

**FILED: August 20, 2014**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

PAUL S. PERRY,  
Plaintiff-Appellant,

v.

JOHN L. HERNANDEZ and TONI R. HERNANDEZ, husband and wife,  
Defendants-Respondents,

and

SHAWN HERNANDEZ and TONYA HERNANDEZ, husband and wife, dba American  
Residential Management Services; and JUSTIN HERNANDEZ,  
Defendants.

Douglas County Circuit Court  
08CV1717CC

A146728

Randolph Lee Garrison, Judge.

Argued and submitted on December 06, 2012.

Kenneth P. Dobson argued the cause for appellant. With him on the opening brief were Megan Cook and Chenoweth Law Group, PC. With him on the reply brief was Chenoweth Law Group, PC.

Dan G. McKinney argued the cause for respondents. With him on the brief was DC Law.

Before Armstrong, Presiding Judge, and Duncan, Judge, and De Muniz, Senior Judge.\*

DE MUNIZ, S. J.

Reversed and remanded.

\*De Muniz, S. J., *vice* Brewer, J. pro tempore.

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**DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS**

Prevailing party: Appellant

- No costs allowed.  
 Costs allowed, payable by Respondents.  
 Costs allowed, to abide the outcome on remand, payable by
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1 DE MUNIZ, S. J.

2 Plaintiff prevailed on a claim under the Residential Landlord and Tenant  
3 Act (RLTA), ORS 90.100-ORS 90.875, and sought an award of attorney fees. ORS  
4 90.255. The trial court denied attorney fees on the ground that plaintiff's counsel had not  
5 sufficiently apportioned his fees between plaintiff's fee-bearing claim and those claims  
6 for which attorney fees were not authorized. We conclude that the trial court erred in  
7 denying plaintiff's attorney-fees claim, and reverse and remand to the trial court with  
8 instructions to award plaintiff reasonable attorney fees.

9 Plaintiff brought claims under the RLTA, as well as common-law claims  
10 for negligence, nuisance, and negligent trespass against defendants Shawn and Tonya  
11 Hernandez, the property owners, and Justin Hernandez, the property manager, of the Old  
12 Town Laundry and Apartments in Reedsport. Plaintiff, an apartment tenant, claimed that  
13 defendants allowed carbon monoxide and other hazardous fumes from the in-building  
14 laundromat to leak into his apartment. He alleged that the noxious fumes sickened him  
15 and caused lasting injury. Plaintiff's RLTA claim was filed only against the owners,  
16 alleging that they had failed to maintain the premises in a habitable condition. *See* ORS  
17 90.320. Plaintiff brought his remaining common-law claims against all defendants.  
18 Plaintiff sought the same damages for all claims.

19 Before trial, the owners made an offer of judgment, which plaintiff  
20 accepted. The offer of judgment expressly included an award of "attorney[ ] fees and  
21 costs of suit." Thereafter, plaintiff submitted a fee petition attaching exhibits detailing all

1 legal services rendered. The owners objected to plaintiff's fee petition on the grounds  
2 that legal services had not been segregated between the RLTA claim and plaintiff's  
3 common-law claims. In response, plaintiff argued that apportionment was unnecessary  
4 because all claims arose out of the same common issues. The court awarded plaintiff  
5 costs, but refused to award attorney fees. On appeal, plaintiff challenges the trial court's  
6 denial of attorney fees, and we review for legal error.<sup>1</sup> *Bennett v. Baugh*, 164 Or App  
7 243, 247, 990 P2d 917 (1999), *rev den*, 330 Or 252 (2000).

8 Defendants' offer of judgment was "given pursuant to ORCP 54 E" and  
9 included "[p]laintiff's attorney[ ] fees and costs of suit." Because the offer of judgment  
10 did not include a specified amount of attorney fees, plaintiff's attorney fees needed to be  
11 determined by the trial court "as provided in Rule 68." ORCP 54 E(2); *see also For*  
12 *Counsel, Inc. v. Northwest Web Co.*, 329 Or 246, 254, 985 P2d 1277 (1999) (noting that  
13 if offer of judgment under ORCP 54 E does not include an amount for attorney fees and  
14 costs, trial court determines amount of fees and costs in accordance with ORCP 68).  
15 Although the offer of judgment authorized an award of attorney fees, the trial court  
16 denied plaintiff an award of attorney fees on the ground that plaintiff's counsel had not  
17 segregated fees authorized under the RLTA from those incurred in pursuit of plaintiff's  
18 common-law claims for negligence, negligent trespass, and nuisance. As a general  
19 matter, when a party prevails on a claim for which attorney fees are authorized and a

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<sup>1</sup> To the extent that defendant argues that the court's decision denying plaintiff an award of attorney fees should be reviewed for abuse of discretion, we reject that argument without written discussion.

1 claim for which they are not, the trial court must apportion the fees incurred for each  
2 claim. *Greb v. Murray*, 102 Or App 573, 576, 795 P2d 1087 (1990). However, there is  
3 an exception to that rule when the claims involve common issues. *Id.* That exception is  
4 based on the premise that attorney fees should not be subject to apportionment when the  
5 party entitled to fees would have incurred roughly the same amount of fees, irrespective  
6 of the additional claim or claims. *Bennett*, 164 Or App at 248; *see also North Marion*  
7 *Sch. Dist. #15 v. Acstar Ins. Co.*, 206 Or App 593, 605, 138 P3d 876 (2006), *rev den*, 344  
8 Or 670 (2008) (when claims present common issues, plaintiff is not required to segregate  
9 time spent on fee-bearing claim from nonfee-bearing claim).

10           According to defendants, plaintiff's common-law claims involved elements  
11 and statutes of limitation that are different from plaintiff's "habitability" claim under the  
12 RLTA. We agree that, in some circumstances, the fact that the elements and statutes of  
13 limitation for a nonfee-bearing claim differ from a fee-bearing claim may require the  
14 segregation of fees. However, that is not the circumstance here. All of plaintiff's claims--  
15 -RLTA, negligence, negligent trespass, and nuisance--arose from and were based on the  
16 hazardous conditions that defendants permitted to exist in the building. The evidence  
17 necessary to prove the RLTA claim and the common-law claims involved, for the most  
18 part, a common core of facts derived from investigation and review of records regarding  
19 the building's condition and deficiencies. Similarly, the development of evidence  
20 regarding plaintiff's damages--plaintiff's medical history and injuries--was equally  
21 applicable to all of the claims that plaintiff alleged. Under those circumstances, we

1 conclude that, because plaintiff would have incurred "roughly" the same fees to prove the  
2 RLTA claim irrespective of the common-law claims, segregation of fees was not  
3 necessary, and the trial court erred in concluding otherwise.

4           Plaintiff was entitled to an award of attorney fees based on the petition  
5 submitted. On remand, the trial court should consider the reasonableness of the requested  
6 fees and enter an appropriate attorney fee award.

7           Reversed and remanded.