

No. 75141-7 – I

COURT OF APPEALS
DIVISION 1
OF THE STATE OF WASHINGTON

CHRISTINE A. TOLMAN,

Plaintiff/Appellant,

v.

KEITH S. JOHNSON, COLONIAL PARK, LLC,

Defendants/Respondents.

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2016 AUG -4 PM 3:40

APPEAL FROM THE SUPERIOR COURT
FOR SKAGIT COUNTY
THE HONORALBE BRIAN L. STILES

BRIEF OF APPELLANT TOLMAN

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I. INTRODUCTION

This appeal involves plaintiff's legal entitlement to attorney fees and costs under the Mobile Home Landlord Tenant Act ("MHLTA"), RCW 59.20 et. seq., and the parties' rental contract requiring an award of attorney fees and costs to the prevailing or non-breaching party.

The underlying issue centered on a dispute between the parties as to the legal duty to maintain a mobile home deck that was unsafe and collapsed. Defendants, as owners of the mobile home park, contended their contract renting the deck along with the lot, transferred the maintenance duties for the deck to the plaintiff, eliminating any duty or liability for defendants and rendering plaintiff solely at fault. Plaintiff countered that the duty to maintain the deck was a non-delegable, statutory duty imposed upon the defendants as owners under the MHLTA. The statute, RCW 59.20.135, was enacted in 1994 to address serious public safety concerns regarding the maintenance of permanent structures in mobile home parks; it imposed a non-delegable duty of maintenance on the landlord, prohibiting attempts to shift that duty to tenants.

On summary judgment prior to trial, plaintiff prevailed on these central issues in the lawsuit. The court granted plaintiff's motion establishing that the defendants owed the plaintiff a non-delegable duty to maintain the deck under the MHLTA, and that the defendants' rental

contract provision to the contrary was void, unlawful and in violation of that Act. Defendants did not appeal those decisions. Instead, defendants conceded liability upon summary judgment, and conceded that plaintiff incurred at least \$58,681.26 in medical expenses and wage loss.

Following summary judgment and before trial, plaintiff moved for attorney fees and expenses on the contract and the MHLTA as the prevailing party. The trial court deferred ruling until after trial on the full amount of damages. Plaintiff also prevailed at trial, with a final judgment rendered in her favor of \$109,681.26. Plaintiff then renewed her motion for attorney fees and expenses under the MHLTA and contract.

The trial court eventually denied plaintiff's legal entitlement to any attorney fees. The trial court did find, and defendants conceded, that plaintiff was the prevailing party at least for purposes of recovering limited, taxable costs under RCW 4.84.010. However, the trial court reframed the overall action as "essentially a premises liability suit for personal injuries," and denied plaintiff's legal entitlement to reasonable attorney fees and litigation expenses under the contract and MHLTA, necessitating this appeal.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in refusing to award plaintiff, as the prevailing and non-breaching party, her reasonable

attorney's fees and costs under the MHLTA and contract.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Plaintiff is legally entitled to an award of reasonable attorney fees and costs under the MHLTA and contract after establishing pretrial that the defendants owed and had violated a duty imposed by the MHLTA, and establishing that the contractual defense on which defendants relied violated the MHLTA and was unenforceable.

2. Whether Plaintiff is entitled to an award of reasonable attorney fees and costs incurred on appeal, where Plaintiff is entitled to an award of reasonable attorney fees and costs under the MHLTA and contract.

IV. STATEMENT OF THE CASE

1. Underlying Facts.

In 2012, the owner/landlord defendants of a mobile home park, Colonial Park LLC, entered into a Rental Contract with plaintiff Christine Tolman to lease her a mobile home space and deck for her newly purchased, used mobile home. CP 351, 156-63 (Lease agreement).¹ The Mobile Home Landlord Tenant Act, RCW 59.20 et seq., determines the “legal rights, remedies and obligations” arising from the lease agreement.

¹ At the time of her injury, Ms. Tolman was in the process of purchasing the mobile home itself from the defendants, who had purchased it from a prior

RCW 59.20.040. It imposes upon the landlord a non-delegable duty to maintain permanent structures and amenities, including decks, in mobile home parks. RCW 59.20.135. It further prohibits the landlord from transferring this duty to the tenant. *Id.* The duties and obligations imposed by the MHLTA are incorporated by law into the rental contract between landlord and tenant. RCW 59.20.040.

The MHLTA provides for attorney's fees and costs for the prevailing party for "any action arising out of" the Act. RCW 59.20.110. Further, the lease agreement drafted by defendants contained two separate provisions for attorney's fees:

[1] If ***any legal action arising out of this Agreement***, including eviction, the *prevailing party* shall be entitled to reasonable attorneys fees and costs. [2] If by reason of any breach or default on the part of either party hereto it becomes necessary for the other party hereto to employ an attorney, then ***the non-breaching party shall have and recover against the other party in addition to costs allowed by law, reasonable attorneys' fees and litigation-related expenses. . .***"

CP 223 (emphasis and brackets added).

2. **Procedural History**

In November 2010, a rotten wood deck on the property leased by Ms. Tolman from Colonial Park, LLC, collapsed under Christine

tenant. The sales agreement for the mobile home did not include the deck. CP 182-84; 164-67 (Purchase and Sale Contract and Note).

Tolman's right foot and shattered her ankle. CP 172. Plaintiff filed this lawsuit on July 25, 2012. CP 38-41. Her complaint expressly alleged that the defendants were liable for statutory violations under the MHLTA. CP 39 (Complaint ¶5.1). Plaintiff also sought damages, injunctive relief and any other relief which was just and reasonable. The prayer for relief included attorney's fees and costs under the MHLTA. CP 41.

The defendants denied the allegation that the MHLTA applied. CP 35 (Answer ¶9). They also denied that the deck itself was defective, and denied liability as well. CP 35 (Answer ¶8). Instead, they blamed Christine Tolman for her injuries. CP 35 (Aff. Def. ¶1).

The central issue in the case in determining defendants' liability was whether the defendants or Christine Tolman had the duty of maintaining the deck. The defendants placed their primary reliance on a provision of the rental agreement which purported to place on Ms. Tolman the duty of maintaining the deck. The contractual provision stated: "Maintenance of existing facilities and any new structure acquired by tenant on a home site is the responsibility of the tenant." CP 160.

a. Motion for Partial Summary Judgment

On September 18, 2015, plaintiff moved for partial summary judgment to establish that defendants owed plaintiff a non-delegable duty under the Mobile Home Landlord Tenant Act to maintain the deck, and to

eliminate the contractual defense through a ruling that shifting the duty to maintain the deck violated the MHLTA. Plaintiff predicated her motion on the express language of RCW 59.20.135, which places on the landlord the duty to maintain permanent structures in a mobile home park and prohibits the landlord from transferring this maintenance responsibility to the tenant. The statute also declares void any contractual provision attempting to transfer the landlord's responsibility of maintenance to the tenant. CP 340-48 (Motion for Partial Summary Judgment).

Defendants' opposition to the motion expressly relied upon the provision transferring provision of the rental agreement. It stated: "As part of the rental agreement, plaintiff expressly promised to maintain 'existing facilities and any new structures acquired by tenant.'" CP 277. Defendants argued that the deck was not a "permanent structure" within the meaning of RCW 59.20.135. They further argued that the statutory bar prohibiting the transfer of maintenance responsibility did not apply, and that the language in the contract transferring maintenance responsibility was enforceable. CP 278. The subject heading for the argument stated: "Decks constructed by tenants are not 'permanent structures' under the MHLTA and therefore, a Landlord may transfer maintenance responsibility." CP 278. Having placed the duty to maintain the structure on Ms. Tolman, defendants proceeded to blame her for

failing in this duty: “After acquiring the property, plaintiff did nothing to maintain the deck.” CP 277.

In her summary judgment reply, plaintiff focused on the statutory intent and language of RCW 59.20.135 to argue that the deck met the statute’s definition of “permanent structure.”

The statutory intent of RCW 59.20.135 is to protect the health and safety of mobile home park tenants by prohibiting mobile home park owners from transferring responsibility for the upkeep of the park’s permanent structures or “amenities” after they have been allowed to deteriorate. RCW 59.20.135(1) and (3). That’s exactly what happened here.

CP 377. Plaintiff discussed the leading case on RCW 59.20.135, *Villa Ass’n v. Hugglud Family Ltd. P’ship*, 163 Wn. App. 531, 547, 260 P.3d 906 (2011), which had rejected as illegal subterfuges to get around the Act.

The summary judgment hearing was held on October 16, 2015. Having fought the application of the MHLTA for over three years, and having vigorously contested the motion, defendants performed a complete about face at the hearing and conceded liability. The trial court entered an order granting plaintiff’s motion for partial summary judgment on defendants’ non-delegable duty to maintain the deck. CP 325-26. The Order stated: “Defendant at the hearing stipulated to liability and has withdrawn affirmative defenses.” CP 325. The summary judgment order

then continued: “Defendants owed plaintiff a non-delegable duty to maintain the deck and other permanent structures *pursuant to the Mobile Home Landlord Tenant Act (MHLTA)*.” CP 325 (Order of October 16, 2015, para. 2). (emphasis added).

The next paragraph of the order stated:

Defendants’ rental contract is void, unenforceable, unlawful *and in violation of the MHLTA* in that it unlawfully shifts their non-delegable duty to maintain the deck and other existing permanent structures on the mobile home lot to tenant plaintiff.

CP 325 (Order, para. 3, emphasis added). Defendants have not appealed from this order. The order established that the duty owed plaintiff by defendants arose out of the MHLTA, and it rejected as in violation of the MHLTA the defense that the non-delegable duty of maintenance could be shifted to the plaintiff.

Defendants conceded that plaintiff suffered injuries and medical expenses resulting from the rotten deck. CP 220. At trial, the jury was instructed without exception that plaintiff had incurred at a minimum \$58,681.26 in past wage loss and medical expenses. CP 58, 65.

b. Pretrial Motion for Attorney’s Fees and Costs

On October 21, 2015, plaintiff brought a Motion for Pretrial Fees and Costs under the attorney’s fees clauses in plaintiff’s rental contract, and the Mobile Home Landlord Tenant Act which by law is incorporated

into that contract. CP 350-61 (Motion). The motion was based upon the Court's judgment in plaintiff's favor that the MHLTA's duty of maintenance of permanent structures applied, and that that the lease provision shifting responsibility for maintenance was illegal and unenforceable under the MHLTA. The Court orally deferred ruling until after trial.

c. Trial and Jury Verdict.

A jury trial began on November 3, 2015. Having already ruled that that the duty under the MHLTA applied, and that the contractual attempt to transfer that duty was illegal under the MHLTA, the only issue left concerned the amount of damages.² On November 10, 2015 the jury returned a verdict awarding plaintiff \$109,681.26, a figure which included the award for past wage loss and medical expenses. CP 405-06.

The jury also heard plaintiff's separate claim brought under the Consumer Protection Act. The Court specifically instructed the jury under Washington law that the CPA claim was for injuries to property only, and did not include physical or pain and suffering injuries. CP 57 (Instruction No. 11); *Ambach v. French*, 187 Wn.2d 167, 173-74, 261 P.3d 405 (2009). The jury did not find that the CPA violation caused injury to property. CP

²The Court instructed the jury that the defendants' negligence had been established. CP 55 (Instruction No. 9).

85-86. Plaintiff is not appealing the CPA verdict, and is not seeking attorney's fees under the CPA.³

The Court entered judgment on the verdict November 10, 2015. CP 293-95.

d. Post-trial Motion for Attorney's Fees and Costs.

On November 20, 2015, plaintiff moved for an award of attorney's fees and costs under the attorney's fees provision of the MHLTA and the rental contract. CP 362-70. The motion supplemented the pre-trial motion for attorney's fees. On March 30, 2016, the trial court denied the motion for attorney's fees, with the following two sentence explanation:

This suit was essentially a premises liability suit for personal injuries. The jury decision that no injury was caused by the violation of the MHLTA from loss of use or the investigation precludes recovery for attorney fees and costs, except statutory fees and costs, under the MHLTA and CPA.

CP 43. Plaintiff timely filed her notice of appeal on April 26, 2016.

V. ARGUMENT

1. **Whether There is a Statutory or Contractual Basis for Attorney's Fees is a Question of Law Reviewable de Novo.**

“Whether to award costs and attorney fees is a legal issue reviewed

³Plaintiff filed a CR 50(b) motion for judgment as a matter of law on her CPA claim, and asked for attorney's fees under the CPA, RCW 19.86.090, assuming judgment in her favor was granted on the CPA claim. CP 566-76; 368-69. The Court denied the CPA motion under CR 50. CP 42-43. Plaintiff is not appealing that ruling, or asking this Court to award attorney's fees under CPA.

de novo.” *Sanders v. State*, 169 Wn.2d 827, 866, 240 P.3d 120 (2010). [T]he trial court's threshold determination on whether there is a statutory, contractual, or equitable basis for attorney fees is a question of law that we review de novo.” *Gander v. Yeager*, 167 Wn. App. 638, 646-47, 282 P.3d 1100 (2012); *accord CCR Partners v. Sunde*, 163 Wn. App. 473, 484, 260 P.3d 915 (2011).

Under Washington law, attorney’s fees may be awarded if provided by contract, statute or a recognized ground in equity. *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 525, 210 P.3d 318 (2009); *Panorama Village Condo. Owners Ass’n Bd of Dirs. v. Allstate*, 144 Wn.2d 130, 143, 26 P.3d 910 (2001). In this case, plaintiff is entitled to attorney’s fees and litigation costs pursuant to the MHLTA, RCW 59.20.110, and pursuant to each of the two attorneys’ fees provisions in the rental contract.

2. **Plaintiff is Entitled to Reasonable Attorney Fees under the Mobile Home Landlord Tenant Act as the Prevailing Party for “any Action Arising out of this Chapter.”**

The MHLTA broadly provides that prevailing parties are entitled to attorney’s fees. “In any action arising out of this chapter, the prevailing party shall be entitled to reasonable attorney's fees and costs.” RCW 59.20.110. The statute applies to “any action arising out of” the MHLTA. It is not limited to only certain types of action. It does not

exclude any category of actions such as actions for personal injuries. It applies to “any action” so long as the action arises out of the MHLTA.

The phrase “arising out of” has long been understood to be “unambiguous and has a broader meaning than ‘caused by’ or ‘resulting from’.” *Toll Bridge Authority v. Aetna Ins. Co.*, 54 Wn. App 400, 404, 773 P.2d 906 (1989); *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 409, 229 P.3d 693 (2010). It does not require the tort-equivalent finding of proximate cause. Instead, an action “arises out of” the contract or statute if it is arguably related to, “flowed from” or “grew out of” the contract in any capacity. *Id.*; Harris, *Washington Ins. Law*, § 25.01 (3rd Ed. 2010), collecting cases.

Under the MHLTA, “[a] prevailing party is one who obtains a judgment in its favor.” *Seashore Villa Ass’n v. Hugglund Family Ltd. Partnership*, 163 Wn. App 531, 547, 260 P.3d 906 (2011) citing *Riss v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 669 (1997). Plaintiff in this case obtained judgments arising out of the MHLTA both before trial and after trial. Those judgments are now final. Defendants have not appealed them. Failure to cross-appeal an issue precludes its review on appeal. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 83, 202, 11 P.3d 762, 778 (2000). Defendants have not challenged any findings of fact supporting the rulings, implicit or otherwise. “Unchallenged

findings are verities on appeal.” *Fuller v. Emp’t Sec. Dep’t*, 52 Wn. App. 603, 605, 762 P.2d 367 (1988).

a. **Plaintiff was a Prevailing Party Entitled to Attorney’s Fees for Violation of the MHLTA when Judgment was Entered for Relief in her Favor Prior to Trial.**

Plaintiff was entitled to attorney’s fees when she obtained an affirmative summary judgment and concession on liability two weeks prior to trial that the MHLTA established the duty owed plaintiff, that defendants were liable as a matter of law for violating the duty imposed by the MHLTA, and that the contract provision relied upon by defendants as their only defense to liability was invalid and illegal under the MHLTA. Plaintiff was entitled to the award pre-trial since she had obtained judgment in her favor based upon the statute, and was a prevailing party at that point. The trial court erred in refusing to rule either before trial or in post-trial motions that plaintiff was entitled to pre-trial attorney’s fees.

The Washington Supreme Court recently highlighted the central role of the MHTLA in resolving issues arising between tenant and landlord in mobile home parks. “The MHLTA controls the legal rights, remedies, and obligations arising from a rental agreement between a landlord and tenant regarding a mobile home lot.” *W. Plaza, LLC v. Tison*, 184 Wn.2d 702, 707, 364 P.3d 76 (2015); *see also* RCW

59.20.040 (“*This chapter [the MHLTA] shall regulate and determine legal rights, remedies, and obligations arising from any rental agreement between a landlord and a tenant regarding a mobile home lot and including specified amenities within the mobile home park*”) (emphasis added).

In 1994, the legislature amended the MHLTA to address specific issues of public health and safety in mobile home parks, issues directly raised in the present case. The 1994 amendment added the statute now codified at RCW 59.20.135.⁴ The statute states:

(1) The legislature finds that some mobile home park owners transfer the responsibility for the upkeep of permanent structures within the mobile home park to the park tenants. This transfer sometimes occurs after the permanent structures have been allowed to deteriorate. Many mobile home parks consist entirely of senior citizens who do not have the financial resources or physical capability to make the necessary repairs to these structures once they have fallen into disrepair.⁵ *The inability of the tenants to maintain permanent structures can lead to significant safety hazards to the tenants as well as to visitors to the mobile home park. The legislature therefore finds and declares that it is in the public interest and necessary for the public health and safety to prohibit mobile home park owners from transferring the duty to maintain permanent structures in mobile home parks to the tenants.*

⁴Laws of 1994, ch. 30.

⁵The present case aptly illustrates this particular justification of the legislation. The lease agreement identifies the contracting party as “Colonial Park LLC An Age 55 or Older Housing Community.” CP 156. Most of the tenants are senior citizens and retired, with modest but lower incomes. RP 14:25-15:5

(2) A mobile home park owner is prohibited from transferring responsibility for the maintenance or care of permanent structures within the mobile home park to the tenants of the park. A provision within a rental agreement or other document transferring responsibility for the maintenance or care of permanent structures within the mobile home park to the park tenants is void.

(emphasis added, omitting sections 3 and 4 of the statute).

Washington courts have vigorously enforced the public policies supporting the non-delegable duty imposed by this statute. In *Seashore Villa*, the Court held that a mobile home park owner could not avoid the statutory duty to maintain permanent structures by the subterfuge of transferring ownership of the structures to the tenants. 163 Wn. App. at 539-40.

The safety issues prompting the legislature to pass RCW 59.20.135 are precisely the issues raised by this case. The legislature determined that the landlord was in the best position to maintain permanent structures on the lot, whose deteriorating conditions might otherwise injure tenants and/or their visitors. The defendants here, however, had for years transferred this duty to the tenants under the contract. All tenants had the illegal provision in their leases. CP 8; RP 13:22-14:24. Defendants accordingly had no inspection or maintenance schedule for the park in general. They had done nothing to maintain Ms. Tolman's deck prior to her injury. CP 7; RP 6:14-22. In violation of the MHLTA, defendants

ignored their responsibility for maintaining Ms. Tolman's deck, as well as other permanent structures at the park.

The MHLTA and its provisions in RCW 59.20.135 regarding the non-delegable duty to maintain the deck were at the heart of the case from the very beginning. Plaintiff plead the MHLTA in the complaint. CP 39 (Complaint ¶5.1). Defendants focused their liability defense on the provision in the contract shifting the maintenance duty to plaintiff in violation of RCW 59.20.135. All of the briefing on both sides of the motion for partial summary judgment related to the interpretation of the MHLTA in one way or another. CP 340-48, 377-81 (Plaintiff's Motion and Reply); CP 275-81 (Defendants' Response).⁶

The key and controlling orders entered by the trial court on summary judgment pertained solely to the MHLTA. "Defendants owed plaintiff a non-delegable duty to maintain the deck and other permanent structures *pursuant to the Mobile Home Landlord Tenant Act (MHLTA)*." CP 326 (October 16, 2015, Order, para. 2). Coupled with the stipulation to liability and the concession regarding undisputed damages, the plaintiff at the hearing established defendants' liability for the duty imposed under the MHLTA. Only the extent of damages

⁶ Plaintiff invites the Court to read the briefing on summary judgment in order to see how the MHLTA was central to both plaintiff's case, and the defendants' ultimately failed defense.

resulting from the statutory breach remained for the jury.

Of particular significance is that plaintiff obtained affirmative relief in the form of a judgment that the duty-shifting provision in the contract was “void, unenforceable, unlawful and in violation of the MHLTA.” CP 325 (Para.3). That judgment is now final, and defendants did not appeal from it. Given that plaintiff obtained a judgment under and based upon specific provisions of the MHLTA, it is difficult to comprehend how the action did not “arise out of” the MHLTA. At this point, with a final judgment entered in favor of plaintiff based upon defendants’ violation of a statutory duty, plaintiff was a prevailing party for purposes of the attorney’s fees statute, entitled to fees.

b. Plaintiff was a “Prevailing Party” Entitled to Attorney’s Fees for Violation of the MHLTA when Judgment was Entered for Relief in her Favor after Trial.

The trial established the total amount of damages flowing from the violation of the duty imposed by RCW 59.20.135. There was no other duty on which the jury’s verdict was based. Defendants had stipulated to liability. The jury was instructed that liability had been established, and that past medical expenses and wage loss had been established. CP 55 (Instruction No. 9). The action on which plaintiff prevailed and was awarded damages arose directly out of the duty imposed by the MHLTA. Plaintiff is entitled to attorney’s fees and costs

under the statute for the entire litigation.

Nevertheless, the trial court denied attorney's fees, pre-trial as well as post-trial, because the action was one for personal injuries. The trial court cited no authority for a "personal injury" exception to the attorney's fees statute, nor did defendants in their opposition response.

In interpreting statutes, including the MHLTA, courts first look to plain language. *Seashore Villa, supra*, 163 Wn. App. at 538-39. Courts may not "rewrite or modify the language of the statute under the guise of statutory interpretation or construction." *Graham Thrift Group, Inc. v. Pierce County*, 75 Wn. App. 263, 267, 877 P.2d 228 (1994), citing *State v. McAlpin*, 108 Wn.2d 458, 465, 740 P.2d 824 (1987).

RCW 59.20.110 applies to "any action arising out of" the MHLTA. RCW 59.20.110 contains no language excluding successful personal injury claims from attorney's fees where the claim is based upon a violation of a duty imposed by the MHLTA. If the legislature had intended to exclude personal injury claims from the attorney's fees statute, it could have easily said so. For instance, the legislature has chosen to exclude personal injury damages from Consumer Protection Act claims, by limiting recovery to injury to "business or property." RCW 19.86.090; *Ambach v. French*, 187 Wn.2d 167, 173-74, 261 P.3d 405 (2009). No similar limitation or exclusion is found in the MHLTA

attorney's fees statute. To the contrary, the statute is written broadly to encompass "any action" arising out of the statute. That includes an action for damages where the damages claim is based upon the violation of a duty imposed by statute.

The litigation in this case vindicated the strong public health and safety purpose of RCW 59.20.135. Where the statute is intended to further important public purposes, the attorney's fees statute should be liberally construed to encourage vindication of those policies. *See Berryman v. Metcalf*, 177 Wn. App. 644, 682, 312 P.3d 745 (2013), and cases therein cited.

The trial court's reference to the CPA claim confuses the MHLTA and the CPA.⁷ The MHLTA and the CPA each have their own statutory attorney's fees provisions, respectively RCW 59.20.110 and RCW 19.86.090. Plaintiff did not prevail on the CPA claim at trial, and is not now seeking fees under the CPA.

CPA claims are limited to injuries to "business or property." RCW 19.86.090; *Ambach v. French*, 187 Wn.2d 167, 173-74, 261 P.3d 405 (2009). The MHLTA contains no such limitation. The failure to find an injury to "business or property" may preclude attorney's fees under

⁷The last sentence of the order states: "The jury decision that no injury was caused by the violation of the MHLTA from loss of use or the investigation

the CPA, but it does not bear upon the issue of attorney's fees under the MHLTA. Further, the attorney's fees provision of the CPA does not have the broad "any action arising out of" language of the MHLTA attorney's fees statute. CPA fees are limited to CPA actions.

3. **Plaintiff is Entitled to Reasonable Attorney's Fees under Defendants' Lease Agreement Provision for Attorney's Fees and Costs for "Any Legal Action Arising out of this Agreement."**

The attorney's fee provision in the Rental Agreement provides for an award of attorney's fees and costs in two circumstances, both of which apply in this case:

[1] If *any legal action arising out of this Agreement*, including eviction, the *prevailing party* shall be entitled to reasonable attorneys fees and costs. [2] If by reason of any breach or default on the part of either party hereto it becomes necessary for the other party hereto to employ an attorney, then *the non-breaching party shall have and recover against the other party in addition to costs allowed by law, reasonable attorneys' fees and litigation-related expenses. . .*"

CP 223 (emphasis and brackets added).

Washington follows "the objective manifestation theory of contracts, imputing an intention corresponding to the reasonable meaning of the words used." *In re Estate of Bernard*, 182 Wn. App. 692, 697, 332 P.3d 480 (2014). "An interpretation which gives effect to all of the words

precludes recovery for attorney fees and costs, except statutory fees and costs,

in a contract provision is favored over one which renders some of the language meaningless or ineffective." *Seattle-First Nat'l Bank v. Westlake Park Assocs.*, 42 Wn. App. 269, 274, 711 P.2d 361 (1985). Further, "courts do not have the power, under the guise of interpretation, to rewrite contracts the parties have deliberately made for themselves." *McCormick v. Dunn & Black, P.S.*, 140 Wn. App. 873, 891–92, 167 P.3d 610 (2007).

In addition, to the extent that the language in either of the contractual attorney's fees provisions is ambiguous and requires interpretation, the well-settled rule is that "the doubt created by the ambiguity will be resolved against the one who prepared the contract." *Felton v. Menan Starch Co.*, 66 Wn.2d 792, 797, 405 P.2d 585 (1965). Defendants drafted this contract not only for plaintiff, but for all of their mobile home park tenants. CP 8; RP 13:22-14:24. Any ambiguity as to the consequences of that choice under the contract must be resolved against them.

Under these well-settled rules of contract, Plaintiff is entitled to attorney's fees pursuant to both attorney's fees provisions in the contract.

First Sentence of Attorney's Fees Provision - The first sentence applies when there is an actual lawsuit—a legal action—which has been filed. It broadly provides for attorney's fees in "any legal action arising

under the MHLTA and CPA." CP 43.

out of this Agreement.” It does not exclude any type of action, such as actions seeking personal injury damages. It is not limited to an action for a breach of contract. It is not limited to enforcement of specific terms expressly set out in the agreement. Rather, it applies to *any action arising out of* the agreement.

The trial court’s interpretation of the first contractual provision reads the word “any” out of the phrase “any legal action.” Instead, the court reinterpreted the phrase by limiting the provision to only “certain legal actions” and specifically excluding actions for personal injury damages. The court presumably followed defendants’ argument below that “plaintiff overlooks the fact that the rental agreement does not authorize attorney’s fees in a personal injury action... .” CP 285.

The contract did not need to specifically authorize attorney’s fees in a personal injury action. It authorized attorney’s fees for “any legal action.” Personal injury actions are legal actions. The court’s ruling rendered the word “any” meaningless, and substituted in new limitations not found in the contract. The trial court violated the fundamental rules of contract interpretation discussed above.

As set out in the preceding argument, “arising out of” is construed broadly when used in contracts. This legal action arose out of the lease agreement in two fundamental ways. First, defendants breached the deck

maintenance duty imposed on them under the MHLTA, RCW 59.20.135. The trial court's October 16, 2015 order on summary judgment established the duty owed by defendants under the MHLTA:

Defendants owed plaintiff a non-delegable duty to maintain the deck and other permanent structures pursuant to the Mobile Home Landlord Tenant Act (MHLTA);

CP 325 (Order of October 16, 2015, para. 2). This is the same duty which was at issue at trial and which was breached by defendants.

The express language of the statute states that the MHLTA determines the rights, remedies and obligations imposed by the MHLTA arising out of any lease agreement:

This chapter shall regulate and determine legal rights, remedies, and obligations ***arising from any rental agreement*** between a landlord and a tenant regarding a mobile home lot and including specified amenities . . .

RCW 59.20.040 (emphasis added); *see also Tison*, 184 Wn.2d at 707 (“The MHLTA controls the legal rights, remedies, and obligations arising from a rental agreement between a landlord and tenant regarding a mobile home lot.”).

The MHLTA thus expressly incorporates its rights, remedies and obligations into any rental agreement covered by the Act. The statute makes explicit what is already well-settled Washington law regarding the incorporation of statutes into contracts:

It is the general rule that parties are presumed to contract with reference to existing statutes (*In re Estate of Clise*, 64 Wn.2d 320, 391 P.2d 547 (1964); *Caruthers v. Sunnyside Valley Irrig. Dist.*, 29 Wn.2d 530, 188 P.2d 136 (1947)), and ***a statute which affects the subject matter of a contract is incorporated into and becomes a part thereof.*** *Dopps v. Alderman*, 12 Wn.2d 268, 273-74, 121 P.2d 388 (1942).

Wagner v. Wagner, 95 Wn.2d 94, 98, 621 P.2d 1279 (1980) (emphasis added). In *Dopps v. Alderman*, *supra*, the Washington Supreme Court, quoting Justice Brandeis, stated:

‘Laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms. This principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge.’

12 Wn.2d at 273-74, quoting *Farmers' and Merchants' Bank, etc., v. Federal Reserve Bank*, 262 U.S. 649, 43 S.Ct. 651, 655, 67 L.Ed. 1157 (1923).

Under this well-settled legal principal, the requirements of the MHLTA are incorporated into and are part of the rental lease agreement relied upon by defendants, to their detriment. The non-delegable duty to maintain the deck, established by RCW 59.20.135, is part of the contract, as is the liability for all costs and fees.

The legal action here unquestionably arose out of the rental contract. Plaintiff unquestionably prevailed in recovering personal injury damages for breach of a duty which was part of the lease contract.

Therefore, plaintiff is entitled to attorney's fees and litigation costs under the contract.

Second, from the beginning of the litigation, defendants' central defense, including their defense to personal injury damages, was the contract and its illegal clause shifting to the tenant the landlord's statutory, non-delegable duty under the MHLTA to maintain the deck and all permanent structures in the park. Only when this defense collapsed on entry of the October 16, 2015 judgment order striking the unlawful lease term and establishing as a matter of law defendants' non-delegable duty to maintain under the MHLTA, incorporated by law into the lease, did defendants finally admit to liability. CPA 324-25.

At the least, plaintiff is entitled to attorney's fees under the first provision of the contract through the October 16, 2015 hearing, when the Court entered its order striking the contractual duty-shifting clause asserted by defendants. The provisions of the MHLTA were incorporated into the contract. Plaintiff's action addressed and obtained a remedy for this violation. *See Walji v. Candyco, Inc.*, 57 Wn. App. 284, 287-288, 787 P.2d 946 (1990) ("prevailing party" under attorney's fees provision in lease contract does not require a final judgment).

Second Sentence of Attorney's Fees Provision – The second sentence of the contractual provision constitutes a separate and

independent basis for an award of attorney's fees. It does not require the existence of a legal action at all, personal injury or otherwise. It provides for attorney's fees upon employment of an attorney for the reason of any breach. Plaintiff is entitled to attorney's fees and costs under this sentence as well. The non-delegable duty to maintain the deck area was incorporated into and became part of the lease agreement. *See* RCW 59.20.040 and case law cited above. Defendants breached that incorporated duty by the failure to maintain the deck, and conceded negligence with respect to that duty. As the non-breaching party, plaintiff has a right to attorney's fees from the defendants, the breaching parties.

4. Plaintiff Requests an Award of Reasonable Attorney fees and Costs on Appeal under RAP 18.1.

Where a statute or contract authorizes attorney's fees to the prevailing party, they are available on appeal as well as in the trial court. *Western Plaza, LLC v. Tison*, 184 Wn.2d 702, 718, 364 P.3d 76 (2015) (awarding attorney fees and costs on appeal to prevailing tenant under the MHLTA and the lease agreement). Both the MHLTA and the contract between the parties authorize the award of attorney's fees. Plaintiff is entitled to an award of reasonable attorney's fees and costs on appeal. Plaintiff requests an order to that effect pursuant to RAP 18.1, and requests remand to the trial court pursuant to RAP 18.1(i) for

determination of appellate attorney's fees and costs.

VI. CONCLUSION

For the reasons stated herein, Appellant Christine Tolman respectfully requests that this Court vacate the judgment of the trial court denying attorney's fees and costs and remand the case for an award of attorney's fees and costs for the entire litigation and on appeal.

DATED this 4th day of August, 2016.

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CERTIFICATE OF SERVICE

THE UNDERSIGNED hereby certifies that she caused delivery of the foregoing Brief to be served on Thursday, August 4, 2016 on the below counsel of record in the following manner:

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Via Email and U.S. Mail

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

Dated this 4th day of August, 2016, at Seattle, Washington.



CATHERINE GALFANO