

FILED

MAR 23 2017

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 34714-1-III

COURT OF APPEALS, DIVISION 3
OF THE STATE OF WASHINGTON

FPA CRESCENT ASSOCIATES, LLC, a Delaware limited liability
company, Respondent

v.

JAMIE'S LLC; PENDLETON ENTERPRISES, LLC, a Washington
limited liability company, d/b/a The Daiquiri Factory Spokane; and
JAMIE PENDLETON, an individual, Appellants.

APPELLANT'S REPLY BRIEF
RAP 10.1(b)(3)

John Pierce
Attorney for Appellant's

Law Office of John Pierce, P.S.
505 W Riverside Ave., Ste. 518
Spokane, WA 99201
Tel: (509)210-0845
WSBA #: 38722

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REPLY ARGUMENT

A reading of FPA's Response Brief, illustrates that the parties in this matter read this Court's previous rulings very differently. Furthermore FPA's brief proffers legal conclusions that do not appear to conform with the settled law on the issue of unlawful detainer.

In FPA's first argument on page 8 of the Response brief, FPA asserts that the "[a]ppellant's first issue on appeal wrongly assumes that the [Appeals] Court "previously dismissed the entire unlawful detainer action." Response Brief, pg. 8. In Pendleton's reading of that published opinion, the ruling does just that when it states that "[w]e [the Court of Appeals]... dismiss FPA's unlawful detainer action against Pendleton. *FPA Crescent Associates, LLC v. Jamie's LLC*, 190 Wn.App. 666, 678-679. (Div. 3 2015)

Dismissing an action logically and functionally includes the dismissal of all claims thereunder. Words have meaning and consequences - especially in a legal ruling. The Superior Court Civil Rules state that "[t]here shall be one form of action to be known as a "civil action"." CR2. Within that action are "claims" for relief. CR 8(a). In this case this court previously dismissed the "action", the heading that labeled the FPA's original Complaint, not just a single claim. This is the salient

fact that both FPA and the trial court refused to accept - that when the action was dismissed, so too were all of FPA's claims thereunder.

On page 10 of FPA's Brief, under section C, it continues this argument by stating that "this Court already decided that FPA's contract claims survived the Initial Opinion." Again, that statement is false. For one, it is illogical and impossible that an action commenced by a party would be dismissed but one or more of its claims under that action would survive. As stated above, when the action was dismissed, so too were all the FPA's claims thereunder. This is the seminal error, wrongly propounded by the FPA and erroneously accepted by the trial court, that is a subject of this appeal.

Under section C.1, page 12, the FPA proffered an argument that "Pendleton is barred from re-litigating whether FPA's contractual claims were dismissed..." This argument appears to be an ironic attempt at deflection of the core issue in this appeal. The second appeal filed by Pendleton was for the express purpose of preventing the trial court and the FPA from re-litigating claims that were part of the action that the appellate court dismissed in its initial ruling. In its clarifying opinion the court of appeals clearly stated that only remaining issue before the trial court was the calculation of damages incurred by Pendleton. Clarifying Opinion,

page 1.

FPA has honed in on the paragraph that states "[i]n reversing the trial court's grant of summary judgment, we intended the trial court to have the ability to offset Pendleton's damages from FPA's contract damages. We did not intend to reopen the issue of how the trial court calculated FPA's contract damages. *Id.* This sentence was not necessarily helpful in actually clarifying the original opinion. But, it can be made sense of in the scheme of an unlawful detainer action.

The unlawful detainer action in chapter 59.12 RCW provides an expedited method for resolving the right to possession and hastening the recovery of real property. *FPA Crescent Assoc. v. Jamie's LLC*, 190 Wn.App. at 674-675 *Quoting MacRae v. Way*, 64 Wn.2d 544, 546, 392 P.2d 827 (1964). " In such proceedings the superior court sits as a special statutory tribunal, limited to deciding the primary issue of right to possession together with the statutorily designated incidents thereto, i.e., restitution and rent or damages." *Id.* The primary issue to be resolved in an unlawful detainer action is the right to possession. *Id.*

FPA argues that it should be able to assert whatever claims it wishes under the unlawful detainer action. But, as this court stated in its original opinion, the longstanding rule with respect to unlawful detainer

actions, that the action is statutorily limited to the primary issue of right to possession together with the statutorily designated incidents thereto, i.e., restitution and rent or damages, still stands. An unlawful detainer action is not, and should not, be a loophole for expediting claims that do not specifically address the right of possession and statutorily designated incidents thereto. This, again, is an error asserted by Pendleton, that continues to be the subject of this appeal.

In the original appellate ruling, when the the appellate court dismissed the action, it also dismissed all claims thereunder, and reversed all judgments against Pendleton. Pendleton's damages were remanded to the trial court, and, as alluded to in the Clarifying Opinion, they could be offset by past due rent. That is all. Any contract claims (that should not have been included in the unlawful detainer action to begin with) were dismissed.

It is of note that even after the appellate court filed its original ruling, FPA did not even return partial possession of the premises to Pendleton until February 29, 2016 - over four months after the published opinion was filed on October 20, 2015. *See Respondent's Brief, pg. 21*

Finally, FPA, its brief, attempts to argue that fees and costs should be calculated differently between two parties. FPA also argues, without

basis, that there can be more than one prevailing party in an action.

Despite the indelible fact that the action was dismissed in the original appeal, FPA continued argue that its claims were still alive, and the trial court continued to erroneously accept this argument. In an action that is wholly dismissed, there is but one prevailing party. Here that party was the Appellant. There is no legal basis to find otherwise.

FPA misrepresented in its brief that the Court of Appeals "decided that both the method and amount of damages imposed by the trial court" were not disturbed." Respondent's Brief, page 10. FPA further misrepresented that the ruling "did not intend to disturb the \$21,245.61 in contract damages (unpaid rent) awarded to FPA Crescent." *Id.* page 23. With regard to this, the original opinion and the clarifying opinion speak for themselves:

...FPA did not give Pendleton notice to pay the delinquent rent or surrender the premises. Due to the defective notice, FPA could not obtain relief under the unlawful detainer statute. We reverse the trial court's grant of summary judgment to FPA, hold that Pendleton was not guilty of unlawful detainer, and dismiss FPA's unlawful detainer action against Pendleton. *FPA*

Crescent Assoc. v. Jamie's LLC, 190 Wn.App. at 679-679.

The October 20, 2015 opinion of this court filed in COA No. 32705-1-111: (1) Held that the trial court erred in granting FPA Crescent Assocs., LLC (FPA) possession of the subject premises; (2) Reversed the trial court's grant of summary judgment to FPA; and (3) Remanded to the trial court the issue of Pendleton's costs, attorney fees, and damages as a result of the wrongful issuance of the writ or restitution.

In reversing the trial court's grant of summary judgment, we intended the trial court to have the ability to offset Pendleton's damages from FPA's contract damages. We did not intend to reopen the issue of how the trial court calculated FPA's contract damages.

Clarifying Opinion (Emphasis Added)

There is no argument that any award of fees and costs payable to Pendleton should be reduced by any back rent due to FPA at the time of commencing the action. That is the offset referenced in this Court's

clarifying opinion. But, this court patently rejected the amount of the judgment when it overturned the summary judgment.

At the time the action was commenced, Pendleton owed FPA approximately \$2300 in back rent. It attempted to pay that amount, twice, both times the checks were rejected by FPA and returned to Pendleton. This fact is recognized in Footnote (1) of *FPA Crescent Assoc. v. Jamie's LLC*.

Pendleton should be awarded its fair amount of fees and costs reduced only by the amount of back rent due at the time the action was filed.

CONCLUSION

In this matter, the appellants ask but one thing - that they be subject to the same treatment, rules, determinations, and calculations as the opposing party. Pendleton should not be subject to a double standard for fee calculation, Pendleton should not be subject to a double standard of scrutiny; Pendleton should not be forced to continue to litigate claims that were already dismissed, and, Pendleton should be awarded the fees and costs which they are rightfully owed. Not doing so is the very definition of bias. It should not matter that the trial court's original determination in

a reasonably public case was reversed; it should not matter that the opposing co-counsel was an undisclosed law partner with the judge at her previous firm.

Equal and equivocal treatment under the trial court is not an unreasonable request or expectation.

Appellants respectfully request that this Court grant the following relief:

1. To reverse the judgment of the trial court on attorney fees and costs;
2. For this Court to re-calculate the attorney fees and costs due to Pendleton instead of remanding it to the trial court;
3. To enter a judgment in favor of Pendleton and against FPA for its attorney fees and costs; and,
4. To provide such other relief as the Court deems just and proper.

Respectfully Submitted this 23rd Day of March, 2017

By: 

John Pierce, WSBA # 38722
Attorney for Petitioner

Law Office of John Pierce, P.S.
505 W Riverside Ave., Ste 518
Spokane, WA 99201
Tel: (509)210-0845

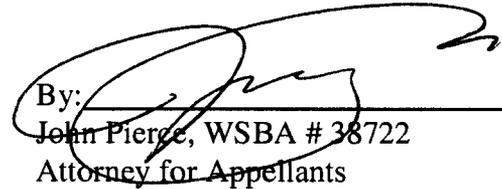
CERTIFICATE

I certify that a copy of the foregoing was delivered by the method
below, and addressed to the following:

Todd Reuter
Foster Pepper PLLC
Attorneys for Plaintiff
618 W. Riverside Ave., Ste. 300
Spokane, WA 99201

- First Class Mail, Postage Pre-paid
- Hand Delivered
- Overnight Mail
- Telecopy (Fax)

Dated this 23rd day of March, 2017.


By: _____
John Pierce, WSBA # 38722
Attorney for Appellants