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Court of Appeals
Division III
State of Washington

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION III

No. 315819

KATHRYN LEARNER FAMILY TRUST,

Appellant, / Cross-Respondent

v.

JAMES D. WILSON, et al.,

Respondents./ Cross-Appellant

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The trial court erred on January 31, 2013 when it denied an award of prevailing-party attorneys' fees to Appellant Kathryn Learner Family Trust (the "Trust") on the basis that Respondent James Dean Wilson ("Wilson") did not receive notice that fees could be awarded to the prevailing party. The trial court's decision should be reversed for at least the following reasons.

First, the Trust prevailed against Wilson's counterclaim for breach of the parties' 99-year ground lease (the "Lease"). Wilson does not dispute that the trial court's August 2012 summary judgment ruling, entered two-and-a-half years after Wilson filed suit, was dispositive of his case. Had Wilson's interpretation of the Lease prevailed, he would have been entitled to an award of attorneys' fees, which he requested in his pleadings. But Wilson lost, and the Trust is entitled to its reasonable attorneys' fees and costs as the prevailing party.

Second, Civil Rule ("CR") 54(c) requires that the Trust be awarded its attorneys' fees as provided under the Lease, regardless of whether such relief was demanded in its pleadings. The parties engaged in extensive briefing on the issue of attorneys' fees and the matter was resolved by the trial court following two separate hearings. The trial court ruled that the fees provision in the Lease covered the Trust's declaratory judgment claim

and that the Trust was the prevailing party. The trial court was therefore obligated to include an award of reasonable attorneys' fees and costs in its final judgment for the Trust.

Third, no Washington court has ruled that contractual attorneys' fees constitute special damages that must be demanded in a pleading. Also, there is support in Washington for the proposition that attorneys' fees should be awarded where the parties had an adequate opportunity to brief and argue the issue. That was the case here. Wilson was not deprived of a hearing on the issue of attorneys' fees, and Wilson has not claimed that he would have prosecuted this action differently (including by filing his counterclaim for \$100,000 in damages) had the Trust included an express demand for attorneys' fees in its pleading.

This Court should overturn the trial court's order denying the Trust's motion for attorneys' fees and direct the trial court to enter an order awarding \$135,493.29 to the Trust.¹ The trial court should also be directed to modify the final judgment to reflect this disposition. In addition, pursuant to RAP 18.1, the Trust should be awarded its attorneys' fees and costs incurred on appeal.

¹ Wilson asserted no specific challenges to the reasonableness of the Trust's demand for attorney's fees in the trial court. (CP 786.)

II. LEGAL ARGUMENT

A. The Trust Is Entitled To Attorneys' Fees And Costs As The Prevailing Party Over Wilson's Counterclaim For Breach Of The Lease.

The Trust filed this declaratory judgment action against Wilson in September 2009 to resolve a dispute over the rent due under the Lease. (CP 4-35.) On February 10, 2010, Wilson counterclaimed against the Trust for breach of the same rent provision. (CP 53-60.) Wilson sought damages in excess of \$100,000, plus interest and attorneys' fees as provided for under the Lease. (*Id.*) Just like the Trust's declaratory judgment claim, Wilson's suit required an interpretation of the rent provision and an accounting of whether sufficient rent had been paid by the Trust. (*Id.*)

In his opposition to this appeal, Wilson does not dispute that the trial court's August 17, 2012 summary judgment ruling in favor of the Trust was fully dispositive of his counterclaim. (*See* Wilson's Opposition ["Opp."] at 12.) The trial court's ruling resolved the only issues raised by the counterclaim, including the interpretation of the rent provision and the sufficiency of the Trust's reconciliation payment. Nonetheless, Wilson claims the Trust should not be awarded its fees and costs in relation to the counterclaim because Wilson "voluntarily" dismissed the counterclaim

after the summary judgment ruling. Washington law does not support Wilson's position.

First, the fees provision in the Lease is bilateral meaning that either party to the contract would be entitled to a fee award if it prevailed. As a result, the definition of "prevailing party" set forth in RCW 4.84.330, which requires the entry of a final judgment in favor of the party seeking fees, is *not* applicable in this case. *See Walji v. Candyco, Inc.*, 57 Wn. App. 284, 288, 787 P.2d 946 (1990); *Hawk v. Branjes*, 97 Wn. App. 776, 780, 986 P.2d 841 (1999). Yet despite these authorities, Wilson argues that the term "prevailing party" should be "equated with a judgment in a party's favor" because the term is undefined in the Lease. (Opp. at 12, f. 10.) That is not the rule in Washington.

Second, in cases involving bilateral fees provisions, "a defendant who 'prevails' is ordinarily one against whom no affirmative judgment is entered," regardless of whether the plaintiff voluntarily dismisses his action. *See, e.g., Andersen v. Gold Seal Vineyards, Inc.*, 81 Wn. 2d 863, 868, 505 P.2d 790 (1973); *Hawk*, 97 Wn. App. at 779-80; *Walji*, 57 Wn. App. at 288. A defendant need not counterclaim for affirmative relief in order to be awarded fees under a bilateral fees provision – he can recover as a prevailing party for successfully defending against the plaintiff's claims. *See Cornish Coll. of the Arts v. 1000 Virginia Ltd. P'ship*, 158

Wn. App. 203, 231-32, 242 P.3d 1 (2010). Wilson addressed none of these arguments or authorities in his opposition.

Here, Wilson did not only fail to obtain an affirmative judgment against the Trust; he is *collaterally estopped* from ever re-challenging the Trust's interpretation of the rent provision or claiming that additional rent is due. See *Christensen v. Grant Cnty. Hosp. Dist. No. 1*, 152 Wn. 2d 299, 306, 96 P.3d 957 (2004). The Trust, therefore, was the prevailing party, and the trial court had no discretion to deny an award of the Trust's contractual attorneys' fees and costs. See *Walji*, 57 Wn. App. at 288 (prevailing party attorneys' fees were appropriate following plaintiff's non-suit "[s]ince the case may never be renewed."); see also *Singleton v. Frost*, 108 Wn. 2d 723, 729, 742 P.2d 1224 (1987) (emphasis added) ("We agree that the trial court has the power to limit an award of attorneys' fees to a reasonable sum; however, *this power does not extend to allow the complete denial of attorneys' fees where the contract provides for their award.*").

B. The Trust Is Entitled To All Available Relief As The Prevailing Party On Its Declaratory Judgment Claim.

The Trust also requested an award of its *attorneys' fees* and costs as the prevailing party on its declaratory judgment claim. (CP 653-753.)

The trial court denied the Trust's motion, but not before making two critical findings:

1. "The contractual language upon which the [Trust] relies is broad enough to support an award of attorney fees to a party which successfully brings an action for declaratory relief."
2. "Because the court adopted [the Trust's] interpretation of the lease, the [Trust] is the prevailing party."

(CP 792.) In essence, the trial court ruled that the Trust would have been entitled to its attorneys' fees as the prevailing party *but for* the Trust's failure to demand such relief in its complaint. This conclusion was an error of law.

Pursuant to CR 54(c) (emphasis added), "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, *even if the party has not demanded such relief in his pleadings.*" This provision applies in cases where a party neglected to demand special damages in its pleading, but where the grounds for the award were proven.² See *Allstot v. Edwards*, 114 Wn. App. 625, 60 P.3d 601 (2002) (special damages established in the trial court would be treated as if they had been pleaded); *Bird v. Best Plumbing Grp., LLC*, 161 Wn. App. 510, 529, 260 P.3d 209 (2011), *review granted*, 172 Wn. 2d 1010, 259 P.3d

² As discussed in Section II.C., below, no Washington case has held that contractual attorney's fees constitute special damages that are waived if not demanded in a pleading. Nonetheless, to the extent that the trial court deemed contractual attorney's fees to be special damages, CR 54(c) will apply.

1109 (2011) (awarding damages for statutory trespass that were established at trial, but not requested in the complaint); *see also* 10A Wash. Prac., Civil Procedure Forms § 54.66 (3d ed.). Applied here, the final judgment in favor of the Trust should have included all relief to which the Trust was entitled, even if such relief was not demanded in the Trust's pleading.

Wilson offers no compelling reason why CR 54(c) should not be applied to ensure that the final judgment for the Trust includes attorneys' fees and costs. The parties engaged in extensive briefing on this issue and the trial court resolved the matter following two separate hearings. In other words, the matter was "tried." The trial court expressly found that the fees provision covered the Trust's claim for declaratory judgment and that the Trust was the prevailing party. Therefore, under CR 54(c), the trial court was obligated to include an award of reasonable attorneys' fees and costs in its final judgment for the Trust.

C. The Trust Was Not Required To Plead Contractual Attorney's Fees In Its Complaint.

The trial court denied the Trust's motion for attorneys' fees because a handful of federal decisions state that contractual attorneys' fees may constitute special damages that need to be demanded in a pleading. (CP 793.) However, no Washington court has ever made such a ruling,

and there are numerous federal and state court decisions holding that attorneys' fees need not be demanded in a pleading where, as here, they are not an element of damages.³ See, e.g., *Tipton v. Mill Creek Gravel, Inc.*, 373 F.3d 913, 922 (8th Cir. 2004) (affirming award of attorneys' fees not included in complaint where the fees were not "special damages"); *NGM Ins. Co. v. Carolina's Power Wash & Painting, LLC*, 2010 WL 3258134, *2 (D.S.C. 2010) (demand for attorneys' fees was not required under Rule 9(b) where such fees were not required to be proved at trial as an element of damages); *Rural Water Dist. No. 1, Ellsworth Cnty., Kan. v. City of Wilson, Kan.*, 184 F.R.D. 632, 633 (D. Kan. 1998) (claim for attorney fees that did not constitute special damages was not barred by failure to plead); *Chinn v. KMR Prop. Mgmt.*, 166 Cal. App. 4th 175, 194, 82 Cal. Rptr. 3d 586 (2008) ("Attorney fees based on a contract provision [that are awarded as costs] do not need to be demanded in the complaint.").

One Washington case, *State ex rel. A.N.C. v. Grenley*, addressed whether *statutory* attorneys' fees constitute special damages that must be pleaded, and the Court concluded that they are not. 91 Wn. App. 919, 930, 959 P.2d 1130 (1998). The *Grenley* Court acknowledged that the fee

³ Wilson concedes that no Washington court has squarely addressed whether contractual attorney's fees must be pled in order to be recovered. (Opp. 9.)

award constituted a “cost” under RCW 4.84, but the Court went on to find no due process violation by allowing the award even though it was not demanded in the plaintiff’s complaint.

Grenley also argues that the award violates the civil rules and his due process rights because the complaint did not give him adequate notice that the issue of attorney fees would be litigated. But as the State points out, ***Grenley had the opportunity to argue the issue to the trial court and to defend against the award after the State filed its motion to set fees. Because the parties argued the issue before the court, and the court ruled on the issue, for the purpose of notice requirements, the request for attorney fees is treated as if it has been pleaded.***

Grenley, 91 Wn. App. at 930-31(emphasis added)(citations omitted).

There is no reason that the “notice” rationale applied by the *Grenley* Court should not apply in the case of contractual attorneys’ fees, particularly when the interpretation of a contract requires consideration of the entire instrument. *See Morgan v. Prudential Ins. Co. of Am.*, 86 Wn. 2d 432, 434, 545 P.2d 1193 (1976) (the entire contract is to be construed together for the purpose of giving force and effect to each clause). Here, the parties asked the trial court to interpret the rent provision in the Lease, which placed the entire contract at issue – including the fees provision. Thus, it was an error to conclude that Wilson lacked notice that attorneys’ fees could be awarded to the prevailing party, particularly since Wilson

filed counterclaims against the Trust for which he demanded an award of his own attorneys' fees and costs.

III. ATTORNEYS' FEES ON APPEAL

The Trust was the prevailing party in the trial court and the Trust should be the prevailing party on this appeal. Under RAP 18.1, the Trust is entitled to an award of its attorneys' fees and costs incurred on appeal.

IV. CONCLUSION

The trial court's January 31, 2013 ruling on the Trust's motion for attorneys' fees should be overturned, and the trial court should be directed to enter an order for the Trust in the amount of \$135,493.29. The trial court should also be directed to modify the final judgment to reflect this disposition. The trial court should also be directed to award the Trust its attorneys' fees and costs incurred on appeal.

Respectfully submitted this 13th day of November, 2013.

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PROOF OF SERVICE

I, Colleen Hickman, state that I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of twenty-one years, I am not a party to this action, and I am competent to be a witness herein. I declare that on November 13, 2013 I caused to be served in the manner noted copies of the following upon designated counsel:

1. Appellant's Reply Brief; and
2. Proof of Service.

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PROOF OF SERVICE - 1

X	Via US Mail
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DATED this 13th day of November, 2013.

FOSTER PEPPER PLLC

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