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STATE OF WASHINGTON

BY  _____
DEPUTY

No. 43873-9-II

**IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

FIDELITY NATIONAL TITLE INSURANCE CO, INC.,

Appellants

v.

PORT ORCHARD FIRST LIMITED PARTNERSHIP, et. al,

Respondents

BRIEF OF APPELLANTS

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I. INTRODUCTION

Fidelity National Title Insurance Company (“Fidelity”) appeals from the trial court’s CR 12(c) summary dismissal of its claim for attorney fees and, based on the same arguments, from the trial court’s denial of its motion for summary judgment to award it attorney fees.

A real estate transaction between Port Orchard First Limited Partnership (“Seller” or “Port Orchard”) and Support Services Commercial, LLC (“Buyer” or “Support Services”) failed and Fidelity, acting as the escrow agent, was ultimately required to bring an interpleader action to resolve the issue of which party was entitled to a \$50,000 earnest money deposit held in escrow. The Seller brought a Counterclaim and Cross Claim, one of which was against Fidelity for “escrow negligence.” That claim was based on the assertion that Fidelity did not have the closing documents available for signature at the appointed closing deadline.¹

On February 10, 2012, Fidelity took the deposition of Richard Brown. Mr. Brown is the president of Sydney Bay Inc., Port

¹ Seller voluntarily dismissed its claim in February, 2012.

Orchard's general partner. (CP 202.) Mr. Brown testified in that deposition that Port Orchard had not obtained the limited partners' approval to sell the property prior to the expiration of time allowed for closing. Following this deposition, the Counterclaim was voluntarily dismissed by the Seller. After the order of dismissal was entered, the only issue that remained was whether Fidelity was entitled to reimbursement of its attorney fees and costs in defending against the Seller's questionable Counterclaim. Fidelity's claim for fees was based on an undisputed provision in the Escrow Instructions which provided as follows:

“The parties jointly and severally agree to pay the Closing Agent's costs, expenses and reasonable attorney's fees incurred in any legal action arising out of or in connection with the Transaction or these instructions, whether such lawsuit is instituted by the Closing Agent, the parties, or any other person.”

Neither Buyer nor Seller challenged the enforceability of the contractual indemnity provision in the Escrow Instructions that permitted Fidelity to recover its attorney fees and costs from Buyer or Seller or both. Instead, the Respondents defended against Fidelity's cost and attorney's fee request by asserting a medley of technical and procedural arguments that were based on the language of Fidelity's pleadings.

The Respondents' "pleading arguments" are misplaced and do not provide a legal basis to prevent Fidelity from recovering what the Respondents promised to do – i.e., reimburse the escrow company for the attorney's fees and costs it incurred to defend Port Orchard's Counterclaim and related issues. Fidelity is entitled to its reasonable attorney fees and costs pursuant to the Escrow Instructions, not as a "prevailing party" in a suit to enforce a contract, but as part of the contractual consideration for serving as the escrow agent and being forced to participate in litigation regarding the transaction.

In its Complaint and response to the Counterclaim, Fidelity affirmatively pled its request for an award of attorney's fees. Contrary to the Respondents' arguments, Fidelity was not required to plead the factual or legal basis for an attorney's fee award, nor was it required to plead the request for fees as an element of special damages. Fidelity's "prayer for relief" was sufficient to put the Respondents on notice that they could be liable for Fidelity's costs and fees incurred in the legal action occasioned by Seller's Counterclaim.

At no point during the trial court proceedings did Fidelity's fee request create an element of surprise or prejudice to Buyer or

Seller. They were both aware of the contractual basis for Fidelity's request for fees at each stage in this litigation. The Respondents ignore their indemnity obligation and suggest that Fidelity should bear the cost of defending Port Orchard's questionable Counterclaim as well as the other collateral issues that were litigated in connection with that Counterclaim. As noted previously, Port Orchard eventually recognized the untenable nature of its Counterclaim and dismissed the claim shortly before trial, on February 28, 2012. (CP 243-246.)

On March 19, 2012, Port Orchard asked the trial court to order disbursement of the interpled funds pursuant to a stipulation between the two Respondents. Despite its decision to dismiss the counterclaim voluntarily, Port Orchard hoped it could avoid any duty to pay Fidelity's attorney's fees even though Fidelity was arguably a "prevailing party" after the court granted Port Orchard's motion for dismissal of the counterclaim per CR 41.² Port Orchard argued in that motion that Fidelity was not entitled to fees because Port Orchard's "voluntary dismissal" of the counterclaim was not a "final

² Fidelity never sought an award of fees and costs as a "prevailing party." The terms of the escrow agreement and instructions made no reference to a prevailing party's right to an award of fees and costs. Instead, the Respondents promised unconditionally to reimburse Fidelity for any costs or fees incurred if litigation ensued over the transaction.

judgment.” “And, where neither party prevails with a final judgment, neither party is entitled to attorney’s fees.” Citing *Wachovia SBA Lending, Inc. vs. Kraft*, 165 Wash. 2d 481,494; 200 P.3d 683,689 (2009). (CP 252.)

Fidelity opposed the disbursement request, noting that the basis for its fee claim was not a “prevailing party” argument but was instead premised on the fee and cost reimbursement promise that the Respondents made when they agreed to the terms of the escrow instructions. The Respondents were no doubt aware of Fidelity’s contractual indemnity claim at this point (March, 2012).³ Since Fidelity’s Motion for Partial Summary Judgment was not heard until August 1, 2012, Respondents were neither surprised nor prejudiced by the content of Fidelity’s Complaint on this subject.

The Respondents’ arguments and the trial court’s decision in this case are contrary to established Washington law. They suggest that a party to litigation can avoid a clear, contractual obligation to pay fees and costs simply because the party entitled to those fees did not expressly identify and articulate in its initial pleadings, the portion of the parties’ contract that addressed that subject. Simply

³ It is arguable that Respondents actually became aware of the contractual indemnity claim and the factual basis for it as early as February 17, 2012 when Fidelity requested leave to amend its answer to the Port Orchard Counterclaim. (CP 188-192.)

stated, the Respondents are asking this Court to return to the time of “demurrers” and arguments over sufficient pleadings, rather than acknowledge the merits of Fidelity’s claim for reimbursement of costs it should never have been required to incur.

Fidelity respectfully asks the Court of Appeals to determine that the trial court pleadings it submitted adequately informed the Respondents of Fidelity’s request for an award of attorney’s fees and costs; that the Respondents were actually aware of the specific nature and basis for the contractual fee and cost claim asserted by Fidelity as early as March of 2012, and that the trial court’s order granting the Respondents’ motion for “judgment on the pleadings” and denying Fidelity’s motion for partial summary judgment should be reversed.

II. ASSIGNMENTS OF ERROR

Appellants assign error to:

- A. The trial court’s decision and order *granting* Respondents’ motion for judgment on the pleadings which effectively dismissed Fidelity’s claim for attorney fees and costs; and
- B. The trial court’s decision and order *denying* Fidelity’s

motion for partial summary judgment on its request for an award of attorney fees and costs against both Respondents.

See Clerk's Papers ("CP") at 354-55 (Order on Plaintiff's Motion for Summary Judgment and Defendants' Motion for Judgment on the Pleadings).

Appellants raise the following issues in relation to those assignments of error:

A. Based on a *de novo* review of the briefing and declarations submitted to the trial court, should the order granting Defendant's Motion for Judgment on the Pleadings and denying Plaintiff's Motion for Summary Judgment be reversed and the matter remanded for an award of Fidelity's attorney fees and costs in an amount to be determined?

(1) Was Fidelity legally entitled to reimbursement of its attorney fees and costs pursuant to the express terms of the Escrow Instructions when it was required to participate in the litigation resulting from the Respondents' real estate transaction?

(2) Was Fidelity required to specifically plead and articulate the underlying authority for its request for attorney fees where: costs and fees were specifically provided for in the Escrow Instructions that Buyer and Seller signed; Fidelity requested attorney fees and costs in its Complaint and in its Reply to the Respondent/Seller's Counterclaim; the Respondents were aware of the contract; the Respondents were specifically advised of the basis for Fidelity's fee and cost claim months before the Parties' respective motions for summary relief were considered; and the Respondents have not alleged nor can they demonstrate any surprise or resulting prejudice based on Fidelity's request?

(3) Was Fidelity required to plead its request for attorney fees as a claim for special damages where the basis for fees is provided by the parties' contract rather than a statute providing for fees in a special cause of action or as an element of damages?

(4) If the rule for pleading special damages applies to Fidelity's request for attorney fees based on the contract, does CR 54 negate such rule because Fidelity was in fact entitled to

fees and because no prejudice would occur as a result of such award?

B. Is Fidelity entitled to an award of attorney fees and costs on appeal?

III. STATEMENT OF THE CASE

Fidelity was the escrow/closing agent engaged by the Buyer and Seller to close a real property purchase and sale. CP at 4 (Complaint at 2). According to the terms of the purchase and sale agreement, defendant, the Buyer deposited \$50,000.00 in earnest money with Fidelity. *Id.*

In connection with the transaction, Buyer and Seller executed a Closing Agreement and Escrow Instructions for Purchase and Sale Transaction ("Escrow Instructions") that detailed the responsibilities and obligations of Fidelity and of the Buyer and Seller. CP at 92-96 (Exhibit A to the Declaration of Katie Slayton).

Included in the Escrow Instructions is the following agreement:

Disputes and Interpleader. Should any dispute arise between the parties, and/or any other party, concerning the Property or funds involved in the Transaction, the Closing Agent may, in its sole discretion, hold all documents and funds in their existing status pending resolution of the dispute, or join in or commence a court action, deposit the money and documents held by it with the court, and require

the parties to answer and litigate their several claims and rights among themselves. **The parties jointly and severally agree to pay the Closing Agent's costs, expenses and reasonable attorney's fees incurred in any legal action arising out of or in connection with the Transaction or these instructions, whether such lawsuit is instituted by the Closing Agent, the parties, or any other person.** Upon commencement of such interpleader action and the deposit of all funds and documents of the parties, the Closing Agent shall be fully released and discharged from all obligations to further perform any duties or obligations otherwise imposed by the terms of this escrow.

CP at 94 (Emphasis added.)

The sale did not close. CP at 4 (Complaint at 2). The Buyer and Seller made conflicting claims to the earnest money, and, as a result, Fidelity was exposed to the potential for double liability. On December 11, 2009, Fidelity filed its interpleader Complaint ("the Complaint") in this matter. CP at 3-5. Contemporaneous with filing, Fidelity deposited the earnest money with the Clerk of the Court pursuant to RCW 4.08.160 and CR 22. The Complaint requested an award of attorney's fees as part of the relief requested by Fidelity. CP at 5.

The Seller, Port Orchard First Limited Partnership, responded to the Complaint by filing an "Answer, Affirmative Defenses, Counterclaim, Cross Claim & Third-Party Complaint".

CP at 63-68. The Counterclaim asserted a questionable claim of “negligence” against Fidelity based on the contention that Fidelity neglected to have the closing documents prepared and available for Seller's agents to execute prior to expiration of the closing deadline. CP at 65-66. Fidelity submitted a Reply to the Counterclaim which included a denial of the basis for it, and, again requested its attorney fees as part of the prayer for relief. CP at 47-48. Port Orchard opposed Fidelity's motion to be discharged from the case. CP at 50-56. Fidelity moved pursuant to CR 12(c) to have the court dismiss the negligence Counterclaim. CP at 101-112. The trial court denied the motion to dismiss, concluding that there were disputes of fact preventing relief under CR 12(b)(6).

On January 24, 2011, the trial court entered an interim award of attorney's fees for Fidelity, but only for Fidelity's fees and costs incurred to commence the interpleader action, as that was the only issue before the court at that time.⁴ CP at 130-33.

Fidelity was thereafter required to participate in the litigation as a Counterclaim defendant and incurred attorney's fees and costs

⁴ Seller has previously attempted to characterize this interim award of fees as a final adjudication of the issue of attorney fees. Not only does the order clearly articulate the “interim” nature of the award, but the Seller's pursuit of the Counterclaim and Cross Claim made it impossible for the trial court to enter a final order addressing all of the cost and fees.

to address the Counterclaim and other issues raised by the Respondents. The case progressed through the discovery phase, and Fidelity was required to respond to written interrogatories and requests for production, and to propound its own requests and take depositions. CP at 326 (Declaration of Lisa Tyler).

On February 10, 2012, Fidelity took the deposition of Seller's general partner, Richard A. Brown. CP at 201-02 (Declaration of Thomas Sandstrom). At that deposition, Fidelity determined that Port Orchard had not obtained the requisite authority from its limited partners to sell the property at issue, as was required by its partnership agreement. *See id.* Therefore, Seller's agent, Richard A. Brown, could not have validly executed closing documents within the contract closing deadline regardless of whether Fidelity made the documents available to sign in a timely manner. *Id.*

Fidelity moved to amend its Reply to the Counterclaim to add an affirmative defense based on Mr. Brown's lack of authority. CP at 188-91. In its motion, Fidelity also moved to amend its Reply to clarify that its request for attorney fees resulting from the Counterclaim was based on the Escrow Instructions. CP at 189-91 (Motion to Amend); CP at 200 (proposed Amended Reply). That motion was filed February 17, 2012.

After receiving the Motion to Amend, and within just a few days of Mr. Brown's deposition, Seller moved for voluntary dismissal of its negligence Counterclaim against Fidelity. CP at 203-04. Seller then opposed Fidelity's motion to amend its Reply based on the procedural argument that Fidelity could not amend its Reply once the Counterclaim was dismissed. CP at 237-42; 219-21.

The trial court granted the Seller's motion for voluntary dismissal and denied Fidelity's motion to amend its Reply, concluding that once the Counterclaim was dismissed, there was no claim to which Fidelity could file an amended Reply. RP (February 24, 2012) at 18:3-12. The trial judge also reasoned that the motion to amend relative to the attorney's fee/contractual indemnity claim was moot, because Fidelity *had already requested attorney fees in the Complaint*. *Id.* at 14:13-15:6. Support Services Commercial, LLC, Respondent/Buyer subsequently entered a voluntary dismissal of its Cross Claim against Respondent/Seller on May 25, 2012. CP at 287-95.

Following the entry of orders voluntarily dismissing Buyer's and Seller's Cross Claims and Counterclaim, the only remaining issue to be resolved was Fidelity's request for relief, both to be discharged from the case, and for reimbursement of its reasonable

attorney's fees. Rather than simply pay Fidelity's attorney fees pursuant to the Escrow Instructions, Seller continued to avoid its obligations under the escrow instructions by asserting that Fidelity was procedurally barred from seeking fees. At no time did either the Seller or the Buyer contend that they were surprised or prejudiced by the theory underlying Fidelity's request for an award of fees and costs.

Port Orchard moved for judgment on the pleadings pursuant to CR 12(c), arguing that, as a matter of law, there were no remaining claims, or that any remaining claims for fees and costs should be dismissed because Fidelity didn't specifically plead a contractual "indemnity" claim for attorney fees. CP 297-302. In response, Fidelity moved for summary judgment alleging that it was entitled to reimbursement of its attorney fees, as requested in its Complaint and its Reply. Fidelity argued, for the second time, that its request for fees and costs was being made pursuant to the express provisions of the Escrow Instructions. CP at 303-15.

The trial court granted the Respondents' motion for "judgment on the pleadings" and denied Fidelity's motion for summary judgment. CP at 354-55. Fidelity timely appealed. There

is no assertion of a dispute as to material facts; the appeal involves wholly legally issues.

IV. ARGUMENT

A. Defendants Were Not Entitled to Judgment on the Pleadings; Fidelity Was Entitled to Summary Judgment.

Fidelity challenges the trial court's rulings for the substantive reasons set forth below.

1. The Trial Court's Dismissal of Fidelity's Claim for Fees and Costs "On the Pleadings" Was Error.

After voluntarily dismissing their respective Crossclaims against one another and the Counterclaim against Fidelity, the Respondents moved "to dismiss [the] action on the pleadings under CR 12(c) as all claims for relief [had] been granted or dismissed by agreement." CP at 297. The statement in the Respondents' motion was incorrect and completely ignored Fidelity's initial pleadings and its prior motions requesting an award of its attorney's fees and costs incurred in the lawsuit.

Whether the trial court's dismissal pursuant CR 12(c) was appropriate is a legal question reviewed by the Court of Appeals *de novo*. *San Juan County v. No New Gas Tax*, 160 Wh.2d 141, 164, 157 P.3d 831 (2007). A dismissal for failure to state a claim under CR 12(b)(6) or judgment on the pleadings pursuant to CR 12(c) is appropriate "only if 'it appears **beyond doubt** that the plaintiff **can prove no set of facts**, consistent with the Complaint, which would entitle the plaintiff to relief.'" *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750 (1995) (emphasis added; internal citations omitted); see also *Gaspar v. Peshastin Hi-Up Growers*, 131 Wn. App. 630, 634-35, 128 P.3d 627 (2006). Motions for summary dismissal "should be granted sparingly and with care." *Id.* "Any hypothetical situation conceivably raised by the Complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support plaintiff's claim." *Id.*

In actual practice, a plaintiff's Complaint or a defendant's Counterclaim is rarely dismissed pursuant to CR 12(b)(6) or 12(c) and then only in the unusual case where it can be determined on the face of the pleadings that there is some insurmountable bar to

relief.⁵ For instance, if the complaint alleges a claim or cause of action that is no longer recognized, such as a complaint for “alienation of affections,” then relief under CR 12(c) or CR 12(b)(6) is appropriate.

That is not the case here. Fidelity’s claim for attorney’s fees is not deficient on its face simply because Fidelity’s Complaint and Counterclaim Reply did not articulate or describe in detail the portion of the escrow instructions that expressly obligated the Respondents to reimburse Fidelity for the attorney’s fees and costs it incurred in the lawsuit.

In its Complaint, Fidelity requested an award of attorney’s fees in the “prayer for relief.” CP at 5. Likewise, Fidelity specifically requested an award of attorney’s fees in its Reply to Seller’s Counterclaim. CP at 47-48. Both Respondents were then “on notice” that costs and fees were being requested as part of a final judgment. Once advised of this claim, the Respondents had every opportunity to determine, through discovery or a review of their own

⁵ In cases where a moving party moves for dismissal under CR 12(c), “on the pleadings,” but presents and relies upon matters outside the pleadings, the motion is treated as a summary judgment motion under CR 56. Matters outside the pleadings were not submitted in connection with Respondents’ CR 12 (c) motion.

file material, the factual and legal basis for Fidelity's requested relief.

As discussed in detail below, the law does not require a party to articulate in its pleadings, the underlying factual or legal basis for an award of attorney's fees. Indeed, Washington courts have held, in some instances, that it is not even necessary to request recovery of attorney fees and costs in the prayer for relief in order to recover. (See, e.g., *State ex rel. A.N.C. v. Grenley*, 91 Wn. App. 919, 929-30, 959 P.2d 1130, 1136 (1998), *infra*.) The issue of whether to award attorney's fees and costs and in what amount, is rarely pertinent until the case has been concluded and the final amount at issue is established.

Fidelity's Complaint and Counterclaim Reply made it clear that an award of attorney's fees was part of the relief it was requesting at the conclusion of the case. The Respondents were advised of the attorney's fee claim in the prayer for relief set forth in Fidelity's pleadings, and from other motions (CP 201-202, 254). These motions and related documents made it clear that Fidelity was asserting a claim for reimbursement of its attorney fees based on the Escrow Instructions and not some other theory or statute. (See also, CP 90; CP 206; CP 252; CP 261-263.)

Washington, a notice pleading state, requires only that a plaintiff make a short and plain statement of its claim and a demand for relief, to put the defendant on notice. See CR 8(a). This Fidelity surely did. Once the “short and plain statement” is submitted, it is incumbent upon defending parties to use the discovery tools allowed under the court rules to flesh out the legal and factual basis for a plaintiff’s claims.

The Respondents did not prove that it was “beyond doubt” that Fidelity could prove no set of facts that would entitle it to its attorney fees. As articulated in detail below, Fidelity was entitled to reimbursement of its fees pursuant to the Escrow Instructions and Fidelity properly preserved its request for fees in its request for relief in the Complaint and in its Reply; as well as through the other pleadings filed in the case. The trial court therefore improperly granted Defendants’ motion for judgment on the pleadings.

2. Fidelity Was Entitled to Partial Summary Judgment on The Issue of Its Right to Recover Attorney’s Fees and Costs.

Likewise, and for the same substantive reasons set forth below, Fidelity was entitled to an order on summary judgment

granting its claim for attorney fees and costs in amounts to be determined.

The Court of Appeals reviews a summary judgment decision de novo, performing the same inquiry as the trial court. *Renner v. City of Marysville*, 145 Wn. App. 443, 448, 187 P.3d 283 (2008). When ruling on a summary judgment motion, the Court of Appeals, like the trial court, is to view all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Id.* The court may affirm or grant summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and the moving party was entitled to judgment as a matter of law. *Id.*

As described in detail below, Fidelity was entitled to reimbursement of its fees pursuant to the Escrow Instructions. Because Fidelity properly articulated its request for fees and costs in its request for relief in the Complaint and Reply, the trial court's order denying Fidelity partial summary judgment was in error. The Respondents offered no evidence or facts to support any argument that they were surprised or prejudiced by the manner in which the attorney's fee and costs request was presented. Fidelity asks that the Court of Appeals reverse the trial court, direct the entry of

partial summary judgment in favor of Fidelity, and remand for a determination of reasonable attorney fees and costs.

a. It Is Undisputed that According to the Agreement in the Escrow Instructions, Fidelity is Entitled to Reimbursement of Its Attorney Fees and Costs in Any Action Related to The Respondents' Transaction.

In its Complaint, Fidelity requested reimbursement of its attorney fees and costs, as well as “any additional or further relief which the court finds appropriate, equitable, or just” as part of its request for relief. CP at 5. Likewise, in its Reply to the Seller’s Counterclaim, Fidelity also requested its attorney fees, as well as “any additional or further relief which the court finds appropriate, equitable, or just” as part of its request for relief. CP at 48-49.

At no time during the underlying litigation did either of the Respondents assert that Fidelity was not entitled to its attorney’s fees and costs pursuant to the terms of the Escrow Instructions. Instead, Respondents relied on their “deficient pleading” arguments and contended that Fidelity was not entitled to an award of fees and costs based on the lack of detail attendant to Fidelity’s request for reimbursement of its attorney fees and costs. The Respondents’

arguments are not grounded in fact, law, or in equity, nor do they articulate any surprise or prejudice arising from the manner in which the attorney's fee/cost request was expressed.

b. Fidelity's claim for an award of attorney's fees and costs is not predicated on its status as a "Prevailing Party" in the litigation.

The applicable agreement—the Escrow Instructions—specifically provided that the Respondents (Buyer and Seller) would be jointly and severally liable for all of Fidelity's attorney's fees and in any litigation related to their transaction regardless of Fidelity's role or who prevailed in the action, as follows:

Disputes and Interpleader. Should any dispute arise between the parties, and/or any other party, concerning the Property or funds involved in the Transaction, the Closing Agent may, in its sole discretion, hold all documents and funds in their existing status pending resolution of the dispute, or join in or commence a court action, deposit the money and documents held by it with the court, and require the parties to answer and litigate their several claims and rights among themselves. **The parties jointly and severally agree to pay the Closing Agent's costs, expenses and reasonable attorney's fees incurred in any legal action arising out of or in connection with the Transaction or these instructions, whether such lawsuit is instituted by the Closing Agent, the parties, or any other person.** Upon commencement of such interpleader action and the deposit of all funds and documents of

the parties, the Closing Agent shall be fully released and discharged from all obligations to further perform any duties or obligations otherwise imposed by the terms of this escrow.

CP at 94 (Emphasis added.)

This contractual provision allows Fidelity to receive its fees and costs for being pulled into litigation for any reason related to the real estate transaction, regardless of who brought the lawsuit, what the issues were, or who prevails. *Id.*

Respondents Buyer and Seller have previously asserted that RCW 4.84.330 precludes an award of attorney's fees to Fidelity despite the express provision in the Escrow Instructions, because pursuant to RCW 4.84.330, contractual provisions providing for payment of attorney fees to one of the parties must be interpreted to provide fees to the "prevailing party" regardless of the language of the contract. See CP at 252 (Motion to Dismiss at 6 & n.6). In connection with this statute, the Respondents may argue that Fidelity was not technically the "prevailing party" because the Seller *voluntarily* dismissed its Counterclaim against Fidelity pursuant to CR 41. *Id.*⁶ This is an apples to oranges argument.

RCW 4.84.330 provides:

⁶ Respondents have relied on the authority of *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn. 2d 481, 200 P.3d 683 (2009), for this proposition.

In any action **on a contract** or lease ... where such contract or lease specifically provides that attorney's fees and costs, **which are incurred to enforce the provisions of such contract or lease**, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

RCW 4.84.330 (emphasis added).

But by its express terms, RCW 4.84.330 **only** applies to a suit **on a contract to enforce** the terms of the contract, where the contract being sued upon specifically provides for an award of attorney fees to one party "incurred to enforce the provisions of such contract." RCW 4.84.330. This statute requires that a contract providing for fees to be awarded to one party to enforce the contract, be reciprocal and available to whichever party prevails in the enforcement proceeding.

RCW 4.84.330 is inapplicable to this case. The escrow instructions do not "provide for fees incurred to enforce provisions of [the] contract." It is a simple indemnity clause designed to insure that Fidelity does not incur excess or unanticipated costs as the escrow agent. The interpleader and negligence counterclaim actions were not actions to *enforce* the Escrow Instructions as contemplated by RCW 4.84.330.

The provision for reimbursement of attorney's fees and costs described in the Escrow Instructions provides that the Buyer and Seller will indemnify Fidelity for its "costs, expenses and reasonable attorney's fees incurred in any legal action arising out of or in connection with the Transaction...." Based on the Respondents' arguments on this subject, Fidelity would never be entitled to reimbursement of its attorney fees if it did not "prevail" in an affirmative claim or defense based on the Escrow Instruction. But in most cases, Fidelity would not be in a position to "prevail," as it is a neutral third party.

The attorney's fee provision in the Escrow Instructions is essentially a contractual indemnity clause. This section of the escrow agreement does not predicate an award of fees on the *outcome* of the case; rather, the Buyer and Seller agreed that they would be jointly and severally liable to cover all of Fidelity's attorney's fees and costs in the event of a lawsuit relating to the "transaction." CP 326 (Declaration of Lisa Tyler.) Fidelity requires parties to an escrow to indemnify and hold them harmless from the fees and expenses that Fidelity may incur if it is dragged into a dispute about the underlying transaction. CP 325. Unlike RCW 4.84.330, which makes a contractual provision for attorney fees

incurred to enforce a contract reciprocal and available to the prevailing party in the enforcement action, the indemnity clause in this case is designed to apply where the escrow agent faces "any legal action" brought by "any party" as a result of "any legal action arising out of or in connection with the Transaction..." CP at 94. This provision is bargained for and impacts the cost of escrow proceedings. If Fidelity was not guaranteed reimbursement of its costs and fees in any potentially related litigation, it would be required to charge much more for its escrow services. See CP at 325-26 (Declaration of Lisa Tyler).

"Indemnity clauses are subject to fundamental rules of contractual construction, and are to be construed reasonably so as to carry out, rather than defeat, their purpose." *Northern Pacific R.R. Co. v. Sunnyside Valley Irrigation Dist.*, 85 Wn.2d 920, 922, 540 P.2d 1387 (1975).

There is no legal basis to allow RCW 4.84.330 and the case law interpreting it to transform a bargained for indemnification agreement into a "prevailing party provision." The Court must enforce the unambiguous language of the Escrow Instructions.

Courts from other jurisdictions facing the identical argument made in the past by Defendants - i.e., that a "reciprocal attorney fee

statute” like RCW 4.84.330 should be held to reverse the effect of a clearly one-sided and unilateral indemnity and hold harmless provision - have squarely rejected the Buyer’s and Seller’s position. See *Baldwin Builders v. Coast Plastering Corp.*, 125 Cal. App. 4th 1339, 24 Cal. Rptr. 3d 9 (2005) (Copy attached in “Appendix A”).

In *Baldwin*, the court addressed and disposed of an argument about the applicability of a statutory provision providing for reciprocal attorney fees (nearly identical to RCW 4.84.330) and an indemnity clause. Referring to the statute, the Court stated:

In any action on a contract, where the contract specifically provides that attorney’s fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney’s fees in addition to other costs.

Baldwin, 125 Cal. App. 4th at 1343-44 (citing and discussing Cal. Civ. Proc. § 1717(a)).

This rule of reciprocity is itself subject to an exception where the recovery of attorney fees is authorized as an item of loss or expense in an indemnity agreement or provision. **Because an indemnity agreement is intended by the parties to unilaterally benefit the indemnitee, holding it harmless against liabilities and expenses incurred in defending against third party claims, application of reciprocity principles would defeat the very purpose of the agreement.**

In requiring reciprocity of only those provisions that authorize the recovery of attorney fees "in an action on [the] contract," section 1717(a) expressly excludes indemnity provisions that allow the recovery of attorney fees as an element of loss within the scope of the indemnity.

Baldwin, 125 Cal. App. 4th at 1344 (internal citations omitted); (emphasis added).

As discussed in *Baldwin*, the intent of the parties' execution of the Escrow Instructions is clear: the Buyer and Seller are to pay any and all costs and attorney fees incurred by Fidelity in any way related to the transaction. The unilateral provision was bargained for and there is no legal or factual basis to import a bilateral intent through application of the incongruous RCW 4.84.330.

Where RCW 4.84.330 does not control, a voluntary dismissal is not intended to and does not preclude attorney fees to a defendant who has "prevailed" at that point. See *Andersen v. Gold Seal Vineyards, Inc.*, 81 Wn.2d 863, 868, 505 P.2d 790 (1973) (allowing fees following voluntary non-suit because a defendant who prevails is ordinarily one against whom no affirmative judgment is entered); *Hawk v. Branjes*, 97 Wn. App. 776, 780, 986 P.2d 841 (1999) (where agreement contains a bilateral attorney fees

provision, RCW 4.84.330 is inapplicable and a voluntary dismissal may warrant an award of fees).

RCW 4.84.330 does not apply in this case, and Fidelity was entitled to an award of attorney fees and costs at the termination of the litigation pursuant to the Escrow Instructions.

c. Fidelity Was Not Required to Plead Its Request for Attorney Fees At All, Let Alone the Specific Legal or Factual Basis For Attorney Fees.

The Respondents argued in the trial court that because Fidelity had not specifically articulated the factual and legal basis for its request for fees, it was procedurally prohibited from recovering attorney fees beyond those initially awarded for bringing the interpleader action. CP at 297-302 (Defendants' Motion for Judgment on the Pleadings). Specifically, the Respondents contend that because Fidelity didn't specifically identify the contractual "indemnity" claim as the basis for its right to an award of attorney fees and costs, no claim could be asserted and it was too late to amend any pleadings to clarify or assert the claim on that basis. CP at 300. The Respondents also contended that Fidelity's pleading of its request for attorney fees was insufficient because it

did not give them sufficient “notice” of Fidelity’s claim or the grounds on which it rested. *Id.* at 301.

But Washington case law on the pleading requirements for attorney fees did not require Fidelity to set out in its Complaint or its Reply the underlying authority or specific factual basis for its attorney’s fee request. According to Tegland, 14 Wash. Prac., Civil Procedure § 12:16, “[i]t is probably unnecessary to specify in the Complaint or answer the precise *basis* for demanding attorney fees (i.e., the specific statute, agreement, or equitable theory relied upon).” (citing *Beckmann v. Spokane Transit Authority*, 107 Wash. 2d 785, 733 P.2d 960 (1987).) Tegland goes on to note that, “in a few cases, the courts have dispensed with the pleading requirement altogether.” *Id.* (Emphasis added).

In *State ex rel. A.N.C. v. Grenley*, 91 Wn. App. 919, 929-30, 959 P.2d 1130, 1136 (1998), one of the cases to which Tegland refers, the Court of Appeals held as follows:

CR 8(a) requires that a pleading “shall contain ... a demand for judgment for the relief to which [the pleader] deems himself entitled.” CR9(g) requires that any demand for special damages also be specifically stated in the pleadings.

But under CR 54(c), “[e]xcept as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in

whose favor it is rendered is entitled, **even if the party has not demanded such relief in his pleadings.**” Alternatively, “Costs shall be fixed and allowed as provided in RCW 4.84 or by any other applicable statute.” CR 54(d). Thus, from the plain language of the civil rules, **the State may recover attorney fees if so entitled by statute or other recognized ground, even though it did not specifically request them in its pleadings.**

Former RCW 26.21 did not specify whether attorney fees must be specifically pleaded. But under RCW 4.84, Washington's costs statute, attorney fees are considered “costs” and may be awarded if so provided by statute, **agreement**, or other recognized ground of equity. Because the allowance of costs, including attorney fees, is governed by statute, it is not necessary that the plaintiff include a request for fees in the Complaint.

(Emphasis added; internal citations omitted).

In *Grenley*, the respondent appealed the trial court’s award of attorney’s fees because the State of Washington had not specifically pled a request for attorney fees or the underlying basis for its request. The Court of Appeals concluded that it was not necessary to plead the request for attorney fees because attorney fees are considered “costs” and may be awarded if so provided by statute, agreement, or other recognized ground of equity. *Id.* Because the allowance of costs, including attorney fees, is governed by statute, it is not necessary that a plaintiff include a request for fees in the Complaint. *Id.*

In the present case, Fidelity sought an award of attorney's fees, based upon the "agreement" of the parties.⁷ Fidelity requested attorney fees in its initial Complaint and in its Reply to the Seller's Counterclaim. Fidelity was required to do no more and is entitled to recover its fees.

Further, if more was required, which it was not, the appropriate remedy would have been to grant leave to amend the complaint. A plaintiff should be freely allowed to amend the complaint, in lieu of granting a dismissal, if it appears that by amending the complaint, the plaintiff may be able to state a cause of action and where no substantial prejudice would result. CR 15(a); *Caruso v. Local Union No. 690 of Intern. Broth. Of Teamsters*, 100 Wn.2d 343, 670 P.2d 240 (1983). If anything, that should have been the result permitted here. "The purpose of pleadings is to facilitate a proper decision on the merits, and not to erect formal and burdensome impediments to the litigation process." *Id.* at 349 (internal citations omitted).

⁷ The rule in Washington is that absent a contract, statute or recognized ground of equity, attorneys' fees will not be awarded as part of the cost of litigation. *Pennsylvania Life Ins. Co. v. Dep't of Employment Sec.*, 97 Wn.2d 412, 413, 645 P.2d 693 (1982); *Tradewell Group, Inc.*, 71 Wn. App. at 126, 857 P.2d 1053.

d. Fidelity Was Not Required to Plead Its Request for Attorney Fees As Special Damages.

Washington's pleading rules are short and sweet. CR 8 provides that a Complaint "shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled." Indeed, Washington courts apply this "notice pleading" standard to avoid technical dismissals of legitimate claims, even observing that "there is no necessity for stating the facts constituting a 'cause of action,'" so long as there is a "short and plain statement of the claim showing that the pleader is entitled to relief," and there is a demand for such relief. *Sherwood v. Moxee School District No. 90*, 58 Wn. 2d 351, 353, 363 P.2d 138 (1961). "All that is required in the Complaint is a generalized statement of facts from which the defendant may form a responsive pleading." *Id.* at 360 n.15 (internal citations omitted).

The Respondents/Buyer and Seller in this case signed and agreed to Escrow Instructions that provided that they would,

"jointly and severally agree to pay the Closing Agent's costs, expenses and reasonable attorney's fees incurred in any legal action arising out of or in connection with the Transaction or these instructions, whether such lawsuit is instituted by the Closing Agent, the parties, or any other person." CP at 94.

The Escrow Instructions agreement permits Fidelity to recover from both the Buyer and Seller, or either of them, the attorneys' fees and costs and expenses "incurred in any legal action" arising out of the transaction. It is undisputed that the parties signed the agreement and that Fidelity's interpleader action and the Seller's Counterclaim were legal actions arising from the transaction.

In another creative attempt to avoid their contractual promise to pay Fidelity's legal fees and expenses, the Buyer and Seller also assert that Fidelity's request for attorney fees is really a claim for "special damages" rather than a claim for "costs." Accordingly, the parties argue, as a request for "special damages," the claim had to be specifically pled in the Complaint pursuant to CR 9(g).

The assertion is not supported in fact or in law. Neither the Buyer nor the Seller can point to a case requiring a request for attorney fees based on a contract like the one at issue here to be pled as a demand for special damages. CR 9(g) provides that "[w]hen items of special damage are claimed, they shall be specifically stated." As noted above, an attorney's fee award is typically treated as a "cost" of litigation and not an element of "special damages." Once again, Professor Tegland provides guidance on the question of what constitutes special damages.

In broad outline, special damages arise in two types of cases. In the first, the special damages sought are for items that are in addition to the general damages the law normally awards to compensate the plaintiff for the injury sought to be redressed. In the second category of cases, the existence of special damages is an essential ingredient of the plaintiff's claim for relief; in other words, as a matter of substantive law recovery is impossible without demonstrating that the plaintiff sustained such damages. Cases in the second category include cases of defamation, disparagement of property, and other "disfavored" causes of action. *Wright and Miller, Federal Practice and Procedure: Civil* § 1310.

Familiar examples of special damages are future pain and disability, permanent injuries, medical expenses, damages due to delay, and damages for defamation. *Breskin, 9 Washington Practice: Civil Procedure Forms and Commentary* §§ 9.81 et seq. (3d ed.) (with forms for pleading special damages).

Attorney fees, when authorized by law as an element of damages, are generally considered special damages and must be specially pleaded. *Wright and Miller, Federal Practice and Procedure: Civil* § 1310. An award of attorney fees as an element of damages should not be confused as an award of attorney fees as an element of costs. On the latter point, see heading 15, below.

3A Wash. Prac., Rules Practice CR 8 (5th ed.) (Emphasis added).

Heading 15, of the same volume is essentially the same statement quoted from Volume 14, above:

Reasonable attorney fees are not awarded to the prevailing party as a normal element of costs, but reasonable attorney fees may be available pursuant to a special statute, pursuant to a contract between

the parties, or on a recognized equitable basis. See *Tegland*, 14A *Washington Practice: Civil Procedure* §§ 37:1 et seq. (2d ed.). In anticipation of this possibility, many plaintiffs routinely include a demand for reasonable attorney fees in the Complaint, and many defendants routinely include a similar demand in the answer.

It is probably unnecessary to specify in the Complaint or answer the precise basis for demanding attorney fees (i.e., the specific statute, agreement, or equitable theory relied upon).

And in a few cases, the courts have dispensed with the pleading requirement altogether. Nevertheless, it is usually good practice to specifically request attorney fees and to specify the basis, if known, in order to avoid subsequent quibbles about whether the opposing party was put on notice that attorney fees were being demanded.

(Internal citations omitted).

There is no legal authority, either directly on point or by analogy, for the Respondents' argument that Fidelity's request for reimbursement of its litigation expenses, as expressly agreed upon in the Escrow Instructions, is an element of special damages related to a specific cause of action. Fidelity is entitled to its attorney fees pursuant to the language of its contract and the trial court's ruling should therefore be reversed.

**e. Even if the Rules of Special Pleading Apply,
CR 54(c) Supersedes CR 9(g) in this Situation.**

Even if this Court concludes that Fidelity's request for an award of fees pursuant to the Escrow Instructions might be called a claim for "special damages" and not costs, CR 54(c) overrides any concerns about the pleading requirements of CR 9(g) and entitles Fidelity to an award of attorney fees.

CR 54(c) states in pertinent part that "[e]xcept as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

In the case of *Allstot v. Edwards*, 114 Wn. App. 625, 632, 60 P.3d 601, 604 (2002), the Court of Appeals specifically applied CR 54(c) to entitle a plaintiff to double damages despite the fact that he had not pled a request for double damages as required by CR 9(g) for special damages, and instead requested double damages for the first time in his trial brief two weeks before trial. The Court of Appeals concluded that despite the technical pleading failure, the plaintiff was nonetheless entitled to double damages:

While CR 9(g) does require that any demand for special damages be specifically stated in the pleadings, the trial court is also directed by CR 54(c) to grant relief to the entitled party “even if the party has not demanded such relief in his pleadings.” See *State ex rel. A.N.C. v. Grenley*, 91 Wash.App. 919, 930, 959 P.2d 1130 (1998). Accordingly, if the trial court had found merit in Mr. Allstot's statutory claim for double damages, it was obligated by CR 54(c) to grant that relief, even though the claim had not been included in the original pleadings. Further, because the parties argued the issue and the trial court ruled on it, it is treated as if it had been pleaded. *Id.* at 931, 959 P.2d 1130 (citing *Reichelt v. Johns-Marville Corp.*, 107 Wash.2d 761, 766, 733 P.2d 530 (1987)).

Allstot v. Edwards, 114 Wn. App. at 632.

The Court of Appeals confirmed the extended reach of CR 54(c) in *Bird v. Best Plumbing Group, PLLC*, 161 Wn. App. 510, 529, 260 P.3d 209 (2011), holding that whether the plaintiff:

[C]ould have amended his complaint is not material. The trial court is directed by CR 54(c) to grant relief to a party entitled to relief even if the party has not demanded such relief in his pleadings. CR 54(c) provides, “Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.” **Thus, if the trial court finds merit in a claim, the court is obligated by CR 54(c) to grant that relief even though the claim has not been included in the original pleadings.**

161 Wn. App. at 529 (emphasis added).

Regardless of any alleged pleading deficiencies, it is undisputed that Fidelity is legally entitled to recover its attorney's fees and costs related to the interpleader action that the Buyer and Seller precipitated based on the Escrow Instructions. The Respondents can point to nothing in this record that would support an argument that the state of the Appellant's pleadings in the trial court surprised them, prejudiced them, or somehow made it difficult for them to defend against the request that they do what they promised to do – pay Fidelity's fees in costs if litigation arose in connection with the Respondents' transaction.

The Court of Appeals therefore should reverse the trial court remand for a determination of reasonable fees and costs.

B. Fidelity is Entitled to Its Attorney Fees on Appeal.

A contractual provision that provides for an award of attorney fees at trial supports award of attorney fees on appeal. *Equitable Life Leasing Corp. v. Cedarbrook, Inc.*, 52 Wn. App. 497, 506, 761 P.2d 77 (1988).

The agreement at issue here, the Escrow Instructions, provided for Fidelity to recover its attorney fees and costs in any litigation arising out of the real estate transaction:

Disputes and Interpleader. Should any dispute arise between the parties, and/or any other party,

concerning the Property or funds involved in the Transaction, the Closing Agent may, in its sole discretion, hold all documents and funds in their existing status pending resolution of the dispute, or join in or commence a court action, deposit the money and documents held by it with the court, and require the parties to answer and litigate their several claims and rights among themselves. **The parties jointly and severally agree to pay the Closing Agent's costs, expenses and reasonable attorney's fees incurred in any legal action arising out of or in connection with the Transaction or these instructions, whether such lawsuit is instituted by the Closing Agent, the parties, or any other person.** Upon commencement of such interpleader action and the deposit of all funds and documents of the parties, the Closing Agent shall be fully released and discharged from all obligations to further perform any duties or obligations otherwise imposed by the terms of this escrow.

CP at 94 (Emphasis added.)

Based on the same arguments set forth throughout Fidelity's opening brief, Fidelity is entitled to reimbursement of its reasonable attorney fees and costs for each stage of this litigation pursuant to the Escrow Instructions signed by Buyer and Seller. Fidelity therefore is entitled to attorney fees on appeal, as well. RAP 18.1.

V. CONCLUSION

The Court of Appeals should reject the Buyer's and Seller's technical, procedural arguments to shirk their responsibilities under the Escrow Instructions to pay for Fidelity's attorney fees and costs

incurred in the underlying litigation resulting from the failed real estate transaction. The Respondents provide no substantive defense to the enforcement of the Escrow Instructions. The Escrow Instructions should be interpreted to support, not defeat, the express language of the agreement and the intent of the parties. Further, Fidelity has sufficiently preserved its request for attorney fees pursuant to its request for relief in the Complaint and Reply to Seller's Counterclaim.

Accordingly, Fidelity asks the Court of Appeals to reverse the trial court's order granting judgment on the pleadings and denying Fidelity's motion for summary judgment, and remand for a determination of reasonable attorney fees, including those incurred by Fidelity on appeal.

Respectfully submitted this 3rd day of December, 2012.



CHRISTON C. SKINNER, WSBA # 9515
KATHRYN C. LORING, WSBA # 37662

Appendix A

125 Cal.App.4th 1339
Court of Appeal, Fourth
District, Division 1, California.

BALDWIN BUILDERS, Cross-
complainant and Appellant,

v.

COAST PLASTERING CORPORATION et
al., Cross-defendants and Respondents.

No. D043422. | Jan. 21, 2005.

Synopsis

Background: After homeowners sued general contractor, general contractor cross-complained against subcontractors for indemnity and other relief. The Superior Court, San Diego County, No. GIC725825, Kevin A. Enright, J., entered judgment on jury verdict in favor of subcontractors and awarded subcontractors attorney fees and costs. General contractor appealed.

Holdings: The Court of Appeal, McIntyre, J., held that:

[1] attorney fee clause in indemnity provision in contract between general contractor and subcontractors was reciprocal, and

[2] subcontractors were entitled to recover fees and costs incurred in defending negligence claims against them.

Affirmed in part, reversed in part, and remanded.

West Headnotes (3)

[1] Indemnity

☞ Attorney fees

Statutory rule of reciprocity for contractual attorney fee provisions is subject to an exception where the recovery of attorney fees is authorized as an item of loss or expense in an indemnity agreement

or provision. West's Ann.Cal.Civ.Code § 1717(a).

20 Cases that cite this headnote

[2] Indemnity

☞ Attorney fees

Attorney fee clause in indemnity provision of contract between general contractor and subcontractors, expressly requiring subcontractors to pay all costs including attorney fees incurred in enforcing indemnity agreement, contemplated action between the parties and thus fell within statute requiring reciprocity of contractual attorney fee provisions, rather than falling within exception where recovery of attorney fees was authorized as item of loss in indemnity agreement. West's Ann.Cal.Civ.Code § 1717(a).

See 7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 162 et seq.; Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2004) ¶ 17:161.5 et seq. (CACIVEV Ch. 17-E); Cal. Jur. 3d, Damages, § 121 et seq.; Cal. Civil Practice (Thomson/West 2003) Procedure, § 33:28 et seq.

26 Cases that cite this headnote

[3] Indemnity

☞ Attorney fees

Attorney fee clause in indemnity provision of contract between general contractor and subcontractors, expressly requiring subcontractors to pay all costs including attorney fees incurred in enforcing indemnity agreement, allowed prevailing subcontractors to recover not only costs incurred in enforcing agreement, but also costs incurred in defending against allegations of their negligence as to underlying construction defects. West's Ann.Cal.Civ.Code § 1717(a).

21 Cases that cite this headnote

Attorneys and Law Firms

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Campbell, Volk & Lauter, Campbell, Souhrada & Volk, Ronald J. Lauter, San Diego, Nannette Souhrada and Michael M. Freeland for Cross-defendant and Respondent Coast Plastering Corporation.

Parker Stanbury and Timothy D. Lucas, Los Angeles, for Cross-defendant and Respondent T & M Framing, Inc.

Opinion

McINTYRE, J.

1341** The issue in this case is whether a unilateral attorney fee clause included in an indemnity agreement between a general contractor and a subcontractor is subject to the reciprocity principles set forth in Civil Code section 1717, subdivision (a) (section 1717(a)). We conclude that where, as here, the contractual provision is not included as an item of loss or expense under the indemnity agreement, but instead separately provides for the recovery of attorney fees incurred in enforcing the *11** indemnity agreement, section 1717 applies and authorizes a prevailing indemnitor/subcontractor to recover attorney fees so incurred. We also hold that where the indemnitor/subcontractor is required to prove its lack of fault in defending against a claim under the indemnity, it is entitled to recover the fees incurred therefor.

***1342 FACTUAL AND PROCEDURAL BACKGROUND**

Baldwin Builders (Baldwin) was the developer of Paloma, a seven-subdivision, 239-unit community in San Marcos. Coast Plastering Corporation (Coast) and T & M Framing, Inc. (T & M) entered into subcontracts with Baldwin to perform certain construction work in the Tierra subdivision of the Paloma development. Although the subcontracts included general indemnity provisions, Coast and T & M each executed a stand-

alone indemnity agreement with Baldwin, agreeing in relevant part:

“The undersigned Subcontractor hereby agrees to indemnify [Baldwin] ... against any claim, loss, damage, expense or liability arising out of acts or omissions of Subcontractor in any way connected with the performance of the subcontract ... unless due solely to [Baldwin's] negligence.... Subcontractor shall, on request of [Baldwin] ... but at Subcontractor's own expense, defend any suit asserting a claim covered by this indemnity. Subcontractor shall pay all costs, including attorney's fees, incurred in enforcing this indemnity agreement.”

In November 1998, the Paloma homeowners filed this action against Baldwin for construction defects in the homes. Baldwin requested that Coast and T & M defend and indemnify it against the claims, but after they refused, it cross-complained against them for express contractual indemnity, implied indemnity, equitable indemnity, contribution, breach of contract, breach of implied warranty, breach of express warranty, negligence and declaratory relief. Prior to trial, the court entered an order bifurcating the trial so that the claims of the homeowners in the Tierra subdivision, and Baldwin's related cross-claims against its subcontractors, would be conducted first. The parties stipulated that the issue of attorney fees and costs between Baldwin and its subcontractors would proceed in a post-verdict bench trial. At trial, the jury returned special verdicts finding that Baldwin was negligent, but neither Coast nor T & M was negligent, in performing their work in the subdivision.

Thereafter, Coast and T & M filed motions and cost memoranda seeking to recover in part attorney fees and nonstatutory costs based on the indemnity agreements. (They also sought statutory costs, which are not at

issue on this appeal.) In support of their requests, Coast and T & M argued that the indemnity agreements' attorney fee provisions were subject to the reciprocity principles of section 1717(a), thus entitling them to recover fees and nonstatutory costs notwithstanding the unilateral language of the agreements. They sought to recover all of their costs and fees incurred in defending against Baldwin's claims. Baldwin opposed these arguments, vigorously contending that attorney fee provisions in the indemnity agreements were not subject to section 1717(a).

*1343 After oral argument, the court issued an order awarding Coast \$218,832.43 in attorney fees and \$63,894.06 in nonstatutory costs and T & M \$65,793.88 in attorney fees and nonstatutory costs. The court held that although the attorney fee provisions were contained in the indemnity agreements, they authorized recovery of "attorney's fees and costs incurred to enforce **12 the indemnity agreement, as opposed to fees [and costs] incurred to defend or indemnify against claims asserted against Baldwin" and thus were subject to reciprocity under section 1717(a). Baldwin moved for reconsideration, reiterating its earlier arguments and arguing alternatively that, to the extent section 1717(a) applied, Coast and T & M were only entitled to recover fees and nonstatutory costs incurred in enforcing the indemnity provision. The court denied the reconsideration motion based on Baldwin's failure to establish new or different facts or law, although it also indicated that it would have rejected Baldwin's arguments on the merits as well. The court awarded Coast an additional \$2,500, and T & M an additional \$1,000, in attorney fees and thereafter entered judgment, from which Baldwin now appeals. (In the proceedings below, the parties and the trial court implicitly assumed that the recoverability of nonstatutory costs pursuant to the attorney fee clauses was co-extensive with the recoverability of attorney fees. The parties' appellate briefs are based on the same implicit assumption. Because the parties have not raised any separate issue regarding the recoverability of nonstatutory costs, we will assume, without deciding, that the parties' assumption is correct.)

DISCUSSION

1. Recoverability of Fees

A party who prevails in a civil action is entitled to recover its costs as a matter of right unless otherwise provided by statute. (Code Civ. Proc., § 1032, subd. (b); see *Lincoln v. Schurgin* (1995) 39 Cal.App.4th 100, 104, 45 Cal.Rptr.2d 874.) However, California law generally requires that a party to a lawsuit pay its own attorney fees, regardless of whether it prevailed in the action. (Code Civ. Proc., § 1021; *Trope v. Katz* (1995) 11 Cal.4th 274, 278–279, 45 Cal.Rptr.2d 241, 902 P.2d 259.) An exception to this general rule is recognized where a contract, statute or other law specifically authorizes the prevailing party to recover attorney fees. (Code Civ. Proc., § 1033.5, subd. (a)(10); see also *Santisas v. Goodin* (1998) 17 Cal.4th 599, 606, 71 Cal.Rptr.2d 830, 951 P.2d 399.) Where the recovery of attorney fees is authorized by a contract, the agreement will generally be subject to section 1717(a), which provides in part: "*In any action on a contract, where the *1344 contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.*" (Italics added.)

[1] This rule of reciprocity is itself subject to an exception where the recovery of attorney fees is authorized *as an item of loss or expense* in an indemnity agreement or provision. (*Campbell v. Scripps Bank* (2000) 78 Cal.App.4th 1328, 1337–1338, 93 Cal.Rptr.2d 635; *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949 971–973, 17 Cal.Rptr.2d 242 (*Myers*); *Appalachian Ins. Co. v. McDonnell Douglas Corp.* (1989) 214 Cal.App.3d 1, 42–44, 262 Cal.Rptr. 716.) Because an indemnity agreement is intended by the parties to unilaterally benefit the indemnitee, holding it harmless against liabilities and expenses incurred in defending against third party tort claims (see Civ.Code, § 2772), application of reciprocity principles would defeat the very purpose of the agreement. (*Myers, supra*, 13 Cal.App.4th at p. 973,

17 Cal.Rptr.2d 242.) In requiring reciprocity of only those provisions that authorize the recovery of attorney fees “in an action on [the] ****13** contract,” section 1717(a) expressly excludes indemnity provisions that allow the recovery of attorney fees as an element of loss within the scope of the indemnity. (*Myers*, at p. 971, 17 Cal.Rptr.2d 242.)

[2] Here, the attorney fee provisions are set forth in the parties' indemnity agreements and thus the paramount issue in this case is whether those provisions are attorney fee clauses that section 1717(a) requires to be reciprocal or are instead an element of loss within the scope of the indemnity agreements, thus rendering the statute inapplicable. There is no question that if Baldwin had been entitled to recover attorney fees incurred in defending against the homeowners' claims pursuant to the indemnity agreements (see Civ.Code, § 2778, subd. (3)), section 1717(a) would not have applied to create a reciprocal right on the part of Coast and T & M to recover attorney fees incurred in defending claims against them arising out of their work under the subcontracts. (See *Campbell v. Scripps Bank*, *supra*, 78 Cal.App.4th at pp. 1337–1338, 93 Cal.Rptr.2d 635; *Myers*, *supra*, 13 Cal.App.4th at p. 973, 17 Cal.Rptr.2d 242; *Appalachian Ins. Co. v. McDonnell Douglas Corp.*, *supra*, 214 Cal.App.3d at pp. 42–44, 262 Cal.Rptr. 716; *Meininger v. Larwin–Northern California, Inc.* (1976) 63 Cal.App.3d 82, 85, 135 Cal.Rptr. 1.) However, the indemnity agreements here not only provide Baldwin with a right to indemnity for liabilities to third parties and expenses ***1345** including attorney fees) arising out of the subcontract work, but they also specify that Coast and T & M are required to pay Baldwin “all costs, including attorney's fees, incurred in enforcing this indemnity agreement.” (Italics added.)

By contrast to the general provisions requiring Coast and T & M to indemnify Baldwin in the event of third party claims, the attorney fee clauses unambiguously contemplate an action *between the parties* to enforce the indemnity agreements (a point that Baldwin's counsel recognized at oral argument in the proceedings below) and thus section 1717(a) would appear to be applicable. (See *Continental Heller Corp. v. Amtech Mechanical Services, Inc.* (1997) 53 Cal.App.4th 500, 508–509, 61 Cal.Rptr.2d 668.) Notwithstanding the unambiguous language of the clauses, however,

Baldwin contends that the analysis of *M. Perez Co., Inc. v. Base Camp Condominiums Assn. No. One* (2003) 111 Cal.App.4th 456, 463, 3 Cal.Rptr.3d 563 (*Perez*), establishes its contention that the attorney fee clauses are nonetheless an element of damage within the scope of the indemnity and thus not subject to section 1717(a).

In *Perez*, the general contractor and the owner of property to be developed entered into an indemnity agreement that provided in part that the general contractor was required to indemnify the owner against third party claims arising from the general contractor's performance under the construction agreement. The indemnity agreement also included an “obligation [by the general contractor] to ‘[r]eimburse [the owner] ... for any and all legal expense incurred’ in connection with any action covered by the indemnity provisions or to enforce the indemnity.” (*Perez*, *supra*, 111 Cal.App.4th at p. 463, 3 Cal.Rptr.3d 563, italics added.) The general contractor prevailed at trial and sought unsuccessfully to recover its defense costs, including attorney fees, incurred in the litigation. After the trial court denied its request, the general contractor appealed, arguing that because the owner's complaint had included a request for attorney fees pursuant to the construction contract, the owner was judicially estopped to deny that the agreement contained a prevailing-party-attorney-fee provision. (*Ibid.*)

****14** In the language on which Baldwin now relies, the *Perez* court observed that the general contractor was not asserting a direct right to recover attorney fees pursuant to the indemnity provision and theorized that this was because the general contractor “[n]o doubt recogniz[ed] that the indemnity provisions ... [did] not constitute a prevailing-party-attorney-fee provision [subject to section 1717(a).]” (*Perez*, *supra*, 111 Cal.App.4th at p. 463, 3 Cal.Rptr.3d 563, citing ***1346** this court's decision in *Campbell v. Scripps Bank*, *supra*, 78 Cal.App.4th at p. 1337, 93 Cal.Rptr.2d 635.) Baldwin's reliance on this language is misplaced, however, because the court's passing comment is dicta and does not provide persuasive authority that section 1717(a) is inapplicable to the attorney fee clauses being challenged here. (*Western Landscape Construction v. Bank of America* (1997) 58 Cal.App.4th 57, 61, 67 Cal.Rptr.2d 868.)

Even if the language in *Perez* was not dicta, however, we would reject Baldwin's argument on its merits. We agree with the *Perez* court's conclusion that the indemnity provision allowing the recovery of attorney fees incurred in defending against third party claims under the construction contract was not within the purview of section 1717(a); however, to the extent the opinion can be read as holding that the indemnity provision's authorization of the recovery of attorney fees in a direct action to enforce that provision was also not subject to section 1717(a), we simply cannot agree with such an interpretation of the contractual language and the statute. (*Continental Heller Corp. v. Amtech Mechanical Services, Inc.*, *supra*, 53 Cal.App.4th at pp. 508–509, 61 Cal.Rptr.2d 668.)

Here, the express language of the attorney fee clauses authorizes the recovery of attorney fees where one of the parties to the agreement brings an action to enforce the indemnity; such an action is one “on [the] contract” within the meaning of section 1717(a) and thus the attorney fee clauses are subject to the statutory requirement of reciprocity. (*Campbell v. Scripps Bank*, *supra*, 78 Cal.App.4th at pp. 1337–1338, 93 Cal.Rptr.2d 635.) The fact that the attorney fee clauses are set forth in the indemnity agreements does not alter this conclusion. (*Continental Heller Corp. v. Amtech Mechanical Services, Inc.*, *supra*, 53 Cal.App.4th at pp. 508–509, 61 Cal.Rptr.2d 668.)

2. Extent of Recoverable Fees

[3] Baldwin contends that, even if the attorney fee provisions were subject to section 1717(a), the statutory reciprocity principles would entitle Coast and T & M to recover only those fees and nonstatutory costs incurred in enforcing the indemnity agreements. Coast and T & M agree that the contractual language authorizes the recovery of only those attorney fees and nonstatutory costs incurred “in enforcing [the] indemnity agreement[s].” (See *Maryland Casualty Co. v. Bailey & Sons, Inc.* (1995) 35 Cal.App.4th 856, 864, 41 Cal.Rptr.2d 519; *Continental Heller Corp. v. Amtech Mechanical Services, Inc.*, *supra*, 53 Cal.App.4th at p. 507, 61 Cal.Rptr.2d 668.) However, they disagree with Baldwin's contention that as a matter of law the contractual language precluded the court from *1347 awarding them all of their fees and nonstatutory costs in defending this case. Specifically, they contend that they were required to show their

lack of fault in order to prevail under the indemnity agreements and thus the court properly awarded them all of their fees. We agree that the court could award Coast and T & M all of their fees and costs incurred to enforce the indemnity, including those fees and costs incurred in establishing **15 their lack of liability for the alleged defects in the Paloma development.

As this court recognized in *Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265, 1275–1281, 87 Cal.Rptr.2d 497 (*Heppler*), an indemnitor/subcontractor generally will not be liable or have a duty to defend its general contractor pursuant to the terms of an indemnity agreement unless it was negligent in performing its work under the subcontract. (*Id.* at p. 1278, 87 Cal.Rptr.2d 497 [holding that indemnity provisions are to be strictly construed against the indemnitee and that no-fault liability will not be imposed unless there is “specific, unequivocal contractual language to that effect”].) In *Heppler*, the court held that contracts providing indemnity for damage “ ‘arising out of or in connection with [indemnitor's] performance of the work’ ” or “ ‘growing out of the execution of the work’ ” did not “evidence a mutual understanding of the parties that the subcontractor would indemnify [the general contractor] even if its work was not negligent.” (*Id.* at pp. 1277–1278, 87 Cal.Rptr.2d 497.)

Like the agreements in *Heppler*, the indemnity agreements between the parties here do not contain unequivocal language requiring Coast and T & M to indemnify Baldwin even in the absence of their fault or negligence. Thus the success of Baldwin's attempts to enforce the indemnity agreements depended on whether Coast and T & M were at fault for any of the defects at the Paloma development and a showing of fault, or lack thereof, was a necessary component of any claim to enforce those agreements.

Baldwin cites *Myers*, *supra*, 13 Cal.App.4th 949, 17 Cal.Rptr.2d 242, in support of its argument that Coast and T & M cannot recover the fees and costs incurred in defending their performance under their respective subcontracts. There, the subcontractors on an office building construction project sued the property owner to foreclose on mechanic's liens they had filed against the property and the property owner in turn sued the general contractor. The general contractor cross-

complained against the property owner, alleging that the owner had failed to compensate it for the costs of numerous plan changes the owner requested during the course of construction. The general contractor prevailed on its claims against the property owner and the court awarded it \$350,000 in attorney fees pursuant to an indemnity agreement that included attorney fees as an element of loss or expense. The court of appeal struck the award of fees *1348 on the ground that the indemnity agreement was not subject to section 1717 and thus did not apply reciprocally for the benefit of the general contractor. (*Myers*, at p. 975, 17 Cal.Rptr.2d 242.)

In addition to arguing that it was entitled to reciprocal benefit of the indemnity agreement, the general contractor also contended that it was entitled to recover attorney fees pursuant to certain subcontracts that had been assigned to it by its subcontractors. The appellate court rejected this alternative argument, finding that although the general contractor prevailed on its claims against the property owner, it did not prevail on the subcontracts that included the attorney fee provisions. (*Myers*, *supra*, 13 Cal.App.4th at p. 975 and fn. 21, 17 Cal.Rptr.2d 242.) After so holding, the *Myers* court noted that even if the general contractor had been entitled to recover fees under the assigned subcontracts, the awards would be limited to fees incurred to enforce those subcontracts rather than all the fees the general contractor incurred in its action against the property owner under the general contract.

**16 Baldwin's reliance on the dicta in *Myers* is misplaced. In this case, the subcontractors seek to recover attorney fees they incurred in defending against Baldwin's attempts to enforce the indemnity agreements, pursuant to the attorney fee provisions in those agreements. They are not relying on the attorney fee provisions as a basis for recovering fees incurred to enforce some other contracts, as the general contractor was attempting to do in *Myers*. *Myers* is inapposite here and does not support a conclusion that Coast and T & M are precluded from recovering fees and costs incurred in establishing their lack of fault for the alleged construction defects.

Because Coast and T & M were required to establish that they were not negligent in performing the work under their respective subcontracts in order to defeat Baldwin's express indemnity claim, the trial court could properly have included the fees and costs incurred in making that showing as an element of the fees and costs incurred to enforce the indemnity agreements. As Coast and T & M were not pursued as defendants by the Paloma homeowners during most of the underlying proceedings, it appears that they would be entitled to recover a large portion of the fees they incurred. However, a cursory review of the record suggests that certain of the fees and costs the court awarded to Coast and T & M were unrelated to the enforcement of the indemnity agreements (that is, did not relate to the subcontractors' liability for defects in the development or to the indemnity agreements themselves). Accordingly, we remand the matter for further proceedings on the issue of what attorney fees and costs are properly characterized as relating to the enforcement of the indemnity agreements and thus recoverable under the express language of the attorney fee provisions of those agreements.

*1349 DISPOSITION

The judgment is reversed insofar as it grants Coast and T & M attorney fees and nonstatutory costs. The matter is remanded for further proceedings as to the amount of such fees and costs that Coast and T & M are entitled to recover under the attorney fee provisions in the indemnity agreements. In all other respects, the judgment is affirmed. Each party is to bear its own costs on appeal.

WE CONCUR: NARES, Acting P.J., and HALLER, J.

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STATE OF WASHINGTON

BY _____
DEPUTY

No. 43873-9-II

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

FIDELITY NATL TITLE INS CO.,

Appellant.

vs.

PORT ORCHARD FIRST LTD
PARTNERSHIP, et al,

Respondents.

DECLARATION OF
SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 3rd day of December, 2012, in the manner indicated below, I caused delivery of copies of the following documents:

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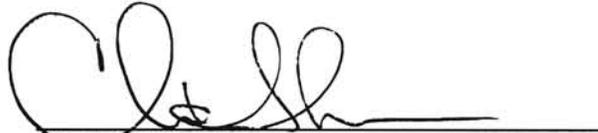
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