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DIVISION II

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STATE OF WASHINGTON

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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

APPELLANT'S REPLY BRIEF

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ORIGINAL

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I. INTRODUCTION

Respondents ask the Court to rely on a legally unsupported and vastly oversimplified, hyper-technical theory as to pleading requirements for requests for attorney fees based on contract—for the sole purpose of defeating Appellant Fidelity’s legitimate request for attorney fees incurred as a result of a failed sale for which Fidelity served as escrow agent. Meanwhile, Respondents fail to assert prejudice based on Fidelity’s request for fees, or to assert a substantive deficiency in the contractual provision at issue.

Fidelity asserts that there was no deficiency in its pleading; it requested attorney fees in both its complaint and in reply to the Seller’s counterclaim. But even if there was a technical deficiency in the pleadings, Fidelity asks the Court to reject Respondents’ strained and hyper-technical interpretation of Washington’s pleading rules, in favor of the principle embodied by CR 54(c)—parties should receive judgment for the relief to which they are entitled based on the applicable facts and law, even if they have not specifically demanded such relief in the pleadings.

Fidelity therefore asks this Court to reverse the trial court's premature and legally unsupported dismissal of Fidelity's request for attorney fees, and to remand the case to the trial court to determine and award reasonable attorney fees and costs.

II. CORRECTION OF FACTUAL MISREPRESENTATIONS BY RESPONDENTS

Respondents assert that Fidelity misrepresented its request for attorney fees in the pleadings. Respondents' Br. at 5. Fidelity did not. Fidelity requested attorney fees, both in its complaint and in its reply to the Seller's counterclaim. Fidelity specifically requested that the court award reasonable attorney fees and costs upon "disposition of the interpleader proceedings." CP at 5; CP at 48. Fidelity asked that the Seller's counterclaim be dismissed without an award of fees to Seller. CP at 48.

Contrary to Respondents' representation, Fidelity was awarded an interim award of attorney fees in January 2011; but that award was not a final award to Fidelity, which was required to remain a party to the litigation. CP at 130-33.

Fidelity did seek to amend its reply to the Seller's counterclaim—to add an affirmative defense discovered in the course of discovery, and to clarify the contractual basis for its

request for attorney fees because Seller *was already making assertions that it would refuse to pay Fidelity's fees*. CP at 205-07. Seller voluntarily dismissed its counterclaim against Fidelity following discovery and before trial. See CP at 203-04. Fidelity therefore prevailed against the Seller on the counterclaim as the term "prevailed" is generally understood. The Buyer and Seller voluntarily dismissed their claims against each other. CP 287-89.

But the interpleader was not "disposed of" until the trial court entered an order dismissing Fidelity as a party, absolving Fidelity of any responsibility for the funds, enjoining the parties from pursuing any further claim related to the funds, and disbursing the funds. CP at 284-86. However, Respondents fail to mention that in said order, the court specifically reserved Fidelity's right to bring a motion for attorney fees. *Id.* at 285.

III. ARGUMENT

A. Fidelity Is Entitled to Attorney Fees, Pursuant to the Escrow Instructions, As a Cost of Litigation.

1. Attorney Fees Generally Are a Cost of Litigation That Must Be Provided by Statute, Rule, Or Contract.

"In Washington, the question of whether attorney fees are costs or a penalty is settled. Attorney fees are considered costs of

litigation.” *Detonics “.45” Associates v. The Bank of California*, 97 Wn.2d 351, 354, 644 P.2d 1170 (1982). A litigant may recover only such attorney fees as a statute, rule or an agreement of the parties provides shall be taxed as costs in the action. *Macri v. City of Bremerton*, 8 Wn.2d 93, 102, 111 P.2d 612 (1941). The Washington Supreme Court has “consistently refused to award attorneys’ fees as part of the cost of litigation in the absence of a contract, statute, or recognized ground in equity.” *Seattle School District No. 1 of King County v. State*, 90 Wn.2d 476, 540, 585 P.2d 71 (1978) (emphasis added).

The fact that fees are provided for by an agreement of the parties does not alter the consideration of fees as a “cost” of litigation. Indeed, the “cost” statute, RCW 4.84.010 states that the “measure and mode of compensation of attorneys and counselors, shall be left to the agreement, expressed or implied, of the parties.” (Emphasis added). Further, RCW 4.84.020 specifically addresses calculation of “contracted attorneys’ fee,” and states that in “all cases . . . in which attorneys’ fees are allowed, the amount thereof shall be fixed by the court at such sum as the court shall deem reasonable...”

2. The Escrow Instructions Provides for Fees to Fidelity.

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 signed Escrow Instructions were provided to the parties on May 26, 2010, in support for Fidelity's Motion to Dismiss. See CP at 89-97. Fidelity clarified in its Motion for Leave to Amend filed on February 17, 2012, that its request for attorney fees to defend against the Seller's counterclaim and otherwise participate in the ongoing litigation was based on the parties' agreement in the Escrow Instructions to pay Fidelity's attorney fees incurred in any

legal action arising out of or in connection with the transaction, regardless of who initiated the action. CP at 196 (motion to amend); CP at 205-207 (Declaration of Thomas Sandstrom).

3. Respondents Create A False, Unsupported Dichotomy Between Fees Being Allowed as a “Cost” By Contract Pursuant to RCW 4.84.330, or Solely as a Separate Contract Claim for Special Damages.

Respondents present a false and unsupported dichotomy by asserting that attorney fees are permitted pursuant to a contract either: (1) as a “cost” of litigation solely to the prevailing party pursuant to RCW 4.84.330 (and the statutory definition of “prevailing party” contained therein); or (2) only as a separate contract claim and request for special damages.

Respondents assert that the only way that Fidelity could be entitled to attorney fees as a “cost” of litigation based on the escrow instructions is pursuant to RCW 4.84.330. See Respondents’ Br. at 11, 13. Specifically, Respondents assert that: “[t]he award of litigation costs is governed by RCW Ch. 4.84 Costs. And costs by agreement are covered by RCW 4.84.330.” Respondents’ Br. at 13. Respondents assert without authority that “[t]he reference to costs by “agreement” is to RCW 4.84.330. There is no common law provision for fees as costs by agreement.” Respondents’ Br. at 15.

But Respondents provide no legal authority for these assertions, which are not supported by the cost statute or case law on attorney fees and litigation costs.

a. **RCW 4.84.330 Does Not Govern All Contractual Provisions For Fees.**

Contrary to Respondents' unsupported assertions, RCW 4.84.330 does not cover all contractual provisions entitling parties to attorney fees as a cost of litigation. RCW 4.84.330 provides:

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).

While it should be unnecessary to state, RCW 4.84.330 does not apply to all contacts providing for recovery of attorney fees. "RCW 4.84.330 is only relevant in any given case to the extent that the statute overrides the parties' intent on matters covered by the statute." *Hawk v. Branjes*, 97 Wn. App. 776, 779, 986 P.2d 841 (1999) (emphasis added). Where a contract at issue does not come within the scope of RCW 4.84.330—because it does not

provide for fees to enforce the contract, or because it does not contain a unilateral right for fees to enforce the contract—RCW 4.84.330 does not apply. *See id.* at 779-80.

In *Hawk*, the Court of Appeals held that the statutory definition of “prevailing party” contained in RCW 4.84.330 did not apply because the contract at issue did not come within the statute’s scope and there was no evidence that the parties to the contract intended to be bound by the definition of “prevailing party” contained in RCW 4.84.330. *See id.* at 779-82. The right to attorney fees provided for by the contract at issue was nonetheless a right to attorney fees as a cost in litigation – not a separate claim for special damages. *See id.*

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, as a cost of litigation. *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); *Walji v. Candyco, Inc.*, 57 Wn. App. 284, 290, 787 P.2d 946 (1990) (interpreting “prevailing party”

in a commercial lease fee provision to allow attorney fees following voluntary dismissal).

Just as was the case in *Andersen and Walji*, RCW 4.84.330 is inapplicable to the agreement at issue, the Escrow Instruction. The Escrow Instructions do not “provide for fees incurred to enforce provisions of [the] contract,” as specified 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 be responsible for Fidelity’s “costs, expenses and reasonable attorney’s fees incurred in any legal action arising out of or in connection with the Transaction...” where Fidelity was not a party to the transaction. CP at 94. There is no evidence that the parties intended the “prevailing party” definition of RCW 4.84.330 to apply to Fidelity’s inclusion in actions arising out of the parties’ transaction. See *Baldwin Builders v. Coast Plastering Corp.*, 125 Cal. App. 4th 1339, 24 Cal. Rptr. 3d 9 (2005).¹

¹ Respondents make much of the fact that in *Baldwin* the defendant “cross claimed” for indemnity and attorney fees under the subject contract. Respondents’ Br. at 17. But the defendant contractor in *Baldwin* had to cross claim for indemnity and attorney fees, because its argument for fees was not against the *plaintiff*, a request that could have been made in its request for relief under the contract, it was against a third party/*co-defendant*, which necessarily had to be asserted as a “cross claim.” *Baldwin*, 125 Cal. App. 4th at 1342.

The fact that RCW 4.84.330 does not apply does not mean that the attorney fees provided for by the Escrow Instructions are not a “cost” of litigation.

b. RCW Ch. 4.84 Is Not the Exclusive Basis for Costs.

RCW Ch. 4.84 also is not the sole basis for attorney fees as “costs,” nor for other costs. RCW Ch. 4.84 does not apply where other legal authority expressly authorizes expanded cost recovery. *Johnson v. Horizon Fisheries, LLC*, 148 Wn. App. 628, 634, 201 P.3d 346 (2009). Likewise, numerous statutes and rules provide for attorney fees, and yet attorney fees are still denominated “costs” of litigation. See, e.g., RCW 49.48.030; RCW 49.60.030.

RCW 4.84.010 provides:

The measure and mode of compensation of attorneys and counselors, shall be left to the agreement, expressed or implied, of the parties, but there shall be allowed to the prevailing party upon the judgment certain sums for the prevailing party's expenses in the action, which allowances are termed costs, including, *in addition to costs otherwise authorized by law*, the following expenses. . .

RCW Ch 4.84 applies “only in the absence of an agreement concerning costs between the parties.” *Ernst Home Center v. Sato*, 80 Wn. App. 473, 491, 910 P.2d 486(1996). “[W]here the parties

have entered into an agreement regarding costs, the costs are 'otherwise authorized by law.'" *Id.*

Here, the contract at issue, the Escrow Instructions, still provides for payment of attorney fees as a cost of litigation, rather than a claim for special damages, as a separate legal basis from RCW Ch. 4.84, just as other contracts and statutes provide for attorney fees.

4. Fidelity Sufficiently Pled Its Request for Fees.

Fidelity adequately pleaded its request for attorney fees, both in its complaint and in reply to the Seller's counterclaim. In its initial complaint, Fidelity requested an order for relief including:

1. Declaring that plaintiff may discharge its obligations to the defendants with regard to the earnest money deposit by paying the earnest money deposit in the amount of \$50,000 into the registry of the court.
...
3. Dismissing plaintiff as a party to the interpleader action between the defendants.
4. Enjoining the defendants from further legal proceedings against plaintiff concerning the earnest money deposit.
5. Awarding plaintiff its reasonable costs and attorney fees as may be determined by the court upon disposition of the interpleader proceedings.

6. Awarding plaintiff any additional or further relief which the court finds appropriate, equitable or just.

CP at 5. In reply to Seller's counterclaim Fidelity again requested its attorney fees upon disposition of the interpleader. CP at 47-48.

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. CP at 130-33. The court did not dismiss the interpleader action or issue any of the other relief requested by Fidelity; it solely awarded interim attorney fees associated with bringing the interpleader action. *See id.*

Following the Buyer's and Seller's voluntary non-suits, Seller moved to release the escrow funds. CP at 247-52. The trial court granted the motion. CP at 285. In doing so, the trial court ordered that Fidelity's obligations to the defendants with regard to the earnest money was discharged and that Buyer and Seller were enjoined from further legal proceedings against Fidelity concerning the earnest money. CP at 285.

This was the first time that Fidelity was granted the relief it requested in its complaint and in reply to the counterclaim and the first time that the interpleader proceedings were "disposed" of—the

time at which Fidelity had requested that the Court award Fidelity its reasonable attorney fees. See CP at 5, 47-48. The trial court did not dismiss Fidelity as a party and instead expressly ordered that Fidelity reserved the right to bring a motion for attorney fees. See CP at 285.

Pursuant to Fidelity's complaint and its reply, on Fidelity's subsequent motion for summary judgment for attorney fees and following the "disposition of the interpleader proceedings," the trial court should have awarded Fidelity its reasonable attorney fees as requested in the pleadings and provided for by agreement.

Washington courts have not required requests for attorney fees to be pleaded, at all, in order to recover them. See *State ex rel. A.N.C. v. Grenley*, 91 Wn. App. 919, 929-30, 959 P.2d 1130, 1136 (1998) (holding that CR 8(a) requires pleadings to contain merely a demand for judgment for the relief to which the pleader claims he is entitled, and that under CR 54(c), regardless of the pleadings, every judgment should grant the relief to which the party is entitled). Contrary to Respondents' assertion, The Court of Appeals in *Grenley* did not rely on the attorney fees being provided for by a specific statute – it reasoned that attorney fees were considered a cost of litigation if provided for by statute, contract, or otherwise. See Respondents' Br. at 15. The Court of Appeals

stated that “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.” *Grenley*, 91. Wn. App. at 930. The Court of Appeals further held that regardless of any pleading deficiency, the State was entitled to its fees under CR 54(c). *See id.*

Respondents further assert that Fidelity “cannot cite a single case where fees were awarded as damages where a damages claim was never pled.” Respondents’ Br. at 17. Respondents’ statement is misleading, as fees generally are awarded as costs, not “damages.” But regardless, this issue most likely is not litigated or reported in published appellate decision because of its simplicity. Attorney fees are allowed as a cost of litigation if provided for by statute, rule, or agreement, period. Numerous unpublished cases refer to requests for attorney fees based on contracts or indemnity agreements. Fidelity notes one published case located in which an insured sought reimbursement of its attorney fees from its insurer for having to prove that its insurer had a duty to defend it, based on a reimbursement policy in its insurance contract. *See Travelers Ins. Co. v. North Seattle Christian and Missionary Alliance*, 32 Wn. App. 836, 844-46, 650 P.2d 250 (1982). The insured did not seek

attorney fees as a separate “contract claim” or request for “special damages,” but rather requested attorney fees as a defendant in a declaratory judgment action based on an agreement of the parties. *Id.* at 839, 844-46.

B. Even If Fidelity Was Only Entitled to Fees As A Separate “Claim,” That Claim Was Sufficiently Plead.

Even if Fidelity was required to allege a separate contract “claim” for attorney fees, its pleadings were sufficient to put Respondents on notice of such a claim. 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.” All that is required is a short and plain statement showing that the pleader is entitled to relief and a demand for relief; it is not necessary to articulate a “cause of action.” *Sherwood v. Moxee School District No. 90*, 58 Wn. 2d 351, 352-53, 363 P.2d 138 (1961). Dismissal for failure on the pleadings is disfavored; the “purpose of the rules of civil procedure is to obtain a decision on the merits as opposed to a mere pleading motion.” *Id.* at 359. “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).

In its complaint, and again in reply to the Seller's counterclaim, Fidelity request its attorney fees through disposition of the interpleader proceedings. CP at 5; CP at 48. The pleadings were sufficient to put the parties on notice that Fidelity sought attorney fees for bringing the interpleader case, and for all fees incurred through the final disposition of the proceeding. Further, Fidelity filed the escrow instructions in support of its 12(b)(6) motion to dismiss. CP at 89-96. Fidelity then clarified that its request for fees through completion of the litigation was based on the Escrow Instructions in its motion to amend, filed February 19, 2012. The parties briefed and argued Fidelity's entitlement to fees on that basis through August 2012. There can be no question that Respondents were on notice of Fidelity's request.

C. Even if Fidelity Was Only Entitled to Fees As "Special Damages," CR 54(d) Requires They Be Awarded as Part of the Relief to Which Fidelity Is Entitled, Which Respondents Has Not Refuted.

Respondents 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). Respondents can point to no 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. But even if this Court concludes that Fidelity's request for an award of fees pursuant to the Escrow Instructions might be denominated 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-Manville Corp.*, 107 Wash.2d 761, 766, 733 P.2d 530 (1987)).

Allstot v. Edwards, 114 Wn. App. at 632; *see also State ex rel. A.N.C. v. Grenley*, 91 Wn. App. 919, 929-30, 959 P.2d 1130, 1136 (1998) (holding that a party was entitled to attorney fees under CR 54(c), regardless of failing to plead the request, because every judgment should grant the relief to which the party is entitled, even if that party has not demanded such relief in the pleadings).

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.

Respondents have wholly failed to respond to this argument, and have no legal or factual basis to do so. The Court of Appeals therefore should reverse the trial court remand for a determination of reasonable fees and costs.

D. Respondents May Not Assert The Unenforceability Of The Indemnification Clause For The First Time On Appeal.

Neither the Buyer nor the Seller asserted before the trial court that the indemnification clause in the Escrow Instructions did

not apply or that there were issues of material fact preventing application of the clause to Fidelity's request for attorney fees. Respondents may not assert for the first time on appeal that the clause in the Escrow Instructions did not apply or that there were disputes of material fact preventing its application. A party may not raise a new issue or legal theory for recovery for the first time on appeal. RAP 2.5(a); *Hansen v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 482 (1992); *State v. Smith*, 130 Wn. App. 721, 728, 123 P.3d 896 (2005). To do so would deprive the parties' an opportunity to respond to the argument before the trial court and would deprive the trial court the opportunity to rule on the issue. *State v. Avendano-Lopez*, 79 Wn. App. 706, 710, 904 P.2d 324 (1995).

Further, even if this improperly raised issue is considered for the first time on appeal, Respondents' argument fails. While Fidelity may have been entitled to an award of attorney fees even if it was found by a trier of fact to have been negligent in performing a specific duty owed to the parties, that is not the case here. Fidelity was never found negligent. Instead, the Seller brought a counterclaim against Fidelity, pursued discovery through interrogatories, requests for production, and depositions, and then dismissed its claim after discovery and before a trial could be had.

As such, Fidelity did not seek its fees “resulting from its own negligence,” as Respondents assert. See Respondents’ Br. at 26. Fidelity sought its fees “incurred in any legal action arising out of or in connection with the Transaction.” CP at 94. Respondents cannot avoid their obligation to Fidelity by asserting that Fidelity “might have been” found negligent if Respondents had not voluntarily dismissed their counterclaim and allowed the action to proceed to trial. Indeed, as of the time that Respondents voluntarily dismissed the action, Fidelity had prevailed.

Respondents raise no legitimate issue concerning the enforceability of the indemnity provision at issue and Fidelity is entitled to their attorney fees incurred as a result of the purchase and sale transaction.

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

If the Court of Appeals concludes that Fidelity was entitled to its attorney fees before the trial court, it is also entitled to recover its fees for pursuing this 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.)

Respondents attempt to raise the same circular, misleading arguments about Fidelity not being entitled to fees because they did not make a contractual claim and assert entitlement to fees as special damages. Respondents' arguments fail for the same reasons set forth throughout Fidelity's opening and reply briefs.

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. RAP 18.1.

V. CONCLUSION

The Court of Appeals should reject Respondents' legally unsupported and 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 and Respondents have never demonstrated prejudice.

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, and to award reasonable attorney fees to Fidelity incurred on appeal.

Respectfully submitted this 27th day of February, 2013.



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STATE OF WASHINGTON

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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 27th of February, 2013, in the manner indicated below, I caused delivery of copies of the following documents:

Appellant's Reply Brief

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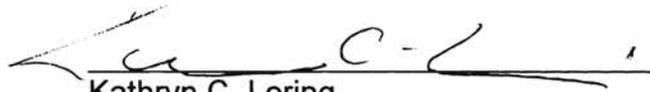
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