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No. 10-35237

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WAPATO HERITAGE, LLC, a Washington Limited Liability Company; KENNETH EVANS; JOHN WAYNE EVANS; and JAMIE JONES, individual residents of Washington State,

Plaintiffs-Appellees,

v.

SANDRA D. EVANS, an individual,

Defendant-Appellant,

and DAN GARGAN, a citizen of Arizona,

Defendant--Cross-Appellant.

On Appeal From a Judgment of the
United States District Court for the Eastern District of Washington

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PRINCIPAL BRIEF OF CROSS-APPELLANT DAN GARGAN

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES iii

STATEMENT OF JURISDICTION 1

STATEMENT OF ISSUES PRESENTED FOR REVIEW 1

STATEMENT OF THE CASE 3

STATEMENT OF FACTS 4

STANDARDS OF REVIEW 6

SUMMARY OF THE ARGUMENT 7

ARGUMENT 8

I. The Trial Court Erroneously Rejected Gargan's Argument That Plaintiffs, Having Alleged A Right To Recover Attorney Fees and Costs In Their Complaint, Were Estopped From Challenging His Reciprocal Right To Recover Attorney's Fees And Costs Under The Settlement Agreement's Attorney Fee Provision And RCW 4.84.330. 8

II. Plaintiffs' Tortious Interference Claim Is An Action "On The Contract," Allowing For The Recovery Of Attorney Fees And Costs Under Washington's Tort-On-A-Contract Doctrine. 17

III. Gargan's Right To Attorney Fees Is Also Encompassed Within The Terms Of The Settlement Agreement, Whose Attorney Fee Provision Broadly Provides That The Prevailing Party In "Any" Action To Recover Damages For Breach Is Entitled To Recover Costs And Attorney Fees. 24

TABLE OF CONTENTS(Cont.)

Page

IV. Gargan Is Entitled To Recover Attorney's Fees Under RCW 4.84.330. 27

CONCLUSION 30

CERTIFICATE OF SERVICE 31

CERTIFICATE OF COMPLIANCE 32

ADDENDUM OF STATUTES 33

STATEMENT OF RELATED CASES 34

EXCERPTS OF RECORD

Complaint, filed October 5, 2007 (Doc. 1)

Settlement Agreement (Doc. 295, Ex. A ex. A-1, § IV.I.7)

Order Denying and Granting in Part Defendant Evans' Summary Judgment Motion, Granting Defendant Gargan's Summary Judgment Motions, Ordering Further Briefing, And Resetting Pretrial Conference, filed July 8, 2009, pp. 33-36, 38 (Doc. 382)

Order Denying Defendant Gargan's Attorney Fees and Costs Motions, entered March 24, 2020 (Doc. 654)

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

Cases **Page**

American Tissue, Inc. v. Donaldson,
351 F. Supp. 2d 79 (S.D.N.Y. 2004). 15

Anderson v. Melwani,
179 F.3d 763 (9th Cir. 1999). 7

Berkla v. Corel Corp.,
302 F.3d 909 (9th Cir. 2002). 6, 7

Black v. Lane,
22 F.3d 1395, 1400 (7th Cir. 1994). 16

Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.,
166 Wn.2d 475, 209 P.3d 863 (2009). 24, 26

City of Seattle v. St. John,
166 Wn.2d 941, 215 P.3d 194 (2009). 10

Colorado Structures, Inc. v. Insurance Co. of the West,
161 Wn.2d 577, 167 P.3d 1125 (2007). 24

Dell Merk, Inc. v. Franzia,
132 Cal. App 4th 443, 33 Cal. Rptr. 3d 694 (2005). 23

Edmonds v. John L. Scott Real Estate, Inc.,
87 Wn. App. 834, 942 P.2d 1072 (1997),
review denied, 134 Wn.2d 1027, 958 P.2d 313 (1998). 18, 21, 22

Eugster v. City of Spokane,
121 Wash. App. 799, 91 P.3d 117 (2004)
review denied, 153 Wn.2d 1012, 106 P.3d 762 (2005). 12

Federal Trade Commission v. Ameridebt, Inc.,
343 F. Supp. 2d 451 (D. Md. 2004). 15

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES(Cont.)

Cases(Cont.) **Page**

Herzog Aluminum, Inc. v. Gen. Am. Window Corp.,
39 Wn. App. 188, 692 P.2d 867 (1984). 28

Hill v. Cox,
110 Wn. App. 394, 41 P.3d 495 (2002). 18

Hooper v. Deukmajian,
122 Cal. App. 3d 987, 176 Cal. Rptr. 569 (1981). 14

Kashishke v. Kepler,
158 F.2d 809 (10th Cir. 1947). 15

Kmetz v. State Historical Society,
304 F. Supp. 2d 1108 (W.D. Wis. 2004). 16

Kramarevcky v. Dep't of Soc. & Health Services,
122 Wn.2d 738, 863 P.2d 535 (1993). 9

Leingang v. Pierce County Medical Bureau, Inc.,
131 Wn.2d 133, 930 P.2d 288 (1997). 12

Loduca v. Polyzos,
153 Cal. App. 4th 334, 62 Cal. Rptr. 3d 780, 784 (2007). 23

Ostrofe v. H. S. Crocker Co.,
670 F.2d 1378 (9th Cir. 1982),
vacated and remanded on other grounds,
460 U.S. 1007 (1983). 15

Santisas v. Goodin,
17 Cal. 4th 599, 71 Cal. Rptr. 2d 830,
951 P.2d 399 (1998). 11

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES(Cont.)

Cases(Cont.) **Page**

Siegel v. Federal Home Loan Mortgage Corp.,
143 F.3d 525 (9th Cir. 1998). 7

Tradewell Group, Inc. v. Mavis,
71 Wn. App. 120, 857 P.2d 1053 (1993). 13, 18, 19, 20, 21, 22

Wachovia SBA Lending v. Kraft,
138 Wn. App. 854, 158 P.3d 1271 (2007),
aff'd, 165 Wn.2d 481, 200 P.3d 683 (2009). 9, 27

Wilson v. Westinghouse Elec. Corp.,
85 Wn.2d 78, 530 P.2d 298 (1975). 9

Xuereb v. Marcus & Millichap, Inc.,
3 Cal. App. 4th 1338,
5 Cal. Rptr. 2d 154 (1992). 11

Yoder v. Orthomolecular Nutrition Institute, Inc.,
751 F.2d 555 (2d Cir. 1985). 15

Statutes, Rules, and Regulations

28 U.S.C. § 1292 1

RCW 4.84.330 . . . . passim

Fed. R. App. P. 4(a)(1)(A) 1

Fed. R. App. P. 4(a)(3) . . . .
1

Fed. R. Civ. P. 8(f) 16

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES(Cont.)

Other Authorities **Page**

Black's Law Dictionary 120 (4th ed. 1968). 14

Wright and Miller, 5 Fed. Practice and Procedure, § 657. 15

JURISDICTIONAL STATEMENT

Defendant and Cross-Appellant Dan Gargan asserts that the District Court did not have subject matter jurisdiction over this matter for the reasons set forth in the opening brief of Defendant-Appellant Sandra D. Evans. Mr. Gargan's cross-appeal and his principal brief, however, are filed under the assumption that the Court will nevertheless determine that the District Court had jurisdiction over the subject matter. This Court has jurisdiction over Dan Gargan's cross-appeal, taken from the final Order Denying Defendant Gargan's Attorney Fees and Costs Motions entered March 24, 2010 (Doc. 654) under 28 U.S.C. § 1292. On April 12, 2010, Defendant and Cross-Appellant Dan Gargan timely filed his Notice of Cross-Appeal pursuant to Fed. R. App. P. 4(a)(1)(A) and 4(a)(3). (Doc. 653.)

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the District Court err as a matter of law and/or abuse its discretion in denying Defendant Dan Gargan's motions for contractually-authorized attorney fees and costs?

2. Did the District Court err as a matter of law and/or abuse its discretion in ruling that Plaintiffs were not estopped from challenging Defendant Dan Gargan's request for attorney fees and costs, where Plaintiffs in their Complaint requested an

award of contractually-authorized attorney fees and costs against Defendant Dan Gargan?

3. Did the District Court err as a matter of law and/or abuse its discretion in determining that Defendant Dan Gargan was not entitled to an award of attorney fees and costs under the Attorney Fee Provision in the Settlement Agreement, which provision broadly applies to "any action" for the recovery of damages for breach of the Settlement Agreement, including Plaintiffs' action for tortious interference with contractual relations brought against Gargan?

4. Did the District Court err as a matter of law and/or abuse its discretion in determining that Defendant Dan Gargan was not entitled to an award of attorney fees and costs under Washington's "tort-on-the-contract" doctrine, where the Plaintiffs' claim for tortious interference with contractual relations arose out of the Settlement Agreement and where the Settlement Agreement was central to that claim?

5. Did the District Court err as a matter of law and/or abuse its discretion in holding that Defendant Dan Gargan does not have reciprocal entitlement to an award of attorney fees and costs under RCW 4.84.330?

STATEMENT OF THE CASE

On October 5, 2007, Plaintiffs filed an action in the United States District Court for the Eastern District of Washington, naming Sandra D. Evans and Dan Gargan as parties defendant, and asserting a claim for tortious interference with contractual relations against Defendant Gargan. (*See* Doc. 1.) Mr. Gargan subsequently moved for summary judgment on July 9, 2008 by filing his Rule 56 Motion for Summary Judgment Re: Lack of Evidence of Intentional Interference. (*See* Docs. 95-99.) Mr. Gargan later filed a second Motion for Summary Judgment Re: No Breach. (Doc. 289.) On July 8, 2009, the District Court granted summary judgment in Mr. Gargan's favor (Doc. 382, p. 38), concluding that "there [was] simply no evidence connecting Defendant Gargan to Defendant Evans' alleged breach of the Settlement Agreement." (Doc. 382, p. 36: lines 8-9.) As a result, Mr. Gargan is indisputably the prevailing party.

On July 22, 2009, Defendant Gargan filed his Motion for Recovery of Attorney Fees and Costs. (Doc. 406.) Gargan further filed a Motion to Determine Reasonableness of Attorney Fees and Costs. (Doc. 403.) By its Order Denying Defendant Gargan's Attorney Fees and Costs Motions entered March 24, 2010 (Doc. 654), the District Court denied both motions. (Doc. 654, p. 6.) Gargan thereafter timely filed his Notice of Cross-Appeal on April 12, 2010. (Doc. ____.)

STATEMENT OF FACTS

Plaintiffs, in their Complaint, sought an award of attorney's fees and costs against both Defendant Sandra Evans and Defendant Dan Gargan pursuant to a contractual attorney fee provision in the Settlement Agreement previously entered into between the Plaintiffs and Evans. Paragraph 25 of the Complaint alleges:

> Section IV.I.7 of the Settlement Agreement provides that the prevailing party in any action or proceeding at law or equity to interpret or enforce the terms of, obligations arising out of the Settlement Agreement, or to recover damages for the breach thereof, or to compel performances thereunder, shall recover the costs and attorney's fees incurred in connection with such enforcement of the Settlement Agreement. Plaintiffs are entitled to recover their costs and attorney's fees (including expert witness fees) *incurred in connection with this action.*

(Doc. 1, ¶ 25 (emphasis added).)

Plaintiffs reiterated their demand for attorney's fees and costs under the "Fourth Cause of Action [for] Tortious Interference" asserted against Gargan, Plaintiffs allege in relevant part in Paragraph 39 that

> *[t]he actions of Dan Gargan* constitute tortious [sic] interference by Gargan with the reasonable business and/or contractual expectancies of Plaintiffs and *have damaged Plaintiffs in an amount to be proven at trial but which includes*, without limitation: . . . iv. *[t]he requirement for plaintiffs to incur substantial professional fees, including* accounting, expert and *attorney's fees*.

(Doc. 1, ¶ 39 (emphasis added).) These allegations as to damages, including the incurring of attorney's fees, are virtually identical to those made against Defendant

Evans under the "First Cause of Action [for] Breaches of Contract by Defendant Evans." (Doc. 1, ¶ 33.) Furthermore, the Complaint's prayer for relief, which is directed against both defendants, specifically requests "[t]hat Plaintiffs be awarded their reasonable costs (including expert witness fees) and attorneys' fees *incurred in connection with this action*." (Doc. 1, Request for Relief, ¶ 5 (emphasis added).)

Following the District Court's grant of summary judgment in favor of Gargan on Plaintiffs' claim for tortious interference with contractual relations (Doc. 382, p. 38), thereby rendering Gargan the prevailing party, Gargan filed motions seeking an award of $340,558.50 in attorney's fees and $18,345.68 in costs under Section IV.I.7 of the Settlement Agreement, under RCW 4.84.330, or by way of equitable estoppel. (Docs. 403, 406.)

In denying Gargan's motions (Doc. 654, p. 6), the District Court recognized that "Defendant Gargan argues . . . he is entitled to costs and attorney fees because 1) Plaintiffs are estopped from challenging his request, and 2) he is a prevailing party under the Settlement Agreement's attorney fee provision and . . . entitled to recover [attorney fees and costs] under RCW 4.84.330 and Washington's tort-on-the-contract doctrine." (Doc. 654, p. 1.) In rejecting Mr. Gargan's estoppel argument, the trial court determined that "Plaintiffs did not assert a right to attorney fees and costs under the Settlement Agreement against Defendant

Gargan" and that "[t]herefore, Plaintiffs are not estopped from challenging Defendant Gargan's attorney fees and costs request." (Doc. 654, p. 2.)

In further determining that Gargan's argument, that he is "entitled to recover attorney fees and costs per the Attorney Fee Provision [of the Settlement Agreement] because he prevailed Plaintiff's tortious interference with contractual relations claim at summary judgment," was without merit, the District Court reasoned "the parties did not intend for the Attorney Fee Provision to apply to non-party Defendant Gargan." (Doc. 654, pp. 3, 4.) The District Court further ruled that RCW 4.84.330 "is unhelpful to Defendant Gargan," reasoning that the statute does not apply "[b]ecause Defendant Gargan is not a party to the Settlement Agreement[.]" (Doc. 654, p. 4.) Finally, the trial court likewise determined that Washington's "tort-on-a-contract" doctrine "does not benefit Defendant Gargan because he was not a party to the Settlement Agreement." (Doc. 654, p. 5.)

STANDARDS OF REVIEW

A district court's decision not to award contractually-authorized attorney's fees and costs is reviewed for an abuse of discretion. *Berkla v. Corel Corp.*, 302 F.3d 909, 917 (9th Cir. 2002). The general rule is that a court abuses its discretion if it awards contractually-authorized attorney's fees under circumstances that make

the award inequitable or unreasonable or fails to award such fees in a situation where inequity will not result. *Anderson v. Melwani*, 179 F.3d 763, 766 (9th Cir. 1999).

However, whether the district court applied the correct legal standard in denying an award of attorney's fees and costs is reviewed de novo. *Berkla v. Corel Corp.*, 302 F.3d at 917. Moreover, any element of legal analysis and statutory interpretation that figures in the district court's decision to either award or deny fees and costs is reviewed de novo. *See Siegel v. Federal Home Loan Mortgage Corp.*, 143 F.3d 525, 528 (9th Cir. 1998).

SUMMARY OF THE ARGUMENT

The District Court erroneously determined that the Plaintiffs were not estopped from challenging Defendant Dan Gargan's request for an award of attorney fees and costs, on the basis of the trial court's overly narrow reading of the Complaint as not including the assertion by Plaintiffs of a right to attorney fees and costs against Defendant Gargan. Reading and construing the Complaint as a whole, it is clear that Plaintiffs *did* make a contractually-authorized request for attorney fees and costs against both Defendant Sandra Evans and Defendant Gargan. Having asserted such a request, it would lead to inequitable consequences

to allow Plaintiffs to change their position and raise an objection to Defendant Dan Gargan's "prevailing party" request for attorney fees and costs.

The District Court further erred in determining that, because Defendant Dan Gargan was not a signatory party to the Settlement Agreement, he could not make a request for attorney fees and costs either under that agreement's Attorney Fee Provision, or under Washington's "tort-on-a-contract" doctrine, or under RCW 4.84.330. Properly construed, the Attorney Fee Provision in the Settlement Agreement broadly applies to "any action" brought for the recover of damages for the breach of the Settlement Agreement, including those brought against third parties for tortious interference that induces a breach of the contract.

ARGUMENT

I. The Trial Court Erroneously Rejected Gargan's Argument That Plaintiffs, Having Alleged A Right To Recover Attorney Fees and Costs In Their Complaint, Were Estopped From Challenging His Reciprocal Right To Recover Attorney's Fees And Costs Under The Settlement Agreement's Attorney Fee Provision And RCW 4.84.330.

Defendant Gargan argued below that, Plaintiffs having alleged a right to recover attorney fees under the Settlement Agreement's Attorney Fee Provision, Plaintiffs were estopped from denying Mr. Gargan's reciprocal right to an award of

attorney fees as the prevailing party, under either the language of the Attorney Fee Provision itself or RCW 4.84.330. Under the principle of equitable estoppel, "'a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon.'" *Kramarevcky v. Dep't of Soc. & Health Services*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993) (quoting *Wilson v. Westinghouse Elec. Corp.*, 85 Wn.2d 78, 81, 530 P.2d 298 (1975).)

Thus, with respect to the purpose of RCW 4.84.330, the Washington Court of Appeals has recognized that "a plaintiff should not be permitted to avoid attorney fee reciprocity after having tested his claim . . . and causing the defendant to incur costs and attorney fees for naught." *Wachovia SBA Lending v. Kraft*, 138 Wn. App. 854, 862, ¶ 16, 158 P.3d 1271, 1275 (2007), *aff'd*, 165 Wn.2d 481, 200 P.3d 683 (2009). By the Plaintiffs assuming the position that, if they succeeded on their tortious interference claim against Gargan, they as the prevailing parties would be entitled to an award of costs and attorney's fees under the Attorney Fee Provision of the Settlement Agreement, causing Defendant Gargan vigorously to defend against the claim and incur costs and attorney's fees in justifiable and good faith reliance on such assumed position, Defendant Gargan would be injured and made to suffer inequitable consequences if Plaintiffs could now repudiate the

position they previously assumed by denying Gargan's reciprocal right to recover costs and attorney's fees under the Attorney Fee Provision and/or RCW 4.84.330. Thus, all of the elements of equitable estoppel are satisfied here. *See City of Seattle v. St. John*, 166 Wn.2d 941, 949, 215 P.3d 194 (2009), summarizing the elements of equitable estoppel as follows: "(1) a party's admission, statement or act inconsistent with its later claim; (2) action by another party in reliance on the first party's act, statement or admission; and (3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission."

The trial court nevertheless held that "Plaintiffs are not estopped from challenging Defendant Gargan's attorney fees and costs request," erroneously concluding that "Plaintiffs did not assert a right to attorney fees and costs under the Settlement Agreement against Defendant Gargan." (Doc. 654, p. 2.)

The trial court initially reasoned that "the Complaint did not allege either that Defendant Gargan was a party to the Settlement Agreement or that he breached the Settlement Agreement." (Doc. 654, p. 2.) Rather, "the Complaint alleged that Defendant Gargan, as Defendant Evans' financial advisor, tortiously interfered with Plaintiffs' contractual and business expectations." (*Id.*)

It is well established, however, that, "[i]f a contractual attorney fee provision

is phrased broadly enough, . . . it may support an award of attorney fees to the prevailing party in an action alleging *both contract and tort claims*: 'Parties may validly agree that the prevailing party will be awarded attorney fees incurred in any litigation between themselves, whether such litigation sounds in tort or contract.'" *Santisas v. Goodin*, 17 Cal. 4th 599, 608, 71 Cal. Rptr. 2d 830, 951 P.2d 399 (1998) (quoting *Xuereb v. Marcus & Millichap, Inc.*, 3 Cal. App. 4th 1338, 1341, 5 Cal. Rptr. 2d 154 (1992)) (emphasis added). In this case, the attorney fee provision in the Settlement Agreement is broad enough to encompass the Plaintiffs' tort claim for tortious interference with Plaintiffs' contractual rights under the Settlement Agreement. The attorney fee provision provides as follows:

> *In the event of any action or proceeding at law or in equity* to interpret or enforce the terms of, or obligations arising out of this Agreement, or *to recover damages for the breach hereof*, or to compel performance hereunder, the party prevailing in any such proceeding or action, including bankruptcy court proceedings and including any appeals, shall be entitled to recover attorneys' fees and costs incurred by the prevailing party.

(Doc. 295, Ex. A ex. A-1, § IV.I.7.) (emphasis added).

To prevail on their claim for tortious interference with contractual relations, Plaintiffs were required to allege and prove the following elements:

> (1) *the existence of a valid contractual relationship* or business expectancy; (2) the defendant's knowledge of and intentional

> interference with that relationship or expectancy; (3) *a breach* or termination *of that relationship* or expectancy induced or caused by the interference; (4) an improper purpose or the use of improper means by the defendant that caused the interference; *and* (5) *resultant damage*.

Eugster v. City of Spokane, 121 Wash. App. 799, 811, 91 P.3d 117 (2004) (emphasis added), *review denied*, 153 Wn.2d 1012, 106 P.3d 762 (2005), citing *Leingang v. Pierce County Medical Bureau, Inc.*, 131 Wn.2d 133, 157, 930 P.2d 288 (1997). Thus, proof of a valid contract, an actual breach of that contract, and damage resulting from the breach were all essential elements of Plaintiffs' claim for tortious interference asserted against Gargan.

Moreover, Plaintiffs specifically alleged in their Complaint that, "[i]n his capacity as a financial advisor to the Defendant Evans, Defendant Gargan has suggested, advised, aided and/or abetted Defendant Evans *in connection with Defendant Evans' breaches of the Settlement Agreement as aforesaid*." (Doc. 1, ¶ 27 (emphasis added).) Plaintiffs further specifically alleged that "[t]he actions of Defendant Gargan as aforesaid have damaged Plaintiffs *in the same manner and to the same extent as the breaches of the Settlement Agreement by Defendant Evans*." (Doc. 1, ¶ 30 (emphasis added).) Finally, Plaintiffs sought exactly the same type and amount of damages from Gargan for his alleged tortious interference as they did from Defendant Evans for her alleged breaches of contract. (Doc. 1, ¶¶ 33,

39.)

In view of the elements of the tort of tortious interference with contractual relations and the allegations of the Complaint, Plaintiffs' action against Dan Gargan for tortious interference with contractual relations constituted an action or proceeding "to recover damages for the breach" of the Settlement Agreement (*see* Doc. 295, Ex. A ex. A-1, § IV.I.7), and, thus, was covered by the language of the attorney fee provision of the Settlement Agreement. Essentially, Plaintiffs sought, in an "action or proceeding at law" (*see id.*), to recover the same exact damages for the alleged breach of the Settlement Agreement from (1) Defendant Evans on a theory of breach of contract and from (2) Defendant Gargan on a theory of tortious interference with contractual relations. Thus, Plaintiffs, if they prevailed, were "entitled to recover attorney's fees and costs incurred by the prevailing part[ies]."[1]

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[1] The Washington Court of Appeals' decision in *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 857 P.2d 1053 (1993) is not to the contrary. Tradewell, a shopping center tenant, unsuccessfully sued defendant Wedgwood Center, the shopping center owner, for tortious interference with Tradewell's prospective business relations with Mavis, a prospective purchaser of Tradewell's lease in the shopping center. The attorney fee provision in Tradewell's lease with Wedgewood Center provided that

> If either party hereby be made or shall become a party to any litigation commenced *by or against the other party* involving the enforcement of any of the rights or remedies of such party, or arising on account of the default *of the other party in its performance of any of the other party's obligations hereunder*, then the prevailing party in

(*See* Doc. 295, Ex. A-1, § IV.I.7.)

Alternatively, as discussed more fully below, attorney fees were potentially recoverable by the Plaintiffs, if they had prevailed on their tortious interference claim against Gargan, under Washington's tort-on-a-contract doctrine.

Furthermore, it makes no difference that Gargan was not a party to the Settlement Agreement. The attorney fee provision authorizes the award of attorney fees and costs to the prevailing party in "*any* action or proceeding at law or in equity . . . to recover damages for the breach hereof," including actions for tortious interference with contractual relations brought against third parties. Black's Law Dictionary 120 (4th ed. 1968) ("any" is "given the full force of 'every' or 'all'"); *Hooper v. Deukmajian*, 122 Cal. App. 3d 987, 1004, 176 Cal. Rptr. 569 (1981) (same).

> such litigation shall receive from the other party all costs incurred by such party in such litigation plus reasonable attorneys' fees . . ..

71 Wn. App. at 129 (emphasis added). In interpreting this paragraph, the trial court concluded that Wedgewood was only permitted to recover attorney fees and costs "for claims arising under the lease." *Id.* The Court of Appeals agreed, reasoning that the language of the attorney fee provision "only establishes a right to attorney fees and costs incurred in defending against Tradewell's contract-related claims." *Id.* at 130.

By contrast, the language of the attorney fee provision at issue here is far broader, applying as it does to "*any* action or proceeding at law or in equity . . . for the recovery of damages for the breach" of the Settlement Agreement, including an action against a third party for tortious interference with that agreement.

Finally, in support of its conclusion that the Plaintiffs did not assert a right to recover attorney fees and costs under the Settlement Agreement against Defendant Gargan, the court below reasoned that "Paragraph 25 of the Complaint, which refers specifically to the Attorney Fee Provision, is in the section [of the factual background of the Complaint] specifically addressing Defendant Evans' alleged breaches." (Doc. 654, p. 2.) By focusing solely on a single paragraph of the Complaint, the trial court thereby violated the precept that a complaint must be read and construed as a whole. *See Ostrofe v. H. S. Crocker Co.*, 670 F.2d 1378, 1381 (9th Cir. 1982), *vacated and remanded on other grounds*, 460 U.S. 1007 (1983) ("It is axiomatic that the allegations of a complaint must 'be read as a whole, and . . . viewed broadly and liberally,'" quoting Wright and Miller, 5 Fed. Practice and Procedure, § 657); *Kashishke v. Kepler*, 158 F.2d 809, 811 (10th Cir. 1947) (the "true construction" of a complaint "cannot be ascertained by lifting a single phrase, sentence, or even paragraph out of its natural setting and considering it alon[e]. The instrument must be considered and construed as a whole, and only in that way can its true intent and import be ascertained."); *American Tissue, Inc. v. Donaldson*, 351 F. Supp. 2d 79, 103 (S.D.N.Y. 2004) (citing *Yoder v. Orthomolecular Nutrition Institute, Inc.*, 751 F.2d 555, 562 (2d Cir. 1985)); *see also Federal Trade Commission v. Ameridebt, Inc.*, 343 F. Supp. 2d 451, 459

(D. Md. 2004) (a district court must liberally construe a complaint as a whole). Indeed, it has been recognized that "[c]omplaints should be construed as a whole to do 'substantial justice.'" *Kmetz v. State Historical Society*, 304 F. Supp. 2d 1108, 1126 (W.D. Wis. 2004) (quoting Fed. R. Civ. P. 8(f)); *see also Black v. Lane*, 22 F.3d 1395, 1400 (7th Cir. 1994).

It is clear from reading the Complaint as a whole that Plaintiffs were asserting a right to recover attorney's fees and costs against Defendant Gargan as well as Defendant Evans. Thus, under the "Fourth Cause of Action [for] Tortious Interference" asserted against Gargan, Plaintiffs allege in relevant part in Paragraph 39 that

> *[t]he actions of Dan Gargan* constitute tortious [sic] interference by Gargan with the reasonable business and/or contractual expectancies of Plaintiffs and *have damaged Plaintiffs in an amount to be proven at trial but which includes*, without limitation: . . . iv. *[t]he requirement for plaintiffs to incur substantial professional fees, including* accounting, expert and *attorney's fees*.

(Doc. 1, ¶ 39 (emphasis added).) These allegations as to damages, including the incurring of attorney's fees, are virtually identical to those made against Defendant Evans under the "First Cause of Action [for] Breaches of Contract by Defendant Evans." (Doc. 1, ¶ 33.) Furthermore, the Complaint's prayer for relief, which is directed against both defendants, specifically requests "[t]hat Plaintiffs be awarded their reasonable costs (including expert witness fees) and attorneys' fees *incurred*

in connection with this action." (Doc. 1, Request for Relief, ¶ 5 (emphasis added).)

Finally, Paragraph 25 itself, after referring to the Attorney Fee Provision of the Settlement Agreement, likewise broadly asserts that "Plaintiffs are entitled to recover their costs and attorney's fees (including expert witness fees) *incurred in connection with this action*." (Doc. 1, ¶ 25 (emphasis added).) Thus, when the Complaint is liberally read and construed as a whole, it can readily be seen that Plaintiffs are seeking to recover, under the Attorney Fee Provision, costs and attorney's fees incurred in connection with the entire action, including such costs and fees incurred in connection with the tortious interference claim asserted against Dan Gargan.

In short, as Plaintiffs did in fact assert a right to the recovery of attorney fees and costs under the Settlement Agreement against Defendant Gargan, the District Court erred in refusing to hold that Plaintiffs are estopped from challenging Defendant Gargan's reciprocal request for attorney fees and costs under the Attorney Fee Provision.

II. Plaintiffs' Tortious Interference Claim Is An Action "On The Contract," Allowing For The Recovery Of Attorney Fees And Costs Under Washington's Tort-On-A-Contract Doctrine.

In Washington, attorney fees are recoverable in actions on tort claims that

are "on the contract" where the contract contains an attorney fees provision. Under this "tort-on-a-contract" doctrine, a tort claim is considered to be "on the contract" if the action arose out of the contract and if the contract is central to the dispute. *Hill v. Cox*, 110 Wn. App. 394, 412, 41 P.3d 495 (2002); *Tradewell Group, Inc. v. Mavis*, *supra*, 71 Wn. App. 120, 130, 857 P.2d 1053 (1993). For example, in *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn. App. 834, 942 P.2d 1072, 1083 (1997), *review denied*, 134 Wn.2d 1027, 958 P.2d 313 (1998), the Washington Court of Appeals held that attorney fees were recoverable by the prevailing party on tort claims for negligence and breach of fiduciary duty because the action arose out of a contract and the contract was central to the dispute. The court in *Edmonds* reasoned as follows:

> The negligence claims were based on [one of the defendant's real estate agents'] drafting of the earnest money agreement and his breach of duty to act with due diligence in negotiating the purchase of the property on terms and conditions acceptable to Edmonds. This duty was created under, and defined by, the buyer/broker agreement. The breach of fiduciary duty claims were based on [the defendant's] disbursement of Edmonds' earnest money in a manner [the defendant] claims was set forth in the earnest money agreement. Therefore, the terms of the earnest money agreement and the contractual relationship created by the agreement are central to these claims, rendering them claims "on a contract." It was proper for the court to award fees in connection with these claims under the contractual attorney fees provisions.

87 Wn. App. at 855-856.

The Plaintiffs' claim for tortious interference with contractual relations was

likewise a tort claim "on the contract." First, the tort claim arose out of the contract in that it was based on alleged breaches of the Settlement Agreement by Defendant Evans that Gargan allegedly induced. Secondly, the contract was central to the dispute in that Gargan defended, in large part, on the basis that Defendant Evans had not breached the Settlement Agreement, i.e., "that Defendant Evans fully satisfied her contractual obligations [under the Settlement Agreement] by executing and delivering Exhibit J." (Doc. 382, pp. 33-34.) As both requirements for application of the "tort-on-a-contract" doctrine are satisfied in this case, it was proper for the District Court to award costs and attorney's fees to Gargan, as the prevailing party on the tortious interference with contractual relations claim, under the Attorney Fee Provision of the Settlement Agreement.

Nor is *Tradewell Group, Inc. v. Mavis*, to the contrary. In that case, Tradewell, a shopping center tenant, alleged that the defendant Wedgewood Center, the shopping center owner, breached the terms of an undelivered shopping center lease extension and tortiously interfered with Tradewell's business relations with Mavis, a prospective purchaser of Tradewell's lease in the Wedgewood Center shopping center. While Wedgewood Center prevailed on both these claims (as well as two other tort claims brought by Tradewell), the trial court awarded costs and attorney's fees to Wedgewood, under an attorney fee provision in the

parties' existing shopping center lease, only to the extent they were incurred by Wedgewood in defending against the breach of contract claim.

In its cross-appeal, Wedgewood argued that the trial court erred in limiting its award against Tradewell to only those costs and attorney's fees incurred in defending against Tradewell's breach of contract claim. In rejecting Wedgewood's contention, the Washington Court of Appeals reasoned as follows:

> 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. . . . Here, none of Tradewell's remaining claims against Wedgwood, tortious interference, unjust enrichment, and promissory estoppel, arise out of the undelivered lease extension. The first two claims relate solely to Wedgwood's alleged intervention in Tradewell's business dealings with *Mavis*. . . .

71 Wn. App. at 130 (emphasis in original and citations omitted).

The decision in *Tradewell* is distinguishable. Because Tradewell's tortious interference claim did not arise out of its contractual relationship with Wedgewood, i.e., was not "on the contract" containing the attorney fee provision, the Court of Appeals concluded that a further award of costs and attorney fees was unwarranted. By contrast, the tortious interference claim asserted by Plaintiffs against Mr. Gargan did arise out of the Settlement Agreement, which was central to that claim, and the Settlement Agreement contains a "prevailing party" attorney fees provision.

Although all of the requirements of Washington's "tort-on-a–contract" doctrine have been met, the trial court nevertheless concluded that the doctrine did not apply because Defendant Gargan "was not a party to the Settlement Agreement." (Doc. 654, p. 5.) While the court below cited *Edmonds* in support of this ruling, the Washington Court of Appeals in *Edmonds* did not reach or decide this issue because the plaintiff in that case, to whom attorney fees and costs were awarded, was a signatory party to both the buyer-broker agreement and the earnest money agreement at issue in that case.

Nor does *Tradewell* provide support for the District Court's conclusion that "Washington requires a litigant to be [a] party to a contract" containing an attorney fee provision, before a court may award that litigant its costs and attorney fees as a prevailing party. (Doc. 654, p. 5.) First, the Court of Appeals in *Tradewell* never addressed or decided this issue. While it is true that the defendant Mavis was "not in a contractual relationship" with Wedgewood (Doc. 654, p. 5), i.e., Mavis was not a party to the lease agreement between Tradewell and Wedgwood, Wedgewood never attempted to argue that it was entitled to an award of attorney's fees and costs against Mavis under the attorney fee provision in the lease. Rather, Wedgewood grounded its request for an award of costs and attorney's fees against Mavis solely on a theory of equitable indemnity.

Secondly, the attorney fee provision at issue in *Tradewell* was clearly limited in its application to litigation between the two signatory parties to the lease. The language of the attorney fee provision in the shopping center lease at issue in *Tradewell* expressly provided that it would apply only "[i]f either party [to the lease] hereby be made or shall become a party to any litigation *commenced by or against the other party*." *Tradewell*, 71 Wn. App. at 129 (quoting paragraph 20 of the lease between Tradewell and Wedgewood) (emphasis added). As the *Tradewell* court observed, the provision was further limited to litigation "involving enforcement of the parties' rights or nonperformance 'hereunder,'" i.e., under the lease. *Id.* at 129-130.

By contrast, the Attorney Fee Provision in the Settlement Agreement at issue in this case broadly provides that it applies "*[i]n the event of any action or proceeding at law or in equity* to interpret or enforce the terms of, or obligations arising out of this Agreement, or to recover damages for the breach hereof, or to compel performance hereunder[.]" (Doc. 295, Ex. A-1, § IV.I.7) (emphasis added).) The provision, unlike the attorney fee provision in *Tradewell*, is thus not limited to litigation between the signatory parties to the Settlement Agreement.

In short, no support exists in either *Tradewell*, *Edmonds*, or any other Washington decision for the trial court's conclusion that, in order for attorney fees

and costs to be awarded to a litigant under a contractual attorney fee provision, that litigant must be a signatory party to the contract.

Finally, while the Washington courts have yet to address the issue, they would likely follow the California rule on this issue. In California, "[i]n cases involving nonsignatories to a contract with an attorney fee provision, the following rule may be distilled from the applicable cases: A party is entitled to recover its attorney fees pursuant to a contractual provision . . . when the party would have been liable for the fees of the opposing party if the opposing party had prevailed." *Loduca v. Polyzos*, 153 Cal. App. 4th 334, 341, 62 Cal. Rptr. 3d 780, 784 (2007), quoting *Dell Merk, Inc. v. Franzia*, 132 Cal. App 4th 443, 450, 451, 33 Cal. Rptr. 3d 694 (2005). In this case, Mr. Gargan clearly would have been liable for an award of attorney's fees and costs under the Attorney Fee Provision of the Settlement Agreement if the Plaintiffs, signatory parties of the agreement, had prevailed on their tortious interference claim. Consequently, under the California rule, which the Washington courts would likely adopt if presented with the question, Mr. Gargan, as the prevailing party, is entitled to recover his costs and attorney's fees under the Settlement Agreement's Attorney Fee Provision even though he is a nonsignatory of the Settlement Agreement.

In short, because the Plaintiffs' tortious interference with contractual

relations claim is a tort claim "on the contract" for purposes of Washington's "tort-on-a-contract" doctrine, Mr. Gargan may recover his attorney's fees and costs under the Attorney Fee Provision of the Settlement Agreement.

III. Gargan's Right To Attorney Fees Is Also Encompassed Within The Terms Of The Settlement Agreement, Whose Attorney Fee Provision Broadly Provides That The Prevailing Party In "Any" Action To Recover Damages For Breach Is Entitled To Recover Costs And Attorney Fees.

Section IV.I.7 of the Settlement Agreement, the Attorney Fee Provision, broadly provides in relevant part:

> *In the event of any action or proceeding* at law or in equity to interpret or enforce the terms of, or obligations arising out of this Agreement, or *to recover damages for the breach hereof*, or to compel performance hereunder, *the party prevailing in any such proceeding or action*, including bankruptcy court proceedings and including any appeals, *shall be entitled to recover attorneys' fees and costs incurred by the prevailing party*.

(Doc. 295, Ex. A-1, § IV.I.7 (emphasis added).)

A contract should be construed as a whole, and, if reasonably possible, in a way that effectuates all of its provisions. *Colorado Structures, Inc. v. Insurance Co. of the West*, 161 Wn.2d 577, 588, 167 P.3d 1125 (2007). Words in a contract should be given their ordinary meaning, and courts should not adopt a contract interpretation that renders a term ineffective or meaningless. *Cambridge*

Townhomes, LLC v. Pacific Star Roofing, Inc., 166 Wn.2d 475, 487, ¶ 27, 209 P.3d 863 (2009).

The Attorney Fee Provision in the Settlement Agreement notably does not limit an award of fees and costs to those who were signatory parties to the agreement. Rather, the Settlement Agreement explicitly applies to the "prevailing party" in "any action" to recover damages for a breach of the Settlement Agreement. Dan Gargan was sued for such damages. Plaintiffs expressly alleged that "[t]he actions of Defendant Gargan as aforesaid have damaged Plaintiffs *in the same manner and to the same extent* as the breaches of the Settlement Agreement by Defendant Evans." (Doc. 1, ¶ 30 (emphasis added).) Plaintiffs, moreover, sought damages of the exact same type and amount against Gargan for tortious interference as they sought against Defendant Evans for breach of contract. (Doc. 1, ¶¶ 33, 39.) Thus, Dan Gargan is the prevailing party in an action for the recovery of damages for breach of contract, and he is therefore entitled to recover the attorney's fees and costs incurred by him in defending against the Plaintiffs' claim.

The trial court, however, ruled that Dan Gargan's argument, that he is "entitled to recover attorney fees and costs per the Attorney Fee Provision because he prevailed on Plaintiff's tortious interference with contractual relations claim at

summary judgment," "fails for a number of reasons." (Doc. 654, p. 3.) The primary reason for the trial court's decision is that "the parties did not intend for the Attorney Fee Provision to apply to non-party Defendant Gargan." (Doc. 654, p. 4.)

Given the broad language of the Attorney Fee Provision, which applies to "any action" for the recovery of damages for a breach of the Settlement Agreement, however, "[i]t defies the plain language of the contract to read this provision as restricting" such actions to those involving signatories or parties to the Settlement Agreement. *Cf. Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.*, 166 Wn.2d at 487, ¶ 28, wherein the Washington Supreme Court rejected the argument that an indemnity clause was intended to encompass only tortious actions, where the indemnity clause "specifically state[d] that the subcontractor shall indemnify the contractor '"from *any and all* claims, demands, losses and liabilities to or by third parties arising from, resulting from, or connected with, *services performed* or to be performed"' under the contract by the subcontractors." *Id.* (emphasis the court's). The court stated that "[i]t defies the plain language of the contract to read this provision as restricting such claims to tortious acts." *Id.*

In sum, the District Court below improperly rendered the contractual phrase "any action" ineffective or meaningless by its overly narrow interpretation of the

Attorney Fee Provision of the Settlement Agreement. When the language of the Attorney Fee Provision is given its ordinary meaning, the provision clearly applies to Plaintiffs' action for tortious interference with contractual relations asserted against Defendant Gargan, and Gargan is therefore entitled, as the prevailing party, to an award of costs and attorney's fees.

IV. Gargan Is Entitled To Recover Attorney's Fees Under RCW 4.84.330.

RCW 4.84.330 provides as follows:

> In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

For RCW 4.84.330 to apply, three requirements must be met: (1) the action must be "on a contract or lease," (2) the contract must contain a unilateral attorney fee or cost provision, and (3) there must be a "prevailing party." *Wachovia SBA Lending v. Kraft*, 138 Wn. App. at 859. In view of Washington's "tort-on-a-contract" doctrine, discussed at length above, Plaintiffs' action for tortious interference with contractual relations is an action "on a contract," and, thus, the first requirement is met. There is also clearly a "prevailing party," namely Gargan,

and therefore the third requirement is also satisfied.

As for the second requirement, assuming arguendo that the trial court properly determined that the Attorney Fee Provision does not apply to Gargan because he is a "non-party Defendant" (*see* Doc. 654, p. 4), i.e., a nonsignatory of the Settlement Agreement, this ruling essentially renders the Attorney Fee Provision a unilateral attorney fee provision for purposes of the Plaintiffs' action for tortious interference with contractual relations against Gargan. Consequently, all three requirements for the application of RCW 4.84.330 have been met, and Gargan has a reciprocal right to an award of fees and costs under that statute.

The District Court opined that the purpose of RCW 4.84.330 "is not to allow a non-party to a contract to collect attorney fees but rather to ensure that a 'unilateral attorney fees provision be applied bilaterally.'" (Doc. 654, p. 4, quoting *Herzog Aluminum, Inc. v. Gen. Am. Window Corp.*, 39 Wn. App. 188, 196-197, 692 P.2d 867 (1984).) Nothing in the language of the statute, however, prohibits its application to non-signatories of or non-parties to the contract containing the unilateral attorney fee provision. Neither has any Washington court so interpreted the statute.

The District Court further opined that "[t]he Attorney Fee Provision is not a unilateral attorney fee provision" because "it entitled all parties to the Settlement

Agreement to attorneys fees and costs if they prevail in litigation." (Doc. 654, p. 4.) Under the trial court's narrow interpretation of the Attorney Fee Provision, however, that provision has been rendered a unilateral attorney fee provision as it only operates in favor of the Plaintiffs and precludes an award of attorney's fees and costs to the prevailing party, Gargan.

In short, RCW 4.84.330 applies, even though Defendant Gargan is not a signatory of nor a party to the Settlement Agreement, because all three requirements for the statute's application have been fully met, and the statute does not restrict its application to parties to the contract containing the unilateral attorney fee provision.

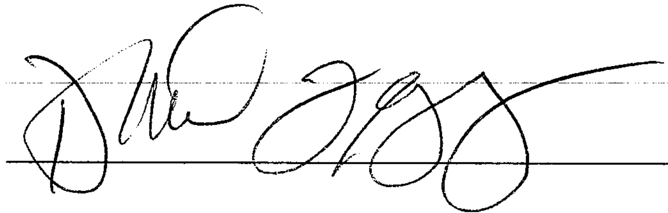
CONCLUSION

In view of the arguments made and authorities cited above, the March 24, 2010 Order of the District Court (Doc. 654) denying Defendant Daniel T. Gargan's Motion for Recovery of Attorney Fees and Costs (Doc. 406) and his Motion to Determine Reasonableness of Attorney Fees and Costs (Doc. 403) should be reversed, and the matter remanded to the District Court for a determination of the reasonableness of the attorney fees and costs that Defendant Gargan seeks to recover.

Respectfully submitted,

CERTIFICATE OF SERVICE

I, Daniel Gargan, do hereby certify that two true and correct copies of the foregoing Brief of Cross-Appellant Dan Gargan has been served, by depositing the copies, postage prepaid, in the United States mail on this 2nd day of July, 2010, on each of the following counsel for Plaintiffs and for Defendant-Appellant:



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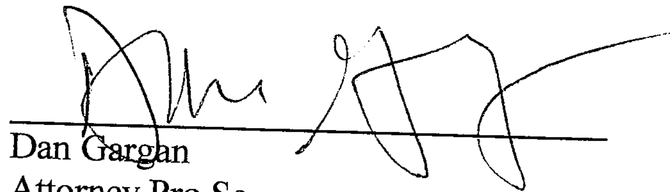
CERTIFICATE OF COMPLIANCE

Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1 for Case Number 06-55387

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief of Cross-Appellant Dan Gargan is proportionately spaced, has a typeface of 14 points or more and contains 9,194 words (including footnotes).

Dated July 2, 2010

Respectfully submitted,



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ADDENDUM OF STATUTES

1. RCW 4.84.330

Actions on contract or lease which provides that attorney's fees and costs incurred to enforce provisions be awarded to one of parties -- Prevailing party entitled to attorney's fees -- Waiver prohibited

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorney's fees is void.

As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

STATEMENT OF RELATED CASES

Certificate of Related Cases
Ninth Circuit Rule 28-2.6
for Case No.

Pursuant to Ninth Circuit Rule 28.2-2.6, Cross-Appellant Dan Gargan states that he is not aware of any related case or cases pending in this court.