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Court of Appeals
Division III
State of Washington

No. 347141

**IN THE COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION III**

FPA CRESCENT ASSOCIATES, LLC,
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.

Appealed from Spokane County Superior Court
Cause No. 2014-02-01930-5

RESPONDENT FPA CRESCENT'S BRIEF

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I. STATEMENT OF CASE

The case began in 2014 when Respondent FPA Crescent Associates (“FPA Crescent” or “FPA”) sued Pendleton Enterprises, LLC; Jamie’s, LLC; and Jamie Pendleton (“Pendleton”), alleging four causes of action: (1) unlawful detainer, (2) breach of lease by failure to pay rent, (3) breach of lease by committing illegal actions, and (4) breach of Mr. Pendleton’s personal guaranty. CP 359. FPA obtained a writ of restitution on the unlawful detainer claim and executed that writ. *Id.* FPA then moved for summary judgment on counts two and four (breach of lease and breach of personal guaranty). *Id.* The trial court granted that motion, awarding FPA \$21,245.61 in damages for unpaid rent. *Id.* FPA then moved for an award of its attorneys’ fees. *Id.* Pendleton did not file any opposition to that motion. The court awarded FPA \$48,870.50 in attorneys’ fees. *Id.*

Pendleton filed his first Notice of Appeal on August 13, 2014. The parties filed their respective appeal briefs on January

8th (SR 1-50), March 4th (SR 51-140), and March 17, 2015 (SR 141-49). On October 20, 2015, the Court released its opinion, entitled *FPA Crescent Associates v. Jamie's LLC*, 190 Wn. App. 666 (2015) (the “**Initial Opinion**”). CP 83. The Initial Opinion concluded that the trial court erred in issuing its 2014 writ of restitution, and remanded to the trial court for determination of a remedy. CP 89.

The parties filed briefs on the remedy issue in February and March, 2016. CP 63, 149, 240. Pendleton argued he was entitled to be restored to possession of the premises. CP 74. FPA Crescent did not contest that issue, and provided a door key on February 29, 2016. CP 169. The only damage Pendleton sought was an award of his attorneys’ fees and costs incurred defending against the writ of restitution. *See* CP 63, 240. He argued (and continues to argue here), that the Initial Opinion dismissed the contract claims and that he was, therefore, the prevailing party on the entire case. CP 64-71. On March 29, 2016, the trial court filed its Findings of Fact, Conclusions of

Law and Order, which, among other things, rejected Pendleton's argument that this Court had dismissed FPA's contract claims. CP 250, 251. The trial court also concluded that possession had been restored under the parties' lease. CP 252.

Pendleton filed his second Notice of Appeal on March 29, 2016, assigning error, among other things, to the trial court's determination that this Court's Initial Opinion did not dismiss FPA's contract claims. CP 255. By letter dated April 25, 2016, this Court requested briefing on appealability and created a new file number: 34335-9. The parties filed their appealability briefs on May 9 (SR 160-224) and 11, 2016 (SR 225-381). The parties had a telephone conference with Commissioner Wasson on May 18, 2016, at which the parties agreed that the critical issue on appeal was whether this Court's Initial Opinion had dismissed the contract claims as Pendleton contended. On May 20, 2016, the Court issued a Commissioner's Ruling reflecting the parties' agreement that

the issue should be resolved by clarification of the Initial Opinion. CP 356.

On May 27, 2016, the Court issued its Order Granting Discretionary Review in Part and Clarifying Opinion Filed October 20, 2015 (the “**Clarifying Opinion**”), along with a letter informing the parties of their right to seek discretionary review. CP 270, 271. The Clarifying Opinion stated that the Court intended the trial court to be able to offset Pendleton’s damages from FPA’s contract damages, and that it did not intend to reopen the issue of how the trial court calculated FPA’s contract damages, which Pendleton had not appealed. CP 271-72. The Clarifying Opinion became final on June 27, 2016 and Pendleton did not seek review of the decision. CP 352. That ended the second appeal and made the Court’s decision final under RAP 12.7(a) and 13.4(a).

Consistent with the Clarifying Opinion, the trial court set a status conference for July 14, 2016. CP 278. At the conference, the court set a due date for the parties’ respective

briefing on remedies. CP 280. Those briefs were timely filed. *See* CP 283, 345. On August 18, 2016, the trial court issued its Findings of Fact, Conclusions of Law and Order, and its Final Judgment. CP 357, 366. The trial court awarded \$53,700 in attorneys' fees to Pendleton; \$21,245.61 in contract damages to FPA, and \$19,144.50 in attorneys' fees that FPA incurred in prevailing on the contract claims. CP 363-64, 366. The net result was an award of \$5,618.30 to Pendleton. *Id.* FPA paid the judgment in full on August 22, 2016. CP 376. The trial court entered an Order Satisfying Judgment on September 2, 2016. CP 416.

Pendleton filed his third Notice of Appeal on September 1, 2016, contending that the trial court erred by offsetting FPA's contractual damages (which included attorneys' fees) against Pendleton's writ of restitution damages. Pendleton further contends that the trial court's decision to offset his damages against FPA's damages evinces that the trial court was

biased against him and that the trial court's ruling violates the Appearance of Fairness Doctrine. FPA now responds.

II. SUMMARY OF THE ARGUMENT

This is the third trip Pendleton has made to the Court of Appeals in this case. He has already made nearly all the arguments he now makes, and this Court has rejected them in the Initial Opinion and the Clarifying Opinion. Those opinions established that the judgment Respondent FPA obtained on its contract claims remained intact and authorized the trial court to offset FPA's damages against any damages awarded to Pendleton. The trial court did exactly that and did not abuse its discretion in doing so. Moreover, the Clarifying Opinion is final under RAP 12.7 and 13.4 because Pendleton never sought review of it. Pendleton should not be allowed to re-litigate these issues in this appeal. All issues related to FPA's contract claims that are addressed in Pendleton's first Issue on Appeal and his Assignments of Error Nos. 2, 3, 5, 6, 8, 16, 18, 19, 21, 23, and 24 have been fully and finally resolved by this Court. Likewise,

Pendleton's arguments regarding the trial court's calculation of damages on remand similarly fail to the extent those arguments are premised on the erroneous argument that this Court dismissed FPA's contract claims.

Not only is Pendleton barred from re-litigating issues relating to the existence of the contract claims, he is also wrong on the merits. Despite its title and prefatory language, the Verified Complaint pleaded separate contract causes of action in addition to the unlawful detainer claim. There is no prohibition against pleading multiple causes of action in a complaint for unlawful detainer.

Pendleton is also wrong that the trial court abused its discretion in how it determined damages for at least two reasons. First, this Court expressly authorized the offsetting approach in its Clarifying Opinion. Second, there is no evidence that the trial court exercised its discretion on untenable grounds or for untenable reasons. This disposes of Pendleton's

Assignments of Error Nos. 7, 9, 10, 11, 12, 13, 14, 17, 20, and 22.

Finally, Pendleton fails to provide the specific facts or any evidence of actual or potential bias needed to overcome the presumption that the trial judge was impartial. Without such facts, Pendleton cannot establish a claim under the “Appearance of Fairness” doctrine.

For all these reasons, this Court should affirm the trial court’s Final Judgment.

III. ARGUMENT

A. Issues on Appeal

Issue No. 1. Appellants’ first issue on appeal wrongly assumes the Court “previously dismissed the entire unlawful detainer action.” *See* Appellant’s Brief, p. 12. Whether the Court’s Initial Opinion and subsequent Clarifying Opinion in fact dismissed all of Respondent’s claims is central to this appeal. While FPA agrees the Court dismissed its unlawful detainer claim, the Clarifying Opinion makes clear that the trial

court's judgment awarding FPA damages on its contract claims—including how damages were calculated—remains intact. This Court also authorized the trial court to use FPA's damages as an offset against any damages awarded to Pendleton on remand. Accordingly, Pendleton's first issue on appeal should be:

Whether, given the Initial Opinion and Clarifying Opinion, the trial court erred in recognizing and accounting for the contract damages it had previously awarded to Respondent when it determined the final damage award.

Issue No. 2. The second Issue on Appeal is simply:

Whether the trial court abused its discretion, or violated the Appearance of Fairness Doctrine, in its method of calculating damages on remand, including its use of FPA's attorneys' fees as part of the offset.

B. Standard of Review

Whether the trial court erred in determining that the “contract claims” existed after the Clarifying Opinion is reviewed *de novo*. See *Graoch Assocs. No. 5 Ltd. P'ship v. Titan Constr. Corp.*, 126 Wn. App. 856, 861, 109 P.3d 830, 832

(2005) (“Absent disputed facts, the legal effect of a contract is a question of law to be reviewed de novo.”); *In re Molasky*, 843 F.3d 1179, 1184 (9th Cir. 2016) (“Because interpretation of a prior decision is a question of law, we review de novo a lower court’s compliance with the mandate of an appellate court (internal quotation marks and ellipses omitted)). The trial court’s calculation of damages, specifically attorneys’ fees, is reviewed for an abuse of discretion. *See Bright v. Frank Russell Investments*, 191 Wn. App. 73, 78, 361 P.3d 245, 247 (2015).

C. The Trial Court Properly Recognized and Offset FPA’s Contract Damage Award, Including Attorneys’ Fees, Against Pendleton’s Damages

In the Clarifying Opinion, this Court already decided that FPA’s contract claims survived the Initial Opinion. It also decided that both the method and amount of damages imposed by the trial court on those claims had not been appealed. It held, therefore, that FPA was entitled to its contractual damages and remanded to the trial court to offset FPA’s damages against any damages Pendleton could prove. CP 271-72. Pendleton

nevertheless argues that the contract claims were dismissed. The argument not only has no merit, but has already been rejected by this Court. The Clarifying Opinion laid that argument to rest and Pendleton did not seek further review of that decision.

Pendleton's argument centers on the idea that there was only one cause of action (unlawful detainer) pleaded in the Verified Complaint. *See* Appellant's Brief, p. 21-25. He contends that because that one claim was dismissed in the Initial Opinion, the entire case, including the contract claims, was therefore necessarily dismissed. It follows, according to Pendleton, that there can be no damages offset against his remedy on remand. He bases this argument on the title of the Complaint ("Verified Complaint for Unlawful Detainer") and the prefatory sentence at the beginning of the Complaint ("Plaintiff . . . as a cause of action for unlawful detainer, alleges as follows"). He also argues that contract claims cannot be combined with an unlawful detainer claim. Appellant's Brief,

p. 25. Because he argued these same points below and in his previous appeals, and did not seek review of the Clarifying Opinion, he is now barred from re-litigating them under RAP 12.7(a) and 13.4(a).

- 1. Pendleton is barred from re-litigating whether FPA's contractual claims were dismissed as unlawful detainer claims and the amount of FPA's damages.**

Rule of Appellate Procedure 12.7(a) provides that this Court loses the power to change or modify its decisions “upon issuance of a certificate of finality.” RAP 12.7(a). That Certificate was issued on July 12, 2016 and made the Clarifying Opinion final effective June 27, 2016. CP 352. At the July 14, 2016 status conference, the trial court asked Pendleton's counsel whether he had received the Certificate. RP 3. He said he had. *Id.* Pendleton did not seek review within the 30 days allowed by RAP 13.4(a).

Nevertheless, Pendleton now makes the same arguments he has unsuccessfully made throughout this case. For instance,

in this appeal, he claims that this Court's Initial Opinion dismissed FPA's contractual claims because FPA's contractual claims are merely part of a single unlawful detainer claim:

In this matter, the action was clearly an unlawful detainer action, and each of the claims proffered by the Plaintiff was set forth '**as a cause of action for unlawful detainer.**'

Appellant's Brief, p. 25 (emphasis in original); *see also* Appellant's Brief, p. 21-24, 31, 33. He made the same argument in response to Respondent's initial June 2014 Motion for Partial Summary Judgment, that "because the Plaintiff has elected to bring the claims under the unlawful detainer statute, it is prohibited from joining any additional claims for damages." Following the release of the Initial Opinion, Pendleton also argued in his Opening Brief RE Remand, that the title of the Complaint and the phrase "as a cause of action for unlawful detainer . . ." meant there was only one cause of action and as a result of this Court's Initial Opinion, the contract claims should

be (or were) dismissed. CP 65-71. He again made the same argument in his March 4, 2016 Reply Brief RE Remand:

This action was clearly an unlawful detainer action, and each of the claims proffered by the Plaintiff was set forth 'as a cause of action for unlawful detainer.' *Supra*. No expectations exist for a plaintiff to join general jurisdiction claims to an action for unlawful detainer, nor to separate a breach of contract claim set forth 'as a cause of action for unlawful detainer' after the unlawful detainer claim is reversed and dismissed. This matter, with the exception of the remand to determine damages, is concluded.

CP 242-243 (emphasis in original).

On March 29, 2016, the trial court filed its Findings of Fact, Conclusions of Law and Order. CP 250. That same day, Pendleton filed his second Notice of Appeal (Case No. 34335-9-III). CP 255. In response to this Court's request for briefing, Pendleton argued in his May 9, 2016 Memo Addressing Finality, that:

This action was clearly an unlawful detainer action, and each of the claims proffered by the Plaintiff/Respondent was set forth 'as a cause of action for unlawful detainer.' No exceptions exist for a plaintiff to join general jurisdiction claims to

an action for unlawful detainer, nor to separate a breach of contract claim set forth ‘as a cause of action for unlawful detainer’ after the unlawful detainer claim is reversed and dismissed.

SR 165.

As part of that argument, he also asked this Court to “clarify to the trial court that, with the exception of determination of the tenant’s right to a remedy, this matter is concluded.” *Id.* at 166.

Before the Clarifying Opinion was issued, however, the parties conferred with Commissioner Wasson. The resulting May 20, 2016 Commissioner’s Ruling made clear that Pendleton agreed the issue he was appealing in his second appeal that was the trial court erred in finding (*see* CP 251) the “contract claims” had not been dismissed. CP 356. That Ruling states that:

The parties agree that this matter, which this Court set as a court’s motion to determine appealability, is more properly characterized as a motion to clarify the opinion at 190 Wn. App. 666 – i.e., whether the prior opinion disposed of all of FPA’s causes of action or whether it disposed of only the

action for writ of restitution, as the superior court believed.

CP 356 (emphasis added).

On May 27, 2016, the Court issued the Clarifying Opinion. Critically, the Clarifying Opinion confirmed that this Court did not dispose of FPA's contract claims in the Initial Opinion. CP 271. In fact, the Clarifying Opinion establishes that the merits of the contract claims did not even need to be litigated on remand. The trial court could instead use the damages awarded to FPA for having proven those claims as an offset against any damages awarded on remand to Pendleton:

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. That issue was not appealed.

CP 271-272.

The Court's Clarifying Order, therefore, presupposes that the claims that formed the basis for FPA's damages remained. Otherwise, the Court would not have ordered an offset. The

Clarifying Order was sent to the parties along with a letter informing the parties of their right to seek discretionary review. CP 270, 271. It became final on June 27, 2016. CP 352. Pendleton did not seek review of the Clarifying Opinion and should not be allowed to re-litigate the issue now.

Likewise, Pendleton should not be entitled to re-litigate FPA's entitlement to damages or the amount of those damages. The initial September 10, 2014 Findings of Fact, Conclusions of Law and Order awarded FPA \$21,245.61 in unpaid rent, plus post judgment interest at 18%. CP 359. It is the unpaid rent that constituted the contract damages, and as this Court has already recognized, Pendleton did not appeal the trial court's damages calculation. Likewise, the trial court's award to FPA of \$48,870.50 in attorneys' fees for having prevailed on the contract claims was modified on remand, consistent with the offsetting approach authorized in the Clarifying Opinion. CP 359.

Pendleton also asserts in his Assignment of Error No. 1 that the trial court erred by including post-judgment interest on the \$21,245.61 award of back rent. CP 359. Including post-judgment interest on the contract damages was part of how the trial court calculated FPA's contract damages, an approach this Court expressly left in place in the Clarifying Opinion. CP 271, 272. But again, Pendleton did not seek review of the Clarifying Opinion and is therefore precluded from raising the issue now. Moreover, Pendleton did not raise the post-judgment interest issue at any stage below or in any prior appeals, so he is precluded from raising the issue on this basis too. *See Fuqua v. Fuqua*, 88 Wn.2d 100, 105, 558 P.2d 801, 804 (1977) (en banc) ("Generally, issues not raised before the trial court will not be considered on appeal.").

For these reasons, this Court should affirm the decision of the trial court because Pendleton's brief merely seeks to improperly raise arguments the Court has already rejected.

2. Pendleton's arguments are wrong on the merits.

Even if Pendleton could re-litigate these issues, his arguments fail on the merits. As explained, Pendleton first contends that FPA's contractual claims are merely unlawful detainer claims because the Complaint is titled as an unlawful detainer complaint. But as FPA argued in its Memorandum Regarding Appealability, the wording of the caption and preface of the complaint do not control what the actual allegations are. There is no basis to say that FPA's contract claims cannot proceed simply because the caption did not fully describe all claims alleged or because a prefatory phrase at the beginning of the Complaint uses the phrase "unlawful detainer." This is a notice pleading state. *See* CR 8 (requiring a "short and plain statement of the claim showing that the pleader is entitled to relief"). Similarly, CR 10, entitled *Form of Pleadings and Other Papers*, requires that the caption merely identify the "nature of the pleading." The body of the Verified Complaint contains detailed separate counts setting forth

specific allegations supporting each of the separate causes of action. They are sufficient to notify any reader that the case was about more than unlawful detainer under the statute. The caption complies with CR 10 because “Unlawful Detainer” adequately conveys the “nature” of this case without limiting the case to an action for a writ of restitution.

Moreover, the Washington Supreme Court has already decided that a landlord, like FPA, *can* assert causes of action for rent inside the same action as the unlawful detainer claim so long as possession has been resolved. *See Munden v. Hazelrigg*, 105 Wn.2d 39 (1985). There, the Court instructed that lower courts should prioritize practicality and judicial economy in deciding when a case that begins with unlawful detainer has converted to “an ordinary civil action.” *Id.* at 46-47. In *Munden*, the lessor brought an unlawful detainer action to obtain rent owed and possession of the leased premises. The tenant moved out before trial, so the Court found possession no longer to be an issue. *Id.* at 47. Given that fact, the Court allowed the lessee

to proceed with counterclaims and ruled that “[l]ikewise, lessor’s claims against various impleaded parties are properly before the court. We remand for a determination of these claims.” *Id.*

Here, possession was no longer an issue when FPA delivered the keys to Pendleton’s counsel on February 29, 2016, along with a letter stating, “Effective today, FPA Crescent hereby reinstates the enclosed lease and restores possession to Jamie’s LLC and Pendleton Enterprises under the terms and conditions stated in the lease.” CP 171. Pendleton makes the conclusory assertion that possession was an issue throughout the proceedings, but he provides no argument or evidence as to why, how, or when possession remained an issue. The record does not, for instance, have any testimony from Mr. Pendleton on this issue. If the Court’s Initial Opinion did not resolve possession, the handing over of the keys did. The trial court did not err in finding possession was no longer an issue. Nor was it error for the trial court to have reinstated the lease. The initial

eviction was overturned (CP 83), Pendleton demanded to be returned to the premises (CP 72), and FPA Crescent agreed (CP 171). The lease was properly considered to be the governing document.

For these reasons, the trial court should be affirmed on the issues raised in Issue on Appeal No. 1.

3. The trial court did not abuse its discretion in its method of calculating damages on remand.

Pendleton next challenges the district court's inclusion of attorneys' fees in FPA's damages award. He first contests FPA's entitlement to damages at all, and next claims that the trial court abused its discretion in setting the amount. Both arguments fail.

Pendleton begins by claiming that FPA is not entitled to have its attorneys' fees included in the offset because the final judgment was entered in his favor. In support, he contends there can be only one prevailing party in an action, and that he is the prevailing party here. Appellant's Brief, p. 35 ("[I]t is untenable

to grant an award of attorney's fees (even as an offset) to a party whose favorable judgment was reversed, and who had no final judgment in its favor. *See* RCW 4.84.330.”). The statute upon which Pendleton relies provides that where a lease provides that attorneys' fees and costs incurred to enforce a lease shall be awarded to one of the parties, the prevailing party shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements. RCW 4.84.330. The statute then defines “prevailing party” to mean “the party in whose favor final judgment is rendered.” *Id.* Pendleton takes this definition to mean that in a case where, as here, there are lease claims and non-lease claims, the attorneys' fee provision becomes invalid if the non-lease claim results in a net judgment amount in favor of the defendant. There is no support for such an outcome.

The Clarifying Opinion establishes that this Court did not intend to disturb the \$21,245.61 in contract damages (unpaid rent) awarded to FPA Crescent, and that it “intended the trial

court to have the ability to offset Pendleton's damages from FPA's contract damages." CP 360. This, combined with Pendleton's decision to limit his remedy to his attorneys' fees, made the trial court's task plain: determine the amount of attorneys' fees to which Pendleton was entitled for having prevailed on the unlawful detainer claim, and subtract from that amount the \$21,245.61 in contract damages plus any attorneys' fees to which FPA was entitled for having prevailed on the contract claims. That is exactly what the trial court did.

Not only is the trial court's decision consistent with this Court's mandate, it is well supported by Washington law. Where, as here, the parties prevail on different claims, the trial court is within its discretion to offset fees and enter judgment. *See e.g. Mike's Painting, Inc. v. Carter Welsh, Inc.*, 95 Wn. App. 64, 67-69, 975 P.2d 532, 534-35 (1999) (holding that where one party receives an affirmative judgment on only a few distinct and severable contract claims, the plaintiff should be awarded attorneys' fees for the claims it prevails upon, the

defendant should be awarded attorney fees for those claims it successfully defends, and the awards should be offset).

For instance, in *Marassi v. Lau*, 71 Wn. App. 912, 917, 859 P.2d 605, 608 (1993) (abrogated on other grounds by *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 200 P.3d 683 (2009)), the Court approved just such an offset. There, the plaintiffs sued the defendant for breach of contract, negligence, fraudulent conveyance, and misrepresentation. *Id.* at 913. The trial court found for the plaintiffs on one damage claim and one specific performance claim, and dismissed the remaining claims. *Id.* at 914. The trial court then awarded the plaintiffs their attorneys' fees as the prevailing party, reasoning that plaintiffs had substantially prevailed. *Id.* The Court of Appeals reversed the trial court's decision. *Id.* at 920. The Court held that both parties were entitled to attorneys' fees, explaining, "[The plaintiffs] did receive an affirmative judgment, but on only 2 of the original 12 claims. In this circumstance, we believe that application of the net affirmative judgment rule or

‘substantially prevailing’ standard does not obtain a fair or just result.” *Id.* at 916. Accordingly, the Court held that the trial court erred in awarding only the plaintiffs their attorneys’ fees, even though plaintiffs obtained a judgment in their favor. The Court reasoned that the plaintiffs were the prevailing party for two of their claims, but that because the defendant had successfully defended against five of the plaintiffs’ claims, they were the prevailing party for the five remaining claims and were, therefore, entitled to receive reasonable attorneys’ fees for their effort on those claims. *Id.* at 920.

The same result is appropriate here. Pendleton prevailed on the writ of execution and unlawful detainer claims and Pendleton prevailed on its two contractual claims. The trial court correctly offset FPA’s attorneys’ fee award against Pendleton’s award.

Pendleton also complains about the method by which the trial court calculated FPA’s damages. To reverse a trial court’s determination of the amount of reasonable attorneys’ fees, “an

appellate court must find the trial court manifestly abused its discretion. That is, the trial court's exercise of discretion must have been based on untenable grounds, was manifestly unreasonable, or was arbitrarily exercised." *Bright v. Frank Russell Investments*, 191 Wn. App. 73, 78, 361 P.3d 245, 247 (2015) (internal quotation marks omitted). Pendleton fails to make this showing.

The trial court's fee award was well within its discretion. Under the trial court's approach, both parties got the hourly rates they requested. *See id.* ("[T]he first step of deciding what is reasonable is to determine the lodestar amount. To calculate the lodestar amount, a court multiplies the number of hours reasonably expended by the reasonable hourly rate."). All that was left for the trial court to do was determine how many hours each legal team spent on the claims for which they prevailed. FPA did not seek fees incurred by its counsel's partners, associates, interns or paralegals. CP 321, 322. Its counsel segregated his timesheets based on cause of action, and

provided a detailed color-coded explanation and argument. CP 321, 345. Pendleton provided no such breakdown. CP 295. He instead reasserted (and continues to assert) that this Court in fact dismissed all four of FPA's causes of action in the Clarifying Opinion. That argument is wrong for the reasons set forth above.

As it was required to do, the trial court weighed the respective time sheets and declarations, made its decisions, and did the math. Pendleton was awarded \$53,700 in fees, but the offset that this Court authorized reduced the net award to \$5,618.30. CP 364. Again, not only did this Court authorize the offset, but Washington law allows that approach. None of Pendleton's newly-minted arguments call the trial court's exercise of its discretion into question.

For instance, Pendleton suggests that this Court should use the amount of FPA's initial fee award (\$48,870.50) as a basis to calculate his fee award. But he cites no case where a court ever based one party's fee award on the fees incurred by

the other party. And the trial court ultimately awarded FPA its attorneys' fees for only the time spent litigating the contract claims, which was less than half of Pendleton's fee award.

Pendleton also complains about the trial court's decision to discount some of his time because it was "unproductive." Appellant's Brief, p. 31. But the referenced reduction was one hour, or \$300, and certainly the trial court's determination in this respect is entitled to deference. CP 360-61.

Pendleton also finds fault with the trial court's comparison of his lawyer's hourly rate to that charged by counsel regularly practicing in the general unlawful detainer field, "most [of whom] represent multiple landlord clients." Appellant's Brief, p. 32. The trial court did not think Pendleton's lawyer was a landlord's lawyer. The court's comment simply provides a reasonable basis for comparison as part of the determination that the trial court could accept Mr. Pierce's requested rate of \$300, which it did. CP 364 (179 hours x \$300/hour = \$53,700). Also noteworthy is the fact that

the trial court awarded Mr. Pierce his attorneys' fee at the rate requested which is higher than the stated average for landlord/tenant lawyers.

Finally, Pendleton challenges part of the trial court's detailed analysis (*see* CP 359-63) that included a reference to the "unique business setting" presented by this case. That was likely a reference to the fact that the parties' lease did not provide Pendleton a right to notice or an opportunity to cure. A review of unlawful detainer cases shows that this is unusual, as does the fact that the Initial Opinion relies in part on a case from 1915. And in any event, the trial court used the uniqueness of the case as a basis to justify, rather than discount, the time spent and hourly rates for both parties.

In sum, the trial court did not abuse its discretion in entering its thorough and thoughtful fee award.

4. There was no appearance of unfairness by the trial judge.

Pendleton's last argument, advanced in the Conclusion section of his brief, contends the trial court was biased against him and the court's ruling violates the Appearance of Fairness Doctrine. Not only did Pendleton waive this argument by failing to raise it in the trial court, *see O'Neill v. Chwen-Jye Ju*, 189 Wn. App. 1049 (2015), *as amended* (Oct. 27, 2015), *review denied sub nom. Du Ju v. JPMorgan Chase Bank, N.A.*, 185 Wn.2d 1014, 367 P.3d 1083 (2016) (recognizing that raising the issue of judicial bias for the first time on appeal waives the issue), the argument is wholly without merit.

"The appearance of fairness doctrine seeks to insure public confidence by preventing a biased or potentially interested judge from ruling on a case." *In re Marriage of Meredith*, 148 Wn. App. 887, 903, 201 P.3d 1056, 1064 (2009). "Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent and

disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing.” *Id.* “There is a presumption that a trial judge properly discharged her official duties without bias or prejudice.” *In re Davis*, 152 Wn.2d 647, 692, 101 P.3d 1, 26 (2004) (en banc). Accordingly, evidence of a judge’s actual or potential bias is required. *See Marriage of Meredith*, 148 Wn. App. at 903; *Davis*, 152 Wn.2d at 692 (“The party seeking to overcome that presumption must provide specific facts establishing bias.”). Bald accusations do not suffice. *See, e.g., Marriage of Meredith*, 148 Wn. App. at 903.

Here, Pendleton presents no facts or cogent argument to support his claim of bias. Rather, he baldly claims that Judge Tompkins was necessarily biased against him because she awarded FPA its contractual damages and related attorneys’ fees. Appellant’s Brief, p. 40. This argument fails for at least two reasons. First, as explained, Judge Tompkins correctly addressed FPA’s contractual damages pursuant to this Court’s Clarifying Order that FPA’s damages, which included the

attorneys' fee award, could be offset against Pendleton's attorneys' fee damages. Thus, rather than evince improper partiality to FPA, Judge Tompkins proceeded as expressly allowed by this Court.

Second, the fact that Judge Tompkins's ruling offset FPA's damages in a way that reduced Pendleton's award does not establish bias. *See Davis*, 152 Wn.2d at 692 ("Judicial rulings alone almost never constitute a valid showing of bias."). And rather than assign to the trial court error of such a magnitude that it would suggest bias, Pendleton instead quibbles with, for instance, the court's \$300 reduction of \$53,700 fee award. Or, perhaps more curiously, challenges the court's commentary about the uniqueness of the case or the customary fees for those who practice in the industry, when the court used both facts as a justification for awarding Pendleton's attorneys' fees at the rate he requested. Certainly nothing in the trial court's detailed ruling suggests actual, or the appearance

of, bias against Pendleton. The Court should reject Pendleton's claim of judicial bias accordingly.

IV. ATTORNEYS' FEES AND COSTS ON APPEAL

The parties' lease, which forms the basis for the contract claims, attorneys' fees, and remedies at issue in this appeal, provides that the prevailing party is entitled to its attorneys' fees and costs on appeal CP 178.

28.6 Attorneys' Fees. If either party commences litigation against the other for the specific performance of this Lease, for damages for the breach hereof or otherwise for enforcement of any remedy hereunder, the parties hereto agree to and hereby do waive any right to a trial by jury and, in the event of any such commencement of litigation, the prevailing party shall be entitled to recover from the other party such costs and reasonable attorneys' fees as may have been incurred, including any and all costs incurred in enforcing, perfecting and executing such judgment.

CP 178.

If FPA prevails on this appeal, it is the prevailing party in a dispute regarding damages for breach of the lease and for enforcing its remedies thereunder. It is therefore entitled to its

attorneys' fees on appeal under RAP 18.1(a) ("If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before . . . the Court of Appeals, the party must request the fees and expenses provided in this Rule . . .").

V. CONCLUSION

For the reasons stated above, FPA Crescent respectfully requests that this Court affirm the decisions of the trial court.

DATED this 23rd day of February, 2017.

FOSTER PEPPER PLLC

By  _____

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of February, 2017, I caused to be served a true and correct copy of the foregoing upon the person below stated via hand delivery:

John Pierce
LAW OFFICE OF JOHN PIERCE, P.S.
505 W Riverside Ave, Ste 518
Spokane WA 99201



Todd Reuter, WSBA # 20859