NO. 94388-5

SUPREME COURT OF THE STATE OF WASHINGTON

ALGO, INC., a Washington corporation and ALLEN R. GRANT, individually and his marital community, and JANE DOE GRANT, her marital community,

Defendants/Appellants and Cross-Respondents,

v.

WASHINGTON FEDERAL SAVINGS, a United States Corporation,

Plaintiff/Respondent and Cross-Appellant.

REPLY TO ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

None of the grounds for discretionary review stated in RAP 13.4(a) are present with regard to the new issue raised in Washington Federal's Answer to Petition for Review: whether it is entitled to attorneys' fees under the parties' agreement. Rather, as discussed below, the Answer rehashes stained, overreaching, and irrelevant arguments that attempt to conflate the bank's original claim for breach of the underlying contract—on which the bank did not prevail—with its claim for breach of the parties' agreement settling the original claim—which did not provide for fee recovery here. The Court of Appeals easily and unanimously rejected these arguments, and this Court need not review that decision.

II. STATEMENT OF THE CASE

A. The Settlement Agreement Provided for Recovery of Attorneys' Fees Only in an Action to Enforce the Payment Obligation

The parties' Settlement Agreement contemplated a payment of $1 million in five years, to be evidenced by a note and secured with certain real property. (CP 228–29.) The agreement, a term sheet drafted at the mediation, contemplated the creation of a more detailed agreement, note, and deed of trust. Nonetheless, the parties agreed to the essential terms with regard to the note:

1. Defendants agree to pay Washington Federal $1 million in the form of a promissory note under the following terms:

   a. Payment shall be due in 60 months from the date of this agreement;

   b. Interest shall be 0% for the five-year term;

   c. Interest shall accrue at 12% per annum in the event of default;

   d. ***In any action to enforce the note***, the prevailing party shall be entitled to recover its reasonable costs, including attorneys' fees….

(CP 228) (emphasis added).

Thus, the parties expressly agreed that attorneys' fees could be recovered only "in any action to enforce the note"—i.e., for breach of a payment obligation. No payments were due before August 1, 2017. There could be no action to "enforce" the payment obligations of note (or of the Settlement Agreement) before then.

In contrast, the obligation to provide security under paragraph 2 of the Settlement Agreement—the breach alleged by Washington Federal and on which it ultimately prevailed—makes ***no*** provision for recovery of

attorneys' fees. (CP 229.) Nor is there any general prevailing-party attorneys'-fee provision for any action to enforce the settlement terms.[1]

B. Inability to Carry Out the Settlement Terms

Over the next several months, Mr. Grant took steps to arrange for the first-position deed of trust encumbering one of the properties in California (the "Merced" and "Oakdale" properties) pursuant to paragraph 2 of the Settlement Agreement. (CP 211–12, at ¶¶ 10–14.) But ultimately Mr. Grant's partner in the business entities that owned the properties was not willing to provide the cooperation needed to make the transaction possible. (CP 213, at ¶ 15; CP 307, at ¶ 6.)

Washington Federal rejected Mr. Grant's offer to discuss an alternative security arrangement; instead, the bank resumed the litigation on its underlying claim for a deficiency judgment based on the original loan documents. (CP 20–24.)

As a result, the parties never executed a "more detailed settlement agreement and release, promissory note, deed of trust, and related documents" as contemplated by the Settlement Agreement. Counsel did prepare draft documents. (CP 281, at ¶ 4, CP 292–305.) But the documents were never revised, finalized, or agreed to. Thus, the

[1] The parties did negotiate general enforcement remedies, however: the Settlement Agreement provided for arbitration to resolve disputes in drafting, for instance. These remedies just did not include fees.

Settlement Agreement signed at mediation—which the parties "understood and agreed… is itself a binding and enforceable agreement"—is the sole written agreement. The only agreed terms of the parties' contract are there.

C. Washington Federal's Unsuccessful Motion for Summary Judgment on Underlying Claim for Deficiency Judgment

Washington Federal gave notice that it was withdrawing the Settlement Agreement in February 2013. (CP 20–24.) Four months later, the bank filed a motion for summary judgment on its claim for a deficiency judgment based on the personal guarantees securing the underlying loan transaction—i.e., the claim stated in the original complaint. (CP 32–58.) On July 17, 2013, Judge John Erlick denied that motion. (CP 86–88.)[2] Washington Federal made no further effort to prevail on this claim; instead, it pursued a claim for breach of the Settlement Agreement.

D. Washington Federal's Alternative Claim for Breach of the Settlement Agreement

On July 18, the day after losing its motion for summary judgment on the underlying loan documents, Washington Federal filed a motion for leave to amend its complaint in order to state claims for breach of the

[2] The trial court denied the bank's request for summary judgment but granted summary judgment dismissing some of Mr. Grant's counterclaims (but not his claim for breach of contract against the bank). (CP 86–88.)

Settlement Agreement. (CP 89–97.) Thus, there was no action to enforce the Settlement Agreement at all (let alone the payment obligations) before July 18, 2013.

Although Mr. Grant did not oppose the motion for leave to amend, Washington Federal waited another six months to file the amended complaint. (CP 98–104.) Then, in March 2014, Washington Federal filed a motion for summary judgment for breach of the Settlement Agreement. (CP 175–189.) That motion was successful and underlies this appeal.

E. The Trial Court's Orders Regarding Attorneys' Fees

After initially denying Washington Federal's request for summary judgment that it was entitled to recover fees (*see* CP 541), the trial court reconsidered its decision and ordered that Washington Federal was entitled to attorneys' fees (CP 540–42).

Washington Federal subsequently filed a motion seeking over $157,000 in fees and costs. (CP 543–560, 566.) This was the total of all fees and costs incurred after August 1, 2012 (the date of the mediation). Thus, the request included fees and costs incurred between February and July of 2013 in pursuit of its unsuccessful motion for summary judgment on the underlying loan guarantees, before there was any action to enforce the Settlement Agreement. (CP 564, 600–645.) The request even

included fees incurred before the alleged breach of the Settlement Agreement (February 11, 2013). (*Id.*)

Mr. Grant objected to any award of fees where there had been no action to enforce the payment terms of the Settlement Agreement, and thus no basis for recovery under the express terms of the agreement. Mr. Grant further objected that, even if fees were recoverable for failure to provide security (as opposed to failure to pay), more than $60,000[3] of the fees and costs awarded were incurred pursuing unrelated claims on which Washington Federal was unsuccessful—indeed, incurred before the bank even commenced (on July 18, 2013) any action to enforce the Settlement Agreement.[4] (CP 649–660.)

The trial court nonetheless awarded the full $157,328.02 in fees and costs requested without exception. (CP 694–698.)[5] In doing so, the

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[3] Relevant calculations are summarized at pp. 28–31of Mr. Grant's Opening Brief filed with the Court of Appeals and are shown in more detail in the declaration of Miles Yanick submitted to the trial court in opposition to the fee/cost request, at CP 624–645.

[4] An "action" to enforce a legal right refers to a judicial proceeding or a proceeding judicial in nature. *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 40–41, 42 P.3d 1265 (2002).

[5] Even if fees and costs had been recoverable under the Settlement Agreement, this award for unsuccessful and unrelated work was an abuse of discretion on the part of the trial court, which at the very least would have required remand had the Court of Appeals not reversed the fee award entirely.

trial court adopted Washington Federal's findings and conclusions verbatim. (*Id.*)[6]

F. The Court of Appeals' Reversal of the Fee Award

The Court of Appeals correctly held that the trial court erred in awarding attorneys' fees absent any contractual basis to do so and reversed the fee award in its entirety.

III. ARGUMENT

A. The Court of Appeals Correctly Held That Washington Federal Was Not Entitled to Recover Any Attorneys' Fees

Where a contract "specifically provides for" the recovery of attorneys' fees "incurred to enforce the provisions of such contract," fees are to be awarded to the "prevailing party," defined as "the party in whose favor final judgment is rendered." RCW 4.84.330. Unless specifically authorized by "contract, statute, or recognized ground of equity providing for fee recovery" each litigant is responsible for paying its own fees. *Dayton v. Farmers Ins. Grp.*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994).

To recover fees under a contact, a party must not only "prevail" but must prevail specifically on its claim for breach of the provision that

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[6] This failure to make findings that "show how the court resolved disputed issues of fact [or]… conclusions [that] explain the court's analysis" and instead "simply accept[ing], unquestioningly, the fee affidavits from counsel" also was an abuse of discretion that would have required remand had the Court of Appeals not reversed the fee award entirely. *Berryman v. Metcalf*, 177 Wn. App. 644, 657–58, 312 P.3d 745 (2013) (internal quotation marks omitted).

authorizes a fee recovery. *C-C Bottlers, Ltd. v. J.M. Leasing, Inc*., 78 Wn. App. 384, 389–90, 896 P.2d 1309 (1995). Numerous cases illustrate this point. For instance, in *Hindquarter Corp. v. Property Development Corp*., 95 Wn.2d 809, 631 P.2d 923 (1981), a tenant sought a declaratory judgment establishing its right to exercise a lease-renewal option. *Id*. at 810. The Washington Supreme Court affirmed the trial court's dismissal of the tenant's complaint because the tenant's failure to pay rent made the option unenforceable. *Id*. at 815. But the court reversed the trial court's award of attorney's fees to the landlord because "[t]he terms of the lease authorized attorney's fees ***only for curing defaults***," not for defending against the tenant's claim for breach of the option provision. *Id*. at 815 (emphasis added); *see also Belfor USA Grp., Inc. v. Thiel*, 160 Wn.2d 669, 160 P.3d 39 (2007) (where a contract only allowed for recovery of fees incurred in collecting amount due under a contract, the plaintiff could ***not*** recover fees expended to enforce contract's arbitration clause.)

In *C-C Bottlers, Ltd*., the plaintiff sued to collect on two notes that contained provisions for the recovery of fees incurred to compel payment of the notes. 78 Wn. App. at 386. The defendant counterclaimed alleging securities fraud. *Id*. The court entered summary judgment in favor of the plaintiff and dismissed the defendant's counterclaims following trial. The defendant appealed the award of fees and costs to the plaintiff, which was

based on fees and cost incurred both to enforce the notes and to defend against the counterclaims. *Id.* Even though the trial court had found the defendants' counterclaims to be "substantially interwoven and inseparable from [the plaintiff's] action to obtain judgment on the notes" the Court of Appeals reversed and remanded with instructions to segregate those fees incurred in prosecuting the notes from those incurred in defending the counterclaims, reasoning that the contract's clear language limited recovery to fees to collect on the notes. *Id*. at 387, 389 (internal citations and quotation marks omitted). The court held that

> "[t]he prevailing party should be awarded attorney fees only for the legal work completed on the portion of the claim permitting such an award," because while collateral claims may well be related to the contract claim and therefore conveniently tried together, they need not be resolved in order to decide the primary claim. ***Allowing recovery of fees for actions which do not authorize attorney fees would also give the prevailing party an unfair and unbargained for benefit***.

Id. at 389 (internal citations omitted; emphasis added).

Here, Washington Federal prevailed only on an action to enforce the Settlement Agreement. The agreement provided that fees could be

recovered in an "action to ***enforce the note***"—i.e., to enforce the payment terms. (CP 228, at ¶ 1.d) (emphasis added).[7]

The note was to provide for payment of up to $1 million within five years. There were no installment payments. Thus, even as of the date of judgment, there were no payments due—payment became due only as the remedy for the failure to provide security.

Because there was no breach of the payment terms, Washington Federal never took action to enforce them. Neither the bank's amended complaint nor its motion for summary judgment even alleged that the payment terms had been breached. (CP 98–104, 175–189.) Thus, the bank has not undertaken, much less prevailed on, any "action to enforce the note."[8]

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[7] Appellants do not rely here on the fact that the actual note was never finalized or executed. To the contrary, this argument assumes that there was a note, but one that incorporated the payment and enforcement terms of the Settlement Agreement—the only terms the parties actually agreed to. Those include the right to recover fees to enforce the note but do not include terms to which the parties never agreed.

[8] The trial court recognized this in refusing to award "default interest" (see CP 541)—there had been no default of any payment obligation, and thus default interest was not due.

B. Washington Federal Has Failed to Identify a Legitimate Basis for the Award of Fees

1. There is no evidence that the parties intended the Settlement Agreement to mean something other than what it says

The Settlement Agreement is clear: fees are recoverable by the prevailing party in an action to enforce the note—i.e., the payment obligation five years hence. Washington Federal does not dispute this. Instead, it argues—without any evidence—that the parties must have meant something other than what the Settlement Agreement says.

Thus, for instance, Washington Federal baldly states: "It was never the intent of *these parties* to limit attorney fees to an action on the note; despite the words used in the Settlement Agreement." (Answer to Petition at 18.) In other words, the Settlement Agreement does not provide for recovery of fees here, but that is not what the parties meant. Washington Federal does not purport to cite any evidence for this, and indeed there is none.

Implicitly acknowledging the absence of such evidence, Washington Federal instead resorts to labeling the agreement "hastily drafted" (Answer to Petition at 13, 18) and "clumsy" (*id*. at 18). But nor is there evidence of this; indeed, the bank's current counsel did not even participate in the mediation. And even if the Settlement Agreement had

been hastily drafted (which it was not), it is nonetheless clear and unambiguous, as even Washington Federal concedes.

The draft note prepared by Washington Federal's counsel after the mediation, although never finalized, was entirely consistent with this. It provided for recovery of fees by the Holder "in collecting sums due ***under this Note*** after default or maturity" or incurred by the prevailing party in a suit "to enforce this Note." (CP 359) (emphasis added). Washington Federal omits the italicized language in order to argue that somehow the draft note authorized it to recover all fees incurred pursuing any claim, whether it prevailed or not. (Answer to Petition at 19.) Such an argument may reveal the bank's level of desperation but not that the parties intended some other meaning when they drafted and signed the Settlement Agreement.

2. The underlying loan documents provide no basis for recovery of attorneys' fees because Washington Federal did not prevail on its claim for breach of the underling agreements

Unable to rely on the Settlement Agreement as its basis for a fee award, Washington Federal tries to lump it together with the contract underlying the initial lawsuit, arguing that it is "obvious" that it should recover fees because both the underlying loan documents and the Settlement Agreement contained fee provisions. (Answer to Petition at

13, citing CP 320–23, CP 160.) But the fee provisions in the underlying loan documents are irrelevant.

The underlying loan documents are the documents relating to the loan from Washington Federal to ARG Development for the acquisition and development of the Bell Woods property. (CP 323–26.) The default on that loan led to the underlying action to enforce personal guarantees executed by Mr. Grant and Algo (the defendants below) securing the loans. That action resulted in the Settlement Agreement. (CP 228–29.) The subsequent breach of the Settlement Agreement resulted in the summary judgment now on appeal. (CP 540–42, 694–98.)

Before deciding to sue for breach of the Settlement Agreement, however, Washington Federal moved for summary judgment on the underlying action to enforce the personal guarantees. (CP 32–58.) That motion failed. (CP 86–88.) It is beyond dispute that Washington Federal did not prevail on its claim to enforce the underlying note and guarantees—it released them as a condition of the settlement term sheet that it chose to enforce. (*See* CP 228, ¶ 3.)

Washington Federal's own motion for summary judgment—the successful one underlying this appeal—correctly took the position that because the settlement term sheet "is enforceable and judgment on it entered, the parties' remaining claims and counterclaims should be

dismissed with prejudice." (CP 176.) Thus, the bank voluntarily dismissed its claim for breach of the underlying loan guarantees when it sought and obtained summary judgment on its claim for breach of the settlement term sheet.[9]

The fact that the bank did not prevail on its original claim for breach of the personal guarantees makes them and the other underlying loan documents an untenable basis for recovering fees for breach of the Settlement Agreement. Again, where a contract provides for the recovery of attorneys' fees "incurred to enforce the provisions of such contract," fees are to be awarded to the "the party in whose favor final judgment is rendered." RCW 4.84.330; *see Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 494, 200 P.3d 683 (2009) (noting that a voluntary dismissal is not a "final judgment" for purposes of "prevailing party" provision in RCW 4.84.330).

Washington Federal never prevailed on its claim for breach of the underlying loan agreements. The issue is not, as Washington Federal suggests, whether the Settlement Agreement "intrinsically vitiates" the

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[9] The trial court had previously bifurcated the claims for breach of the personal guarantees and the claim for breach of the settlement term sheet. (CP 132–33.) In doing so, the court agreed with the argument that "the settlement term sheet that Washington Federal seeks to enforce includes the complete release of its claim for deficiency judgment against the Defendant guarantors" such that, if the bank prevails on is claim for breach of the settlement term sheet, "then it has no other claims to try" and trial on the underlying loan documents would be unnecessary. (CP 125.)

underlying loan agreements; the question is much simpler than that. The underlying loan agreements are alive and well—Washington Federal just settled those claims, failed to prevail on them when it reinstituted litigation, and then ultimately prevailed on a claim for breach of a ***different*** agreement with a ***different*** fee provision.

Thus, to the extent that Washington Federal, as it states, "relied on the underlying loan documents" in its fee request (Answer to Petition at 17), the reliance is wholly misplaced.

3. Mr. Grant's asserted right to recover fees under the loan documents has no bearing on Washington Federal's right to fees under the Settlement Agreement

Washington Federal seems to argue that, because Mr. Grant took the position in a letter that he might be entitled to recover attorneys' fees if he prevailed ***in the underlying action*** on the loan guarantees, Washington Federal should be able to recover its fees in an action on the Settlement Agreement. (Answer to Petition at 13–16.) But here again, we are talking about two separate agreements. As the letter expressly states, Mr. Grant's counsel was referring to fees for "recovering on the personal guarantees." (CP 385–86.) Had Washington Federal prevailed on its claim for breach of the underlying loan guarantees, it would have been entitled to recover those fees—and, under RCW 4.84.330, Mr. Grant would have enjoyed the reciprocal right had he prevailed. This has no

bearing on whether Washington Federal may recover fees on the claim on which it did prevail, for breach of the Settlement Agreement.[10]

RCW 4.84.330 applies in "[a]ny action on a contract or lease." The statute makes any provision in "such contract or lease" providing for recovery of fees incurred in enforcement reciprocal, such that the prevailing party is entitled to fees. Nothing in RCW 4.84.330 suggests that, in an action involving two discrete claims based on two separate agreements, a party who takes the position that the prevailing party may recover fees under ***one*** agreement somehow stipulates that the prevailing party may recover fees under the ***other*** agreement.

Nor does joining claims on the two separate agreements in a single action somehow make fees incurred in enforcement of Agreement A recoverable under Agreement B, as Washington Federal also seems to argue. To make the argument is effectively to concede that the provisions don't go as far as Washington Federal would like.

Again, the rule is simple: To recover fees under a contact, a party must not only "prevail" but must prevail specifically on its claim for breach of the provision that authorizes a fee recovery. *C-C Bottlers, Ltd.*, 78 Wn. App. at 389–90. At the very least, this means prevailing on the

[10] For the same reason, the argument that Mr. Grant should be estopped from denying that both sides acted on "the assumption that the prevailing party would recover its fees" is meritless. (Answer to Petition at 17.)

contract that provides for the fee recovery. By taking the position that Washington Federal must have prevailed (which it did not) on its underlying claim for breach of the personal guarantees in order to recover fees under them, Mr. Grant is merely arguing for the application of basic, black-letter law.

4. The prevention-of-performance doctrine does not beget contractual provisions to which the parties never agreed

Washington Federal next seeks to invoke the prevention-of-performance doctrine. The argument seems to be that, because the Settlement Agreement contemplated execution of a note embodying its terms and Mr. Grant never agreed to or executed the note prepared by Washington Federal, he should be bound by the terms of the note as drafted. (Answer to Petition at 18–19.)

One obvious problem with this argument is that, as addressed above, the draft note is consistent with the Settlement Agreement. The draft note does not allow Washington Federal to recover fees either: the draft note provides for fees incurred to enforce ***the note***, not the Settlement Agreement generally or Mr. Grant's failure to provide the security contemplated in the Settlement Agreement in particular.

Moreover, to the extent that the draft note contained terms not in the Settlement Agreement, Mr. Grant's duty to perform his obligations

under the Settlement Agreement would not have required him to sign it. If "performance" means executing a note containing the terms the parties agreed to at mediation, Mr. Grant did not fail to perform any more than Washington Federal did by preparing a note that included terms the parties had not agreed to.

5. The principle of predictability

Scraping the bottom of the barrel as far as legal arguments are concerned, Washington Federal argues, without citation, that the "principle of predictability" mandates that it recover fees. (Answer to Petition at 17.) The argument goes that, where courts do not enforce parties' agreements, thereby forcing them to guess about outcomes, predictability is undermined. True enough. But the solution, of course, is to enforce what agreements say, rather than what one party argues self-servingly, in hindsight, it "obviously" must have meant and would have said if not so hastily drafted. Washington Federal's reliance on this argument alone demonstrates the weakness of its position.

IV. CONCLUSION

For all of the above reasons, this Court should deny Washington Federal's request that it review the Court of Appeals' opinion regarding the right to recover attorneys' fees and costs.

DATED: May 30, 2017.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 30, 2017 a true and correct copy of the foregoing document was served via **Email/PDF** on the following party:

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