IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CARGOLUX AIRLINES INTERNATIONAL, S.A., a Luxembourg corporation,	)	NO. 65498-5-I
	)	DIVISION ONE
Respondent,	)	
v.	)	UNPUBLISHED OPINION
SEA-TAC AIR CARGO L.P., a Washington limited partnership, acting by and through its general partner TRANSIPLEX (SEATTLE) INC., a Washington corporation,	)	
Appellant.	)	FILED: July 9, 2012

Leach, C.J. — In this commercial lease dispute, the landlord, Transiplex, challenges a number of the trial court's decisions. It claims the trial court erred by (1) finding the parties modified their lease, (2) excluding from evidence pleadings the tenant, Cargolux, previously filed in this lawsuit, (3) finding Transiplex could not charge its tenants certain litigation expenses, and (4) denying it attorney fees. Cargolux cross appeals from the dismissal of its claim that Transiplex breached a duty of good faith and fair dealing plus a denial of attorney fees. We reverse the dismissal of Cargolux's claim for breach of duty of good faith and the complete denial of attorney fees to Cargolux, otherwise affirm, and remand for further proceedings.

FACTS

Transiplex develops and operates air cargo facilities at airports. It does this by leasing ground at airports and then building terminal facilities that it leases. In 1982, Transiplex leased land from the Port of Seattle at Sea-Tac International Airport (Port). It constructed several cargo terminals and offices on the site.

In 1992, Transiplex leased a cargo terminal, "Building A," to Cargolux, a large all-cargo air carrier. The lease provided that Cargolux would pay building operation costs (BOCs), such as maintenance, heat, power, water, and "all other operating and administrative expenses of every kind and nature incurred by Landlord in the operation of [the] Terminal."

In 2000, Transiplex and Cargolux signed "Amendment No. 1" to their lease. This amendment provided for a one-year lease term that automatically renewed each year on December 1, unless a party gave one year's advance notice to the other to terminate.

In 2002, Transiplex and the Port amended their lease to reduce the property being leased by Transiplex by removing from the leasehold a portion of the terminal common area—a large concrete pad used for aircraft parking known as the "hardstand." The lease amendment provided that the hardstand "shall return to the Port's possession and the Port shall assume responsibility for the

management of aircraft movement [and] for providing cargo hardstand services as common use cargo hardstands to current and future tenants of [Transiplex]."

In 2005, the Port informed Transiplex of an increase in the ground lease rent. In response, Transiplex sued the Port, alleging that the Port did not give proper notice of the increase. In the same lawsuit, Transiplex also sought to rescind the 2002 lease modification and regain possession of the hardstand, contending that the Port failed to uphold its promise to provide a "nose-load" parking configuration on the hardstand. Transiplex obtained summary judgment in its favor on the rent increase, but the parties litigated the hardstand dispute for three more years. Eventually the Port prevailed on this issue. This court affirmed in an unpublished opinion.[1]

During this time, Transiplex invoiced Cargolux in 2006, 2007, and 2008 for extra lease BOCs incurred during the previous year. In 2006, Transiplex attributed a $4,588 increase to "disputing a late notice received from the Port of Seattle regarding a land rental increase." In 2007, Transiplex blamed an extra $11,757 in expenses on "legal expenses associated with the Port of Seattle appealing the original ruling regarding the land rental increase." Cargolux paid these BOC assessments without protest.

[1] Sea-Tac Air Cargo Ltd. P'ship (Transiplex) v. Port of Seattle, noted at 156 Wn. App. 1022, 2010 WL 2265315, at *13, review denied, 169 Wn.2d 1031, 241 P.3d 786 (2010).

On March 26, 2008, Cargolux received an additional BOC invoice for $76,565, attributed to "legal expenses associated with the Port of Seattle's breaches of the Transiplex (Seattle), Inc. Ground Lease at our facility at Sea Tac International Airport." Cargolux disputed these charges and requested a more-detailed statement and explanation. In response, Transiplex explained that it "was appropriate and necessary that we brought that action to protect the rights of the tenants as well as Sea-Tac Air Cargo LP." Cargolux did not pay the invoice.

On May 29, 2008, Transiplex sent to Cargolux a notice of intent to declare default. On May 30, Transiplex sent a separate letter to Cargolux, stating that its lease would expire on November 30 and asking if Cargolux wished to renew the lease by accepting new terms, including a five-year term and higher base rent.

On June 5, 2008, Cargolux responded to the default notice by suing Transiplex. In this lawsuit, Cargolux requested a temporary restraining order (TRO) to prevent an impending eviction-lockout from Building A for failure to pay the disputed BOCs. In Cargolux's complaint, it asserted occupancy rights through November 2009 under the lease's automatic renewal provision. After a court denied the TRO, Cargolux paid the 2008 BOCs "under protest." Later, Cargolux amended its complaint and asserted claims including breach of contract, breach of duty of good faith and fair dealing, breach of fiduciary duty,

and fraudulent misrepresentation.

On June 11, Cargolux responded to Transiplex's May 30 correspondence with a letter stating this correspondence breached the parties' lease because Transiplex failed to provide adequate notice to terminate.[2] The letter further stated that despite this view, Cargolux would vacate Building A by November 30 to avoid any sudden disruption to its business and hold Transiplex liable for "resulting and consequential damages from this breach."[3]

Cargolux also sought a declaratory judgment as to whether the lease allowed Transiplex to charge its Port litigation expenses as BOCs. In December 2008, the trial court decided by summary judgment that the hardstand legal expenses could not be charged as BOCs because the hardstand was not part of "the Terminal." The court decided that Transiplex could "pass through its legal expenses related to the Terminal as physically defined, but it may not pass through its legal expenses related to other property."

The court also decided as a matter of law that if the parties intended the 2008 letter exchange to modify the lease and terminate it early, then that exchange was sufficient to satisfy the lease's requirement that all changes be in

[2] Amendment No. 1 did not provide a mechanism for changing the rent. In the fall of 2007, the parties discussed a rent increase but never reached an agreement.

[3] Collectively, we refer to the May 30 and June 11 correspondence between Cargolux and Transiplex's representatives as the "2008 letter exchange."

writing. However, due to the parties' history of negotiating formal amendments to their lease, the court determined that genuine issues of material fact existed as to the parties' intent and a trial was needed to determine if the parties intended that the correspondence modify or repudiate the lease.

In October 2009, after another round of summary judgment motions from both sides, the trial court ruled that Transiplex properly charged all Port litigation expenses except those relating to the hardstand. The trial court refused to revisit the previous denial of summary judgment regarding the parties' intent to modify the lease with the 2008 correspondence. Two months later, the court granted summary judgment dismissing Cargolux's claims alleging breach of fiduciary duty and fraud but denied dismissal of its claim alleging breach of Transiplex's duty of good faith and fair dealing.

Trial began in January 2010. The trial court ruled in limine that Cargolux could not present evidence of the improperly charged hardstand litigation expenses to support its breach of duty of good faith claim. The court allowed that claim to proceed only "in context other than the specifics of the operating costs." After Cargolux presented no evidence supporting a breach of duty of good faith and rested its case, the court dismissed the claim for insufficient evidence.

A jury found that the parties modified the lease to terminate on November

30, 2008.[4] The court reviewed billing records and determined Transiplex owed Cargolux a $102,143 refund for improperly charged hardstand-related legal expenses. Both parties moved for attorney fees and costs. The court found that Cargolux prevailed but denied it fees because Cargolux failed to show the reasonableness of the fees it requested. Both parties appeal.

ANALYSIS

The issues Transiplex raises in this appeal fall into three categories: (1) modification of the parties' lease, (2) BOC charges for Port litigation, and (3) attorney fees. On cross appeal, Cargolux contends the trial court abused its discretion by dismissing its claim for Transiplex's breach of its duty of good faith and fair dealing and by failing to award it any attorney fees.

Lease Modification Issues

Transiplex claims that no lease modification occurred as a matter of law because it never offered to modify the lease and Cargolux never accepted any offer it made. Transiplex also claims the trial court failed to admit relevant evidence contradicting Cargolux's position on this issue at trial and that it improperly instructed the jury. Cargolux further contends the trial court's jury instructions commented on the evidence.

Whether Transiplex offered to modify the lease turns on the meaning of

[4] The jury also reached a verdict on two claims not relevant to this appeal.

its May 30 letter. This letter stated in part,

> Your lease with Transiplex and your rights to occupy the premises will expire on November 30, 2008. We are requesting that you indicate prior to June 11, 2008, if you wish to renew your lease with Transiplex under the following conditions:
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> | | |
> |---|---|
> | *Five Year Lease Term | |
> | *28,676 sq. ft. of Distribution space | |
> | @ $14.82 per sq. ft. per year | $425,064.00 |
> | *Estimated Building Operating Cost | |
> | @ $5.00 per sq. ft. per year | 143,380.00 |
> | Estimated Gross Monthly Rental Cost | $568,444.00 |
>
> After June 11, 2008, Transiplex will begin to market the premises to interested parties.

Cargolux claims the letter was either an offer to terminate the lease early or an anticipatory repudiation of the lease. Transiplex admits the letter contained an "unequivocal statement" that the lease would terminate on November 30, 2008,[5] but claims it made only one offer, an offer to renew the lease at increased rent. Transiplex notes that the letter contains no express words saying that it offers to terminate the lease early.

The trial court determined on summary judgment that the parties agreed that Cargolux would vacate by November 30, 2008, rather than pay increased rent. However, it noted that in their prior course of dealings, the parties always

[5] Transiplex's chief operating officer testified at trial that the reference to "November 30, 2008" was a typographical error, which should have read "2009." Since this was never communicated to Cargolux, Transiplex acknowledges that this claim is not relevant under Washington's objective-manifestation theory of contracts.

negotiated a formal amendment to the lease. The court concluded the inconsistency between this history and the informal exchange of letters before it permitted the inference that the parties may not have intended the letter exchange to modify their lease. This created a genuine issue of fact requiring a trial concerning the parties' intent.

We determine the meaning of a lease using contract interpretation rules.[6] Washington law permits the mutual modification of an existing contract provided there is an objective manifestation of the parties' intent and the modification is supported by new consideration.[7] "If a party's words or acts, judged by a reasonable standard, manifest an intention to agree in regard to the matter in question, that agreement is established, and it is immaterial what may be the real but unexpressed state of the party's mind on the subject."[8]

Transiplex's May 30 letter required that Cargolux select between two choices, either accept the stated rent increase and a five-year lease term or vacate by November 30, 2008. Implicit in Transiplex's contention that the letter did not offer an early termination of the lease is a claim that Cargolux had a third choice, continuing under the existing lease until November 30, 2009. But

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[6] Berg v. Hudesman, 115 Wn.2d 657, 663, 801 P.2d 222 (1990).

[7] Columbia Park Golf Course, Inc. v. City of Kennewick, 160 Wn. App. 66, 78, 248 P.3d 1067 (2011).

[8] Wesco Realty, Inc. v. Drewry, 9 Wn. App. 734, 735, 515 P.2d 513 (1973).

Transiplex's letter does not contain any words objectively communicating that or any other third choice. Nor does Transiplex identify any third choice in its briefing. The letter can be read only as acknowledging Cargolux's right to possession until November 30, 2009, if the reader understands that Transiplex meant November 30, 2009, when it wrote November 30, 2008, in the letter. Only a reader aware of Transiplex's claimed but uncommunicated intent would reasonably interpret the May 30 letter this way. As acknowledged by Transiplex, under Washington's objective-manifestation theory of contracts, we do not consider this uncommunicated intent. Accordingly, the trial court correctly decided the May 30 letter offered Cargolux an early lease termination date, as a matter of law.

Transiplex next contends that Cargolux rejected any offer it made by filing a lawsuit on June 5, 2008, because Cargolux's complaint asserted a right of possession until November 30, 2009. Yet it cites no case that supports this result. Cargolux's complaint and motion for a TRO responded to Transiplex's May 29 default notice, not the offer made on May 30. The complaint and other pleadings filed on June 5 were not, as Transiplex suggests, constructive notice to it that Cargolux was rejecting the modification offer.[9] Cargolux's legal action to protect its immediate access to its leased premises did not purport to reject

[9] Transiplex asserts these pleadings provided it with constructive notice because it was not served with the complaint until after June 11.

the modification offer and has no bearing on its ability to accept that offer.

Transiplex also claims that Cargolux did not accept the modification offer with its June 11 letter but instead made a counteroffer. In this letter, Cargolux stated it would vacate the premises but would pursue damages for breach of the lease. Transiplex correctly observes, "A purported acceptance that changes or adds a material term constitutes a counter-offer, not an acceptance," citing Sea-Van Investments Associates v. Hamilton.[10] But Cargolux's acceptance, under protest, of one of the two choices Transiplex offered did not make its acceptance a counteroffer, as it did not change, delete, or add any material term.

Transiplex further contends that the trial court erred by excluding from evidence the complaint Cargolux filed on June 5, 2008. We disagree. Transiplex relies exclusively on Schotis v. North Coast Stevedoring Co.,[11] where the court held the trial court erred by refusing to admit pleadings filed by the plaintiff in that and two earlier cases. The court's opinion describes significant inconsistencies between the factual allegations and the legal theories relied upon in the plaintiff's three different complaints. The court noted, "There were palpable inconsistencies in [the pleadings] which the appellant had a right to have the jury consider, even though it seemed likely that the respondent might

[10] 125 Wn.2d 120, 126, 881 P.2d 1035 (1994).
[11] 163 Wash. 305, 314-15, 1 P.2d 221 (1931).

have some reasonable explanation for some or all of them."[12] Schotis does not hold that an earlier pleading is categorically admissible. Because the "palpable inconsistencies" present in Schotis are not present in this case, Transiplex's argument fails. Concerns with relevance and confusion still govern evidence admissibility.[13] On these basic evidentiary grounds, the court properly excluded the complaint, which was both duplicative of other evidence already admitted and unnecessarily confusing.

Even if the trial court erred, "[a]n evidentiary error that does not result in prejudice to the defendant is not grounds for reversal."[14] Cargolux acknowledged numerous times its belief that Transiplex had not given proper termination notice—the evidentiary point for which Transiplex offered the complaint. Because Transiplex cannot show prejudice, its argument fails for this reason as well.

Transiplex argues that the court improperly commented on the evidence by instructing the jury in instruction 14 as follows:

> If you find that the parties intended by the correspondence between Scott Wilson (Exhibit 257)[15] and Joseph Joyce (Exhibit

[12] Schotis, 163 Wash. at 314-15.
[13] ER 401; ER 402; ER 403.
[14] State v. Howard, 127 Wn. App. 862, 871, 113 P.3d 511 (2005) (citing Brown v. Spokane County Fire Prot. Dist. No. 1, 100 Wn.2d 188, 196, 668 P.2d 571 (1983)).
[15] Transiplex's May 30, 2008, letter.
[16] Cargolux's June 11, 2008, letter.

> 5)[16] to modify the lease to terminate it as of November 30, 2008, then that correspondence constitutes an agreement in writing executed by the parties within the meaning of paragraph 32 of the parties' lease (Exhibit 1).
>
> The lease is a contract and any modification of a lease is a contract. Once a contract has been entered into, mutual assent of the contracting parties is essential to any modification of the contract.
>
> To establish a modification, Cargolux must prove by a preponderance of the evidence, through the words or conduct of the parties, that there was an agreement of the parties on all essential terms of the contract modification, and that the parties intended the new terms to alter the contract.

Transiplex claims that this instruction improperly removed from the jury's consideration whether exhibit 257 was an offer and exhibit 5 was an acceptance. But, as we have previously discussed, the trial court properly resolved these issues by summary judgment, leaving only the parties' intent as to the effect of these letters for the jury to decide. Stated another way, the trial court decided that the parties' history of memorializing lease modifications with a formal written document labeled as an amendment created an issue of fact as to whether the parties intended that formal action on the early termination date to accomplish modification of the termination date.

"An impermissible comment is one which conveys to the jury a judge's personal attitudes toward the merits of the case.[17] An instruction that accurately

[16] Cargolux's June 11, 2008, letter.

[17] Hamilton v. Dep't of Labor & Indus., 111 Wn.2d 569, 571, 761 P.2d 618 (1988).

states the law pertaining to an issue does not constitute a comment on the evidence by the trial judge prohibited by the Washington Constitution.[18] The instruction at issue conforms to the trial court's earlier summary judgment ruling and was not an improper comment on the evidence.

Transiplex also argues that the first and third paragraphs of instruction 14 are internally inconsistent. Reading the jury instruction as a whole, it is internally consistent. As discussed above, the first paragraph incorporates the trial court's earlier summary judgment. The third paragraph goes on to correctly state the rule the jury must apply to find a modification. Contrary to Transiplex's assertion that the court instructed the jury to disregard whether the parties actually agreed to terminate early, the paragraph's plain language clearly instructs the jury that to find a modification they must find "that the parties intended . . . to alter the contract."

Transiplex also challenges the trial court's denial of its motion to dismiss Cargolux's lease repudiation claim and the submission of this issue to the jury. The jury never reached this issue because it decided the parties modified the lease. Therefore, Transiplex cannot show any prejudice, and we need not consider this claim further.

BOC Charges for Port Litigation

[18] Hamilton, 111 Wn.2d at 571.

Transiplex challenges the trial court decision that the lease did not permit it to charge Cargolux for Transiplex's hardstand litigation expenses. Transiplex bases its claim upon a lease provision requiring Cargolux to pay its share of any increase in "the operating expenses of the Terminal" in excess of base amounts stated in the lease. The lease stated that these expenses included but were not limited to

> ground rental and charges imposed by The Port of Seattle . . . , assessments or charges imposed by any federal, state or municipal authority or government including leasehold excise taxes and real and personal property taxes, all maintenance and repairs, heat, air conditioning, power, water, and sewer charges, janitorial services, security services, insurance premiums for fire, extended coverage, liability, and any other insurance that Landlord deems necessary for the operation of the Terminal, interest on Landlord's indebtedness for Terminal, parking charges pursuant to Section 22.2 hereof and all other operating and administrative expenses of every kind and nature incurred by Landlord in the operation of Terminal.

Because this provision does not expressly include litigation costs or attorney fees, Transiplex characterizes the hardstand litigation expenses as "other operating expenses."

Transiplex relies on Arizona Oddfellow-Rebekah Housing, Inc. v. U.S. Department of Housing & Urban Development[19] and Chevron U.S.A., Inc. v. United States[20] to support its position. In Arizona Oddfellow, the terms of a HUD

[19] 125 F.3d 771 (9th Cir. 1997).
[20] 20 Cl. Ct. 86 (1990).

(Housing and Urban Development) mortgage insurance agreement limited Arizona Oddfellow (a low-income housing project) to using project revenues to pay for certain purposes, including "reasonable operating expenses and necessary repairs."[21] When Arizona Oddfellow used the revenue to pay attorney fees for defending housing discrimination suits, HUD filed suit and contended that the attorney fees were not reasonable operating expenses.[22] The court held that the attorney fees were operating expenses because the fees were "unavoidable costs" of operating a housing project and were "to the benefit of the project."[23]

In Chevron, Chevron and the federal government contracted to share "'all costs expenses incurred . . . in the exploration, prospecting, development and operation'" of a petroleum reserve they jointly owned.[24] The United States engaged Williams Brothers Engineering Company (WBEC) to operate the reserve. Two WBEC employees sustained on-the-job injuries and successfully prosecuted negligence claims against Chevron under California's "peculiar risk" doctrine. Chevron claimed that the federal government should share payment of the judgment because it was an "operating expense" of the reserve.[25] The court

[21] Arizona Oddfellow, 125 F.3d at 773.
[22] Arizona Oddfellow, 125 F.3d at 773, 775.
[23] Arizona Oddfellow, 125 F.3d at 775.
[24] Chevron, 20 Cl. Ct. at 88.
[25] Chevron, 20 Cl. Ct. at 87.

held that the fees and judgment were operating expenses under the terms of the contract.[26] It concluded that the expenses in issue were reasonably anticipated in projects of the type undertaken by the parties and were "unambiguously attributable to the operation of the plant."[27]

Arizona Oddfellow and Chevron do not support Transiplex's position. In Arizona Oddfellow, the court examined cases that considered what expenses constituted "operating expenses" under the HUD regulatory agreement. It identified a central principle followed in those cases—"to be operating expenses, expenses must primarily 'benefit the project,' rather than the owner."[28] It then addressed when a legal action "benefits the project."[29] It noted that cases involving legal actions to create or preserve an owner's ownership interest have held that those actions benefit the owner and not the project, while those cases to collect rent, evict tenants, or defend lawsuits arising out of the operation of a project have held those legal expenses benefit the project. It concluded that legal expenses arising out of the day-to-day operations of a business are properly considered to be "operating expenses."[30]

Here Transiplex initiated the hardstand litigation to reacquire leasehold

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[26] Chevron, 20 Cl. Ct. at 89.
[27] Chevron, 20 Cl. Ct. at 88.
[28] Arizona Oddfellow, 125 F.3d at 774.
[29] Arizona Oddfellow, 125 F.3d at 774-75.
[30] Arizona Oddfellow, 125 F.3d at 775.

property that it previously surrendered to the Port. Transiplex does not contend, and nothing in the record suggests, that this litigation arose out of the day-to-day operations of the terminal leased to Cargolux. The case law described in Arizona Oddfellow holds that this type of legal expense benefits the owner, not the project, and is not an operating expense.

Chevron applies the same rule described in Arizona Oddfellow. The lawsuit in question arose out of the day-to-day operations of the reserve. Because the hardstand litigation did not arise out of the day-to-day operations of the leased terminal, Chevron supports Cargolux's position, not that of Transiplex.

Transiplex also assigns error to the trial court's calculation of the BOC refund that Transiplex owes Cargolux. However, Transiplex provides no argument or legal analysis on this issue and, accordingly, has waived it.[31]

The Court Erred by Dismissing Cargolux's Good Faith Claim

In a cross appeal, Cargolux claims the trial court erred when it dismissed its claim for breach of duty of good faith and fair dealing because the court "used the improper legal standard, the duty is implied in every contract, and Cargolux had demonstrated that there was sufficient evidence to take the matter to a jury."

[31] RAP 10.3; Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (refusing to consider grounds not supported by argument or authority).

Cargolux's arguments regarding Transiplex's breach of duty of good faith fall into two categories: (1) that Transiplex engaged in "wasteful, commercially unreasonable litigation" and (2) that Transiplex improperly charged for and concealed the source of the BOCs.[32]

Cargolux contends that the trial court improperly excluded evidence of Transiplex's conduct charging BOCs, precluding Cargolux from proving its claim at trial. Relying on earlier summary judgment orders, the court reasoned that because Transiplex properly charged some, but not all, of the Port litigation expenses as BOCs, no factual issue relating to good faith remained for the jury. The circumstances and procedure of the case do not support this ruling.

First, the earlier summary judgment motions did not address Transiplex's alleged breach of duty of good faith relating to the BOCs. The trial court previously had determined that the hardstand litigation costs were not chargeable as BOCs, but that the remaining Port litigation costs were. Second, because Transiplex could not charge the hardstand litigation costs as a matter of law, the summary judgment orders resolving that issue actually support rather than negate Cargolux's claim. And third, a month before trial and well after entry of the BOC summary judgment orders, the trial court denied Transiplex's motion for summary dismissal of the good faith claim, which indicates a genuine issue of

[32] Cargolux also asserted fraud, but the trial court awarded summary judgment in Transiplex's favor on that claim.

material fact existed as to the claim before the court made its evidentiary ruling. Thus, we find that the trial court erred by excluding the evidence of Transiplex's conduct charging the BOCs.

Next, Cargolux contends that sufficient evidence existed to preclude dismissal. The duty of good faith and fair dealing is implied in every contract.[33] "This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance."[34] It promotes "'faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.'"[35] The duty of good faith and fair dealing "exists only 'in relation to performance of a specific contract term.'"[36] It does not "'inject substantive terms into the parties' contract.'"[37]

The written statements for BOC charges and accompanying requests for payment can be read to support Cargolux's theory. In 2006 and 2007, Transiplex's year-end BOC invoice identified line items for both "Legal and Professional" and "Legal-Lease Negotiations."[38] In contrast, the 2008 invoice

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[33] Badgett v. Sec. State Bank, 116 Wn.2d 563, 569, 807 P.2d 356 (1991).

[34] Badgett, 116 Wn.2d at 569.

[35] Frank Coluccio Constr. Co. v. King County, 136 Wn. App. 751, 766, 150 P.3d 1147 (2007) (quoting Restatement (Second) of Contracts § 205 cmt. a (1981)).

[36] Keystone Land & Dev. Co. v. Xerox Corp., 152 Wn.2d 171, 177, 94 P.3d 945 (2004) (quoting Badgett, 116 Wn.2d at 570).

[37] Badgett, 116 Wn.2d at 569 (quoting Barrett v. Weyerhaeuser Co. Severance Pay Plan, 40 Wn. App. 630, 635 n.6, 700 P.2d 338 (1985)).

[38] Notably, Transiplex does not assign error to finding of fact 16 (that in

did not provide a line item for legal fees but instead included all the year's legal fees in the "Administration, Accounting, and Office Expense" category. After Cargolux requested a detailed explanation, Transiplex responded that the charges were "legal expenses associated with the Port of Seattle's breach" of the ground lease and asserted, "The Port gave us no alternative" but to engage in the Port litigation and that it was "a good thing we did," because it was a "wise investment for the interest of Cargolux."

In sum, although Transiplex met its obligation to deliver "written statements," a jury could find these statements did not reflect the "actual expenses" as required by the lease. Further, the discrepancies between Transiplex's communications to Cargolux and the realities of the Port litigation create a genuine issue of material fact with respect to whether Transiplex acted in good faith by including the hardstand litigation costs in its invoices. Therefore, we reverse the trial court's dismissal of the good faith claim.

Attorney Fees

Transiplex makes a conditional challenge to the trial court's denial of an award of attorney fees to it. It only seeks reversal of this decision if it prevails on one or more issues on appeal. Since it has not, we need not address this issue

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2005, 20 percent of the Port litigation expenses were attributable to the hardstand while only 80 percent pertained to the increased ground rent). Unchallenged findings of fact are verities on appeal. Cowiche Canyon, 118 Wn.2d at 808.

further.

Cargolux contends the trial court abused its discretion by completely denying it any award of attorney fees. The lease provides that "in the event that suit is brought, attorney's fees and costs are to be awarded to the prevailing party." The trial court ruled that while Cargolux was the prevailing party, it failed to prove the reasonableness of its requested fees. Thus, the court denied it any fees.

RCW 4.84.330 provides that a lease containing a mandatory attorney fee provision entitles the prevailing party in an enforcement action to an award of reasonable attorney fees.[39] The language of this statute is mandatory; a trial court has no discretion in deciding whether to award fees to the prevailing party. Its discretion is limited to the amount awarded.[40]

Because Cargolux substantially prevailed, the lease and RCW 4.84.330 entitled it to an award of reasonable attorney fees.

Washington courts use the "lodestar" method as the starting point to determine reasonable attorney fees,[41] multiplying the hours reasonably expended in the litigation by each lawyer's reasonable hourly compensation, then excluding wasteful or duplicative hours and any hours spent on

[39] CHD, Inc. v. Boyles, 138 Wn. App. 131, 140, 157 P.3d 415 (2007).

[40] CHD, 138 Wn. App. at 140.

[41] Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 593-94, 675 P.2d 193 (1983).

unsuccessful claims or theories.[42] The party seeking fees bears the burden of proving the reasonableness of the fees[43] and must provide "reasonable documentation of work performed to calculate the number of hours."[44]

Cargolux requested $627,884.40 in fees. It submitted brief conclusory declarations of two of its attorneys, to which were attached more than 200 pages of billing records that included some seemingly duplicative billing entries. The declarations offered no specificity as to the number of hours related to discrete aspects of the litigation and did not identify other timekeepers or what they did. The trial court held that Cargolux had not met its burden of proving the reasonableness of its claimed fees.[45] Instead of applying the lodestar method and subtracting those duplicative entries, wasteful time, and time spent on unsuccessful claims from Cargolux's initial request, the court denied all fees. Cargolux moved for reconsideration and supported its request with a declaration of counsel that identified the timekeepers and what work each did. The declaration also identified how much time counsel expended for initial work, discovery, summary judgment motions, other motions, trial preparation, trial, and

[42] Absher Constr. Co. v. Kent Sch. Dist. No. 415, 79 Wn. App. 841, 847, 905 P.2d 1229 (1995) (citing Bowers, 100 Wn.2d at 597).

[43] Mahler v. Szucs, 135 Wn.2d 398, 433-34, 957 P.2d 632 (1998) (citing Scott Fetzer Co. v. Weeks, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993)).

[44] Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 335, 858 P.2d 1054 (1993).

[45] The judge did note that he presumed the hourly rates charged were reasonable.

posttrial motions. The trial court denied this motion. The court criticized "the stark inadequacies of the supporting declarations, which are little more than bare assertions of reasonableness." The court also provided "the court's probable ruling on remand" but did not make the formal findings required to support this decision without a remand.[46]

The trial court abused its discretion by failing to engage in a lodestar analysis of the materials supplied by Cargolux and by categorically refusing to award Cargolux any of its requested fees. The lease entitles Cargolux, as the prevailing party, to recover reasonable attorney fees and costs. With its motion for reconsideration, Cargolux provided the trial court with the minimum level of information currently required by our case law—contemporaneous time records, type of work performed, and category of attorney performing the work.[47]

The trial court appears to have been frustrated by the volume of time records and internal inconsistencies it found in these records. But the fact finder is not relieved of its obligation to make a decision simply because a party has not presented its evidence clearly and succinctly or made the fact finder's task as easy as it might have done.

Here, the trial court had information sufficient to award some fees. Cargolux provided the hours each of its attorneys spent in trial. The trial judge

[46] Mahler, 135 Wn.2d at 435.
[47] Mahler, 135 Wn.2d at 434.

was present for the trial and was in a position to determine whether the presence of each attorney was necessary, whether any of the time charged was wasteful or duplicative, and whether any time was devoted to an unsuccessful claim. Similarly, the court file reflects which pretrial motions were successful and the pleadings prepared to present them. At least some of the time spent in discovery depositions appears undisputed as opposing counsel submitted time records for the same activity. The same is true for other activities involving counsel for both parties. The effort undertaken by the trial court to support its "probable decision on remand" demonstrates that it had sufficient information to make the lodestar analysis contemplated by our case law to determine a reasonable fee award.

Attorney Fees on Appeal

Both parties request attorney fees on appeal. As the prevailing party on appeal, Cargolux is entitled to reasonable fees.

CONCLUSION

We reverse the trial court's dismissal of Cargolux's good faith claim and its denial of Cargolux's fee request, award Cargolux reasonable attorney fees on appeal upon its compliance with RAP 14.4, and otherwise affirm the trial court. We remand for further proceedings consistent with this opinion.

Leach, C.J.

WE CONCUR: