

**IN THE
SUPREME COURT OF MISSOURI**

SC90771

LUCAS STUCCO & EIFS DESIGN, LLC,

Plaintiff-Respondent,

vs.

LOREN LANDAU,

Defendant-Appellant.

Appeal from the Circuit Court of St. Louis County, Missouri
Associate Division
Division No. 33
The Honorable Brenda Stith Loftin

SUBSTITUTE REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

	<u>PAGE</u>
Table of Contents.....	i
Table of Authorities.....	ii
Points Relied On.....	1
Argument.....	2
Conclusion.....	10
Certificate of Service and Compliance.....	12

TABLE OF AUTHORITIES

	<u>PAGE(S)</u>
<u>Error! No table of authorities entries found.</u> Missouri Revised Statutes, § 431.180 .. <i>passim</i>	
Missouri Revised Statutes, Chapter 610.....	6
Missouri Revised Statutes, § 610.027	6

POINTS RELIED ON

I. RESPONDENT'S CLAIMS THAT IT ULTIMATELY PLED AND PROVED AT TRIAL THE ELEMENTS REQUIRED TO RECOVER ITS ATTORNEYS' FEES UNDER THE ACT DO NOT SATISFY THE REQUIREMENT THAT A PARTY MUST SPECIFICALLY PLEAD THE BASIS FOR ITS ATTORNEYS' FEES CLAIM, BECAUSE RESPONDENTS' PETITION MAKES NO MENTION OF THE ACT.

Missouri Supreme Court Rule 55.19

II. RESPONDENT'S GENERAL REQUESTS FOR ATTORNEYS' FEES IN THE PETITION'S PRAYERS DO NOT SATISFY THE REQUIREMENT THAT A PARTY SPECIFICALLY PLEAD THE BASIS FOR ITS ATTORNEYS' FEES CLAIM, BECAUSE UNDER MISSOURI LAW THE PRAYERS FOR RELIEF ARE NOT PART OF THE PETITION AND MAY BE DISREGARDED IN DETERMINING WHAT RELIEF, IF ANY, IS AUTHORIZED BY THE PETITION.

Buckner v. Burnett, 908 S.W.2d 908, 912 (Mo.App. W.D. 1995)

III. RESPONDENT'S ELEVENTH-HOUR DISCLOSURE OF THE STATUTORY BASIS FOR ITS REQUEST FOR ATTORNEYS' FEES DOES NOT EXCUSE RESPONDENT'S FAILURE TO SPECIFICALLY PLEAD ITS ALLEGED ENTITLEMENT TO FEES.

Condos v. Associated Transports, Inc., 453 S.W.2d 682, 688 (Mo.App. E.D. 1970)

ARGUMENT

Respondent Lucas Stucco and EIFS Design, LLC's ("Respondent") Brief makes three arguments in response to Appellant's failure-to-plead-with-specificity argument. First, Respondent argues that because it pled and proved at trial all elements required to recover attorneys' fees under the Missouri Private Prompt Payment Act, R.S.Mo. §430.180, et. seq. ("the Act"), it is entitled to its attorneys' fees in this matter. Second, Respondent argues that its general request for attorneys' fees in the Petition's prayers satisfies the "specifically pled" requirement. Third, Respondent argues that because Appellant learned the statutory basis of Respondent's request – the Act – a week before trial, Appellant cannot now complain about Respondent's failure to specifically plead the Act in the Petition.

As set forth more fully below, none of these arguments excuses Respondent's failure to specifically plead the alleged basis for the recovery of its attorneys' fees. Respondent's Petition does not contain any reference to the Act upon which Respondent now seeks to rely. Rather, Respondent's general request for attorneys' fees is contained only in the Petition's prayers, and it is well established that the prayer for relief "is no part of the petition and may be disregarded in determining what relief, if any, is authorized by the petition." *Buckner v. Burnett*, 908 S.W.2d 908, 912 (Mo. App. W.D. 1995). Finally, Respondent's eleventh-hour disclosure that it sought to rely on the Act, made after ten months of litigation and just one week before trial, cannot excuse Respondent's failure to specifically plead the Act. For all of these reasons, that portion of the trial court's

judgment awarding Respondent its attorneys' fees should be reversed, and judgment should be entered in Respondent's favor solely for the principal amount sought by Respondent, plus interest.

I. RESPONDENT'S CLAIMS THAT IT ULTIMATELY PLED AND PROVED AT TRIAL THE ELEMENTS REQUIRED TO RECOVER ITS ATTORNEYS' FEES UNDER THE ACT DO NOT SATISFY THE REQUIREMENT THAT A PARTY MUST SPECIFICALLY PLEAD THE BASIS FOR ITS ATTORNEYS' FEES CLAIM, BECAUSE RESPONDENTS' PETITION MAKES NO MENTION OF THE ACT.

Respondent first argues that it pled and ultimately proved the elements required to recover its attorneys' fees under the Act. In support of its position, Respondent relies primarily on *Vance Bros., Inc. v. Obermiller Const. Services, Inc.*, 181 S.W. 3d 562 (Mo. Banc 2006), emphasizing that the *Vance* court allowed recovery under the Act in both a contract claim and an action on account. (Respondent's Brief, pp. 13-14). At this stage in the proceedings, however, the issue before the Court is whether Respondent, in its Petition, specifically pled its entitlement to attorneys' fees under the Act, not whether Respondent introduced evidence to prove each element of the Act. As a result, the *Vance* case is clearly distinguishable, because the parties in *Vance* stipulated that the Respondent's petition would be amended to include a claim for recovery under the Act. *See* 181 S.W. 3d at 563. No such stipulation occurred in this case, and Respondent's Petition makes no mention of the Act. In fact, Appellant did not learn that Respondent

was invoking the Act until the morning of the initial trial setting, just one week before the case was ultimately tried.¹

Because Respondent's Petition failed to mention the Act, Respondent's argument that it "has proved all elements required to recover attorney's fees under the (Act)" is irrelevant. *See* Respondent's Brief, p. 14. At the time of trial, the damage had already been done – Appellant had no idea that Respondent was seeking to recover under the Act, and by failing to specifically plead its alleged entitlement to attorney's fees, Respondent failed to put Appellant on notice that Respondent would ultimately invoke the Act at trial.

As set forth in Appellant's opening Brief, attorneys' fees constitute special damages which must be specifically pled in order to be recovered. Missouri Supreme Court Rule 55.19; *Conley v. Rauschenbach*, 863 S.W.2d 617, 620 (Mo. App. E.D. 1993); *Washington Univ. v. Royal Crown Bottling Co.*, 801 S.W.2d 458, 470 (Mo. App. E.D. 1990). The purpose of Rule 55.19 is to prevent surprise, by informing the defendant what damages are claimed. *Condos v. Associated Transports, Inc.*, 453 S.W.2d 682, 688 (Mo. App. E.D. 1970). If Missouri law permitted litigants simply to allege the elements required to ultimately prove a statutory claim for attorney's fees, without citing the particular statute being invoked, litigants could easily mask claims for attorney's fees and

¹ This case originally was set for trial on January 8, 2009. That is when Respondent first notified Appellant that it would seek its fees pursuant to the Act. Appellant requested and was granted a one-week continuance due to his medical condition, and the trial began on January 15, 2009.

defeat the purpose of Rule 55.19. By failing to cite the Act in its Petition, Respondent failed to specifically plead its alleged entitlement to attorneys' fees under the Act and frustrated the purpose of Rule 55.19.

II. RESPONDENT'S GENERAL REQUESTS FOR ATTORNEYS' FEES IN THE PETITION'S PRAYERS DO NOT SATISFY THE REQUIREMENT THAT A PARTY SPECIFICALLY PLEAD THE BASIS FOR ITS ATTORNEYS' FEES CLAIM, BECAUSE UNDER MISSOURI LAW THE PRAYERS FOR RELIEF ARE NOT PART OF THE PETITION AND MAY BE DISREGARDED IN DETERMINING WHAT RELIEF, IF ANY, IS AUTHORIZED BY THE PETITION.

Next, Respondent argues that it specifically pled its entitlement to attorneys' fees under the Act, because "the prayer for each count specifically requested 'attorneys' fees', thereby clearly satisfying Missouri's pleading requirements." (Respondent's Brief, p. 19). Respondent, however, cites no authority for the proposition that a request for "attorneys' fees", set forth in a prayer for relief, is sufficient. Simply put, it is impossible for Respondent to reconcile its position with the well-established rule that prayers for relief "are no part of the petition and may be disregarded in determining what relief, if any, is authorized by the petition." *Buckner v. Burnett*, 908 S.W. 2d 908, 912 (Mo. App. W.D. 1995).

Respondent's attempt to distinguish the *Buckner* case is unpersuasive. Just like the case at bar, the plaintiff in *Buckner* sought attorneys' fee pursuant to a specific statute

– R.S. Mo. 610.027. *See* 908 S.W.2d at 909. Unlike the instant case, however, the *Buckner* plaintiff specifically identified the statute in his petition. *Id.*, at 910.

Regardless, the *Buckner* court ruled that because the plaintiff failed to plead sufficient facts to give notice that he was "contending a purposeful violation" of the statute at issue, which is required to recover attorneys' fees under the statute, the *Buckner* plaintiff failed to sufficiently plead his alleged entitlement to attorneys' fees. *Id.* At 912. In an attempt to distinguish the case at bar from *Buckner*, Respondent argues that because it pled the underlying "factual predicate" for its alleged entitlement to attorney's fees, Respondent's pleading is sufficient. (Respondent's Brief, pp. 15-16). This argument fails, however, because Respondent's Petition here contains no mention of the Act.

In *Buckner*, the plaintiff clearly sought relief pursuant Chapter 610, R.S.Mo, but failed to plead sufficient facts indicating that he was making a statutory claim for attorneys' fees. In this case, Respondent may have pled facts to support a claim for attorneys' fees under the Act, but failed to mention the Act. As a result, Respondent's Petition was insufficient to put Appellant on notice that it was invoking the Act. The *Buckner* case is instructive and disposes of Respondent's argument – because Respondent failed to cite the Act in the body of its Petition, Respondent did not specifically plead its claim for attorneys' fees as required by Rule 55.19.

Respondent also relies on *Lau v. Pugh*, 299 S.W. 3d 740 (Mo. App. S.D. 2009), which is easily distinguishable from the instant case. In *Lau*, the court evaluated whether the plaintiff adequately pled his entitlement to attorney's fees in a claim for slander of

title. 299 S.W. 3d at 748. The *Lau* court noted that whether attorney's fees were recoverable in a slander of title case was an issue of first impression.

There is no statute that allows a plaintiff to recover fees in an action for slander of title. 299 S.W.3d at 748. Therefore, it was impossible for the *Lau* plaintiffs to cite a particular statute in their petition. As a result, the *Lau* court held that because the plaintiffs alleged, in the body of their petition, that they had suffered "pecuniary loss", in connection with their general request for fees in the prayer for relief, the plaintiffs specifically pled their entitlement to attorneys' fees as required by Rule 55.19. The *Lau* court reached this conclusion because the law required that a plaintiff demonstrate that he "suffered pecuniary loss or injury" when seeking damages in a slander of title action. *Id.*, at 749. Because the *Lau* plaintiffs could not cite to a contract or statute in support of their claim for fees, it follows that their allegations that they suffered "pecuniary loss", set forth in the body of their petition, allowed the plaintiffs to state a claim for recovery of their attorney's fees.

Unlike the plaintiff in *Lau*, Respondent here is seeking its attorneys' fees pursuant to the Act, a specific statute that Respondent easily could have cited in its Petition. At best, Respondent's allegations relating to the "factual predicate" of its claim – that Respondent entered into a construction contract with Appellant – would direct any responding party to the exhibited contract, which does not include an attorneys' fees clause. *See* Legal File ("L.F."), p. 13-14. By failing to even mention the Act in its Petition, Respondent failed to specifically plead its entitlement to attorney's fees as required by to Rule 55.19.

Respondent also cites the *Lau* case in support of the proposition that when construing remedial statutes courts apply a liberal standard to evaluate the sufficiency of Respondent's pleadings. *See* Respondent's Brief, p. 19. This argument is misplaced, because the claim in the *Lau* case on which Respondent recovered its attorneys fees (slander of title) did not involve the construction of a statute. Moreover, although Missouri courts note that the Act is a remedial statute that that requires liberal interpretation, the standard of construction that should be applied to the Act itself has nothing to do with the applicable pleading standard. At this stage in the proceedings, only Rule 55.19 is at issue – not the provisions of the Act. Respondent's statements that a "small contractor trying to survive in tough economic times" was "punished" in favor of a "savvy, business-wise commercial property owner" (*See* Respondent's Brief, p. 18) are disingenuous and completely unsupported by the record. Most importantly, these statements have nothing to do with the sufficiency of Respondent's Petition. Respondent failed to specifically plead its alleged entitlement to attorneys' fees under the Act, and the trial court's award of attorneys' fees in this case was improper.

III. RESPONDENT'S ELEVENTH-HOUR DISCLOSURE OF THE STATUTORY BASIS FOR ITS REQUEST FOR ATTORNEYS' FEES DOES NOT EXCUSE RESPONDENT'S FAILURE TO SPECIFICALLY PLEAD ITS ALLEGED ENTITLEMENT TO FEES.

Respondent's final argument is that because Respondent eventually advised Appellant of the basis of Respondent's request for attorneys' fees – after ten (10) months

of litigation and one week before trial – Appellant had "ample time to prepare and present any arguments . . ." (Respondent's Brief, pp. 20-22). Respondent's argument misses the point.

Appellant was served with the Petition on March 27, 2008. At that time, and for the next ten (10) months until one week before trial, Appellant and its counsel believed that the amount in dispute was \$4,900, plus interest. (L.F. 1-5). This belief obviously affected the strategy Appellant and its counsel employed, including what pleadings to file, what discovery to conduct, and whether and how to engage in settlement negotiations. Appellant did not learn that his potential exposure was nearly \$20,000 until after trial, when Respondent submitted its request for attorneys' fees. (L.F. 21-24).

Again, the purpose of Rule 55.19 is to prevent surprise, by informing the defendant what damages are claimed. *Condos*, 453 S.W.2d at 688. This case presents a textbook example of why the rule exists, and the prejudice that can result if the rule is ignored. Appellant was sued for \$5,000. Only after trial did Appellant learn that his potential liability was nearly \$20,000. Appellant's potential liability escalated to nearly \$35,000 on appeal, and now Appellant's potential liability is (presumably) approaching \$40,000. This is exactly the prejudice (and waste of resources) that the rule was designed to prevent. Respondent's last-minute notice regarding its intent to rely on the Act cannot

excuse Respondent's failure to specifically plead the alleged basis for its attorneys' fees claim.²

CONCLUSION

For the reasons and upon the authorities herein and in Appellant's opening Brief, it was error for the trial court to include Respondent's attorneys' fees in the trial court's Judgment. That portion of the trial court's judgment should be reversed, and this case should be remanded to the trial court with instructions to enter judgment in favor of Respondent and against Appellant for the principal amount sought by Respondent (\$4,900), plus interest accruing to the date of the April 14, 2009 judgment, and to require that Respondent enter a satisfaction of judgment, as Appellant has paid the principal amount and applicable interest to Respondent.

² Respondent also argues in this section of its brief that the Motion to Withdraw filed by Appellant's counsel somehow supports Respondent's claim for fees. (Respondent's Brief, pp. 21-22). Appellant's counsel's request to withdraw prior to trial, based on temporary communication problems stemming from Appellant's medical condition, has nothing to do with the pleading rules at issue herein.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

1. The brief includes the information required by Rule 55.03;
2. The brief complies with the limitation contained in Rule 84.06(b);
3. According to the word count function of counsel's word-processing software (Microsoft® 2007), the brief contains 2403 words;
4. The number of lines of monospaced type in the brief is 208.
5. The floppy disk submitted herewith containing a copy of this brief has been scanned for viruses and is virus-free.

Andrew J. Scavotto

CERTIFICATE OF SERVICE

On this 12th day of August, 2010, I hereby certify that two copies of the above and foregoing brief, together with a copy of this brief on disk, were served by regular United States mail, first class postage prepaid, addressed to:

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