substitute counsel (Nold Muchinsky) pursued was to resume litigation on the original litigation on the loan guaranties. The bank did not prevail on this claim. The fees and costs incurred between February 11, 2013 and July 17, 2013 were incurred solely as part of this unsuccessful pursuit of a claim not only unrelated to but fundamentally at odds with the claim on which the bank ultimately prevailed.[8]

Nold Muchinsky charged Washington Federal **$41,619** in fees (*see* CP 661, 664–67) and **$1,891.57** in costs (*see* CP 662, 669) for this work, which is **not recoverable**.

As the Court will see, the fees awarded that were incurred before the action for breach on July 18, 2013 (addressed in part IV.E.2.a above) and those incurred pre-breach or on unrelated and unsuccessful work (addressed in this part IV.E.2.b) are for the most part the same, the

[8] The settlement term sheet provided for a release and dismissal of this claim. The bank could not enforce it and simultaneously assert claims released. This was the basis for the court's earlier order bifurcating the trials on the respective claims. (CP 132–33.) As the bank's motion for summary judgment on the settlement term sheet acknowledged, granting the motion meant "striking both trials." (CP176, lines 8–9, 188, lines 22–23.) By enforcing the settlement, the bank lost the opportunity to try, let alone prevail on, the claim for breach of the guaranties. *See Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 494, 200 P.3d 683 (2009) (holding that a voluntary dismissal is not a "final judgment" for purposes of "prevailing party" provision in RCW 4.84.330.)

exception being $1,332.50 in fees[9] and $28.00 in costs[10] charged by Carney Badley Spellman for work after the alleged breach on February 11, 2013 and before their withdrawal. (*See* CP 662, at ¶ 4.) Either way, the court's fee and cost award was excessive by more than $61,000.

3. The trial court failed to make findings of fact and conclusions of law explaining the basis for its fee award

To facilitate review, a trial court must make findings and conclusions that "do more than give lip service to the word 'reasonable.' The findings must show how the court resolved disputed issues of fact and the conclusions must explain the court's analysis." *Berryman v. Metcalf*, 177 Wn. App. 644, 658, 312 P.3d 745 (2013). "Courts must take an *active* role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought. Courts should not simply accept unquestioningly fee affidavits from counsel." *Id.* at 657 (internal quotation marks omitted).

In *Berryman*, for instance, "[t]he trial court signed [the plaintiff's] proposed findings of fact and conclusions of law without making any changes except to fill in the blank for the multiplier." The findings "did not address [the defendant's] detailed arguments for reducing the hours

[9] The difference between $14,483.00 and $13,150.50.

[10] The difference between $4,938.79 and $4,910.79.

billed to account for duplication of effort and time spent unproductively." *Id*. Specifically, the Court of Appeals noted:

> While the trial court did enter findings and conclusions in the present case, they are conclusory. There is no indication that the trial judge actively and independently confronted the question of what was a reasonable fee. We do not know if the trial court considered any of [the defendant's] objections to the hourly rate, the number of hours billed, or the multiplier. The court simply accepted, unquestioningly, the fee affidavits from counsel.

Id. at 658. This was reversible error. *Id*. at 659.

The trial court committed the same error here. The court simply signed the order awarding attorney's fees proposed by Washington Federal, without modification. (CP 694–98.) That order, while it included "Findings of Fact and Conclusions of Law," did not address any of the arguments and issues raised by Appellants, described above. Rather, the findings and conclusions merely recited that Washington Federal was the "prevailing party," recited the rates and calculations supporting the lodestar amount, and deemed that "reasonable." (CP 695–97.)

Mr. Grant did not contest the hourly rate or the time expended on particular tasks. But there is no indication of how the trial court could have concluded that fees incurred before there was a breach and before

there was any action to enforce the settlement term sheet could be recoverable. This error requires reversal and a remand if the Court deems fees recoverable at all.

V. CONCLUSION

Appellants have chosen not to appeal the trial court's grant of summary judgment as to liability for breach of the settlement term sheet by their inability to obtain the requisite security, even though it resulted from events beyond their control. The security was material, and the inability to provide it entitled Washington Federal to either rescind the agreement or seek a judgment for the amount it bargained for.

As the trial court agreed, that amount the bank had bargained for was $850,000, and because there had been no failure to make any payment when due, the court did not include default interest. But because no payments were yet due, there also was no basis to award prejudgment interest, and an action to enforce the payment terms was neither ripe nor ever commenced. Accordingly, it was an error or law to for the trial court to award prejudgment interest and attorneys' fees.

Even if fees were recoverable, it was also an abuse of discretion for the trial court to award Washington Federal the full amount of the fees it requested, which included $60,000 for work that was unrelated to the action to enforce the settlement and on which the bank did not prevail in

any event. The trial court's adoption of the fee affidavits and order presented by the bank without addressing the issues raised here and below compounded this error and require remand if the fee award is not reversed.

Respectfully submitted this 5th day of April, 2016.

SAVITT BRUCE & WILLEY LLP

By: */s/ Miles A. Yanick*
Miles A. Yanick, WSBA # 26603
Sarah Gohmann Bigelow, WSBA #43634

Attorneys for Appellants/Cross-Respondents

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 5, 2016 a true and correct copy of the foregoing **APPELLANT'S BRIEF** was served via Email/PDF on the following party:

David Nold
Brian M. Muchinsky
Jodi Graham
10500 NE 8th St
Bellevue, WA 98004
dnold@noldmuchlaw.com
bmuchinsky@noldmuchlaw.com
adamato@noldmuchlaw.com
jgraham@noldmuchlaw.com

Attorneys for Respondent

Gabriella Sanders

Gabriella Sanders