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DIVISION II
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STATE OF WASHINGTON
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No. ~~43873-9II~~

COURT OF APPEALS – DIVISION II
OF THE STATE OF WASHINGTON

Fidelity National Title Insurance Co, Inc.

Appellant,

v.

Port Orchard First Limited Partnership, et. al.,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

Fidelity brought an interpleader complaint against the respondents. Port Orchard First counterclaimed for negligence. After all claims by all parties had been resolved or dismissed, Fidelity sought to recover attorney's fees incurred defending the negligence claim. Fidelity did so under the guise of an indemnity claim because it was not entitled prevailing party fees as costs. But no contract or indemnity claim was pled. An interpleader is the only claim Fidelity ever brought.

Fidelity cannot recover fees as costs because there is no provision in the law for them to do so. They cannot rely on RCW 4.84.330 which allows for a prevailing party to recover its fees. Fidelity concedes it is not a prevailing party. Alternatively, Fidelity cannot recover fees as damages under a contractual indemnity theory because no contract claim was pled or litigated. Neither theory fits.

As such, Fidelity seeks fees by blurring the line between a judgment for attorney's fees as damages and an award of costs at the conclusion of the litigation. At times Fidelity argues its claim is one for damages – when it argues its claim is an indemnity claim. (“The attorney's fee provision in the Escrow Instructions is essentially a

contractual indemnity clause.”)¹ This argument is troublesome for Fidelity because it never pled an indemnity claim.

Other times, they argue they seek costs. (“In the present case, Fidelity seeks an award of attorney fees as costs, based on the “agreement” of the parties.”)² But an indemnity claim is not one for costs. And fees as costs are barred here by the holding in *Wachovia SBA Lending, Inc. v. Kraft*.³

Fidelity claims that “[t]he trial court’s decision and order *granting* Respondents’ motion for judgment on the pleadings ...effectively dismissed Fidelity’s claim for attorney fees and costs....”⁴

Fidelity’s use of the word “effectively” illustrates its argument’s failure. The trial court did not dismiss any claim. It could not dismiss a claim that was never made.

Further demonstrating the problems with its position, Fidelity argues it is “entitled to its reasonable attorney fees and costs pursuant to the Escrow Instructions, not as a prevailing party in a suit to enforce a contract, but as part of the contractual consideration for serving as the escrow agent and being forced to participate in litigation regarding the

¹ Brief of Appellant at 29.

² CP 348.

³ 165 Wash.2d 481, 200 P.3d 683 (2009).

⁴ Brief of Appellant at 10. Emphasis in original.

transaction.”⁵ But to support its position that it did not need to plead its contractual indemnity claim for attorney’s fees it cites to cases where the entitlement to attorney’s fees is based on the claimant being a prevailing party⁶ – not to cases related to attorney’s fees as damages.

Fidelity argues that leave to amend “should be freely given.”⁷ But its motion to add this claim was denied. Fidelity did not assign error to this ruling.

Fidelity argues the denial of its motion to amend is irrelevant due to Washington’s lenient pleading rules. While Fidelity is correct that Washington’s notice pleading rule is forgiving, Washington courts of appeal have held that a party cannot proceed with a claim that was never pleaded.

Finally, Fidelity misquotes and misapplies the standard under CR 12 (c). It may be correct that respondents “did not prove that it was ‘beyond doubt’ that Fidelity could prove no set of facts that would entitle

⁵ Id at 7.

⁶ See Id at 22, 27, 34, 36, 42, 43 citing to *Beckman v. Spokane Transit Authority*, 107 Wash.2d 785, 733 P.2d 960 (1987); *Equitable Life Leasing Corp. v. Cedarbrook, Inc.*, 52 Wash. App. 497, 761 P. 2d 77 (1988); *Pennsylvania Life Ins. Co. v. Dep’t of Employment Sec.*, 97 Wash.2d 412, 645 P.2d 693 (1982); *State ex rel A.N.C. v. Grenley*, 91 Wash. App. 919, 959 P.2d 1130 (1998).

⁷ Brief of Appellant at 36.

it to its attorney's fees.”⁸ But this argument fails for at least two reasons. First, the standard is not whether the plaintiff can prove *no set of facts* – the standard is if the plaintiff can prove no set of facts *consistent with its complaint*. Respondents did show that Fidelity can prove no set of fact *consistent with its complaint* that would entitle it to its attorney's fees in defending the negligence claim under a contractual indemnity theory because its complaint did not make any claim on a contract, for indemnity, or for damages. It was an interpleader complaint. A claim for indemnity is not consistent with an interpleader complaint.

Second, respondents did not seek to dismiss *anything*. There was no contractual indemnity claim in the case to dismiss. Respondents simply sought, and obtained, a ruling that the case was over – that no claims in the case were left unadjudicated.

Because Fidelity did not bring a claim for indemnity in response to Port Orchard First's negligence claim, it cannot now recover on a contract claim that simply does not exist. Under the standard for a 12 (c) motion, the trial court was correct. Fidelity's contractual indemnity claim is not consistent, in any way, with its interpleader complaint. Fidelity can prove no set of facts, consistent with its interpleader complaint that would entitle it to damages on a contractual indemnity claim.

⁸ Brief of Appellant at 20.

II. COUNTER-STATEMENT OF THE CASE

Fidelity acted as the escrow agent on a real estate transaction between Port Orchard First and Support Services. The transaction did not close. A dispute arose over entitlement to the earnest money. Accordingly, Fidelity filed an Interpleader Complaint pursuant to RCW 4.08.160 in December, 2009.⁹

In its complaint Fidelity requested the following relief:

1. Declaring that plaintiff may discharge its obligations to the defendants with regard to the earnest money deposit by paying the earnest money deposit in the amount of \$50,000.00 into the registry of the court.
2. Requiring defendants be interpled and settle between themselves their rights to the earnest money deposit.
3. Dismissing plaintiff as a party to the interpleader action between the defendants.
4. Enjoining the defendants from further legal proceedings against plaintiff concerning the earnest money deposit.
5. Awarding plaintiff its reasonable costs and attorney fees as may be determined by the court *upon the disposition of the interpleader proceedings.*¹⁰
6. Awarding plaintiff any additional or further relief which the court finds appropriate, equitable or just.¹¹

⁹ CP 1-25.

¹⁰ Compare this to the partial quote found in Brief of Appellants at page 21. Fidelity's omission of the emphasized language is telling.

¹¹ CP 5. (Emphasis added).

It brought no other claims, and sought no further relief. Support Services' response to the complaint included a cross-claim against Port Orchard First. Likewise, Port Orchard First cross-claimed against Support Services. At issue in these claims was the earnest money's rightful disposition.

Port Orchard First also filed a claim against Fidelity, alleging negligence.¹² Fidelity's reply to Port Orchard First's counterclaim asked for the identical relief as in its interpleader complaint, except that it also requested:

Dismissal of Port Orchard First Limited Partnership's claim against Plaintiff with prejudice and *without award of any fees or costs*....¹³

Fidelity then moved to dismiss the claim by Port Orchard First, discharge Fidelity, award attorney's fees and expenses, and enjoin the interpleaded defendants from taking further action against Fidelity. Fidelity sought complete dismissal from the case, including Port Orchard First's negligence claim.¹⁴

In January, 2011 the court denied the motion to dismiss but ordered that the Clerk disburse \$1,652.96 to plaintiff as the "reasonable

¹² CP 63-68.

¹³CP 48-49 (Emphasis added).

¹⁴ CP 101-138.

attorney fees and costs incurred in bringing this action...."¹⁵ From this point forward Fidelity simply defended the negligence action – taking no further action on the interpleader.¹⁶

Support Services then brought a motion for summary judgment on its claims against Port Orchard First, and to have the money disbursed to it.¹⁷ Fidelity did not object. The motion was granted and the money disbursed to Support Services. That order was later set aside by agreement (because Port Orchard First's previous attorney claimed he did not receive notice of the motion). But under the parties' agreement Support Services counsel held the money in trust pending further disposition by the trial court.¹⁸

On February 17, 2012 Fidelity moved to amend its reply to Port Orchard First's negligence counterclaim.¹⁹ Specifically, Fidelity sought to amend its response to include a claim for relief that stated:

Awarding Plaintiff its reasonable costs and attorney fees pursuant to the terms of and as required by the Escrow Instructions executed by the parties.²⁰

¹⁵ CP 130-135.

¹⁶ See CP 281-284.

¹⁷ CP 171-176.

¹⁸ Id.

¹⁹ CP 188-191.

²⁰ Id.

At the same time Port Orchard First moved to dismiss its negligence claim against Fidelity. Fidelity's motion was denied. Port Orchard First's motion was granted.²¹ Fidelity's mischaracterizes the trial court's reasoning²² regarding these motions.

It quotes an excerpt where the court is asking hypothetical questions during argument. But in making its decision on these motions, the trial court specifically limited its ruling:

The only issues that are before the court today, and I'm going to limit my ruling to those issues, are Fidelity's motion to amend its answer to the counterclaim – not its complaint, just the answer to the counterclaim – and Port Orchard's motion to nonsuit on the counterclaim. I think that Port Orchard is correct. They have an absolute right to take the nonsuit that renders the amendment of the answer to the counterclaim moot. And I will simply sign an order denying the application to file an amended answer to the counterclaim and granting the motion to take a nonsuit on the counterclaim and all other – the posture of the case and the rights and responsibilities between the three parties are not otherwise addressed by the court today.²³

Fidelity speculates as to why Port Orchard First moved to voluntarily dismiss its negligence claims. It is wrong. No rationale was

²¹ CP 244-245..

²² Brief of Appellant at 17.

²³ RP 17-18.

given in Port Orchard First Limited Partnership's motion for nonsuit. None was required. Nevertheless, the rationale is completely irrelevant to its request, these motions, or this appeal, as no error is assigned to this order.

Fidelity calls the negligence claim "questionable" but it survived the motion to dismiss (where the court considered affidavits, and such was treated as a summary judgment motion). As Fidelity concedes in its brief, there "were disputes of fact."²⁴

Port Orchard First and Support Services then agreed that the remaining escrow monies could be disbursed to Support Services.²⁵ Fidelity opposed the motion to disburse the interpleader funds claiming an entitlement to the escrow monies for attorney's fees for defending the negligence claim based on a contractual indemnity claim arising from the escrow instructions. Fidelity made clear that it was not seeking fees as a prevailing party under RCW 4.84.330 (as it was not one) but was seeking fees incurred defending Port Orchard First's counterclaim.

Nevertheless, over Fidelity's objection, the monies were disbursed to Support Services.²⁶ The interpleader resolved when the court released

²⁴ Brief of Appellant at 15.

²⁵ CP 248-253.

²⁶ CP 258-284; CP 285-286.

the escrow monies to Support Services and discharged Fidelity.²⁷ No error is assigned to this ruling.

Port Orchard First and Support Services then dismissed all their claims against each other.²⁸ No claims by any party remained.

All the relief requested by Fidelity in its complaint had been granted:

- Fidelity discharged its obligations to the defendants with regard to the earnest money deposit.²⁹
- The respondents were interpled and settled between themselves their rights to the earnest money deposit.³⁰
- The respondents agreed that Fidelity should be dismissed as a party.³¹
- The court enjoined respondents from further legal proceedings against Fidelity concerning the earnest money deposit.³²
- Fidelity was already awarded its reasonable costs and attorney fees for bringing the interpleader action as determined by the court.³³ Fidelity will argue that the order granting interpleader fees was an “interim order.” But there is no evidence in the record that any fees post-dating the interim order relate to the interpleader complaint and not the negligence action’s defense. The record is actually to the contrary.³⁴

²⁷ CP 285-287.

²⁸ CP 244-245; 295-296.

²⁹ CP 286.

³⁰ CP 291-292.

³¹ CP 301.

³² CP 286.

³³ Id.

³⁴ See CP 281-284.

Respondent's 12(c) motion sought the trial court's positive determination that the above was correct – that no further claims were pending adjudication. Fidelity's pleadings lack any affirmative claim (other than those in interpleader). Its pleadings lack *any* claim for damages.

As such, the trial court granted respondent's motion.

III. ARGUMENT

A. FIDELITY IS MAKING A CLAIM FOR ATTORNEY'S FEES AS DAMAGES BUT RELIES ON CASELAW SUPPORTING AN AWARD OF FEES AS COSTS

Fees are allowable as costs pursuant to statute or, in the alternative, as damages. Here, because respondents took a nonsuit, prevailing party fees are not available as costs under RCW 4.84.330. No other costs statute is applicable.

Attorney's fees as damages on a contractual indemnity claim are not allowable here because Fidelity did not bring any contract or other claim for damages.

Fidelity recognizes these problems and so cites cases regarding fees as costs where convenient, and arguing fees pursuant to a contractual indemnity clause where fees as costs do not fit.

But it fails to cite any statute providing for “costs” in this situation. And Fidelity does not cite a single case where a party was awarded attorney’s fees as costs pursuant to a contractual indemnity claim. They cite no case where a contractual indemnity claim was not pled, yet fees were awarded on this ground at the litigation’s conclusion.

Of course, despite their protestations to the contrary, Fidelity’s claim is a contract damages claim. But because it failed to bring a contract claim in its complaint, or in response to Fidelity’s negligence action, it relies on case law that applies only to attorney’s fees as costs – not to a substantive contract claim. As such, Fidelity’s arguments are contradictory and self-defeating.

1. Attorney’s Fees can be awarded as a litigation cost in certain circumstances, and as damages in others.

Fidelity concedes the “distinction between attorney’s fees awarded by contract to a prevailing party in a suit to enforce a contract...and attorney’s fees awarded as an element of damages under an indemnity or hold harmless clause....”³⁵ Fidelity cited to *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*³⁶ which held that a contractual indemnity claim is

³⁵ CP 314-315.

³⁶ 139 Wash.App. 743, 162 P.3d 1153 (2007).

one for “damages, rather than costs of suit.”³⁷

This is the key difference. Attorney’s fees as costs are awarded ancillary to the substantive claim. Attorney’s fees as damages *are* the substantive claim.

Because Fidelity did not bring any substantive claim other than its interpleader, its arguments for fees suffer from cognitive dissonance. Fidelity alternatively argues *both* grounds when neither fits. Fidelity cannot pick one, because each suffers from a hopeless flaw.

2. Fidelity cannot recover attorney’s fees as costs.

Fidelity asserts it is entitled to attorney’s fees as costs. “In the present case, Fidelity seeks an award of attorney’s fees as costs, based on the “agreement” of the parties.”³⁸ The award of litigation costs is governed by RCW Ch. 4.84 Costs. And costs by agreement are covered by RCW 4.84.330.

Fidelity’s pleadings in the trial court and its opening brief are emphatic that it is not seeking fees as costs under RCW 4.84.330 as a prevailing party.³⁹ Fidelity does this because it recognizes it is not entitled

³⁷ *Id.*

³⁸ CP 348.

³⁹ *See* CP 263-264; Brief of Appellant at 25-32.

to fees under *Wachovia SBA Lending, Inc. v. Kraft*.⁴⁰ But, as will be discussed in more detail below, its argument's foundation is case law interpreting prevailing party attorney's fees as costs under RCW 4.84.330 and similar statutes. Fidelity cites to no alternative statute under RCW Ch. 4.84 or otherwise to recover its fees as costs.

"Costs" are specifically defined in RCW 4.84.010. That definition does not include attorney's fees pursuant to an indemnification obligation. It lists categories of items recoverable as costs. Similarly, RCW 4.84.330 and other statutes in this chapter provide for attorney's fees as costs in specific circumstances.

Fidelity claims it is not seeking prevailing party fees as statutory costs under RCW 4.84.330, but repeatedly cites to cases that are applicable to prevailing party fees at costs. Fidelity's brief at page 36 discusses *State ex rel. A.N.C. v. Grenley*⁴¹ at length. But it concedes that the basis of the holding was that the "Court of Appeals concluded that it was not necessary to plead the request for attorney's fees because attorney's fees are considered 'costs'...."⁴²

⁴⁰ 165 Wash.2d 481, 200 P.3d 683 (2009).

⁴¹ 91 Wash.App. 919, 930, 959 P.2d 1130, 1136 (1998). See Brief of Appellant at 35.

⁴² Brief of Appellant at 36.

Fidelity's citation to this case illustrates the internal inconsistency in its argument because fees are awarded as costs only by statute. In *State ex rel. A.N.C. v. Grenley* the court cites with approval to Black's Dictionary:

[C]osts' do not include attorney fees unless such fees are by a statute denominated as costs or are by statute allowed to be recovered as costs in the case."⁴³

Fidelity, instead, relies on a general statement in that case:

But under RCW 4.84, Washington's costs statute, attorney fees are considered "costs" and may be awarded if so provided by statute, **agreement**, or other recognized ground of equity. Because the allowance of costs, including attorney fees, **is governed by statute**, it is not necessary that the plaintiff include a request for fees in the complaint.⁴⁴

Here, there is no statute that authorizes the costs here. The reference to costs by "agreement" is to RCW 4.84.330. There is no common law provision for fees as costs by agreement. And no authority for this is provided by Fidelity. As such, Fidelity is seeking fees as damages arising from a contractual indemnity claim. They admit so in

⁴³ *State ex rel. A.N.C. v. Grenley*, 91 Wash.App. at 925 citing to Black's Law Dictionary, 312 (5th ed. 1979).

⁴⁴ *Id* at 930. (Emphasis added, internal citations omitted).

their brief. (“[T]he Escrow Instructions provide[] that the Buyer and Seller will indemnify Fidelity....”); (“The attorney’s fees provision in the Escrow Instructions is essentially a contractual indemnity clause.”)⁴⁵

3. Fidelity’s claim is one for damages.

A contractual indemnity claim is a damages claim, not one for costs.⁴⁶ According to the case law Fidelity cites, including *Northern Pac. Ry. Co. v. Sunnyside Val. Irrigation Dist.*,⁴⁷ a party seeking attorney’s fees under an indemnity claim is seeking damages. Fidelity further cites to Professor Tegland:

Attorney’s fees, when authorized by law as an element of damages, are generally considered special damages and must be specially pleaded. *Wright and Miller, Federal Practice and Procedure: Civil §1310. An award of attorney fees as an element of damages should not be confused as an award of attorney fees as an element of costs.*⁴⁸

But Fidelity has done just what Professor Tegland warns against. Fidelity has confused its request for attorney’s fees (on a contractual

⁴⁵ Brief of Appellant at 29.

⁴⁶ *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*

⁴⁷ 85 Wash.2d 920, 921-922, 540 P.2d 1387, 1389 (1975).

⁴⁸ Appellants Brief at 39 (emphasis in original) citing 3A Wash. Prac., Rules Practice CR 8 (5th ed.)

indemnity claim) as damages, with a request for fees as costs permitted by statute when there is a contract between the parties.

This confusion is further evident in its additional citation to Professor Tegland⁴⁹, who cites to *Beckmann v. Spokane Transit Authority*⁵⁰ for the proposition that attorney's fees requests need not be specifically pleaded. This is correct. But this only applies to fees as costs. *Beckmann* involved fees as costs pursuant to RCW 4.28.250.

Fidelity has not, and cannot, cite a single case where fees were awarded as damages where a damages claim was never pled. Fidelity cites to *Baldwin Builders v. Coast Plastering Corp.*⁵¹ for the proposition that attorney's fees can be awarded in indemnification even absent a reciprocal prevailing party clause. This is correct.

But in that case Baldwin perfected its claim, not by making a broad, general, boilerplate, request for relief for fees and costs. It "cross-complained for express contractual indemnity, implied indemnity, equitable indemnity, contribution, breach of contract, breach of implied

⁴⁹ Brief of Appellants at 34.

⁵⁰ 107 Wash. 2d 785, 733 P.2d 960 (1987).

⁵¹ 125 Cal.App.4th 1339, 1342, 24 Cal.Rptr.3d 9, 11 (Cal.App. 4 Dist.,2005).

warranty, breach of express warranty, negligence and declaratory relief.”⁵² Fidelity never did so.

Fidelity concedes that it seeks not adjudication of a substantive claim under a contractual indemnity claim, but an ancillary claim to the underlying substantive litigation (over the negligence claim) stating that the issue of attorney’s fees “is addressed at the conclusion of the litigation as an element of “costs.”⁵³ But that is not the case where fees are damages.

Fidelity’s confusion between fees as costs and fees as damages is shown in its citation to *Anderson v. Gold Seal Vineyards, Inc.*⁵⁴ for the proposition that “[w]here RCW 4.84.330 does not control, a voluntary dismissal is not intended to and does not preclude attorney’s fees to a defendant who has ‘prevailed’ at that point.”⁵⁵ But it claims elsewhere that it is not seeking prevailing party fees. Further, *Anderson* was controlled by another attorney’s fees statute, RCW 4.28.185(5).

This statute is inapplicable. And Fidelity has failed to cite a statute it can rely on for claiming fees as costs. Fidelity has done just as the party

⁵² *Id.*

⁵³ CP 352.

⁵⁴ 81 Wash.2d 863, 868, 505 P.2d 790, 794 (1973).

⁵⁵ Brief of Appellant at 32.

claiming fees in *Wachovia* did. They also tried to craft “an erroneous rule” from *Anderson*.⁵⁶ These differences make *Anderson* inapplicable.

B. FIDELITY NEVER PLED A CONTRACTUAL INDEMNITY CLAIM.

Fidelity claims it is entitled to fees pursuant to a contractual indemnity obligation arising from the escrow agreement. But it did not plead a contractual indemnity claim. The first time the word “indemnity” was used in this lawsuit was when it became clear the case would not proceed to trial because the respondents agreed on the escrow monies’ disposition and the underlying claims’ dismissal among all the parties.

Fidelity is correct that the liberal pleading rules give much leeway to litigants. But even though “inexpert pleading is permitted, insufficient pleading is not.”⁵⁷ “A pleading is insufficient when it does not give the opposing party fair notice of what the claim is and the ground upon which it rests.”⁵⁸ A complaint for relief must contain: “(1) a short and plain statement of the claim showing that the pleader is entitled to relief **and** (2)

⁵⁶ *Wachovia* at 491.

⁵⁷ *Dewey v. Tacoma School Dist. No. 10*, 95 Wash.App. 18, 23, 974 P.2d 847, 850 (1999).

⁵⁸ *Id.*

a demand for judgment for the relief to which he deems himself entitled. CR 8(a).”⁵⁹

Fidelity did not recite a contract cause of action or even attach the escrow agreement to its complaint or reply to counterclaim. The first reference to the indemnity clause in the escrow agreement was in its motion to amend. Fidelity argues its pleading asked for fees. But it merely requested fees in its interpleader complaint. Fidelity claims it sought fees for defending the negligence action in its pleadings. But it did not seek fees as damages. Fidelity merely asked that the claim be dismissed “with prejudice and *without award of any fees or costs....*”⁶⁰

While Fidelity can argue its claim for relief satisfies CR 8 (a) (2); the claim for relief does not satisfy CR 8(a)(1) as its pleadings are completely devoid of a short and plain statement of the claim for contractual indemnity.

1. Fidelity’s pleadings are insufficient to bring a contract claim.

Even under Washington’s lax pleading rules, Fidelity’s interpleader complaint and reply to counterclaim are insufficient to bring a contract claim.

⁵⁹ *Id.* (Emphasis added).

⁶⁰ CP 48-49 (Emphasis added).

In *Dewey v. Tacoma School Dist. No. 10* the plaintiff brought claims against a school district, but his complaint did not have a First Amendment claim. This Court held that because the First Amendment claim was not pled at all – the plaintiff was not entitled to relief on that ground. The court stated:

A complaint must at least identify the legal theories upon which the plaintiff is seeking recovery.... Dewey's amended complaint explicitly identifies seven separate causes of action. But Dewey's complaint does not identify a free speech or First Amendment theory, nor does it fairly imply such a theory. The trial court did not err in finding Dewey's complaint failed to state a First Amendment claim as a legal theory of recovery.⁶¹

Here Fidelity's complaint merely recited an interpleader cause of action. It did not cite a contract. It did not cite or attach the escrow agreement. It did not make any claim for damages or indemnity. Its complaint does not give even a "short and plain statement" of a contract or indemnity claim. Again, *Dewey* is instructive.

A party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into trial

⁶¹ *Id* at 25. (Internal citation omitted).

briefs and contending it was the case all along.⁶²

Fidelity attempts to finesse the issue and argue its indemnity claim existed all along. But until its motion to amend, this claim was not in the case. Other courts have reached the same result as the *Dewey* court when confronted with similar facts. See *Northwest Line Constructors Chapter of Nat. Elec. Contractors Ass'n v. Snohomish County Public Utility Dist. No. 1*⁶³ (“[W]hile NECA's complaint implies that the PUD is generally in violation of RCW 54.04.070, nowhere does it identify or even fairly imply the specific legal theories NECA raised at summary judgment.”) See also *Green v. Hooper*⁶⁴ where a plaintiff's complaint alleging adverse possession was insufficient to bring to trial a mutual recognition and acquiescence claim.

Here, as in the cases cited above, there was no mention of the Fidelity's substantive claim in its complaint. The trial court was correct in concluding that based on the pleadings, no further claims remained for adjudication.

⁶² *Dewey v. Tacoma School District No. 10*, 95 Wash.App. 18, 974 P.2d 847 (1999).

⁶³ 104 Wash.App. 842, 849, 17 P.3d 1251, 1255 (2001).

⁶⁴ 149 Wash.App. 627, 205 P.3d 134 (2009).

Fidelity is attempting to do what the court did not allow in *Lewis v. Bell*.⁶⁵ In that case plaintiffs brought a claim for the tort of outrage. Defendants moved for summary judgment. In response to the motion, the plaintiffs submitted affidavits that supported an assault claim. The appellate court affirmed the dismissal holding that an outrage complaint could not put the court, or defendants, on notice of an assault claim. Here, Fidelity's interpleader complaint is insufficient to support a contractual indemnity claim.

2. Because Fidelity's contractual indemnity theory was not pled, it asserts its claim as "costs".

In response to the above authority Fidelity cites to cases where a party was not required to specifically plead a request for attorney's fees. But in each case the fees are awarded as a component of costs under statute. And as discussed above, this is not the case here. But Fidelity relies on this "costs" theory to support its indemnity claim because the pleading rules for "costs" are much more lax than the rules regarding a substantive claim for damages.

Those cases do not deal with attorney's fees as damages. They hold that because prevailing party attorney's fees are *costs*, and a *cost*

⁶⁵ 45 Wash.App. 192, 724 P.2d 425 (1986).

award to a prevailing party is governed by statute, the prevailing party is not required to specifically plead the request.

As previously discussed, Fidelity does not rely on any statutory cost provision. It relies on its contractual indemnity rights under the escrow agreement. Fidelity acknowledges the distinction in how the law treats attorney's fees as damages and costs in its brief, but fails to address the fact that because it is not *really* seeking fees as costs, *State ex rel. A.N.C. v. Grenley* (and other similar cases) do not apply. Fidelity fails to address the fact that it did not plead *any* damages, and the civil rules require special damages to be pled with specificity.

3. Special damages must be pled with specificity.

“CR 9(g) requires that claims for special damages be “specifically stated. The purpose of the rule is to avoid surprise to the defendant as to the extent and character of the plaintiff's claim.”⁶⁶ “Attorney fees, when authorized by law as an element of damages, are generally considered special damages and must be specially pleaded.”⁶⁷

For the proposition that CR 9(g) is inapplicable, Fidelity cites to

⁶⁶ Tegland, 3A Wash. Prac. Rules Practice. CR 8 citing Wright and Miller, Federal Practice and Procedure: Civil § 13.

⁶⁷ Id citing Wright and Miller, Federal Practice and Procedure: Civil § 1310.

Allstot v. Edwards.⁶⁸ But that case rested on the fact that the plaintiff had made a claim under a statute that provided for double damages. Because the issue was tried, the court was required to grant the relief sought in the complaint even if it was not specifically pled:

Accordingly, if the trial court had found merit in Mr. Allstot's statutory claim for double damages, it was obligated by CR 54(c) to grant that relief, even though the claim had not been included in the original pleadings. Further, because the parties argued the issue and the trial court ruled on it, it is treated as if it had been pleaded.⁶⁹

Here, the claim for fees as damages was not pled at all. It was not tried by consent. As in *Green v. Hooper*,⁷⁰ respondents objected to this claim being considered at all, and the trial court agreed. The claim was not tried by consent, and has never been a part of the case.

C. FIDELITY'S ENTITLEMENT TO INDEMNIFICATION HAS NOT BEEN SHOWN.

Fidelity argues that its entitlement to attorney's fees is independent of the outcome of the underlying litigation – that it is entitled due to the contractual indemnification clause in its contract. But if Fidelity's own negligence caused it to be sued, it cannot recover. “[T]he general rule... is

⁶⁸ 114 Wash.App. 625, 632, 60 P.3d 601, 604 (2002).

⁶⁹ *Id.*

⁷⁰ *Supra.*

that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from his own negligence unless this intention is expressed in clear and unequivocal terms.”⁷¹ The question of Fidelity’s negligence was never litigated.

The negligence action was never litigated because Port Orchard First dismissed it. Issues surrounding the indemnification clause were never litigated because they were not pled or proven. What would have occurred if Port Orchard First had prevailed in its negligence claim? Would that award be offset by an award of attorney’s fees to Fidelity from Port Orchard First? Would Support Services have been responsible for those fees? These issues would have had to have been litigated in the trial court if Fidelity brought a claim for indemnification under the contract. It did not. It brought an interpleader complaint. It did not bring a contractual indemnity claim. As such, even if the court concludes that dismissal under CR 12 was not proper, the denial of summary judgment was not error. Questions regarding whether the indemnification clause is enforceable exist.

⁷¹*Nw. Airlines v. Hughes Air Corp.*, 104 Wash.2d 152, 155, 702 P.2d 1192 (1985).

D. FIDELITY IS NOT ENTITLED TO ATTORNEY’S FEES ON APPEAL

Fidelity cites to *Equitable Life Leasing Corp. v. Cedarbrook, Inc.*,⁷² for its request for fees on appeal. This further illustrates Fidelity’s confusion over the difference between fees as costs, and fees as damages in a contractual indemnity claim. Fidelity cites to this case for the proposition that “[a] contractual provision that provides for an award of attorney fees at trial supports award of attorney fees on appeal.”⁷³ *Equitable Life Leasing*, however, applies to claims for fees as costs under RCW Ch. 4.84.

Attorney's fees will be awarded to a prevailing party only on the basis of a private agreement, a statute, or a recognized ground of equity. *Pennsylvania Life Ins. Co. v. Department of Employment Sec.*, 97 Wash.2d 412, 413, 645 P.2d 693 (1982). Contractual authority for awarding attorney's fees at trial supports an award of attorney's fees on appeal under RAP 18.1. *West Coast Stationary Eng'rs Welfare Fund v. Kennewick*, 39 Wash.App. 466, 477, 694 P.2d 1101 (1985); see also RCW 4.84.330.

*Both parties request attorney's fees under RCW 4.84.330, which reads in pertinent part.....*⁷⁴

⁷² 52 Wash.App. 497, 506-507, 761 P.2d 77, 83 (1988).

⁷³ Brief of Appellant at 43.

⁷⁴ *Equitable Life Leasing* at 506-507. (Emphasis added).

Here, Fidelity cannot cite to RCW 4.84.330 because it recognizes its recovery on that ground is barred by the holding in *Wachovia*. It can cite to no other statute. It cannot make a request for fees as damages because it has not pled or proven a contractual indemnity claim.

Ironically, if Fidelity properly brought a contractual indemnity claim and prevailed, it would not be entitled to fees for bringing the claim or on appeal. The escrow agreement has no prevailing party fee provision. As such, if Fidelity sued on the contract for indemnity and prevailed, it would not be entitled to fees for enforcing its escrow contract. At best, Fidelity would only be entitled to recover for defending the negligence action. It could not recover its prevailing party fees for enforcing the indemnity provisions of the escrow agreement.

IV. CONCLUSION

Fidelity brought an interpleader complaint. It now seeks damages. But it never brought a substantive contract, indemnity or damages claim. Under Fidelity's theory, even if Port Orchard First prevailed in its negligence action against Fidelity, Support Services and Port Orchard First would be liable, jointly and severally, for the fees. But that did not occur. This case is over. The interpled funds have been disbursed. All other claims and counterclaims have been dismissed. Fidelity's complaint did

not seek any damages. It sought fees as costs. But it is not entitled to fees as costs incurred defending the negligence claim.

And because it failed to plead *any* claim other than the interpleader, and failed to plead its special damages, it cannot seek them now. The trial court should be affirmed.

Respectfully submitted this 24th day of January, 2013.

LAW OFFICE OF
DAVID P. HORTON, INC. P.S.

A handwritten signature in black ink, appearing to read 'D. Horton', is written over a horizontal line.

DAVID P. HORTON WSBA No. 27123
Attorney for Respondents

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on January 25, 2013, a true and accurate copy of the document to which this Certificate is affixed was sent via United States mail to:

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DATED this 25th day of January 2013.



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