IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JOHN K. EACHO,	)	**No. 29421-8-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
GUSTAFSON & HOGAN, P.S., INC.,	)	**UNPUBLISHED OPINION**
	)	
Appellants.	)	
	)	

Brown, J. — Gustafson & Hogan, P.S., Inc. (GH), a Spokane law firm, appeals the trial court's bench trial award to John Eacho, a home seller, for GH's failure to ensure Mr. Eacho received his contractually-agreed insurance protection at closing. Shortly after closing, fire damaged a portion of the home. Barbara Uribe, the purchaser, collected on her fire insurance policy, quit making contract payments, abandoned the property, and left town with the money. The trial court awarded Mr. Eacho $93,016.95 for damages, prejudgment interest, and attorney fees and costs. GH contends (1) substantial evidence does not support a breach of contract and the trial court erred in (2) granting Mr. Eacho's motion in limine regarding GH's late-filed claim

for contributory negligence, (3) awarding prejudgment interest, and (4) awarding attorney fees and costs. We affirm and award attorney fees to Mr. Eacho as prevailing party here.

FACTS

We draw the facts from the trial court's unchallenged findings of fact that are verities on appeal. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 47, 59 P.3d 611 (2002).

GH was the closing and escrow agent for a residential real property transaction between Mr. Eacho, seller, and Ms. Uribe, buyer. On January 27, 2007, Mr. Eacho and Ms. Uribe signed a Real Estate Purchase and Sale Agreement (REPSA) for $295,000, with $20,000 down and $275,000 to be financed. The REPSA incorporated a "Seller Financing Addendum," which indicated Mr. Eacho was receiving $20,000 cash as a down payment and the balance of $275,000 was seller financed to be memorialized by a promissory note and secured by a deed of trust.

The REPSA included by reference an "Addendum to Purchase and Sale Agreement (Buyer's Procurement of Insurance)" that partly made the agreement contingent upon the buyer obtaining "acceptable insurance" and further provided that the insurance contingency shall be deemed satisfied unless within 14 days after mutual acceptance of the agreement, the buyer gives notice of inability to obtain acceptable insurance. Clerk's Papers (CP) at 358. The REPSA partly provided, "Notice must be given in writing." CP at 358. Ms. Uribe did not give notice to any interested party of

her inability to obtain acceptable insurance. GH prepared its own forms.

GH prepared the parties' promissory note. Paragraph 7 provides, "Maker shall pay all real estate taxes and hazard insurance premiums pursuant to paragraphs 2 and 3 of the Deed of Trust securing this obligation, and shall provide holder with annual proof that same have been timely paid." CP at 359. GH prepared a deed of trust, providing for Ms. Uribe "to keep all buildings now or hereafter erected on the property described herein continuously insured against loss by fire or other hazards in an amount not less than the total debt secured by this Deed of Trust. All policies shall be held by the beneficiary, and be in such companies as the beneficiary may approve and have loss payable first to the beneficiary as its interest may appear and then to Grantor." CP at 359. The deed of trust designated GH as Trustee and Mr. Eacho as beneficiary who was to be the first loss payee of the obligated insurance.

GH prepared a closing agreement and escrow instructions for purchase and sale transaction specifying GH be referred to as "the Closing Agent" and "to act as their closing and escrow agent according to the following agreements and instruments." CP at 360. The document acknowledged matters were to be completed by Ms. Uribe and Mr. Eacho outside of escrow and not part of the closing agent's duties. Specifically, the document stated, "If a new policy of fire, hazard or casualty insurance on the property is necessary to close the transaction, the buyer will arrange for the policy to be issued, outside of escrow, and will provide evidence of the required insurance coverage to the

Closing Agent before the closing date." CP at 360. A new insurance policy was required by terms of the contract between buyer and seller. And, the agreement partly provided, "The parties jointly and severally agree to pay the Closing Agent's costs, expenses and reasonable attorney fees incurred in any lawsuit arising out of, or in connection with, the transaction or these instructions, whether such lawsuit is instituted by the Closing Agent, the parties, or any other person." CP at 364.

Before closing, GH did not receive or hold evidence of the required insurance coverage designating Mr. Eacho, as the first loss payee. Mr. Gustafson contacted Mr. Eacho to advise him of the closing date and time. While Mr. Gustafson indicated they discussed insurance coverage, GH's file does not contain any written notation of a verbal waiver of the contractual condition of hazard insurance. GH's file contains no signed written waiver of the contract's obligation for the buyer to provide insurance. Ms. Uribe obtained property insurance from Farmers Insurance Company of Washington (Farmers), naming her the sole loss beneficiary.

On July 4, 2007, a fire at the residence consumed a detached garage. Farmers decided a $67,720.50 replacement value and a coverage limit of $63,200. After subtracting $36,084.10 for depreciation, Farmers paid Ms. Uribe $31,635.90 on August 8, 2007; Mr. Eacho received nothing. Soon, Ms. Uribe became delinquent in her payments to Mr. Eacho, and abandoned the property while keeping the insurance proceeds. Mr. Eacho retained legal counsel who was finally able to communicate with

Ms. Uribe. By agreement, Ms. Uribe signed a deed in lieu of foreclosure to Mr. Eacho, and Mr. Eacho agreed not to pursue Ms. Uribe for delinquent monthly payments, damage to the property, or the insurance proceeds, which Ms. Uribe wrongfully kept.

Mr. Eacho sued GH for breach of contract, later amending his complaint to add a negligence claim, arguing GH was negligent in closing the transaction without insurance in place to protect Mr. Eacho. Fourteen days before trial and after the parties had engaged in discovery, GH alleged contributory fault on the part of Mr. Eacho and third-party fault on the part of Ms. Uribe. Mr. Eacho successfully moved in limine to exclude these arguments, convincing the court the defense was untimely asserted.

During a bench trial, the court heard expert testimony from Mr. Eacho's witness, Martin Weber, a Spokane attorney practicing real estate law in Spokane county for more than 30 years who has closed thousands of residential real estate transactions, including many seller financed transactions. The court heard testimony from defense expert attorney Richard Perednia, similarly experienced. Both experts generally established that closing a seller financed transaction without proof of insurance designating the seller as the first loss payee is not in conformance with industry and community standards.

The trial court concluded the contract between Ms. Uribe and Mr. Eacho required Ms. Uribe to obtain acceptable hazard insurance on the subject property that

named Mr. Eacho as the first named loss payee. And, Ms. Uribe was required to show evidence of the required insurance coverage to GH before the closing date. The court, therefore, concluded GH materially breached its contractual duty to Mr. Eacho, "by failing to receive or hold said required insurance document which was necessary to close the transaction." CP at 364. The court concluded GH acted negligently by failing to ensure Mr. Eacho was "the first named loss payee of acceptable insurance where the seller is primarily financing the transaction and where there is no express waiver by the seller of hazard insurance on the subject property." CP at 365. The court awarded Mr. Eacho $31,635.90 damages, $46,207.75 attorney fees, $3,451.55 costs, and $11,721.75 in prejudgment interest. Judgment totaled $93,016.95. GH appeals.

A. Breach of Contract

The issue is whether the trial court erred in concluding GH breached a contractual obligation to Mr. Eacho. GH contends it was not required to ensure Ms. Uribe secured an insurance policy that named Mr. Eacho as the beneficiary.

Because the unchallenged findings are verities here, we limit our review to determining if those findings justify the trial court's conclusions of law. *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 353, 172 P.3d 688 (2007). We review conclusions of law de novo. *Bingham v. Lechner*, 111 Wn. App. 118, 127, 45 P.3d 562 (2002).

A contract is actionable when it imposes a duty, that duty is breached, and the

breach proximately causes damage to the one owed the duty. *Nw. Indep. Forest Mfrs. v. Dep't of Labor & Indus.*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995). Failure to perform a contractual duty constitutes a breach. Restatement (Second) of Contracts § 235(2) (1981). An injured party is entitled to those damages necessary to put that party in the same economic position it would have occupied had the breach not occurred. *Rathke v. Roberts*, 33 Wn.2d 858, 865-66, 207 P.2d 716 (1949).

Here, GH prepared a promissory note requiring Ms. Uribe to obtain hazard insurance pursuant to the deed of trust. The deed of trust, prepared by GH, required Ms. Uribe "to keep all buildings now or hereafter erected on the property described herein continuously insured against loss by fire or other hazards in an amount not less than the total debt secured by this deed of trust. All policies shall be held by the beneficiary, and be in such companies as the beneficiary may approve and have loss payable first to the beneficiary as its interest may appear and then to Grantor." CP at 359. The deed specified Mr. Eacho as the beneficiary to be the insurance's first loss payee. GH prepared a closing agreement that stated, "If a new policy of fire, hazard or casualty insurance on the property is necessary to close the transaction, the buyer will arrange for the policy to be issued, outside of escrow, and will provide evidence of the required insurance coverage to the Closing Agent before the closing date." CP at 360. The trial court specifically found "[a] new policy of insurance was required by terms of the contract between buyer and seller." *Id.* at 360. This finding is a verity on appeal.

As a direct consequence of GH's failure to receive a document establishing that acceptable insurance had been provided listing Mr. Eacho as the beneficiary, Mr. Eacho lost $31,635.90 paid by Farmers to Ms. Uribe. This failure by GH constituted a material breach of its contractual obligation to Mr. Eacho to close this real estate transaction according to the closing agreement's contractual terms and real estate industry standards. Accordingly, the findings support the trial court's conclusion that GH breached a contractual obligation to Mr. Eacho.

B. Motion in Limine

The next issue is whether the trial court erred by abusing its discretion in granting Mr. Eacho's motion in limine to exclude evidence regarding a contributory negligence defense. GH contends it did not waive the opportunity to argue the defense.

We review a trial court's ruling on a motion in limine for an abuse of discretion. *Garcia v. Providence Med. Ctr.*, 60 Wn. App. 635, 642, 806 P.2d 766 (1991). Discretion is abused when a court's decision is manifestly unreasonable or based on untenable grounds or reasons. *Olver v. Fowler*, 161 Wn.2d 655, 663, 168 P.3d 348 (2007).

Under CR 8(c), a defendant intending to set forth a defense of contributory negligence is required to affirmatively plead the issue. A defendant has 20 days after the service of a summons and complaint to answer and plead the defense. CR 4(a)(2). In May 2009, GH answered Mr. Eacho's complaint regarding his breach of contract claim. In August 2009, Mr. Eacho amended his complaint to add a claim for negligence. The parties then engaged in discovery. Approximately 9 months later, and just 14 days prior to the scheduled trial date, GH filed another answer, raising for the first time the issue of contributory negligence on the part of Mr. Eacho. The deadline for amendment of claims and defenses had long since passed as had the deadline for completion of discovery. Mr. Eacho has relied on the assumption that contributory negligence was not an issue. Given the untimely assertion of contributory negligence, the trial court had tenable grounds to grant Mr. Eacho's motion in limine to exclude evidence relating to the improperly raised defense and did not err.

C. Prejudgment Interest

The issue is whether the trial court erred in awarding prejudgment interest. GH contends damages were not liquidated; therefore, prejudgment interest was improper.

A court is authorized to award prejudgment interest if the amount due is liquidated, or the amount is based on a specific contract for the payment of money and "the amount due is determinable by computation with reference to a fixed standard." *Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d 25, 32, 442 P.2d 621 (1968). If the fact

finder does not need to exercise discretion to determine the measure of damages, the claim is liquidated. *Egerer v. CSR West*, *LLC*, 116 Wn. App. 645, 653, 67 P.3d 1128 (2003). The amount due is liquidated "where the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion." *Prier*, 74 Wn.2d at 32. The fact a claim is disputed does not mean the amount due is not liquidated, "so long as it may be determined by reference to an objective source such as fair market value." *Egerer*, 116 Wn. App. at 653. "The award of prejudgment interest is reviewed for abuse of discretion." *Scoccolo Constr.*, *Inc. ex rel. Curb One*, *Inc. v. City of Renton*, 158 Wn.2d 506, 519, 145 P.3d 371 (2006).

The trial court found Farmers paid Ms. Uribe $31,635.90 that should have gone to Mr. Eacho according to the closing documents. This, the exact fixed amount Mr. Eacho claimed as damages at trial. Under *Prier*, this amount is liquidated.

Moreover, GH did not challenge the amount. In *Hadley v. Maxwell*, 120 Wn. App. 137, 141, 84 P.3d 286 (2004), this court awarded prejudgment interest for the period between a damages verdict and an ensuing liability verdict. The Hadleys sued the Maxwells for personal injury damages arising out of a car accident, but Mrs. Hadley also filed a cross-claim against Mr. Hadley, the driver. *Id.* at 140. The Maxwells appealed on a liability issue but did not challenge the damages award. *Id.* On remand for a new trial on liability alone, the jury found the Maxwells solely liable. *Id.* The trial judge denied the Hadleys' proposed prejudgment interest arrangement where the

prejudgment interest accrued between the 1998 damages verdict and the date of the 2003 liability verdict. *Id.* at 140-41. This court reversed, reasoning that because the Maxwells had never challenged the damages award and reviewing courts had impliedly affirmed it, the Hadleys were entitled to prejudgment interest for the period between the 1998 damages verdict and the date of the 2003 liability verdict. *Id.* at 147. Likewise, GH did not challenge the amount. Accordingly, the trial court had tenable grounds to award prejudgment interest on the $31,635.90 judgment and did not err.

D. Attorney Fees and Costs

The issue is whether the trial court erred in awarding attorney fees for all work performed by Mr. Eacho's attorneys. GH contends work spent on the negligence claim was not recoverable.

The amount of a fee award is discretionary, and we will overturn an award except for a manifest abuse of discretion. *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 65, 738 P.2d 665 (1987). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. *Allard v. First Interstate Bank of Wash.*, *N.A.*, 112 Wn.2d 145, 148, 768 P.2d 998 (1989) (citing *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 77, 684 P.2d 692 (1984)).

The general rule is that "[if] attorney fees are recoverable for only some of a party's claims, the award must properly reflect a segregation of the time spent on issues for which fees are authorized from time spent on other issues." *Mayer v. City of*

Seattle, 102 Wn. App. 66, 79-80, 10 P.3d 408 (2000). A trial court need not segregate time, however, "if it determines that the various claims in the litigation are 'so related that no reasonable segregation of successful and unsuccessful claims can be made.'" *Id.* at 80 (quoting *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 673, 880 P.2d 988 (1994)). A "court is not required to artificially segregate time . . . where the claims all relate to the same fact pattern, but allege different bases for recovery." *Ethridge v. Hwang*, 105 Wn. App. 447, 461, 20 P.3d 958 (2001) (citing *Blair v. Wash. State. Univ.*, 108 Wn.2d 558, 572, 740 P.2d 1379 (1987)). The party claiming an award of attorney fees has the burden of segregating his or her lawyer's time. *Loeffelholz v. Citizens for Leaders with Ethics & Accountability Now*, 119 Wn. App. 665, 690, 82 P.3d 1199 (2004).

The escrow instructions state, "The parties jointly and severally agree to pay the Closing Agent's costs, expenses and reasonable attorney fees incurred in any lawsuit arising out of, or in connection with, the transaction or these instructions, whether such lawsuit is instituted by the Closing Agent, the parties, or any other person." CP at 364. The trial court concluded, "In accord with RCW 4.84.330, the aforementioned (Finding of Fact #37) provision for '. . . costs, expenses and reasonable attorney fees incurred in any lawsuit arising out of or in connection with the transaction or these instructions' applies equally to and shall be paid by the defendant to the prevailing plaintiff." CP at 365.

RCW 4.84.330 partly 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 or she 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.

Under Washington law, an action is on a contract for purposes of a contractual attorney fees provision if the action arose out of the contract and if the contract is central to the dispute. *Seattle-First Nat'l Bank v. Wash. Ins. Guar. Ass'n*, 116 Wn.2d 398, 413, 804 P.2d 1263 (1991). The record shows the facts which surround Mr. Eacho's breach of contract claim are identical to the facts established in support of the negligence claim. Each claim involved the same documents, the same acts, and the same omissions. It is impractical to divide the legal work between the contract claim and the negligence claim.

In *Edmonds v. Scott Real Estate*, 87 Wn. App. 834, 840, 942 P.2d 1072 (1997), a buyer brought suit against the Scott Real Estate Agency. The trial court found the real estate agency had breached its fiduciary duty regarding its disbursement of the earnest money, breached the earnest money agreement, was negligent preparing the earnest money agreement, and violated the Consumer Protection Act, chapter 19.86 RCW. *Id.* The buyer was awarded attorney fees. The real estate company disputed the court's award, arguing the fees were in connection with breach of fiduciary duty and

negligence claims, thus tort claims not included in the attorney fees provisions of either the buyer/broker agreement or the earnest money agreement. *Id.* at 855. The court held the breach of fiduciary duty and negligence claims were actions "on a contract" because the actions "'arose out of the contract and . . . the contract is central to the dispute.'" *Id.* (citing *Tradewell Group*, *Inc. v. Mavis*, 71 Wn. App. 120, 130, 857 P.2d 1053 (1993)).

Here, like in *Edmonds*, the actions arose out of contracts prepared by GH. The documents created the contractual relationship between the parties central to Mr. Eacho's claims. Both causes of action were based on the same documents, acts, and omissions involving the real estate closing and GH's failure to receive and hold the required insurance documents. The closing agreement and escrow instructions specifically provide, "[t]he parties jointly and severally agree to pay . . . reasonable attorney fees incurred in any lawsuit out of, or in connection with, the transaction or these instructions, whether such lawsuit is instituted by the Closing Agent, the parties, or any other person." CP at 364. The contract language does not limit recovery of attorney fees to actions for breach of contract, but allows recovery of attorney fees on "any lawsuit . . . in connection with, the transaction or these instruction." CP at 364.

Given this backdrop, the trial court did not abuse its discretion by awarding Mr. Eacho the entirety of his reasonable attorney fees.

Lastly, Mr. Eacho requests attorney fees on appeal based on the same contract

language discussed above. A contractual provision for an award of attorney fees at trial supports an award of attorney fees on appeal. *Reeves v. McClain*, 56 Wn. App. 301, 311, 783 P.2d 606 (1989). Mr. Eacho prevails here and is entitled to his attorney fees for this appeal. *Landberg v. Carlson*, 108 Wn. App. 749, 758, 33 P.3d 406 (2001).

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Report, but it will be filed for public record pursuant to RCW 2.06.040.

_____
Brown, J.

WE CONCUR:

_____ _____
Sweeney, J. Siddoway, J.