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Division I
State of Washington

No. 75212-0-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BTNA LLC, a Washington limited liability company,

***Petitioner*,**

v.

FORMOSA BROTHERS INTERNATIONAL LLC, a Washington limited liability company, FU MEI CHU, an individual, and JIH-CHENG CHU and LIHUI CHU, husband and wife,

***Respondents*.**

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner BTNA LLC ("BTNA") asks this Court to accept review of the Court of Appeals decision terminating review designated in Part II of this petition.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the decision of the Court of Appeals, Division I, filed on June 26, 2017 (cited as "Op."). A copy of the decision is in the Appendix.

III. ISSUE PRESENTED FOR REVIEW

When a landlord initiates an unlawful detainer action to recover rent owed under a lease and the lawsuit causes the tenant to pay the amount owed, and the landlord then voluntarily dismisses the case because it was made whole, does the Court of Appeals err in awarding then tenant attorneys' fees as the prevailing party?

IV. STATEMENT OF THE CASE

A. BTNA Filed an Unlawful Detainer Action to Recover Rent Owed for Nearly Two Years

Respondent Formosa Bros International LLC ("Formosa Bros.") leases restaurant space in Bellevue from BTNA, and has since 2012.[1] CP 24. In May 2014, Formosa Bros. fell behind in rent, placing it in default

[1] Respondents Fu Mei Chu, Jih-Cheng Chu and Lihui Chu each executed a Guaranty of Lease that provides for unconditional guaranty of the full performance of each and all of the terms of Formosa Bros.'s lease. CP 36-43.

under the lease; Formosa Bros. spent the next twenty-three months in default. CP 256-57.

In March 2016, BTNA served Formosa Bros. with notice to pay the owed rent, totaling over $20,000, or vacate the premises. CP 57, 98-100. Formosa Bros. appeared at the show cause hearing and claimed that the unlawful detainer action should be dismissed because the notice was improperly served and because Formosa Bros. paid the next month's rent. CP 509. Commissioner Henry H. Judson denied Formosa Bros.' motions, but questioned the validity of the service, and provided BTNA an opportunity to serve Formosa Bros. with a new notice to pay or vacate.[2] CP 512.

B. Facing Unlawful Detainer, Formosa Bros. Paid the Amount Owed, Resulting in BTNA Dismissing the Unlawful Detainer Action

Three days later, BTNA served Formosa Bros. with a new notice to pay or vacate. CP 309-10. The validity of the service of the notice was never questioned. Formosa Bros. then paid the full amount owed, as requested in the notice. CP 196. Because BTNA received payment in full, the unlawful detainer action was no longer necessary—BTNA had

[2] Commissioner Judson continued the show cause hearing, and after counsel for both parties left the hearing room, counsel for Formosa Brothers returned to the hearing room alone and presented a proposed order to the Commissioner. CP at 514. BTNA's counsel did not approve the order as to form and was not provided an opportunity to be heard regarding the order. *Id.*

been made whole. BTNA then voluntarily dismissed the action under CR 41(a)(1)(B). CP 195-96.

C. As the Prevailing Party, BTNA is Awarded Attorneys' Fees Under the Lease

Formosa Bros. moved the court for an award of attorneys' fees under the lease, claiming it was the prevailing party, despite having paid over $20,000 as a result of the unlawful detainer action. CP 199. The attorneys' fee provision of the lease states, in relevant part, that

> If Tenant or Landlord engage the services of an attorney to collect monies due or to bring any action for any relief against the other, declaratory or otherwise, arising out of this Sublease, including any suit by Landlord for the recovery of Rent or other payments, or possession of the Premises, the losing party shall pay the prevailing party a reasonable sum for attorneys' fees in such suit in mediation or arbitration, at trial, on appeal and in any bankruptcy proceeding.

CP 24. BTNA cross-moved for attorneys' fees; Judge Palmer Robinson received briefing on the issue and heard oral argument before ruling in favor of BTNA. CP 357-58. On May 10, 2016, Judge Robinson granted BTNA's request for attorneys' fees. *Id.*

D. Formosa Bros. Appealed the Order Granting Attorneys' Fees to BTNA

Formosa Bros. filed a flurry of motions, totaling seven motions or amended motions in less than one month, causing BTNA to appear at five

separate hearings. CP 424-27. BTNA prevailed on each, except for an unnecessary motion to stay, which BTNA did not oppose. CP 424-27. On May 12, 2016, Formosa Bros. filed a notice of appeal of Judge Robinson's order granting BTNA attorneys' fees, but no other order or judgment. Op. at 3 ("Neither party disputes that the May 12, 2016 notice of appeal timely brings before this court the only order designated in that notice: the Order Granting Plaintiff's Motion for Attorney Fees and Costs.").

E. The Court of Appeals Reversed and Remanded Based on Misapplication of Case Law

The Court of Appeals, Division I, received briefing and heard oral argument; it filed its unpublished decision on June 26, 2017. The Court of Appeals reversed Judge Robinson's award of attorneys' fees to BTNA, and remanded the case with instructions to award reasonable attorneys' fees to Formosa Bros. Op. at 9. The Court of Appeals decision was based solely on BTNA's voluntary dismissal of the unlawful detainer action, stating simply that "Where a landlord takes a voluntary nonsuit under CR 41(a) in an unlawful detainer proceeding, the tenant is the 'prevailing party' under the terms of the parties' lease." Op. 1. BTNA respectfully asks for discretionary review under RAP 13.4(b)(1), (4).

V. ARGUMENT

A. Division One's Decision Conflicts with Its Decision in *4105 1st Ave. S. Investments, LLC v. Green Depot WA Pacific Coast, LLC*

In spite of its poignant applicability to the parties' conflict, Division One did not follow its decision in *4105 1st Avenue South Investments, LLC v. Green Depot WA Pacific Coast, LLC* ("*Green Depot*"), 179 Wn. App. 777, 321 P.3d 254 (2014). The Court of Appeals did not follow the *Green Depot* holding that a defending tenant prevails in an unlawful detainer action if "dismissal of the unlawful detainer action…leave[s] the parties in the position 'as if the action had never been brought.'" *Id.* at 787, citing *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 492, 200 P.3d 683 (2009). This rule can be summarized as follows: a defendant tenant prevails in an unlawful detainer action if it is left in the same position as before the action was filed. The Court of Appeals did not follow this rule, instead misapplying the general rule that if a landlord seeks dismissal under CR 41(a), the nonmoving party prevails. Op. at 8. The Court of Appeals decision conflicts with *Green Depot*, which should control.

In *Green Depot*, 4105 1st Avenue South Investments ("4105") leased space to Green Depot WA Pacific Coast, LLC ("Green Depot"). 4105 served Green Depot with notice to pay past due rent or vacate, and three days later initiated an unlawful detainer action for unpaid rent,

damages, and attorneys' fees as authorized in the parties' agreement. *Green Depot*, 179 Wn. App. at 780. 4105 also filed a breach of contract claim, requesting the same amount sought in the unlawful detainer action. *Id.*

The unlawful detainer action was set for expedited trial, but it would not commence until four days after the end of the lease. *Id.* at 781. Green Depot agreed to vacate by the end of the lease term, and if Green Depot did not vacate, then it agreed that 4105 would be entitled to a writ of restitution. *Id.* In essence, this agreement conceded that 4105 would be entitled to the relief sought if Green Depot did not vacate, leaving only the question of the amount owed. In line with the agreement, Green Depot moved out at the end of the lease term, and 4105 voluntarily dismissed its unlawful detainer action. *Id.* at 782.

Once the action was dismissed, tenant Green Depot moved for attorneys' fees, claiming it was the "prevailing party" under the terms of the lease, arguing that it had successfully defended against the unlawful detainer action. *Id.* Green Depot claimed that 4105 "has received exactly none of the relief sought," in spite of Green Depot's agreement to move out, and that the dispute over unpaid rent was ongoing. *Id.* at 782-83.

The trial court denied the tenant's request for attorneys' fees because the question of unpaid rent was still outstanding, and would be

resolved in the contract action. *Id.* at 783. The court stated in its order that 4105 could continue to pursue its breach of contract claim, and Green Depot could pursue attorneys' fees, but both would occur in the contract action, not the unlawful detainer action. *Id.* Green Depot appealed, arguing that it was the prevailing party solely because 4105 voluntarily dismissed the lawsuit. *Id.*

The Court of Appeals in *Green Depot* affirmed the trial court, reasoning that "Because Green Depot was not the prevailing party in the unlawful detainer action and 4105 was not the losing party, the court did not err in denying Green Depot's request for an award of attorney fees and costs under the terms of the lease." *Id.* at 784. The unlawful detainer action became moot when Green Depot agreed to vacate, leaving the question of past due rent for the contract action. *Id.* at 786. The Court of Appeals said that defending a show cause hearing, simply by disputing the amount owed and setting the issue for trial, was not the same as prevailing. *Id.* Instead, a defending tenant prevails if the parties are left, after dismissal, in the same position as if the action had never been brought. *Id.* at 787.

Green Depot is remarkably similar to the current dispute. Here, BTNA served Formosa Bros. with a notice to pay or vacate, and then brought an unlawful detainer action for unpaid rent. Formosa Bros. then

paid the full amount requested by BTNA. With the rent paid, BTNA had obtained the relief it sought by initiating the lawsuit, and there was no reason to continue with the unlawful detainer action, so BTNA voluntarily dismissed. Similarly, 4105 brought an unlawful detainer action against Green Depot for unpaid rent, causing Green Depot to agree to vacate the premises at the end of the lease term; if Green Depot did not vacate, it agreed that a writ of restitution would be warranted. With this agreement, there was no need to continue the unlawful detainer action, so 4105 voluntarily dismissed. In both cases, the landlord voluntarily dismissed the case because each obtained the relief it sought in the action. In both cases, the trial court found that the tenant was not the prevailing party, because the tenant was not in the same position as before the action was brought. In both cases, the tenants were in a worse position due to the action. In *Green Depot* the tenant had vacated the premises; in the case at hand the tenant had paid all amounts due.

The Court of Appeals in this dispute focused on two distinguishing facts: it is unclear if 4105 obtained dismissal under CR 41(a), and because Green Depot did not agree to pay the rent owing, 4105 had to continue with its contract action. BTNA submits that these two differences are inapposite to this dispute. The Court of Appeals stated

> *Green Depot* is distinguishable for two reasons. First, there is nothing in the opinion to establish that [4105] obtained a dismissal under CR 41(a). Thus, the case appears to be an exception to the general rule stated in *Walji* and *Hawk*. Second, there was a separate breach of contract action against Green Depot for the past due rent, damages, and attorney fees and costs under the lease. Here, there is no such separate action.

Op. at 8. While the *Green Depot* case does not discuss whether the voluntary dismissal was obtained under CR 41(a), it does not change the rule promulgated by the *Green Depot* court that the defendant prevails if the case is dismissed and the parties are in the same position as before the lawsuit. This rule describes perfectly the cause and effect of bringing the unlawful detainer action; if the lawsuit causes no effect, then the defendant is entitled to fees.

To the Court of Appeal's second point, the existence of a second lawsuit does not bear on the dismissal of the unlawful detainer action. In *Green Depot*, the unlawful detainer action resulted in the tenant's agreement to move out; in the present case, the action resulted in the tenant paying owed rent. In both cases, the defendant tenant was in a worse position and the plaintiff landlord was in a better position as a result of the bringing the action. The plaintiff landlord is therefore the prevailing party.

In arriving at its conclusion in this case, the Court of Appeals relied on the very cases that the *Green Depot* court distinguished: *Walji v. Candyco, Inc.*, 57 Wn. App. 284, 787 P.2d 946 (1990), and *Hawk v. Branjes*, 97 Wn. App. 776, 986 P.2d 841 (1999). Each is readily distinguished.

1. *Walji v. Candyco, Inc.* Does Not Consider Settlement Resulting in Dismissal, and the Facts Do Not Describe the Current Dispute

In *Walji*, the landlord brought a contract claim to enforce a commercial lease. *Walji*, 57 Wn. App. at 286. The landlord lost at mandatory arbitration and requested trial de novo. Prior to trial, the landlord realized that its entity had been administratively dissolved, and it sought to substitute the former entity's shareholders for the entity. *Id.* The request was denied, so the landlord voluntarily dismissed under CR 41(a). *Id.* The court awarded the tenant fees because it was the prevailing party at the mandatory arbitration, and then the landlord nonsuited under CR 41(a). *Id.* The landlord appealed, arguing that the prevailing party is one for whom a final judgment is entered, the definition of "prevailing party" in RCW 4.84.330.[3] *Id.* at 287-88. The court rejected this argument, stating that there was no indication in the lease that the term "prevailing party" was to be interpreted under the statute; the court instead

[3] RCW 4.84.330 provides in relevant part that "As used in this section 'prevailing party' means the party in whose favor final judgment is rendered."

said that "prevailing party" had the common sense meaning. *Id.* at 288. Because the tenant won at arbitration, it was common sense that it had prevailed.

The *Green Depot* court distinguished *Walji* by pointing out that the parties were left in the same position as before the initiation of the lawsuit, so the defending party prevailed. *Green Depot*, 179 Wn. App. at 787. This distinction applies to the case at bar. For a party defending a suit, this is the goal: the initiating party does not receive the relief sought. For Formosa Bros. to have prevailed in the unlawful detainer suit, they would have needed to be in the same position as prior to initiation of the suit. That did not occur. Instead, Formosa Bros. paid over $20,000 in rent owed to BTNA. Once BTNA received this sum, it voluntarily dismissed the suit, having received exactly what it sought by bringing the action. BTNA was left in a better position than prior to initiating the action. Formosa Bros. was left in a worse position than prior the lawsuit. BTNA was the prevailing party.

2. *Hawk v. Branjes* Similarly Does Not Consider the Effect of Payment Resulting in Dismissal

The *Green Depot* court also distinguished *Hawk v. Branjes*, which the Court of Appeals relied on when reversing the trial court in the instant case. *Hawk*, like *Walji*, dealt with the interpretation of an attorneys' fee

provision of a lease. Also like *Walji*, *Hawk* did not deal with an unlawful detainer action, but instead a contract lawsuit. It also did not consider the impact of the defendant paying the sum requested in the lawsuit.

In *Hawk*, the landlord filed a complaint against its commercial tenant for failure to pay rent, and also sought an injunction to prevent the tenant from removing fixtures. *Hawk v. Branjes*, 97 Wn. App. 776, 778, 986 P.2d 841 (1999). The landlord obtained the injunction, but before the tenant answered the complaint, the landlord sought and received voluntary dismissal under CR 41(a)(1)(B). *Id.* The tenant moved for attorneys' fees, and the trial court awarded them under the bilateral fee provision of the lease. *Id.* The landlord appealed. *Id.* at 779.

On appeal, the landlord argued that RCW 4.84.330, the reciprocal fee statute, controlled the definition of "prevailing party," meaning that the tenant was not entitled to fees because there was no final judgment entered. *Id.* The Court of Appeals affirmed the trial court's award of fees, stating that the statutory definition of prevailing party was not relevant unless the lease provided some indication that the parties intended to adopt that definition. *Id.* at 780. The court noted that the lease stated that the "successful party" was entitled to fees, and made no mention of a "prevailing party," supporting the idea that the parties did not intend to adopt the definition of "prevailing party" from the statute. *Id.* at 781.

Like in *Walji*, the court acknowledged the "general rule" that the defendant is regarded as having prevailed when the plaintiff obtains a voluntary nonsuit. *Id.*

Hawk is readily distinguishable. The tenant in *Hawk* did nothing to cause the nonsuit—it did not vacate and payment of rent was not even an issue. The tenant in *Hawk* was left in the same position as prior to initiation of the lawsuit. The question was simply whether, under the lease, a party could only obtain fees when there was a final judgment. The court cited the general rule that a defendant prevails when the plaintiff obtains a voluntary nonsuit, but the court had no occasion to discuss exceptions to this general rule unlike the *Green Depot* court. Had the court been faced with a voluntary nonsuit caused by payment of the amount requested, the analysis likely would have been different, because the court would have needed to analyze the general rule under the more complicated facts, just as was required of the *Green Depot* court.

3. The Court of Appeals Distinguished *Green Depot* While Ignoring the Differences of *Walji* and *Hawk*

The Court of Appeals worked to distinguish the most on-point case, *Green Depot*, while failing to discuss the significant distinguishing factors present in *Walji* and *Hawk*. The Court of Appeals distinguished *Green Depot* on two grounds. First, it stated that the opinion does not

establish whether the dismissal was under CR 41(a). Op. at 8. Second, it claimed that because there were two actions in *Green Depot* (unlawful detainer and contract), reliance on the case is misplaced. *Id.* While these are two distinguishing elements of *Green Depot*, BTNA respectfully asserts that the distinctions are immaterial and the case remains more on point than *Walji* and *Hawk* because *Green Depot* addresses the exception to the general rule that the defendant is the prevailing party when the plaintiff obtains a voluntary nonsuit under CR 41(a).

The *Green Depot* court discussed both *Walji* and *Hawk*, knew that each case resulted in fees for the defendant, yet did not apply the general rule. Instead, the *Green Depot* court looked at the actions that caused the dismissal, and recognized that the defendant's agreement to move out of the property put it in a different position than at the beginning of the suit. The court knew that the landlord had obtained, in part, what it sought in bringing the unlawful detainer action. This specific consideration of the position of the parties takes a more granular look at the intricacies of the case, rather than following blindly a rule that requires awarding fees regardless of the actions that result in awarding the fees. Applying *Walji* and *Hawk* in this manner conflicts with the Court of Appeals decision in *Green Depot*.

In this case, the Court of Appeals overlooked several significant distinguishing factors of *Walji* and *Hawk*. The court did not consider that *Walji* and *Hawk* dealt primarily with whether the definition of "prevailing party" in the reciprocal fee statute, RCW 4.84.330, applied to the bilateral attorneys fee provisions in the leases. It did not consider that neither case involved an unlawful detainer action. The court looked past the fact that neither tenant took any action that caused the voluntary dismissal of the action. BTNA respectfully submits that these differences carry far greater weight than the differences between the instant case and *Green Depot*. Therefore, *Green Depot* should control, and the Court of Appeals should have looked at whether the parties were left in the same position as if the action had never been brought.

B. This Petition Raises Issues of Substantial Public Interest That Should be Resolved by the Supreme Court

The Court of Appeals decision in this case raises three major issues of substantial public importance. First, the decision, if not reversed, would discourage parties from settling. Second, the decision conflicts with the intent of the unlawful detainer statute. Third, the Court of Appeals misinterpreted the terms of the lease, causing uncertainty as to the courts' ability to accurately interpret the intent of contracting parties.

1. The Court of Appeals Decision is Contrary to Public Policy Because it Discourages Parties from Settling Claims

Washington courts strongly favor settlement, and the Court of Appeal's decision directly conflicts with this policy. *See Haller v. Wallis*, 89 Wn.2d 539, 544, 573 P.2d 1302 (1978) ("The law favors settlement…"); *see also Seafirst Ctr. Ltd. P'ship v. Erickson*, 73 Wn. App. 471, 476, 866 P.2d 60 (1994) ("[This action] promotes settlement, which the law strongly favors.").

The Court of Appeals decision would discourage a landlord from settling a dispute with a tenant that owes rent for fear that it would be required to pay the delinquent tenant's attorneys' fees. Even in the face of an offer to pay all sums owing, a landlord will take the case to trial simply for the protection of a final judgment in its favor. With a final judgment, presumably the landlord would receive payment in full and still not be required to pay the tenant's attorneys' fees. This certainly is contrary to the policy of favoring settlement. Parties would unnecessarily continue litigation, clogging up the courts and needlessly wasting the parties' money.

2. The Court of Appeals Decision Conflicts with the Unlawful Detainer Statute Because it Lengthens and Complicates a Streamlined Process

The unlawful detainer statute is to provide the landlord with a "speedy, efficient procedure" to recover the premises after a breach by the tenant. *Christensen v. Ellsworth*, 162 Wn.2d 365, 375-76, 173 P.3d 228 (2007). Part of the procedure is the mandatory notice to "pay or vacate," which is intended to allow the tenant an opportunity to pay the rent owing prior to initiation of the lawsuit and potential termination of the lease. *Id.* at 371. So, the entire statute is established to expeditiously provide remedy to landlords dealing with tenants that owe money or have otherwise breached the lease. The Court of Appeals decision in this case directly conflicts with this purpose by discouraging the speedy and efficient settlement of the dispute by requiring the landlord to see the case through trial or pay the breaching tenant's attorneys' fees. Under the Court of Appeals rule, a tenant in default for failure to pay rent would benefit by withholding rent until the day the sheriff executes a writ of restitution. At that point, the tenant could pay the back rent, then demand that the landlord pay its attorneys' fees. This would cause the maximum harm to the landlord, thus converting the very statute meant to *protect* landlords into a statute that could inflict harm.

3. The Court of Appeals Decision Conflicts with the Lease Terms, Creating Uncertainty as to How the Court of Appeals May Interpret Future Agreements

The public has an interest in knowing that the Court of Appeals will accurately interpret the language of leases that come before it, and the Court of Appeals did not interpret the parties' lease correctly. The clause at issue, the attorneys' fee provision, states in relevant part that

> If Tenant or Landlord engage in the services of an attorney to collect monies due or to bring any action for any relief against the other, declaratory or otherwise, arising out of this Sublease, *including any suit by Landlord for the recovery of Rent* or other payments, or possession of the Premises, the losing party shall pay the prevailing party a reasonable sum for attorneys' fees in such suit in mediation or arbitration, at trial, on appeal in any bankruptcy proceeding.

CP at 24 (emphasis added). In this case, BTNA engaged the services of an attorney to collect monies due, resulting in the initiation of an unlawful detainer action after serving a notice to pay or vacate. As a result of this legal action "for the recovery of Rent or other payments," Formosa Bros. paid BTNA the amount demanded in the notice to pay or vacate. BTNA received exactly what it sought, and then voluntarily dismissed its lawsuit. Under the plain meaning of the lease, BTNA is entitled to attorneys' fees as the prevailing party. It defies logic to think that Formosa Bros. could spend two years in chronic default for failure to pay rent, then be found

the prevailing party when it finally pays all amounts due to BTNA as a result of BTNA's unlawful detainer action.

Businesses need certainty that the plain meaning of their legal documents will be reasonably interpreted. The public must be able to trust in the courts' ability to reasonably interpret the intent of the parties as described in the words of their agreements. The Court of Appeal's decision undermines this core understanding. It is difficult to imagine a landlord and tenant agreeing to terms as interpreted by the court, where the party in breach of the lease could then be awarded attorneys' fees after paying rent due as a result of being taken to court by the landlord. BTNA certainly did not intend the attorneys' fee provision to be interpreted in this manner.

The court's interpretation would insert significant uncertainty into landlord tenant relationships, requiring landlords and tenants to unnecessarily revisit and enter into negotiations to revise leases that have for years been sufficient. The court's interpretation casts doubt on the courts' ability to fairly and accurately interpret legal documents in the face of a dispute, conflicting with the public interest of confidence in the courts.

VI. CONCLUSION

Petitioner BTNA respectfully asks this Court to accept review of the decision of the Court of Appeals, Division One. The decision is in direct conflict with *4105 1st Avenue South Investments, LLC v. Green Depot WA Pacific Coast LLC*, 179 Wn. App. 777 (2014), and is also in conflict with the public interest because it discourages the favored public policy of settlement, it contradicts the intent and purpose of the unlawful detainer statute, and it calls into question the quality of the Court of Appeals contract interpretation.

RESPECTFULLY SUBMITTED this 25th day of July, 2017.

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BTNA LLC, a Washington limited liability company, Respondent, v. FORMOSA BROTHERS INTERNATIONAL LLC, a Washington limited liability company; FU MEI CHU, an individual; and JIH-CHENG CHU and LIHUI CHU, husband and wife, Appellants.	)	No. 75212-0-I DIVISION ONE UNPUBLISHED FILED: June 26, 2017

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Cox, J. — Where a landlord takes a voluntary nonsuit under CR 41(a) in an unlawful detainer proceeding, the tenant is the "prevailing party" under the terms of the parties' lease.[1] BTNA LLC took a voluntary nonsuit under CR 41(a) in this unlawful detainer proceeding against Formosa Brothers International LLC. But the trial court awarded reasonable attorney fees to BTNA as the "prevailing party" under the parties' sublease. Because this was incorrect, we reverse and remand with directions.

[1] Hawk v. Branjes, 97 Wn. App. 776, 781, 986 P.2d 841 (1999); Walji v. Candyco, Inc., 57 Wn. App. 284, 288, 787 P.2d 946 (1990).

This is a commercial unlawful detainer action based on RCW 59.12.010 et seq. Formosa Brothers operates a restaurant and subleases the premises from BTNA. After Formosa Brothers allegedly failed to pay rent, BTNA attempted to serve Formosa Brothers with a three-day notice to pay rent or surrender the premises. Thereafter, BTNA commenced this commercial unlawful detainer action and sought a writ of restitution at a show cause hearing. Formosa Brothers moved to dismiss this action, arguing that the service of the three-day pre-litigation notice was improper.

On April 12, 2016, at the show cause hearing, the trial court denied, without prejudice, BTNA's motion for a writ of restitution. It based this decision, in part, on BTNA's failure to properly serve Formosa Brothers with the three-day pre-litigation notice. The trial court also denied Formosa Brothers' motion to dismiss, orally stating that dismissal "would be a needless waste -- expense."

The parties represented to this court that BTNA then served a new three-day notice, and Formosa Brothers paid the amounts due. On April 19, 2016, the trial court granted BTNA's motion for voluntary dismissal under CR 41(a). But this order did not address either attorney fees or costs. Formosa Brothers has not appealed this order.

On May 10, 2016, the trial court entered its Order Granting Plaintiff's Motion for Attorney Fees and Costs in favor of BTNA. This order was based on a "prevailing party" provision in the parties' sublease.

Formosa Brothers timely appealed this order on May 12, 2016. The notice of appeal only designates the May 10, 2016 order, nothing else.

ATTORNEY FEES AND COSTS

Formosa Brothers argues that the attorney fees award must be reversed. We agree.

Notice of Appeal

Neither party disputes that the May 12, 2016 notice of appeal timely brings before this court the only order designated in that notice: the Order Granting Plaintiff's Motion for Attorney Fees and Costs. This ruling held that BTNA was the "prevailing party" under the sublease with Formosa Brothers. This ruling is contrary to Washington law.

"[A] trial court may grant attorney fees only if the request is based on a statute, a contract, or a recognized ground in equity."[2]

We review de novo the legal basis for an attorney fee award.[3]

Here, Formosa Brothers challenges the basis for the attorney fee award in the May 10, 2016 order. Thus, the focus of our analysis is on that order.

Prevailing Party

Formosa Brothers argues that it was the prevailing party under the terms of the sublease with BTNA. Accordingly, it argues that the trial court improperly awarded BTNA attorney fees. We agree.

The sublease between the parties provides:

> If [Formosa Brothers] or [BTNA] engage the services of an attorney to collect monies due or to bring any action for any relief

[2] Gander v. Yeager, 167 Wn. App. 638, 645, 282 P.3d 1100 (2012).

[3] In re Estate of Langeland v. Drown, 195 Wn. App. 74, 82, 380 P.3d 573 (2016), review denied sub nom., Estate of Langeland, 187 Wn.2d 1010 (2017).

> against the other, declaratory or otherwise, arising out of this Sublease, including any suit by [BTNA] for the recovery of Rent or other payments, or possession of the Premises, the losing party shall pay the ***prevailing party*** a reasonable sum for attorneys' fees in such suit in mediation or arbitration, ***at trial, on appeal*** and in any bankruptcy proceeding.
>
> . . . .[4]

The issue in this case is whether BTNA or Formosa Brothers is the "prevailing party" under the circumstances of this case.

A defendant prevails when a plaintiff obtains a voluntary dismissal under CR 41(a).[5] Walji v. Candyco, Inc.[6] is instructive. There, Queen Anne Group, the landlord, sought enforcement of a commercial lease against Candyco, Inc. in a commercial unlawful detainer proceeding.[7] Thereafter, Queen Anne Group moved for a voluntary dismissal without prejudice under CR 41(a).[8] The trial court granted the motion and awarded Candyco, the tenant, attorney fees according to the prevailing party provision in the lease.[9] The lease provided:

> "If by reason of any default on the part of [Candyco] it becomes necessary for the [Queen Anne Group] to employ an attorney, or in case [Queen Anne Group] shall bring suit to recover any rent due

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[4] Clerk's Papers at 24 (emphasis added).

[5] Andersen v. Gold Seal Vineyards, Inc., 81 Wn.2d 863, 865-68, 505 P.2d 790 (1973); Housing Auth. of City of Seattle v. Bin, 163 Wn. App. 367, 377, 260 P.3d 900 (2011); Council House, Inc. v. Hawk, 136 Wn. App. 153, 159-60, 147 P.3d 1305 (2006); Hawk, 97 Wn. App. at 781; Walji, 57 Wn. App. at 288; Soper v. Clibborn, 31 Wn. App. 767, 769-70, 644 P.2d 738 (1982).

[6] 57 Wn. App. 284, 288, 787 P.2d 946 (1990).

[7] Id. at 286.

[8] Id.

[9] Id.

> hereunder, or for breach of any provision of this lease, or to recover possession of the lease premises, or if [Candyco] shall bring any action for any relief against [Queen Anne Group], declaratory or otherwise, arising out of this lease, then and in any of such events, the ***prevailing party*** shall be entitled to a reasonable attorneys' fee and all costs and expenses expended or incurred in connection with such default or action."[10]

Queen Anne Group appealed, arguing that Candyco could not be a prevailing party under RCW 4.84.330, which defines a prevailing party as one "'in whose favor [a] final judgment is rendered.'"[11] It also argued that this statutory definition must be used when interpreting the fee provision in the lease.

This court affirmed, explaining that "[a]t the time of a voluntary dismissal, the defendant has 'prevailed' in the commonsense meaning of the word. . . . There is no reason to believe that the parties intended to incorporate [into the lease] this statutory definition, which is not even the usual legal definition."[12]

This court followed this reasoning in Hawk v. Branjes,[13] where a landlord voluntarily dismissed a breach of contract case it commenced against the tenants. This court affirmed the trial court's award of attorney fees to the tenants in accordance with the "successful" party attorney fee provision in the lease.[14]

Here, after Formosa Brothers allegedly failed to pay rent, BTNA attempted service of the three-day pre-litigation notice and then commenced this unlawful

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[10] Id. at 287 (emphasis added).

[11] Id. (quoting RCW 4.84.330).

[12] Id. at 288.

[13] 97 Wn. App. 776, 778, 986 P.2d 841 (1999).

[14] Id. at 778-79.

detainer action, seeking a writ of restitution and damages. After serving a new three-day notice, it obtained from Formosa Brothers all amounts due. Thereafter, BTNA moved to voluntarily dismiss the case without prejudice based on CR 41(a). The trial court granted BTNA's motion on this basis.

Under the Washington case law that we just discussed, this dismissal made Formosa Brothers, the defendant, the prevailing party under the sublease. The tenant prevailed because BTNA obtained a voluntary nonsuit under CR 41(a).

BTNA relies on 4105 1st Avenue South Investments, LLC v. Green Depot WA Pacific Coast, LLC[15] to support its argument that it was the prevailing party below. That case is distinguishable and does not control this outcome.

There, 1st Avenue South, the landlord, commenced a commercial unlawful detainer action against Green Depot, the tenant, and requested a writ of restitution.[16] 1st Avenue South also commenced a separate breach of contract action against Green Depot for the past due rent, damages, and attorney fees and costs under the lease.[17]

Green Depot denied owing past due rent at the show cause hearing on the writ of restitution, and the trial court set the matter for an expedited trial.[18]

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[15] 179 Wn. App. 777, 780, 321 P.3d 254 (2014).

[16] Id.

[17] Id. at 785.

[18] Id. at 786.

Green Depot later stipulated that it would vacate the premises by the end of the lease term.[19]

Green Depot then moved for attorney fees, claiming it prevailed because it successfully defended against the issuance of a writ of restitution.[20] The trial court denied Green Depot's motion.[21]

On appeal, this court rejected Green Depot's argument. The court noted that a show cause hearing "'is not the final determination of the rights of the parties in an unlawful detainer action.'"[22] It further agreed with the trial court that the disputes regarding past due rent, damages, and fees would be resolved in the separate pending breach of contract action.[23]

In distinguishing Walji and Hawk, which we discussed earlier in this opinion, this court concluded in Green Depot that the case before it did not leave the parties in the position "'as if the action had never been brought.'"[24] The then pending separate action on the lease was to determine the question of fees.

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[19] Id.

[20] Id. at 782.

[21] Id. at 783.

[22] Id. at 786 (quoting Carlstrom v. Hanline, 98 Wn. App. 780, 788, 990 P.2d 986 (2000)).

[23] Id.

[24] Id. at 787 (quoting Wachovia SBA Lending, Inc. v. Kraft, 165 Wn.2d 481, 492, 200 P.3d 683 (2009)).

Accordingly, this court affirmed the trial court's denial of Green Depot's motion for attorney fees as the prevailing party.[25]

Green Depot is distinguishable for two reasons. First, there is nothing in the opinion to establish that 1st Avenue South obtained a dismissal under CR 41(a).[26] Thus, the case appears to be an exception to the general rule stated in Walji and Hawk. Second, there was a separate breach of contract action against Green Depot for the past due rent, damages, and attorney fees and costs under the lease.[27] Here, there is no such separate action. The question of fees was resolved by the trial court in this unlawful detainer proceeding.

The general rule on award of attorney fees when there is a CR 41(a) dismissal by a landlord under these circumstances controls. BTNA's reliance on Green Depot is misplaced.

BTNA also argues that it prevailed based on a United States Supreme Court case dealing with the federal Civil Rights Act.[28] Why this federal case controls Washington law on the question of attorney fees in a commercial unlawful detainer action is left unexplained. We need not address the Supreme Court case any further.

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[25] Id.

[26] See id. at 782-83.

[27] Id. at 785.

[28] BTNA's Response Brief at 12 (quoting Lefemine v. Wideman, 568 U.S. 1, 11, 133 S. Ct. 9, 11, 184 L. Ed. 2d 313 (2012)).

BTNA argues for the first time on appeal that a prevailing party is the one that substantially prevails.[29] The record does not show that it made this argument below. Thus, we need not consider this argument.[30]

Accordingly, we reverse the trial court's award of attorney fees to BTNA and remand with directions for the trial court to award reasonable attorney fees to Formosa Brothers, the prevailing party under the sublease for the proceedings below. The amount of such an award must be properly supported by findings of fact and conclusions of law, as Mahler v. Szucs[31] and other cases require.

On Appeal

Both parties request attorney fees on appeal. We award fees to Formosa Brothers. The amount of such fees shall also be determined by the trial court on remand.[32]

Here, the plain words of the sublease that we previously quoted also require the award of fees on appeal. Formosa Brothers also prevails on appeal.

Based on RAP 18.9, BTNA requests fees "as an appropriate sanction" due to the fees it incurred in bringing and defending its motion to modify this court's ruling. There is no conduct subject to sanction, and fees are simply not appropriate on this basis.

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[29] Id. at 16.

[30] See RAP 2.5(a).

[31] 135 Wn.2d 398, 435, 957 P.2d 632 (1998).

[32] RAP 18.1(i).

BTNA also requests fees as the prevailing party if this court grants its motion to modify this court's ruling. Because this motion is moot, we deny this request.

Costs

Neither party separately argues the awardability of costs either below or on appeal. But the lease provision, which we previously quoted in this opinion, supports the award of costs to Formosa Brothers for trial and appeal. It is so ordered.

MOTION TO MODIFY

The question in BTNA's motion to modify the commissioner's ruling is "whether the April 12, 2016 [Order on Show Cause Re Writ of Restitution] is within [this court's] scope of review." Because we reverse the May 10, 2016 order awarding fees and costs to BTNA as the prevailing party, there is no need to address this question. The motion to modify is moot.

We reverse the Order Granting Plaintiff's Motion for Attorney Fees and Costs. We remand with directions to the trial court to award reasonable attorney fees and costs for trial and appeal to Formosa Brothers. The award shall be supported, as appropriate, with findings of fact and conclusions of law.

Cox, J.

WE CONCUR:

Trickey, ACJ

Appelwick, J.

CERTIFICATE OF SERVICE

On July 25, 2017, I caused to be served upon the below named counsel of record, at the address stated below, via the method of service indicated, a true and correct copy of the foregoing document.

Dave Bandstra, WSBA No. 40544 dave@chianglinlawfirm.com Chianglin Law 10 148th Ave. NE #202 Bellevue, WA 98007 Tel: 425.451.4945	___ Via hand delivery _X_ Via U.S. Mail, 1st Class, Postage Prepaid ___ Via Overnight Delivery ___ Via Facsimile _X_ Via Email

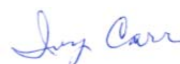
Attorneys for Formosa Brothers, LLC, Fu Mei Chu, Jih-Cheng Chu, and Lihui Chu

Christopher D. Cutting, WSBA No. 41730 christopher@cuttinglaw.com Loeffler Law Group PLLC 500 Union Street, Suite 1025 Seattle, WA 98101 Tel: 206.443.8678	___ Via hand delivery _X_ Via U.S. Mail, 1st Class, Postage Prepaid ___ Via Overnight Delivery ___ Via Facsimile _X_ Via Email

Attorneys for Formosa Brothers, LLC, Fu Mei Chu, Jih-Cheng Chu, and Lihui Chu

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Bellevue, Washington, on July 25, 2017.



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