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Court of Appeals
Division III
State of Washington

No. 315819

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

KATHRYN LEARNER FAMILY TRUST,

Appellant/Cross-Respondent,

vs.

JAMES DEAN WILSON, individually and as Administrator of the
ESTATE OF ELSA BURGETT; and ESTATE OF ELSA BURGETT,

Respondents/Cross-Appellants.

BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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I. INTRODUCTION

The Kathryn Learner Family Trust (Trust) filed a declaratory judgment action against James D. Wilson, individually and as administrator of the Estate of Elsa Burgett (Wilson), regarding the interpretation of a long-term real estate lease between the parties, and Wilson filed a counterclaim against the Trust alleging breach of the lease. The dispute between the parties has been resolved by the superior court on summary judgment, and while Wilson originally filed a protective cross-appeal, he does not intend to pursue it. The sole issue on appeal is whether the superior court erred in denying an award of attorney fees to the Trust.

II. RESTATEMENT OF ISSUES ON APPEAL

Did the superior err in denying an award of attorney fees to the Trust pursuant to a contractual fee-shifting provision (a) in the absence of a demand for fees in its complaint for declaratory judgment, and (b) where Wilson's counterclaim requesting fees was voluntarily dismissed?

III. RESTATEMENT OF THE CASE

The Trust leases certain property in Grant County, Washington, from Wilson. The Trust filed a declaratory judgment action against Wilson acknowledging that the Trust had underpaid rent, seeking clarification of certain lease terms and a court declaration that no further amounts were

due, and seeking confirmation of Wilson's status as the lessor. CP 4-9.

The demand for relief in the complaint states:

Wherefore, the Kathryn Lea[r]ner Family Trust requests as follows:

1. That the Court either approve the Reconciliation as submitted herein or direct such payment as it determines are [sic] owed under the lease to date of judgment.

2. That the Court interpret the meaning of the lease as to the additional yearly payments to be made in excess of the monthly rents, so that the parties['] rights and obligations are clear and will not be subject to dispute in the future.

3. That the Court direct that the administrator of the estate of Elsa Burgett complete the probate of the estate so that title to the property is clear.

CP 8 (brackets added; formatting in original). Although the lease between the parties contains a fee-shifting provision, CP 21, the complaint does not include a demand for attorney fees.

Wilson answered the complaint and alleged a counterclaim against the Trust. CP 53-59. The counterclaim includes a demand for "attorney's fees as provided by contract," i.e., the lease. CP 59.

The superior court resolved the parties' dispute regarding the meaning of certain lease terms and the amount due under the lease on summary judgment. CP 636-38. The Court specifically declined the

Trust's request to find that its summary judgment order was dispositive of Wilson's counterclaim. CP 637.

The Trust subsequently filed a motion for the superior court to certify its summary judgment order as final pursuant to CR 54(b). CP 639-43. The motion included a request to schedule a pretrial conference regarding Wilson's counterclaims. CP 641 (lines 9-10).

Before the hearing on the CR 54(b) motion, Wilson filed a motion to dismiss his counterclaims without prejudice pursuant to CR 41, which was granted by the superior court. CP 650-52. Counsel for the Trust concurred in the motion, and acknowledged that it negated the Trust's CR 54(b) motion. CP 649 (minutes); RP, Sept. 14, 2012, at 2 (line 16).

The Trust then sought an award of attorney fees. CP 653-60. Wilson objected on grounds that the Trust is not entitled to an award of fees and that the amount of fees requested is unreasonable. CP 760-, 781-83 & 786. The superior court declined to award fees to the Trust, CP 791-810, and entered final judgment, CP 811-13.¹

¹ A copy of the superior court's letter ruling, CP 791-97 is reproduced in the Appendix to this brief.

The Trust appeals the denial of its request for fees.² In its opening brief, the Trust limits its assignment of error to the denial of its request for fees. App. Br., at 4.

IV. ARGUMENT

A. Contractual attorney fees should not be awarded unless they are pled in the complaint, and the superior court did not err in denying the Trust’s request for fees in this case.

Contractual attorney fees must be pled in the complaint. CR 8(a) provides in pertinent part:

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross claim, or third party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) *a demand for judgment for the relief to which he deems himself entitled.*

The plain meaning of the italicized portion of the rule would seem to require a request for contractual attorney fees to be included in the complaint. The Trust does not appear to dispute this requirement, but instead relies on CR 54 as an exception to the rule. *See* App. Br., at 10-11.³

The Trust points out that, except in cases of default, CR 54(c) provides “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

² The Notice of Appeal is being transmitted to the Court of Appeals pursuant to a supplemental designation of Clerk’s Papers.

³ The full text of the current version of CR 8 is reproduced in the Appendix to this brief.

such relief in his pleadings.” The Trust does not acknowledge any limits on the extent to which a judgment may go beyond the relief requested in the complaint. *See App. Br.*, at 11-12. Taken literally, this portion of CR 54(c) would eliminate even the barest notice pleading requirements, let alone the special pleading requirements of CR 8 and 9. *See 4 Wash. Prac., Rules Practice CR 54* (6th ed.) The rule should only be applied to save a defective complaint when the unpleaded issue is susceptible to an amendment to conform to the evidence under CR 15(a). *See id.* For example, where a contractor pled \$1,500 attorney fees in his complaint, presumably for purposes of obtaining a default judgment, he should not be limited to that amount at the conclusion of litigation. *See Hos Bros. Bulldozing, Inc. v. Hugh S. Ferguson Co.*, 87 Wn. App. 769, 773, 508 P.2d 1377 (1973).⁴

Perhaps recognizing the limits of CR 54(c), the Trust turns to section (d) of the rule, which specifically governs the recovery of costs, disbursements, attorney fees and expenses. It is noteworthy that this section does not contain any exception to the pleading requirements of CR 8. The Trust characterizes the sections (c) and (d) as alternative, suggesting that attorney fees may be recovered under either subsection or both. *See App. Br.*, at 11. However, the specific provision should control

⁴ The full text of the current version of CR 54 is reproduced in the Appendix to this brief.

over the general. *See Flight Options, LLC v. State Dep't of Revenue*, 172 Wn.2d 487, 504, 259 P.3d 234 (2011) (stating more specific statutory provision prevails over general in case of apparent conflict); *Jafar v. Webb*, 177 Wn.2d 520, 526, 303 P.3d 1042 (2013) (indicating court rules are interpreted in the same manner as statutes).

CR 54(d) provides:

(d) Costs, Disbursements, Attorneys' Fees, and Expenses.

(1) *Costs and Disbursements.* Costs and disbursements shall be fixed and allowed as provided in RCW 4.84 or by any other applicable statute. If the party to whom costs are awarded does not file a cost bill or an affidavit detailing disbursements within 10 days after the entry of the judgment, the clerk shall tax costs and disbursements pursuant to CR 78(e).

(2) *Attorneys' Fees and Expenses.* Claims for attorneys' fees and expenses, other than costs and disbursements, shall be made by motion unless the substantive law governing the action provides for the recovery of such fees and expenses as an element of damages to be proved at trial. Unless otherwise provided by statute or order of the court, the motion must be filed no later than 10 days after entry of judgment.

(Formatting in original.) The Trust relies on the language of subsection (1) stating that “[c]osts shall be fixed and allowed as provided in RCW 4.84 or by any other applicable statute,” and argues that the trial court made an unwarranted distinction between attorney fees authorized by statute and those recoverable pursuant to contract. *See App. Br.*, at 11-13. None of the

statutes cited in subsection (d)(1) provide for right to recover contractual attorney fees, and none has been cited by the Trust.⁵ The Trust glosses over the fact that the subsection specifically refers to RCW 4.84 and “any other applicable statute,” while omitting any mention of contract. This omission excludes contract as a basis for recovery of attorney fees under the principle of interpretation that the expression of one thing is the exclusion of others (*expressio unius est exclusio alterius*). *See State v. Ortega*, 177 Wn.2d 116, 124, 297 P.3d 57 (2013).

The superior court below made a distinction between statutory attorney fees, which do not have to be pled, and contractual attorney fees, which do, and noted that *State ex rel. A.N.C. v. Grenley*, 91 Wn.App. 919, 959 P.2d 1130, *rev. denied*, 136 Wn.2d 1031 (1998), supported this distinction. *See* CP 795. In *Grenley*, the Court of Appeals acknowledged the pleading requirements of CR 8(a), but held that statutory attorney fees recoverable under former RCW 26.21, the Uniform Interstate Family

⁵ *See, e.g.*, RCW 4.84.010 (providing “[t]he measure and mode of compensation of attorneys and counselors, shall be left to the agreement, expressed or implied, of the parties,” as distinguished from statutory attorney fees and other costs allowed to the prevailing party); RCW 4.84.020 (providing for amount of contracted attorney fees to be fixed by the court, but not providing for a right to recover such fees); RCW 4.84.185 (providing for right to recover attorney fees incurred in frivolous action); RCW 4.84.250-.300 (providing for right to recover attorney fees in damage actions of \$10,000 or less); RCW 4.84.330 (providing for bilateral effect and non-waiver of contractual fee provisions); RCW 4.84.340-360 (providing for attorney fees for judicial review of agency action); RCW 4.84.370 (providing for attorney fees for appeal of land use decisions).

Support Act, did not have to be pled in order to be recovered, reasoning as follows:

Former RCW 26.21 did not specify whether attorney fees must be specifically pleaded. 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. *See Detonics ".45" Assocs. v. Bank of California*, 97 Wash.2d 351, 644 P.2d 1170 (1982); *Armstrong Constr. Co. v. Thomson*, 64 Wash.2d 191, 390 P.2d 976 (1964). *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. See Lujan v. Santoya*, 41 Wash.2d 499, 501, 250 P.2d 543 (1952); *see also Hos Bros. Bulldozing, Inc. v. Hugh S. Ferguson Co.*, 8 Wash.App. 769, 773, 508 P.2d 1377 (1973).

91 Wn. App. at 930 (emphasis added.) The Trust contends that the superior court erred because the first sentence of the foregoing quotation states that attorney fees can be recovered as costs "if so provided by ... agreement." App. Br., at 12-13 (quoting *Grenley*, at 930). However, the fact that attorney fees can be recovered pursuant to contract does not resolve the question of whether such right of recovery must be pled. The Trust overlooks the italicized language that contains the statement of the court's rationale. The court's rationale in *Grenley* is specifically tied to the statutory basis for the award of fees in that case, and to that extent it suggests that only statutory fees are exempt from the normal pleading requirements.

Nonetheless, neither *Grenley* nor any other Washington case squarely addresses the issue of whether contractual attorney fees must be pled in order to be recovered. The Trust cites four cases from outside of Washington. *See* App. Br., at 11-12. One of them involves a California court rule. *See Chinn v. KMR Property Mgmt.*, 82 Cal. Rptr. 586, 609 (Cal. App. 2008) (involving Cal. Rules of Court, Rule 3.1702⁶). The other three involve Fed. R. Civ. P. 54. *See Tipton v. Mill Creek Gravel, Inc.*, 373 F.3d 913, 922-23 (8th Cir. 2004); *Rural Water Dist. No. 1 v. City of Wilson*, 184 F.R.D. 632, 633 (D. Kan. 1998); *NGM Ins. Co. v. Carolina's Power Wash & Painting, LLC*, 2010 WL 3258134 (D.S.C., July 6, 2010) (unpublished magistrate judge report and recommendation).⁷ None of these decisions is controlling.

There are significant differences between the rules involved in the cases cited by the Trust and the relevant Washington rules. The California rule specifically delineates the procedure for making a claim for attorney fees based on statute or contract, and the federal rule refers to attorney fees based on statute, rule, or court order, whereas the Washington rule is limited to RCW 4.84 and other applicable statutes. *Compare* Cal. Rule of Court, Rule 3.1702 *and* Fed. R. Civ. P. 54(d)(1) *with* CR 54(d)(1). These

⁶ The full text of the current version of Cal. Rule of Court, Rule 3.1702 is reproduced in the Appendix to this brief.

⁷ The full text of the current version of Fed. R. Civ. P. 54 is reproduced in the Appendix to this brief.

differences militate against interpreting the Washington rules in lockstep with these other jurisdictions.

One of the cases cited by the Trust involves statutory attorney fees. *See Rural Water Dist.*, 184 F.R.D. at 633 (involving fees under 42 U.S.C. § 1988). It is entirely consistent with Wilson’s analysis of the *Civil Rules* and the *Grenley* decision.

Two of the cases cited by the Trust involve attorney fees based on equitable judge-made fee-shifting rules, one involving attorney fees incurred in prosecuting shareholder derivative suits, *see Tipton*, 373 F.3d at 922-23, and the other involving attorney fees incurred to obtain insurance coverage, *see NGM*, 2010 WL 3258134.⁸ Both courts distinguished cases involving contractual attorney fees, and noted that contractual attorney fees generally must be pled in order to be recovered. *See Tipton*, 373 F.3d at 922 n.10 (noting “[c]ourts have held attorney fees to be special damages primarily in instances when available under a contract between the parties”); *NGM*, 2010 WL 3258134 (noting general rule). To this extent, these cases support Wilson’s analysis.⁹

⁸ *NGM* appears to involve a South Carolina fee-shifting rule in insurance cases similar to *Olympic S.S. C. v. Centennial Ins. Co.*, 117 Wn.2d 37, 52-53, 811 P.2d 673 (1991).

⁹ The general rule noted in *Tipton* and *MGM* is based on the federal counterpart to CR 9(g), which provides: “[w]hen items of special damage are claimed, they shall be specifically stated.” (Brackets added.) *Grenley* noted the relevance of this pleading rule in connection with a claim for statutory attorney fees. *See* 91 Wn. App. at 930. It bolsters the pleading requirement of CR 8(a)(2), quoted in the main text.

The Trust seems to be advocating for a rule that would eliminate the requirement of pleading contractual attorney fees as long as there is notice and a lack of prejudice. *See* App. Br., at 13-14. As an initial matter, the Trust equivocates between notice of the fee-shifting provision in the parties' lease and notice that the Trust was making a claim for attorney fees. Knowledge of the *contract term* is not the same as knowledge of the *claim*. The purpose of the pleading requirements is to inform a defendant of the claim that is being asserted against him or her. To the extent that the Trust's complaint did not include a demand for attorney fees, Wilson did not have notice that the Trust intended to seek attorney fees.

More importantly, if the rule the Trust is advocating were taken to be the law, then it would embroil trial courts in unnecessary disputes regarding the issues of notice and prejudice resulting from the failure to plead a demand for attorney fees in the complaint. *See* 3 Wash. Prac., Rules Practice CR 8 (7th ed.) (stating "it is usually good practice to specifically request attorney fees and to specify the basis, if known, in order to avoid subsequent quibbles about whether the opposing party was put on notice that attorney's fees were being demanded"). This would be a waste of judicial and litigant resources that could easily be avoided by proper pleading.

Requiring litigants to plead a demand for contractual attorney fees would provide notice, avoid disputes, and, in the final analysis, be consistent with the presumption against fee shifting that is the law of Washington. *See Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 79 & n.2, 272 P.3d 827 (2012) (noting “American rule that parties bear their own costs and fees in litigation”).

B. The Trust is not entitled to attorney fees based on Wilson’s counterclaim, which was voluntarily dismissed.

Wilson’s counterclaim pled an entitlement to attorney fees. CP 59. As with the original complaint, the Trust’s reply to the counterclaim did not plead any entitlement to fees. CP 62 (merely denying that the relief requested in the counterclaim should be awarded). Nonetheless, the Trust reasons that it is entitled to fees as the “prevailing party” on the counterclaim, even though the counterclaim was voluntarily dismissed pursuant to CR 41. *See App. Br.*, at 14-17. This argument suffers from the same defect as the Trust’s attempt to recover fees in prosecuting the declaratory judgment action. Because fees were not pled in reply to the counterclaim, they should not be recoverable.¹⁰

¹⁰ On another level, the phrase “prevailing party” is undefined by the parties’ contract. To the extent it is equated with a judgment in a party’s favor, the Trust is not a prevailing party in light of the voluntary dismissal. *Cf. Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 200 P.3d 683 (2009) (relying on RCW 4.84.330 definition of prevailing party as one in whose favor final judgment is entered, and finding that opposing party was not a prevailing party in light of voluntary dismissal under CR 41).

C. The Trust should be denied attorney fees on appeal on the same grounds as in the trial court.

On appeal, the Trust seeks attorney fees incurred in the superior court. Those fees should be denied on the same grounds that they were denied in the trial court. The Trust should also be denied fees incurred on appeal because, even though it has now complied with RAP 18.1 by requesting fees in its brief, it should not be deemed the prevailing party.

Consistent with this analysis, Wilson does not seek attorney fees incurred in the superior court because, even though he pled his entitlement to contractual fee-shifting, he did not prevail. However, he should be entitled to the benefit of contractual fees as the prevailing party on appeal. *See* RAP 18.1.

V. CONCLUSION

Based on the foregoing Wilson respectfully asks the Court to affirm the superior court, deny the Trust's requests for fees in the superior court and on appeal, and award fees to Wilson on appeal.

Submitted this 14th day of October, 2013.

AHREND ALBRECHT PLLC



George M. Ahrend, WSBA #25160

Attorneys for Respondents/Cross-Appellants

CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On October 14, 2013, I served the document to which this is annexed by email and First Class Mail, postage prepaid, as follows:

Dillon E. Jackson
Charles P. Rullman
Foster Pepper PLLC
1111 Third Ave., Ste. 3400
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Signed at Ephrata, Washington on October 14, 2013.



Shari M. Canet, Paralegal

APPENDIX

APPENDIX

Superior Court Civil Rules, CR 8

RULE 8. GENERAL RULES OF PLEADING

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross claim, or third party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) Defenses; Form of Denials. A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, he may do so by general denial subject to the obligations set forth in rule 11.

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fault of a nonparty, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitation, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading.

Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) Pleading to Be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in rule 11.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

The adoption of this rule shall not be considered an adoption or approval of the forms of pleading in the Appendix of Forms approved in rule 84, Federal Rules of Civil Procedure.

[Amended effective September 18, 1992.]

Superior Court Civil Rules, CR 54

RULE 54. JUDGMENT AND COSTS

(a) Definitions.

(1) *Judgment.* A judgment is the final determination of the rights of the parties in the action and includes any decree and order from which an appeal lies. A judgment shall be in writing and signed by the judge and filed forthwith as provided in rule 58.

(2) *Order.* Every direction of a court or judge, made or entered in writing, not included in a judgment, is denominated an order.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties.

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination in the judgment, supported by written findings, that there is no just reason for delay and upon an express direction for the entry of judgment. The findings may be made at the time of entry of judgment or thereafter on the court's own motion or on motion of any party. In the absence of such findings, determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except 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.

(d) Costs, Disbursements, Attorneys' Fees, and Expenses.

(1) *Costs and Disbursements.* Costs and disbursements shall be fixed and allowed as provided in RCW 4.84 or by any other applicable statute. If the party to whom costs are awarded does not file a cost bill or an affidavit detailing disbursements within 10 days after the entry of the judgment, the clerk shall tax costs and disbursements pursuant to CR 78(e).

(2) *Attorneys' Fees and Expenses.* Claims for attorneys' fees and expenses, other than costs and disbursements, shall be made by motion unless the substantive law governing the action provides for the recovery of such fees and expenses as an element of damages to be proved at trial. Unless otherwise provided by statute or order of the court, the motion must be filed no later than 10 days after entry of judgment.

(e) Preparation of Order or Judgment. The attorney of record for the prevailing party shall prepare and present a proposed form of order or judgment not later than 15 days after the entry of the verdict or decision,

or at any other time as the court may direct. Where the prevailing party is represented by an attorney of record, no order or judgment may be entered for the prevailing party unless presented or approved by the attorney of record. If both the prevailing party and his attorney of record fail to prepare and present the form of order or judgment within the prescribed time, any other party may do so, without the approval of the attorney of record of the prevailing party upon notice of presentation as provided in subsection (f)(2).

(f) Presentation.

(1) *Time.* Judgments may be presented at the same time as the findings of fact and conclusions of law under rule 52.

(2) *Notice of Presentation.* No order or judgment shall be signed or entered until opposing counsel have been given 5 days' notice of presentation and served with a copy of the proposed order or judgment unless:

(A) *Emergency.* An emergency is shown to exist.

(B) *Approval.* Opposing counsel has approved in writing the entry of the proposed order or judgment or waived notice of presentation.

(C) *After Verdict, etc.* If presentation is made after entry of verdict or findings and while opposing counsel is in open court.

[Amended effective September 1, 1989; September 1, 2007.]

Cal. Rules of Court, Rule 3.1702

Rule 3.1702. Claiming attorney's fees

(a) Application

Except as otherwise provided by statute, this rule applies in civil cases to claims for statutory attorney's fees and claims for attorney's fees provided for in a contract. Subdivisions (b) and (c) apply when the court determines entitlement to the fees, the amount of the fees, or both, whether the court makes that determination because the statute or contract refers to "reasonable" fees, because it requires a determination of the prevailing party, or for other reasons.

(b) Attorney's fees before trial court judgment

(1) Time for motion

A notice of motion to claim attorney's fees for services up to and including the rendition of judgment in the trial court--including attorney's fees on an appeal before the rendition of judgment in the trial court--must be served and filed within the time for filing a notice of appeal under rules 8.104 and 8.108 in an unlimited civil case or under rules 8.822 and 8.823 in a limited civil case.

(2) Stipulation for extension of time

The parties may, by stipulation filed before the expiration of the time allowed under (b)(1), extend the time for filing a motion for attorney's fees:

(A) Until 60 days after the expiration of the time for filing a notice of appeal in an unlimited civil case or 30 days after the expiration of the time in a limited civil case; or

(B) If a notice of appeal is filed, until the time within which a memorandum of costs must be served and filed under rule 8.278(c) in an unlimited civil case or under rule 8.891(c)(1) in a limited civil case.

(c) Attorney's fees on appeal

(1) Time for motion

A notice of motion to claim attorney's fees on appeal--other than the attorney's fees on appeal claimed under (b)--under a statute or contract requiring the court to determine entitlement to the fees, the amount of the fees, or both, must be served and filed within the time for serving and filing the memorandum of costs under rule 8.278(c)(1) in an unlimited civil case or under rule 8.891(c)(1) in a limited civil case.

(2) Stipulation for extension of time

The parties may by stipulation filed before the expiration of the time allowed under (c)(1) extend the time for filing the motion up to an additional 60 days in an unlimited civil case or 30 days in a limited civil case.

(d) Extensions

For good cause, the trial judge may extend the time for filing a motion for attorney's fees in the absence of a stipulation or for a longer period than allowed by stipulation.

(e) Attorney's fees fixed by formula

If a party is entitled to statutory or contractual attorney's fees that are fixed without the necessity of a court determination, the fees must be claimed in the memorandum of costs.

(Formerly Rule 870.2, adopted, eff. Jan. 1, 1994. As amended, eff. Jan. 1, 1999; Jan. 1, 2006. Renumbered Rule 3.1702 and amended, eff. Jan. 1, 2007. As amended, eff. July 1, 2008; Jan. 1, 2009; Jan. 1, 2011; July 1, 2013.)

Federal Rules of Civil Procedure Rule 54

Rule 54. Judgment; Costs

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

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

(c) Demand for Judgment; Relief to Be Granted. A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which

each party is entitled, even if the party has not demanded that relief in its pleadings.

(d) Costs; Attorney's Fees.

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

(2) *Attorney's Fees.*

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

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

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

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

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

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

(C) *Proceedings.* Subject to Rule 23(h), the court must, on a party's request, give an opportunity for adversary submissions on the motion in accordance with Rule 43(c) or 78. The court may decide issues of liability for fees before receiving submissions on the value of services. The court must find the facts and state its conclusions of law as provided in Rule 52(a).

(D) *Special Procedures by Local Rule; Reference to a Master or a Magistrate Judge.* By local rule, the court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings. Also, the court may refer issues concerning the value of services to a special master under Rule 53 without regard to the limitations of Rule

53(a)(1), and may refer a motion for attorney's fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.

(E) *Exceptions.* Subparagraphs (A)-(D) do not apply to claims for fees and expenses as sanctions for violating these rules or as sanctions under 28 U.S.C. § 1927.

(Amended December 27, 1946, effective March 19, 1948; April 17, 1961, effective July 19, 1961; March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 29, 2002, effective December 1, 2002; March 27, 2003, effective December 1, 2003; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

The Superior Court of Washington
In and for Grant County



EVAN E. SPERLINE, Judge, Dept. 1
JOHN D. KNODELL, Judge, Dept. 2
JOHN M. ANTOSZ, Judge, Dept. 3
MELISSA K. CHLARSON, Court Commissioner

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MARY JANE CASTILLO, Court Interpreter

January 31, 2013

FILED

JAN 31 2013

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RE: Lerner Family Trust
Grant County Cause No.: 09-2-01276-4

Dear Counsel:

This matter is before the court on the Plaintiff's motion for attorney fees. The parties will recall that this is a declaratory judgment action brought by the Plaintiff/lessee to clarify the rent provisions of the lease between the parties. The Defendants counter-claimed for rent due.

After the court granted summary judgment for the Plaintiff on its prayer for declaratory relief, the Defendants dismissed their counterclaim. At the time of dismissal, the Plaintiff announced its intention to seek attorney fees. It formally moved for attorney

fees within ten days, claiming entitlement under a provision of the parties' lease which provides the prevailing party shall be entitled to recover reasonable attorney fees in any action brought "because of or to enforce" the lease provisions. This was the first occasion on which the Plaintiff had pled for this relief.

Two of the Defendants' objections to an attorney fee award are easily dealt with. First, the contractual language upon which the Plaintiff relies is broad enough to support an award of attorney fees to a party which successfully brings an action for declaratory relief. See Hite v. Public Utility Dist. No. 2 of Grant County, 51 Wash. App. 704, 709-10, 754 P.2d 1274 (1988), rev'd on other grounds, 112 Wash. 2d 456, 772 P.2d 481 (1989). Second, although the Plaintiff is obligated to pay additional rent as a result of this action, it is an amount the Plaintiff has always been willing to pay. Because the court adopted its interpretation of the lease, the Plaintiff is the prevailing party. Harbour Landing-Dolfann, Ltd., v. Anderson, 48 Cal. App. 4th 260, 263, 55 Cal.Rptr.2d 640 (1996).

But the Defendants also argue that because the Plaintiff did not include a request for attorney fees in its pleadings, this court has no jurisdiction to grant that relief now. The Plaintiff responds that the pleading here was sufficient to give fair notice and that attorney fees are not special damages which must be specifically pled under CR 9(g). (Plaintiff's Reply Brief in Support of Motion for an Award of Attorney's Fees and Costs and Entry of Judgment at 5)

The pleading requirements of the civil rules ensure the constitutional guaranty of procedural due process which requires both notice and an opportunity to be heard or defend. Mullane v. Central Hanover Bank, 339 U.S. 396, 313-315, 94 L. Ed. 865, 70 S.Ct. 652 (1950); In re Hendrickson, 12 Wash. 2d 600, 606, 123 P.2d 322 (1942). One court has explained this principle as follows:

It is fundamental to the concept of due process that a defendant be given notice of the existence of a lawsuit and notice of the specific relief which is sought in the complaint served upon him. The logic underlying this principle is simple: a defendant who has been served with a lawsuit has the right, in view of the relief which the complainant is seeking from him, to decide not to appear or defend. However, a defendant is not in a position to make such a decision if he or she has not been given full notice. In re Marriage of Lippel, 51 Cal. 3d 1160, 1166, 276 Cal. Rptr. 290, 801 P.2d 1041 (1990).

In other words, notice to be sufficient must allow the opposing party not only a meaningful opportunity to meet the merits of the pleader's claim, but also a chance to make an informed decision to undergo the risks of litigation. Such a decision requires the opposing party, at the inception of litigation, to not only consider the probability of success, but also to estimate what might be won or lost in the enterprise.

In this case, the Defendants certainly had an opportunity to meet Plaintiff's claims. The Plaintiff's request for attorney fees was clear and easily understood. This court held a hearing at which the Defendants had every opportunity to address the Plaintiff's claim. But this opportunity came after the fees in question had accrued. The Plaintiff did not notify the Defendants of its intent to seek attorney fees until after the court had granted Plaintiff the relief sought in its complaint and dismissed the Defendants' counterclaims. The Defendants, at that point, had no chance to avoid the fees by foregoing a challenge to the complaint.

The Plaintiff was required to give the Defendants this chance by serving upon them a complaint which gave them fair notice of the relief sought and the legal theory upon which the plaintiff sought relief. See Northwest Line Constructors v. PUD, 104 Wash. App. 842, 17 P.3d 1251 (2001). Special damages must be specifically pled. CR 9(g). Attorney fees are such special damages. United Industries, Inc., v. Simon-Hartley, Ltd., 91 F.3d 762, 764 (5th Cir. 1996); (attorney fees must be pled under FRCP 9(g)). Maidmore Realty Co., Inc. v. Maidmore Realty Co., Inc., 474 F.2d 840, 843 (3d Cir. 1973) ("Claims for attorney fees are items of special damage which must be specifically pleaded under Federal Rule of Civil Procedure 9(g)."); Western Casualty & Sur. Co. v. Southwestern Bell Tel. Co., 396 F. 2d 351, 356 (8th Cir. 1968) ("Claims for damage which must be specifically pleaded under Fed.R.Civ.P. 9 (g)."); see also In re American Casualty Co., 851 F.2d 794, 802 (6th Cir.1998); 5 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure 1310 (1990). Failure to plead waives the right to attorney fees under federal law. Maidmore, 474 F.2d at 843; Western, 396 F. 2d at 356; see 5 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure 1312 (1990).¹ The Plaintiff did not state in its complaint that it sought attorney fees. Its failure to do so when the civil rules explicitly required them to precludes this court from reading such an intent into the complaint or expecting the Defendants to anticipate the Plaintiff's motion for attorney fees.

One court has held that even though attorney fees are special damages which must be specifically pled, the presence of an attorney fee clause in a contract which is the subject of litigation is sufficient notice by itself to the parties that the court may award the prevailing party such fees, even in the absence of specific pleading. Fleet Business Credit, LLC v. Krapohl Ford Lincoln Mercury Co., 274 Mich. App. 584, 591, 735 N.W.2d 644 (2007). But a party's knowledge that his opponent has a potential claim is not the same as knowledge that his opponent in fact makes that claim. To require a party

¹ Because the language of the applicable federal and Washington civil rules is identical, these federal cases, while not binding, Darling v. Champion Home Builders Co., 96 Wash. 2d 701, 706, 638 P.2d 1249 (1982), provide helpful guidance. Rinke v. Johns-Manville Corp., 47 Wash. App. 222, 734 P.2d 533 (1987). Even if attorney fees are not special damages under CR 9(g), common law may require they be pled in order to further their purpose to promote caution in the pursuit of litigation. See Last Chance Riding Stable, Inc. v. Stephens, 66 Wash. App. 710, 713-714, 832 P.2d 1353 (1992). As discussed below, the authority Plaintiff cites is not inconsistent with their proposition.

to anticipate all potential claims an opponent may assert at any time during the process of litigation is inconsistent with both due process and Washington's civil rules. As the Court of Appeals has stated:

Although inexpert pleading is permitted, insufficient pleading is not... 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... A complaint must at least identify the legal theories upon which the plaintiff is seeking recovery... 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 briefs and contending it was the case all along. Dewey v. Tacoma School District No. 10, 95 Wn. App. 18, 974 P.2d 847 (1999).

Another way courts in other jurisdictions have awarded unpled attorney fees is under federal and state equivalents of CR 54(c). In Engel v. Teleprompter Corp., 732 F.2d 1238 (5th Cir. 1984), for example, the court held under FRCP 54(c) it was appropriate to award the Defendant attorney fees provided for in a contract between the parties after the conclusion of trial even though the Defendant had not requested those fees in his pleadings. The court reasoned that the Plaintiff was not prejudiced by the award because the contract was in evidence at trial and the Plaintiff had himself moved the court for attorney fees under the parties' contract. Unlike the instant case, the motion for fees in Engel was made before the court awarded final judgment.

CR 54(c) provides in relevant part:

Except as to a party against whom a judgment is entered by default, every final judgment shall grant 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).

As Professor Tegland has observed:

Taken literally, this portion of CR 54(c) could potentially eliminate the need to plead special damages pursuant to CR 9(g), or for that matter, to plead any of the other claims or defense that must be specially pleaded under CR 8 and 9. It is doubtful that CR 54(b) was intended to abrogate these portions of CR 8 and 9. Instead, CR 54(c) should probably be applied to save a defective complaint only when the unpleaded issue is actually litigated at trial, thus triggering the provision in CR 15(a) that says the pleadings will be deemed amended to conform to the evidence... Karl B. Tegland, Washington Practice: Rules Practice CR 54 author's comments at 301 (5th ed. 2006).

Professor Tegland's analysis is sound and this court adopts it. By introducing the contract between them for the purpose of allowing the court construe its rental provision, the parties did not implicitly try all issues which could conceivably arise from any of the contract provisions. See Riggs v. West Virginia University Hospitals, Inc., 221 W. Va. 646, 679, 656 S.E.2d 91 (2007) (“... implied consent (to the trial of unpled issues) cannot be based on the introduction of evidence that is relevant to an issue already in the case when there is no indication that the party presenting the evidence intended to raise a new issue.”).

At this point, nothing can be done to enable the Defendants to retroactively weigh the additional risk they underwent by defending this action. This state of affairs is entirely attributable to the Plaintiff's failure to plead for those fees and it has offered no reason which would excuse this failure. To award the sought relief under CR 54(c) here would in effect write CR 8 and 9 out of the civil rules and due process out of both the federal and Washington constitutions.

Nevertheless, the Plaintiff cites State ex rel. A.N.C. v. Grenley, 91 Wash. App. 919, 959 P.2d 960 (1987) in support of the proposition that there is no requirement that a party request attorney fees in a pleading. It is true that in Grenley, the Court of Appeals approved an award of attorney fees even though the prevailing party did not plead for that relief in its complaint. But to understand this ruling, one must recognize, as the Grenley court did, that attorney fees are neither equal under the law nor fungible for purposes of legal analysis. Although attorney fees are not generally available to the prevailing party, they may be awarded if provided for by contract, statute or recognized ground of equity. Id. at 91 Wash. App. 925. In Grenley, the attorney fees sought were statutory. The court addressed the nature of statutory attorney fees and determined they were costs:

...Black's Law Dictionary, 312 (5th ed. 1979) is equivocal as to whether “costs” generally include or exclude attorney fees: “ ‘[C]osts’ do not include attorney fees unless such fees are by a statute denominated costs or are *by statute allowed* to be recovered as costs in the case.” But the word “costs” is frequently understood as including attorney fees. Black's Law Dictionary, supra, at 312. State et al. A.N.C. v. Grenley, supra 91 Wash. App. at 925-26. (Emphasis added).

This language suggests contractual fees are not costs and is consistent with federal authorities cited above. But the Court of Appeals did not need to reach this question. This court, therefore, as a matter of first impression, must decide whether to extend Grenley to requests for contractual attorney fees.

In order to do so, one must recognize that the Washington legislature has both expressly denominated statutory attorney fees as costs and expressly excluded contractual attorney fees from the definition of costs.² The relevant statute reads in part:

The measure and mode of compensation of attorneys and counselors, shall be left to the agreement, expressed or implied, of the parties, but there shall be allowed to the prevailing party upon the judgment certain sums by ways of indemnity for the prevailing party's expenses in the action, which allowances are termed costs, including, in addition to costs otherwise authorized by law, the following expenses. . .

(5) Reasonable expenses, exclusive of attorneys' fees. . .

(6) *Statutory attorney and witness fees. . .* (Emphasis added) RCW 4.84.010.

The court's authority to impose costs derives exclusively from this statute. See Bergman v. State, 187 Wash. 622, 625, 60 P.2d 699 (1936). Under it the court must award costs to the prevailing party in every action filed.

The law charges all parties with knowledge of the court's duty to impose costs. The statute therefore provides the parties with the notice required for the imposition of such costs at the inception of litigation. See Martin v. City of Seattle, 111 Wash. 2d 727, 735, 765 P.2d 257 (1988)(all persons are charged with knowledge of the provisions of statutes and must take notice thereof).

Following these principles, the Grenley court held:

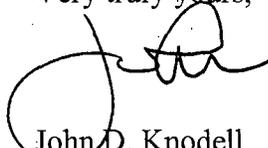
...under RCW 4.84, Washington's costs statute, attorney fees are considered "costs" and may be awarded if so provided by statute, agreement, or other recognized ground of equity. See Detonics ".45" Assocs. v. Bank of California, 97 Wash. 2d 351, 644, P.2d 191, 390, P.2d 1170 (1982); Armstrong Constr. Co. v. Thomson, 64 Wash. 2d 191, 390 P.2d 976 (1964). 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. See Lujan v. Santoya, 41 Wash. 2d 499, 501, 250 P.2d 543 (1952); see also Hos Bros. Bulldozing, Inc. v. Hugh S. Ferguson Co., 8 Wash. App. 769, 773, 508 P.2d 1377 (1973).

² Even without the express exclusion, the provision that statutory attorney fees are costs implies the legislature meant to exclude contractual attorney fees from the definition of costs. See In re Hopkins, 137 Wash. 2d 897, 976 P.2d 616 (1999).

Because the statutory definition of costs does not extend to contractual attorney fees, the filing of the action here did not give the Defendants notice the court might award attorney fees as costs³ without a specific request in the pleadings as the filing of the action in Grenley did. See State v. Estate of Brown, 802 S.W.2d 898, 900-02 (Tex. App. 1991).

For the above reasons, the court concludes the Plaintiff, having failed to plead for contractual attorney fees until adjudication of all pled claims, may not now claim those attorney fees. The Plaintiff, however, as the prevailing party is entitled to costs including statutory attorney fees. Plaintiff's counsel should present an appropriate order attaching this opinion as an exhibit.

Very truly yours,



John D. Knodell
Judge

JDK:cmb

³ The Grenley court's reference to CR 54(c) has little significance in light of its holding that the statutory attorney fees sought in that case were costs which did not need to be pled. Similarly, its reference to CR 54(d) can have no application to this case because that section deals only with costs.