

**FILED**  
Jul 22, 2013  
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,

v.

JAMES D. WILSON, et al.,

Respondents.

---

**APPELLANT'S OPENING BRIEF**

---

Dillon E. Jackson, WSBA No. 1539  
Charles P. Rullman, WSBA No. 42733  
Attorneys for Appellant  
Kathryn Learner Family Trust

**FOSTER PEPPER PLLC**  
1111 Third Avenue, Suite 3400  
Seattle, WA 98101-3299  
Telephone: (206) 447-4400  
Telefax: (206) 447-9700  
E-mail: rullc@foster.com

## TABLE OF CONTENTS

|   | <i>Page</i> |
|---|-------------|
| I. INTRODUCTION .....   | 1           |
| II. ASSIGNMENT OF ERROR .....   | 4           |
| III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....  | 5           |
| IV. STATEMENT OF THE CASE.....  | 5           |
| A. The Trust Sued Wilson For Declaratory Relief To Interpret The Rent Provision In The Lease.....                         | 5           |
| B. The Trust Conducted Discovery On Wilson’s Counterclaim For Breach Of The Rent Provision In The Lease.....              | 6           |
| C. The Court Granted Summary Judgment For The Trust.....  | 6           |
| D. Wilson Dismissed His Counterclaims After The Court Rejected His Interpretation Of The Rent Provision In The Lease..... | 8           |
| E. The Trial Court Denied The Trust’s Motion For An Award Of Attorney’s Fees.....   | 9           |
| V. LEGAL ARGUMENT.....  | 10          |
| A. The Trial Court’s Denial Of The Trust’s Motion For Attorney’s Fees Is Reviewed De Novo.....                            | 10          |
| B. The Trust Was Not Required To Request Attorney’s Fees In Its Complaint For Declaratory Judgment.....                   | 10          |
| C. Wilson Had Notice That The Trust Could Be Awarded Its Attorney’s Fees and Costs.....                                   | 13          |
| D. The Trust Was The Prevailing Party Against Wilson’s Counterclaim For Breach Of The Lease.....                          | 14          |
| VI. ATTORNEYS’ FEES ON APPEAL .....   | 17          |
| VII. CONCLUSION.....  | 17          |

## TABLE OF AUTHORITIES

|   | <u>Page(s)</u> |
|---|----------------|
| <b>CASES</b>  |                |
| <i>Andersen v. Gold Seal Vineyards, Inc.</i> ,<br>81 Wn. 2d 863, 868, 505 P.2d 790, 793 (1973).....                             | 15             |
| <i>Chinn v. KMR Prop. Mgmt.</i> ,<br>166 Cal. App. 4th 175, 82 Cal. Rptr. 3d 586 (2008).....                                    | 12             |
| <i>Christensen v. Grant County Hosp. Dist. No. 1</i> ,<br>152 Wn. 2d 299, 96 P.3d 957 (2004).....                               | 16             |
| <i>Cornish Coll. of the Arts v. 1000 Virginia Ltd. P'ship</i> ,<br>158 Wn. App. 203, 242 P.3d 1 (2010).....                     | 16             |
| <i>Hawk v. Branjes</i> ,<br>97 Wn. App. 776, 986 P.2d 841 (1999).....   | 15             |
| <i>In re Washington Builders Ben. Trust</i> ,<br>173 Wn. App. 34, 293 P.3d 1206 (2013).....                                     | 10             |
| <i>NGM Ins. Co. v. Carolina's Power Wash &amp; Painting, LLC</i> ,<br>2010 WL 3258134 (D.S.C. 2010).....                        | 11             |
| <i>Rural Water Dist. No. 1, Ellsworth Cnty., Kan. v. City of Wilson,</i><br><i>Kan.</i> ,<br>184 F.R.D. 632 (D. Kan. 1998)..... | 12             |
| <i>Singleton v. Frost</i> ,<br>108 Wn. 2d 723, 742 P.2d 1224 (1987).....  | 17             |
| <i>State ex rel. A.N.C. v. Grenley</i> ,<br>91 Wn. App. 919, 959 P.2d 1130 (1998).....  | 11, 12         |
| <i>Tipton v. Mill Creek Gravel, Inc.</i> ,<br>373 F.3d 913 (8th Cir. 2004).....   | 11             |
| <i>Walji v. Candyco, Inc.</i> ,<br>57 Wn. App. 284, 787 P.2d 946 (1990).....  | 14, 15, 16     |

**STATUTES**

RCW 4.84 .....11, 12  
RCW 4.84.330 .....14, 15

**OTHER AUTHORITIES**

14A Karl B. Tegland, Washington Practice: Civil Procedure  
§ 35.32, at 475 (1st ed. 2003).....16  
Civil Rule 8(a).....10  
Civil Rule 9(g) .....10, 12  
Civil Rule 54(c).....11  
Civil Rule 54(d)(2).....12  
Rule of Appellate Procedure 18.1 .....4, 5, 17

## **I. INTRODUCTION**

Appellant Kathryn Learner Family Trust (the “Trust”) filed this lawsuit against Respondent James Dean Wilson (“Wilson”) on September 16, 2009. The Trust sought a judgment declaring that the Trust owed no additional rent to Wilson under the parties’ 99-year ground lease (the “Lease”) beyond a reconciliation payment that had been deposited with the trial court. The Lease was incorporated in and attached to the Trust’s Complaint.

On February 10, 2010, Wilson counterclaimed against the Trust for breach of the same rent provision, seeking damages in excess of \$100,000, plus interest and attorney’s fees as provided for in the Lease. Wilson’s counterclaim, which he pursued for two years, was the mirror image of the Trust’s claim for declaratory judgment – it required an interpretation of the rent provision and an accounting of whether sufficient rent had been paid by the Trust.

The trial court entered summary judgment for the Trust on November 22, 2011 on the legal interpretation of the rent provision. The trial court ruled that the Trust’s interpretation is the only reasonable one, thereby rejecting Wilson’s interpretation of the rent provision. On August 17, 2012, the trial court entered summary judgment on the accounting issue, finding that Wilson is owed no additional money for past-due rent.

The summary judgment rulings foreclosed Wilson's counterclaim for breach of the Lease and the Trust demanded that Wilson dismiss his case with prejudice. Instead, Wilson filed a strategic motion for voluntary dismissal of his claims on September 14, 2012 – a week after the Trust moved for entry of final judgment. Over the Trust's objection, the trial court entered the dismissal order without prejudice.

The Trust, as the prevailing party, filed a timely motion for its attorney's fees and costs in the amount of \$135,493.29, as permitted by the Lease. Wilson did not oppose the motion prior to the initial hearing. Instead, he requested and received an extension to file an opposition brief 30 days after the Trust filed its original brief. The Court heard oral argument on the attorney's fees motion on November 2, 2013.

On January 31, 2013, the trial court issued a letter ruling denying the Trust's motion for attorney's fees on the basis that the Trust did not include a prayer for attorney's fees in its Complaint. The trial court reasoned that attorney's fees are special damages that must be specifically pled and that Wilson did not have adequate notice that the Trust might seek an award of attorney's fees. The trial court's ruling was silent about the Trust's status as prevailing party against Wilson's counterclaim for breach of the Lease. The trial court's ruling was entered as an order on March 29, 2013.

The trial court erred in denying the Trust an award of its attorney's fees in three ways:

**First**, there is no requirement in Washington that attorney's fees be demanded in a pleading where such relief is awarded as an element of *costs*, rather than *damages*. The Trust sued Wilson for a declaratory judgment because the parties' disputed how rent should be paid under the Lease. The Trust did not seek damages. The parties' agreement identified reasonable attorney's fees as a measure of the costs recoverable by the prevailing party "[i]n the event of a suit or action brought because of or to enforce provisions [of the Lease]." Thus, awarding attorney's fees to the Trust as the prevailing party on the declaratory judgment claim was not discretionary, it was mandatory.

**Second**, Wilson sued the Trust for breach of the Lease in February 2010, for which he sought an award of monetary damages and his attorney's fees. He pursued his counterclaims for two years before dismissing them as a consequence of the summary judgment rulings. Wilson was not "surprised" by the prospect of paying the Trust's attorney's fees, nor is there any reason to believe he would have conducted this lawsuit differently if the Trust had demanded fees in its Complaint.

**Third**, the bilateral fees provision in the Lease did not require that an affirmative judgment be entered against Wilson on his counterclaim in order for the Trust to be awarded its attorney's fees. Wilson strategically dismissed his lawsuit after the trial court entered case-dispositive summary judgment rulings in favor of the Trust. Wilson is barred from re-asserting his flawed interpretation of the Lease against the Trust under the doctrine of collateral estoppel. Under Washington law, the Trust is the prevailing party against Wilson's counterclaim for breach of the Lease and the Trust is entitled to an award of its attorney's fees and costs.

For all of these reasons, the Trust requests that the trial court's order denying its motion for attorney's fees and costs be reversed and that this Court direct the trial court to enter an order awarding the Trust its reasonable attorney's fees and costs in the amount of \$135,493.29. Pursuant to Rule of Appellate Procedure 18.1, the Trust also requests an award of its attorney's fees and costs incurred on appeal.

## **II. ASSIGNMENT OF ERROR**

The trial court erred in denying the Trust's motion for an award of attorney's fees and costs.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

(1) Did the trial court err in denying the Trust an award of attorney's fees on the basis that attorney's fees must be plead as "special damages" in a claim for declaratory judgment?

(2) Did the trial court err in denying the Trust an award of attorney's fees when the trial court's final judgment was required to grant all relief to which the Trust is entitled?

(3) Did the trial court err in denying the Trust an award of attorney's fees when the Trust was the prevailing party against Wilson's counterclaim for breach of the Lease?

### **IV. STATEMENT OF THE CASE**

#### **A. The Trust Sued Wilson For Declaratory Relief To Interpret The Rent Provision In The Lease.**

In September 2009, the Trust, as master tenant, filed this lawsuit for declaratory relief against its landlord, Wilson, to resolve a dispute regarding the rent due under the 99-year ground lease (the "Lease") for the Grant County Mall in Moses Lake, Washington. (Clerk's Papers ["CP"] 4-35.) For several years, Wilson had been demanding additional rent based on his flawed interpretation of the rent provision in the Lease. (*Id.*)

In February 2010, Wilson sued the Trust for breach of the same rent provision in the Lease, seeking damages in excess of \$100,000. (CP 53-60.) Wilson also sought an award of attorney's fees and costs, as

provided by the Lease: “In the event of suit or action brought because of or to enforce provisions [of the Lease], the prevailing party in such suit or action shall be entitled to recover reasonable attorney fees in addition to such other relief as the Court may grant.” (*Id.* 21 and 59)

**B. The Trust Conducted Discovery On Wilson’s Counterclaim For Breach Of The Rent Provision In The Lease.**

The Trust conducted discovery on Wilson’s counterclaim for breach of the Lease, including interrogatories and document demands that were served on August 25, 2010. (CP 122-133.) Wilson’s discovery responses offered no facts or evidence supporting his case or disputing the Trust’s claim for declaratory relief. (*Id.* 144-151.)

On January 21, 2011, the Trust deposed Wilson. (CP 471-476.) He disclaimed all personal knowledge about the Trust’s rent obligations under the Lease, past rent collected from the Trust or its subtenants, or any alleged deficiency in the Trust’s reconciliation payment. (*Id.*) On April 25, 2011, the Trust deposed Wilson’s purported accounting expert, Clayton Lynch, who confirmed that he had no reason to dispute the Trust’s claims. (*Id.* 478-484.)

**C. The Court Granted Summary Judgment For The Trust.**

On July 11, 2011, the Trust moved for summary judgment on the interpretation of the rent provision and the sufficiency of the Trust’s reconciliation payment, which was paid to Wilson in November 2010.

(CP 351-366.) The Trust's summary judgment motion framed the parties' dispute over the rent provision as follows:

Mr. Wilson claims that the Lease's rent provision entitles him to payment of a monthly base rent and, in addition, both 5% of the Trust's yearly excess rentals income and a 2% escalation of the base monthly rental amount in the following year. Such an interpretation of the Lease defies its plain language and is contrary to Washington law. As discussed below, the Lease must be interpreted consistent with ordinary meaning of its unambiguous terms, which means that the Trust is obligated to pay a base monthly rent and either 5% of the Trust's yearly excess rentals income or a 2% escalation of the base monthly rental amount in the following year, whichever is greater. The Trust's interpretation of Lease is the proper one, and it is not susceptible to any reasonable dispute.

(CP 364.) Regarding the reconciliation payment, the Trust stated:

The Trust made every effort to supply Mr. Wilson with the documentation needed to verify that the reconciliation payment made in September 2009 accounted for all past-due rents for 2001 through 2009. This included copies of the Trust's subleases, its general ledger for the Grant County Mall, tax records, and proof of the excess rentals income received from Safeway and Fashion Bug. These are the precise records that Mr. Wilson's accountant, Clayton Lynch, claimed that he would need in order to verify the accuracy of the Trust's reconciliation. Yet, even after receiving open access to the Trust's records, neither Mr. Wilson nor his accountant could find a single error or shortcoming in the reconciliation payment. [...]

[T]here is a complete absence in the record of any facts indicating that the Trust miscalculated or undervalued its reconciliation payment, and Mr. Wilson may not rely on unfounded speculation that material issues of fact exist. *See Meyer v. University of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986). (“[A] nonmoving party may not rely on speculation or on argumentative assertions that unresolved

factual issues remain.”). On this basis, the Court should enter summary judgment for the Trust.

(CP 365-366.)

On November 22, 2011, the trial court granted the Trust’s summary judgment motion regarding the interpretation of the rent provision, stating that “the court finds as a matter of law that Plaintiff’s interpretation of the lease is the only reasonable one.” (CP 551-553.)

On August 17, 2012, after Wilson opposed two motions for reconsideration filed by the Trust, the trial court entered summary judgment on the accounting portion of the Trust’s declaratory relief claim, finding that Wilson is not due any additional amounts for past-due rent.

(CP 636-638.)

**D. Wilson Dismissed His Counterclaims After The Court Rejected His Interpretation Of The Rent Provision In The Lease.**

On August 14, 2012, the Trust demanded that Wilson dismiss his case with prejudice. (CP 633.) Three weeks passed without a response and the Trust moved on September 7, 2012 for entry of final judgment.

(*Id.* 639-643.)

On September 10, 2012, Wilson moved pursuant to CR 41 for the voluntary dismissal of his counterclaims. (CP 650-652.) The trial court addressed Wilson’s non-suit at a hearing on September 14, 2012, where the Trust objected that the dismissal should be entered with prejudice.

Over the Trust's objection, the trial court entered the dismissal without prejudice. (*Id.* 652.)

**E. The Trial Court Denied The Trust's Motion For An Award Of Attorney's Fees.**

On September 24, 2012, the Trust filed a motion for its attorney's fees and costs, as provided in the Lease. (CP 653-753.) The Trust's motion was based on its status as the "prevailing party" on the Trust's declaratory relief action and Wilson's counterclaim for breach of the rent provision. (*Id.* 657.) Wilson did not file a timely opposition, but the trial court allowed a continuance of the hearing until November 2, 2012 for Wilson to make a belated submission. (*Id.* 755-757.)

On October 23, 2012, Wilson filed his opposition to the Trust's motion for attorney's fees. (CP 760-764.) The Trust filed its reply brief on October 30, 2012 (*Id.* 765-780), and Wilson filed an improper surreply on October 31, 2012. (*Id.* 781-785.) The Trust requested \$129,841.28 in attorney's fees and \$5,652.01 in costs. (*Id.* 769.)

On January 31, 2013, the trial court issued its ruling denying the Trust's motion for attorney's fees and costs. (CP 791-797.) The trial court ruled that the attorney's fees provision in the Lease was broad enough to support an award to the Trust for its declaratory relief claim and that the Trust is the prevailing party on that claim, but the trial court denied the motion on the basis that the Trust did not plead for an award of

attorney's fees in its Complaint. (*Id.*) The trial court's ruling did not address whether the Trust is entitled to an award of attorney's fees and costs as the prevailing party against Wilson's claim for breach of the rent provision in the Lease. (*Id.*)

## **V. LEGAL ARGUMENT**

### **A. The Trial Court's Denial Of The Trust's Motion For Attorney's Fees Is Reviewed De Novo.**

The Washington Court of Appeals applies a two-part standard of review to a trial court's award or denial of attorney fees: "(1) we review de novo whether there is a legal basis for awarding attorney fees by statute, under contract, or in equity and (2) we review a discretionary decision to award or deny attorney fees and the reasonableness of any attorney fee award for an abuse of discretion." *In re Washington Builders Ben. Trust*, 173 Wn. App. 34, 83, 293 P.3d 1206, 1231 (2013) (citing *Gander v. Yeager*, 167 Wn. App. 638, 647, 282 P.3d 1100 (2012)). Here, the trial court determined that there was no legal basis to award attorney's fees to the Trust, and that decision should be reviewed de novo. (CP 791-797.)

### **B. The Trust Was Not Required To Request Attorney's Fees In Its Complaint For Declaratory Judgment.**

Civil Rule 8(a) requires that a pleading "shall contain ... a demand for judgment for the relief to which [the pleader] deems himself entitled." In addition, Civil Rule 9(g) requires that any demand for special damages

be specifically stated in the pleadings. Citing these authorities and a handful of Federal and non-Washington cases, the trial court classified the Trust's request for attorney's fees as "special damages" that were waived because they were not requested in the Complaint. (CP 810: "[T]he court concludes the Plaintiff, having failed to plead for contractual attorney's fees until adjudication of all pled claims, may not now claim those attorney fees."). This was an error of law.

Under Civil Rule 54(c), "[e]xcept as to a party against whom a judgment is entered by default, 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.*" (Emphasis added.). Alternatively, "[c]osts shall be fixed and allowed as provided in RCW 4.84 or by any other applicable statute." CR 54(d). Based upon the plain language of these Civil Rules, the Trust is entitled to recover attorney fees as **costs** if authorized by statute, contract, or other recognized ground, even though the Trust did not specifically request such relief in its pleadings. *See State ex rel. A.N.C. v. Grenley* ("Grenley"), 91 Wn. App. 919, 930, 959 P.2d 1130, 1136 (1998); *see also Tipton v. Mill Creek Gravel, Inc.*, 373 F.3d 913, 922 (8th Cir. 2004) (affirming award of attorney's 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) (“Kuras is entitled to recover attorney fees as a recoverable cost under the substantive law of South Carolina, can do so by requesting those fees pursuant to Rule 54(d)(2), and was not required to plead them under Rule 9(g), because 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 include it in the complaint or pretrial order); *Chinn v. KMR Prop. Mgmt.*, 166 Cal. App. 4th 175, 194, 82 Cal. Rptr. 3d 586, 603 (2008) (“Attorney fees based on a contract provision [that are awarded as costs] do not need to be demanded in the complaint.”).

In its ruling, the trial court read a distinction into the *Grenley* holding between “statutory” and “contractual” attorney’s fees in so far as the latter must be plead in a complaint, regardless of whether such fees are awarded as “costs.” (CP 795: “This court ... as a matter of first impression, must decide whether to extend *Grenley* to requests for contractual attorney fees.”) The *Grenley* Court did not invite this distinction between statutory and contractual attorney’s fees; rather, it recognized that attorney’s fees may constitute costs under RCW 4.84 if

provided for by “**agreement.**” *Grenley*, 91 Wn. App. at 930 (emphasis added).

The Trust did not request its attorney’s fees as “special damages” in relation to its claim for declaratory judgment. Rather, the Lease identifies attorney’s fees as part of the recoverable costs awarded to a party who prevails “[i]n the event of a suit or action brought because of or to enforce provisions [of the Lease].” The trust should therefore have received its attorney’s fees as the prevailing party on its claim for declaratory judgment.

**C. Wilson Had Notice That The Trust Could Be Awarded Its Attorney’s Fees and Costs.**

The trial court’s order denying attorney’s fees focused on the alleged prejudice to Wilson of being surprised that the Trust would seek fees if it prevailed. (CP 795: “At this point, nothing can be done to enable the Defendants to retroactively weigh the additional risk they underwent by defending this action.”) The Court erred in this consideration.

Wilson sued the Trust in February 2010 for breach of the Lease, and he demanded \$100,000 in damages plus interest and attorney’s fees. (CP 53-60.) From the moment Wilson filed suit until he voluntarily dismissed his claims after summary judgment was granted for the Trust (and after two years of litigation), Wilson was on notice that his failure to

prevail on his counterclaims would subject him to an award of attorney's fees. In addition, Wilson had an ample opportunity to oppose the Trust's motion for attorney's fees, including more than 30 days to prepare his opposition. Thus, it was an error to conclude that Wilson was prejudiced by the Trust's failure to plead for attorney's fees in its Complaint.

**D. The Trust Was The Prevailing Party Against Wilson's Counterclaim For Breach Of The Lease.**

Wilson voluntarily dismissed his counterclaim for breach of the Lease after two years of litigation and after the trial court entered case-dispositive summary judgment rulings in favor of the Trust. Under Washington law, the Trust is the prevailing party for the purposes of the parties' bilateral attorney's fees provision (which Wilson asserted in his pleading) and it was mandatory for the trial court to enter an award of attorney's fees for the Trust.

First, the attorney's fees provision in the Lease is a bilateral fees provision, meaning that it provides for an award of attorney's fees and costs to **either** prevailing party "[i]n the event of a suit or action brought because of or to enforce provisions [of the Lease]." The fees provision in the Lease is not a single-party fees provision of the kind addressed by the reciprocal attorney fee statute, RCW 4.84.330. Thus, 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. *See Walji v. Candyco, Inc.*, 57 Wn. App. 284, 288, 787 P.2d 946 (1990) (holding that the statutory definition of “prevailing party” contained in reciprocal attorney’s fee statute was not applicable for enforcement of bilateral attorney’s fees provision); *Hawk v. Branjes*, 97 Wn. App. 776, 780, 986 P.2d 841 (1999) (“where, as here, the agreement already contains a bilateral attorneys’ fee provision, RCW 4.84.330 is generally inapplicable.”).

Second, the Trust meets the standard of a prevailing party used in cases involving bilateral fees provisions and the voluntary dismissal of claims. In *Andersen v. Gold Seal Vineyards, Inc.*, the Washington Supreme Court held that “a defendant who ‘prevails’ is ordinarily one against whom no affirmative judgment is entered.” *Id.*, 81 Wn. 2d 863, 868, 505 P.2d 790, 793 (1973); *see also Hawk*, 97 Wn. App. at 779-780 (tenants were entitled to award of attorney fees pursuant to the lease’s bilateral attorney fees provision following landlord’s voluntary dismissal of action to enforce terms of commercial lease); *Walji*, 57 Wn. App. at 288 (trial court awarded the defendant attorney’s fees under a bilateral fee provision in a lease agreement after the court issued an order of voluntary non-suit). Similarly, to recover attorney fees, a defendant need not have made a counterclaim for affirmative relief, but 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, 231-232, 242 P.3d 1 (2010).

Here, Wilson dismissed his counterclaim for breach of the Lease after the trial court ruled as a matter of law that the Trust's interpretation of the rent provision is the only reasonable one and that no additional rent is due to Wilson. (CP 551-553 and 636-638.) But Wilson's decision to dismiss his counterclaims was not "voluntary." He could not proceed to trial on counterclaims that were already decided in the Trust's favor and he is collaterally estopped from raising these issues in subsequent litigation against the Trust. *See Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn. 2d 299, 306, 96 P.3d 957 (2004) (collateral estoppel, or issue preclusion, bars relitigation of an issue in a subsequent proceeding involving the same parties; citing 14A Karl B. Tegland, *Washington Practice: Civil Procedure* § 35.32, at 475 (1st ed. 2003)). Thus, not only did Wilson fail in obtaining an affirmative judgment in this action, but he is precluded from suing in the future based upon his rejected interpretation of the rent provision and his claim for underpayment of rent. *See Walji*, 57 Wn. App. at 288 (prevailing party attorney's fees were appropriate following plaintiff's non-suit because the case "[s]ince the case may never be renewed.").

Third, awarding attorney's fees to the prevailing party pursuant to the Lease is mandatory, not permissive. (CP 21: "the prevailing party in such suit or action **shall** be entitled to recover reasonable attorney fees[.]" [Emphasis added.]). Thus, the trial court had no discretion in whether the Trust should have been awarded its reasonable attorney's fees as the prevailing party against Wilson's counterclaim for breach of the Lease. *See Singleton v. Frost*, 108 Wn. 2d 723, 729, 742 P.2d 1224, 1228 (1987) ("We agree that the trial court has the power to limit an award of attorney's fees to a reasonable sum; however, *this power does not extend to allow the complete denial of attorney's fees where the contract provides for their award.*" [Emphasis added.]).

In sum, the Trust was the prevailing party against Wilson's claim for breach of the rent provision in the Lease. The Trust is entitled to an award of its reasonable attorney's fees and costs.

## **VI. ATTORNEY'S FEES ON APPEAL**

Pursuant to Rule of Appellate Procedure 18.1 and the Lease, the Trust requests an award of attorneys' fees and costs on appeal.

## **VII. CONCLUSION**

Based on the foregoing, the Trust requests that the trial court's order denying its motion for attorney's fees and costs be reversed and that this Court direct the trial court to enter an order awarding the Trust its

reasonable attorney's fees and costs in the amount of \$135,493.29. The Trust also requests that the case be remanded for a determination of the Trust's attorney's fees and costs that will have been incurred on appeal, which are awardable under the Lease.

RESPECTFULLY SUBMITTED this 22nd day of July, 2013.

FOSTER PEPPER PLLC



---

Charles P. Rullman, WSBA No. 42733  
Attorneys for Appellant  
Kathryn Learner Family Trust

1111 Third Avenue, Suite 3400  
Seattle, Washington 98101-3299  
Telephone: (206) 447-4400  
Facsimile: (206) 447-9700

COURT OF APPEALS  
THE STATE OF WASHINGTON  
DIVISION III

KATHRYN LEARNER FAMILY  
TRUST,

Appellant,

v.

JAMES D. WILSON, et al,

Respondents.

No. 315819

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 July 22, 2013 I caused to be served in the manner noted copies of the following upon designated counsel:

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

**Attorneys for Appellee**

George M. Ahrend  
Matthew C. Albrecht  
Ahrend Albrecht PLLC  
16 Basin Street SW  
Ephrata, WA 98823  
T: (509) 764-9000  
E: gahrend@trialappeallaw.com

|                                     |             |
|-------------------------------------|-------------|
| <input checked="" type="checkbox"/> | Via US Mail |
| <input checked="" type="checkbox"/> | Via Email   |

PROOF OF SERVICE - 1

DATED this 22nd day of July, 2013.

FOSTER PEPPER PLLC

*s/Colleen Hickman*

\_\_\_\_\_  
Colleen Hickman

1111 Third Avenue, Suite 3400  
Seattle, Washington 98101-3299  
Telephone: (206) 447-4400  
Facsimile: (206) 447-9700  
Email: hickc@foster.com  
Kathryn Learner Family Trust

PROOF OF SERVICE - 2