

IN THE MISSOURI SUPREME COURT

No. SC90771

LUCAS STUCCO & EIFS DESIGN, L.L.C.,

Plaintiff/Respondent,

v.

LOREN L. LANDAU,

Defendant/Appellant.

**ON APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY
THE HONORABLE BRENDA STITH LOFTIN
CIRCUIT COURT NO. 07SL-AC05092**

**SUBSTITUTE BRIEF OF PLAINTIFF/RESPONDENT
LUCAS STUCCO & EIFS DESIGN, L.L.C.**

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STATEMENT OF FACTS

This appeal arises from a dispute concerning payment of amounts due a contractor for work done on a commercial property. (L.F. 8-9.) Defendant/Appellant, Loren L. Landau (“Property Owner”), hired Plaintiff/Respondent, Lucas Stucco & EIFS Design, LLC (“Contractor”), to install stucco finishing on Property Owner’s commercial building (Contractor’s Exhibit 2.) Specifically, Contractor was to “[i]nstall Tyvek Stucco Wrap” on the existing structure to “match [the] existing [finish] as closely as possible,” replacing any damaged supporting wood “where needed.” (L.F. 8, 13; Contractor’s Exhibit 2.) Contractor submitted a written estimate to Property Owner describing the work to be done and the proposed \$19,000.00 price, which estimate Property Owner accepted by signing. (L.F. 8; Contractor’s Exhibit 2.)

After work had begun, Property Owner asked Contractor to remove a sign from the building and “replace” and cover the space where the sign had been with plywood. (Contractor’s Exhibit 2.) Contractor submitted a work order to Property Owner describing the additional work requested and the proposed \$900.00 additional charge. (*Id.*) Property Owner did not sign the work order for the requested additional work, but Contractor nonetheless completed the additional work as requested. (*Id.*)

Contractor timely completed both the original scope of work and the additional work and submitted invoices to Property Owner for payment of the \$19,900.00 agreed-upon price for the work. (L.F. 8, 15.) Property Owner did not complain about the quality of work and submitted two separate payments totaling \$15,000.00 as partial payment for

the work. (L.F. 15.) When Property Owner did not pay the remaining balance owed of \$4,900.00, Contractor filed the underlying suit to collect this balance. (L.F. 7-15.)

Contractor's Petition for Damages named Property Owner as the sole defendant and set forth claims for Breach of Contract (Count I), Action on Account (Count II), Quantum Meruit/Unjust Enrichment (Count III), and Detrimental Reliance to recover the balance owed (Count IV). (*Id.*) Contractor's Petition specifically alleged that the parties had entered into a written contract for the original scope of work, that Contractor ultimately provided \$19,900.00 in work on Property Owner's building, that Contractor billed Property Owner for the work performed, and that Property Owner made payments of \$15,000.00 to Contractor but refused, despite repeated requests, to pay the remaining \$4,900.00 balance owed. (L.F. 8-9.) In addition to requesting recovery of the \$4,900.00 balance owed, the prayer for relief for each count also requested awards of "interest" and "the reasonable attorneys' fees and costs incurred in bringing this action[.]" (L.F. 9, 10, 11, 12.)

The trial court scheduled the trial for January 8, 2009. (L.F. 3.) However, on January 2, 2009, less than one week before the scheduled trial date, Property Owner's counsel filed a "Motion to Continue Trial Setting and Withdraw as Counsel" ("Withdrawal Motion"). (*Id.*; Supp. L.F. 1-3.) The Withdrawal Motion informed the trial court that Property Owner's counsel "has attempted to contact [Property Owner] on numerous occasions to discuss this case and prepare for trial" but "has not received any response or communication from [Property Owner] in regards to this case." (Supp. L.F. 1.) The Withdrawal Motion further informed the trial court that Property Owner "has

been notified of the trial date on numerous occasions since it was originally set on October 23, 2008,” and asked the trial court for leave to withdraw “[d]ue to [Property Owner’s] failure to communicate with counsel.” (*Id.*) The Withdrawal Motion concluded by asking “that this matter be continued from the trial setting of January 8, 2009, so that [Property Owner] can obtain alternate counsel and/or adequately prepare for trial.” (Supp. L.F. 2.)

After the trial court denied the Withdrawal Motion, Property Owner again requested a continuance, this time submitting his request orally to the trial court on the scheduled trial date, January 8, 2009. (L.F. 4.) At that time, Contractor’s counsel reminded the trial court and Property Owner that Contractor was seeking recovery of its attorneys’ fees and costs, and specifically identified Missouri’s Private Prompt Payment Act, § 431.180 RSMo. (“PPPA”), as the basis for its fee request. (L.F. 26; Appellant’s Brief, pp. 2, 5.) The trial court granted Property Owner a one-week continuance—until January 15, 2009—but specified that “no further continuances” would be granted. (L.F. 4.) The case was then tried before the trial court on January 15, 2009. (L.F. 4, 29.)

After the close of the evidence at trial, the trial court took up the issue of Contractor’s request for attorneys’ fees. (L.F. 29.) Property Owner objected, based solely on a contention that Missouri courts have interpreted the PPPA as being applicable only to private construction contracts that require multiple payments, and submitted an appellate court opinion to the trial court that purportedly supported this contention. (L.F. 22; Supp. L.F. 6.) The trial court then informed the parties that it would not take the case under submission until Contractor had submitted its request for fees pursuant to the PPPA

and Property Owner had an opportunity to submit a written response. (L.F. 29.) That same date, January 15, 2009, the trial court set a briefing schedule on Contractor's claim for attorneys' fees. (*Id.*)

On January 23, 2009, Contractor submitted a Motion and a Memorandum in Support of its request for attorneys' fees. (L.F. 21-24; Supp. L.F. 4-8.) As previously disclosed to Property Owner and the trial court in open court on the original trial date, Contractor based its fee request on the PPPA, and supported its request by citing the PPPA and *Vance Bros., Inc. v. Obermiller Const. Services, Inc.*, 181 S.W.3d 562 (Mo. 2006), this Court's decision construing the PPPA. (L.F. 22-23; Supp. L.F. 6-8.)

On January 29, 2009, Property Owner filed Suggestions in Opposition to Contractor's attorneys' fee request. (L.F. 25-28.) In his Suggestions, as he had at trial, Property Owner relied on the unpublished opinion from the Western District of the Missouri Court of Appeals in the subsequently transferred *Vance* case, contending that this subsequently-transferred opinion imposed a multiple payment requirement under the PPPA. (L.F. 22, 25-26; Supp. L.F. 6.) In addition, Property Owner argued for the first time that Contractor's request in its prayer was insufficient, contending that Property Owner was prejudiced by Contractor's allegedly tardy notice of the specific statutory basis of its attorneys' fee request. (L.F. 26-27.)

The trial court took the case "under submission on January 30, 2009," and issued its Judgment on February 27, 2009. (L.F. 29.) In its Judgment, the trial court ruled that Contractor proved the existence of a contract and breach thereof due to Property Owner's nonpayment of a balance due of \$4,000.00 pursuant to the written contract dated

September 20, 2005. (L.F. 29-30.) With regard to the additional \$900.00 claimed to be due and owing under a Work Order dated November 23, 2005, the trial court found that this amount was not recoverable under a breach of contract theory, but was recoverable under quantum meruit. (L.F. 30.) In addition, the trial court found that the Property Owner was liable for reasonable attorneys' fees in the amount of \$10,567.04 "pursuant to Section 431.180 and *Vance Bros, Inc. v. Obermiller Const. Services, Inc.*, 181 S.W.3d 562 (Supreme Court, En Banc 2006)." (*Id.*)

On Contractor's Motion to Amend the Judgment to include an erroneously omitted award of prejudgment interest, the trial court entered an Amended Judgment in which it added an award of prejudgment interest in the amount of \$2,832.20, for a total judgment of \$18,299.24, with costs assessed to Property Owner. (L.F. 32.) Property Owner then filed this appeal, challenging only the trial court's award of attorneys' fees to Contractor. (L.F. 35.)

On February 2, 2010, the Missouri Court of Appeals, Eastern District, issued its opinion, stating "we find that a party seeking attorney fees under the PPPA must specifically invoke the Act in an initial or amended pleading," and concluding that, "[u]nder the circumstances here, [Contractor] failed to properly plead its entitlement to attorneys fees under the PPPA." (Opinion at 6, 8.) On February 17, 2010, Contractor filed a Motion for Rehearing and an Application to Transfer with the Court of Appeals, which the Court of Appeals denied on March 8, 2010.

Contractor then submitted an Application for Transfer to this Court and, on April 20, 2010, this Court issued its Order sustaining Contractor's Application and transferring this appeal.

ARGUMENT

I. THE TRIAL COURT PROPERLY AWARDED ATTORNEYS' FEES TO CONTRACTOR, BECAUSE THE PRIVATE PROMPT PAYMENT ACT, § 431.180 RSMO. (THE "PPPA"), AUTHORIZES A COURT TO AWARD ATTORNEYS' FEES TO THE PREVAILING PARTY IN ANY ACTION FOR FAILURE TO PAY UNDER A PRIVATE CONSTRUCTION CONTRACT, CONTRACTOR'S PETITION SOUGHT RECOVERY FOR PROPERTY OWNER'S FAILURE TO PAY UNDER THE PARTIES' PRIVATE CONSTRUCTION AGREEMENT AND CONTAINED A SPECIFIC REQUEST FOR "REASONABLE ATTORNEYS' FEES" IN THE PRAYER FOR RELIEF FOR EACH COUNT, AND CONTRACTOR PREVAILED ON ITS CLAIMS.

Standard of Review

Whether attorneys' fees have been specifically pled to entitle the pleader to an award of such is an application of law, which is reviewed *de novo*. See *Ridgway v. TTnT Development Corp.*, 126 S.W.3d 807, 818 (Mo. App. S.D. 2004); *Morgan v. Morgan*, 249 S.W.3d 226, 230 (Mo. App. W.D. 2008).

Argument

A. Contractor Pled, and Proved, All Elements of the PPPA.

The trial court's award of attorneys' fees to Contractor was proper under the PPPA. Contractor filed suit seeking to recover the unpaid balance owed by Property

Owner for work done under a private construction agreement and requested an award of attorneys' fees pursuant to the PPPA against Property Owner. (L.F. 7-15, 21-24.)

Property Owner objected, both at trial and in his Suggestion in Opposition, based on a contention that "Missouri courts have clearly stated that in order to recover attorney's fees under the [PPPA], the contract must provide for scheduled payments." (L.F. 25. (emphasis in original)) Property Owner conceded that his assertion was based on a Missouri appellate court opinion in a case that was ultimately transferred to, and decided by, this Court, but contended that the appellate court's multiple payment ruling "was not at issue before the Supreme Court, and it was not overruled."¹ (L.F. 25-26.)

In his Suggestions in Opposition – filed two (2) weeks after the trial - Property Owner also argued, for the first time, that Contractor's request in its prayer was insufficient, contending that Property Owner was prejudiced by Contractor's allegedly tardy notice of the specific statutory basis of its attorneys' fee request. (L.F. 26-27.) The trial court rejected Property Owner's argument, and ruled that Property Owner was liable

¹ Property Owner asserted this alleged "multiple payment" requirement as his primary argument at trial, in his Suggestions in Opposition, and in his initial brief to the court of appeals (L.F. 22, 25-26; Supp. L.F. 6; Brief of Appellant ("Property Owner's Appellate Court Brief") at 4-6.), but did not assert it as his primary argument in the Substitute Brief of Defendant-Appellant he filed with this Court. In fact, Property Owner does not even mention this argument anywhere in his Substitute Brief, having apparently abandoned this once-primary argument before this Court.

for reasonable attorneys' fees in the amount of \$10,567.04 "pursuant to [the PPPA] and *Vance Bros., Inc. v. Obermiller Const. Services, Inc.*, 181 S.W.3d 562 (Supreme Court, En Banc 2006)." (L.F. 30, 32.)

The trial court's ruling in this case was fully supported by authority. In Missouri, attorneys' fees are recoverable when a statute specifically authorizes recovery or when attorneys' fees are provided for by contract. *Essex Contracting, Inc. v. Jefferson County*, 277 S.W.3d 647, 657 (Mo. banc 2009). Here, the award of attorneys' fees was authorized by statute, namely, the PPPA, which states in pertinent part:

1. All persons who enter into a contract for private design or construction work after August 28, 1995, shall make all scheduled payments pursuant to the terms of the contract.
2. Any person who has not been paid in accordance with subsection 1 of this section may bring an action in a court of competent jurisdiction against a person who has failed to pay. The court may in addition to any other award for damages, award ... reasonable attorney fees, to the prevailing party....
3. The provisions of this section shall not apply to contracts for private construction work of ... owner-occupied residential property of four units or less.

* * *

Section 431.180 RSMo.

The law is clear that the PPPA authorizes the recovery of attorneys' fees by the prevailing party in an action for failure to pay under a private construction contract. This Court construed the PPPA in *Vance Bros., Inc. v. Obermiller Const. Services, Inc.*, 181 S.W.3d 562 (Mo. banc 2006). In *Vance*, a general contractor engaged a subcontractor to apply microsurfacing to a parking lot. *Id.* at 563. After a dispute arose concerning the quality of work performed, the general contractor withheld payment and subcontractor brought suit. *Id.* The jury found in favor of subcontractor, and the trial court awarded the subcontractor its attorneys' fees pursuant to the PPPA. *Id.*

The general contractor appealed, contending in part that the PPPA did not apply because the subcontractor's suit "was brought as a petition on account rather than on a contract." *Id.* This Court rejected that argument, holding that the PPPA does not require that the action brought be one in contract to fall within the ambit of the PPPA. *Id.* at 564. Instead, the Court found that filing any action seeking recovery of unpaid amounts under the parties' contractual agreement—such as a petition on account—was sufficient to bring an action within the domain of the PPPA. *Id.* In this case, as in *Vance*, Contractor satisfied those requirements by filing its Petition in multiple counts, each of which sought recovery of unpaid amounts owed by Property Owner under the parties' contractual agreement and for quasi-contractual claims. (L.F. 7-15.)

This Court held in *Vance* that invoking the PPPA merely requires proof that (1) the parties entered into a private construction contract that required one party to make one or more payments, and (2) that party failed to timely make all payments required pursuant to that contract. *Vance*, 181 S.W.3d at 564. In this case, Contractor pled and

proved at trial that the parties entered into a written contractual agreement under which Contractor agreed to perform certain work on Property Owner's commercial property, that Property Owner agreed to pay Contractor for its work under the written contract, that Contractor performed additional work requested by Property Owner, that Property Owner failed to pay the \$4,900.00 balance owed under the written contract, and for the additional work, to Contractor, and that Property Owner thus breached the written contract and was unjustly enriched with respect to the additional work. (L.F. 7-15.) As such, Contractor has proved all elements required to recover attorneys' fees under the PPPA. *Vance*, 181 S.W.3d at 564.

B. Contractor's Request for Attorneys' Fees was Specifically Pled.

In his brief, Property Owner argues that, "it is well-established that claims for attorney's fees constitute special damages, which must be specifically pleaded in order to be recovered." (Substitute Brief of Defendant-Appellant ("Substitute Brief") at 6.) Property Owner contends that Contractor's request for attorneys' fees set for in the prayer for relief for each Count fails to satisfy this standard. (*Id.* at 7.)

Property Owner cites two cases in support of his argument—*Washington Univ. v. Royal Crown Bottling Co. of St. Louis*, 801 S.W.2d 458 (Mo. App. E.D. 1990), and *Conley v. Rauschenbach*, 863 S.W.2d 617 (Mo. App. E.D. 1993)—neither of which are on point here. In fact, these cited cases actually contradict Property Owner's argument. For instance, in *Washington Univ.*, the court held that a prayer for "costs" in a declaratory judgment action does not include a request for attorneys' fees. *Washington Univ.*, 801 S.W.2d at 469-70. Similarly, in *Conley*, the party seeking fees did not request or even

mention them in any pleading, instead requesting only general damages, punitive damages, costs, and such other and further relief as to the court may seem just and proper. *Conley*, 863 S.W.2d at 620-21. Just as in *Washington Univ.*, the court in *Conley* held that failure to specifically request “attorneys’ fees” precluded an award under Missouri law. *Id.* at 620.

Property Owner’s other cited case similarly do not support of his argument. Property Owner cites *Buckner v. Burnett*, 908 S.W.2d 908, 912 (Mo. App. W.D. 1995) and *Willett v. Farm Mortgage & Loan Co.*, 263 S.W. 234 (Mo. App. 1924) for the proposition that “a prayer [for relief] is not considered part of a petition” and thus “does not affect the petition’s sufficiency.” (Substitute Brief at 7.) These cases do not support Property Owner’s argument.

In *Buckner*, a citizen filed suit against the chief clerk of the Missouri House of Representatives and the chairman of the House Accounts Committee for failure to produce requested public records, in violation of Section 610.010(6) RSMo. *Buckner*, 908 S.W.2d at 909-10. Of the two remedies provided in Chapter 610 for the violation at issue, only one – “a fine and attorney fees in cases of purposeful violations” - was applicable to the case. *Id.* at 912. As such, plaintiff “would have had to plead facts averring that [the defendants] purposely violated Chapter 610.” *Id.* The court ruled that plaintiff “failed to plead sufficient facts to give notice that he was contending a purposeful violation.” *Id.* The court noted that plaintiff’s “prayer for relief asked for reasonable attorney fees,” but ruled that this request did not rectify plaintiff’s failure to plead (or mention anywhere in his petition) the necessary factual predicate – “purposeful

violation” – to bring the petition within the ambit of the remedy offered by Chapter 610. *Id.* Unlike in *Buckner*, however, Property Owner does not contend – nor could he – that Contractor did not plead the factual predicate necessary to invoke the PPPA -- entry into a private construction agreement and one party’s failure to timely make all payments required pursuant to that contract. *Vance*, 181 S.W.3d at 564.

Further, Plaintiff’s citation to *Willett* provides absolutely no support for his argument. *Willett* involved an attempt to collaterally attack a federal court judgment. *Willett*, 263 S.W. at 236. At no point, however, did any party raise the issue of attorney fees, nor did the court address the sufficiency of the state court petition issuing the collateral attack. *Id.* at 234-36.

A prompt payment statute such as the PPPA “promotes timely payment of contractors, subcontractors, and suppliers.” *Jerry Bennett Masonry, Inc. v. Crossland Constr. Co.*, 171 S.W.3d 81, 89 (Mo. App. S.D. 2005) (quoting *Leo Journagan Constr. Co. v. City Utils.*, 116 S.W.3d 711, 724 (Mo. App. S.D. 2003)). As such, it “is considered a remedial statute and therefore requires liberal interpretation.” *Id.*; *see also*, *Midwest Floor Co. v. Miceli Dev. Co.*, 304 S.W.3d 243, 247-48 (Mo. App. E.D. 2009) (“Statutes creating mechanics’ liens are remedial in nature and should be given a liberal construction so as to effectuate their object and purpose and protect the claims of mechanics and materialmen.”) (quoting *Glenstone Block Co. v. Pebworth*, 264 S.W.3d 703, 710-11 (Mo. App. S.D. 2008)).

Rather than construing the PPPA liberally to further its remedial purposes, however, the Eastern District incorrectly imposed more stringent pleading requirements

for attorney fee awards under the PPPA than that applicable to non-PPPA claims. For example, in *Lau v. Pugh*, 299 S.W.2d 740, 751 (Mo. App. S.D. 2009), the Southern District construed the pleading standards for recovery of attorney fees under the mechanics' lien statutes. Applying the required "liberal interpretation" to those remedial statutes, the Southern District held that allegations of "pecuniary loss" were sufficient under Rule 55.19 to allege claim for attorney fee under the mechanics lien statutes. *Id.*

Similarly, in *Vance Bros.*, this Court broadly construed the scope of the PPPA, in accord with its intended purpose to promote "timely payment," *Jerry Bennett Masonry, Inc.*, 171 S.W.3d at 89, to bring within its ambit quasi-contractual as well as contractual claims. *Vance Bros.*, 181 S.W.3d at 564. Such broad, liberal interpretations allow the PPPA's remedial aspects – imposing interest and attorney fees against recalcitrant commercial property owners – to perform their intended persuasive purpose.

In its opinion, however, the Eastern District extrapolated from a generic statement of law – that attorney fees are special damages and, therefore, must be specifically pleaded to be recovered – to impose a requirement "that a party seeking attorney fees under the PPPA must specifically invoke the Act in an initial or amended pleading." (Opinion at 6.) This particularity pleading standard applied by the Eastern District to the remedial PPPA imposes requirements more stringent than those generally applied by Missouri courts to review requests for attorney fees. In those earlier cases, Missouri courts rejected attorney fee requests only if the party seeking the request had not included any request for attorney fees in its pleadings. *See, Ridgway*, 126 S.W.3d at 818-19 (in trespass action, attorney fee award reversed because "petition did not contain any request

for attorney fees in either the body of the petition or the prayer for relief”); *Washington Univ.*, 801 S.W.2d at 467-68 (in declaratory judgment action, attorney fee award reversed because plaintiff “asked for costs in the prayer of its first amended petition, but did not specifically ask for attorney’s fees”); *Conley*, 863 S.W.2d at 620 (plaintiffs “failed to specifically seek attorney fees in either their answer or counterclaim[, n] or did their prayer seek attorney fees”); *Fisher v. Fisher*, 874 S.W.2d 543, 547 (Mo. App. W.D. 1994) (“Plaintiffs failed to request attorney’s fees in their petition: They merely requested “costs for the disbursement of this action”).

Imposing a standard more stringent than that applied to cases not involving remedial statutes contradicts the remedial purpose of the PPPA (and its intent to promote timely payment of amounts owed to small contractors). Essentially, the Eastern District has rewarded the undisputed dilatory conduct undertaken by the savvy, business-wise commercial property owner, and punished the small contractor attempting to survive in tough economic times. This approach is contrary to broadening interpretation of the PPPA set forth in *Vance Bros.*, in which this Court not only rejected the potentially limiting “multiple payment” argument asserted by the property owner in that case, but in fact broadened the scope of the PPPA – in accord with its remedial purposes – by bringing within its ambit quasi-contractual as well as contractual claims. *Vance Bros.*, 181 S.W.3d at 564. This Court’s approach thus allowed the PPPA’s primary remedial aspects – accrual of interest and recovery of attorney fees – to be used by the broadest range of workers and contractors across Missouri.

Missouri courts have found pleadings lacking only if a petition fails to specifically request “attorneys’ fees” in its prayer or elsewhere in the petition. *See, Ridgway*, 126 S.W.3d at 818-19; *Washington Univ.*, 801 S.W.2d at 467-68; *Conley*, 863 S.W.2d at 620; *Fisher*, 874 S.W.2d at 547. Moreover, when construing remedial statutes – such as the PPPA at issue in this case – courts have awarded fees even if the words “attorney fees” appear nowhere in the petition. *Lau*, 299 S.W.3d at 751.

In this case, the prayer for each count specifically requested “attorneys’ fees,” thereby clearly satisfying Missouri’s pleading requirements. Accordingly, this Court should find that Contractor’s pleadings were sufficient to raise the issue of attorney’s fees and deny this point on appeal.

C. Not Only was Contractor’s Pleading Sufficient, Property Owner Admits He had Notice that Contractor was Invoking the PPPA and was Given Reasonable Opportunity to be Heard.

Not only were attorneys’ fees pled with sufficient specificity, Property Owner admits that he had notice that Contractor was invoking the PPPA well before trial. The reasoning behind Rule 55.19 is to give the defendant fair notice of the damage that the plaintiff will claim and to prevent surprise. *Crossno v. Taube*, 754 S.W.2d 13, 15 (Mo. App. E.D. 1988). Not only was Contractor’s pleading sufficient to put Property Owner on notice that Contractor was seeking attorneys’ fees, Property Owner admits that he was aware, at least by the initial trial setting of January 8, 2009 (a week before the actual trial on January 15, 2009), that Contractor would be invoking the PPPA to claim entitlement to such fees. (Substitute Brief at 2.) Moreover, the trial court allowed the parties a

reasonable time after trial to submit their memoranda on Contractor's claim for attorneys' fees. (*See* L.F. 29) Thus, Property Owner had ample notice that Contractor was invoking the PPPA and was provided ample opportunity to be heard on this issue.

Property Owner nonetheless contends that he was somehow "prejudiced" by Contractor's failure to inform him of the specific statutory basis for its attorneys' fee request prior to the initial trial setting, one week before the actual trial. (Substitute Brief at 8.) Specifically, Property Owner asserts that this allegedly tardy notice that Contractor was seeking to recover its fees and costs pursuant to the PPPA adversely impacted Property Owner's "decisions regarding discovery, trial strategy, and settlement." (*Id.*)

This argument barely merits response. Any prejudice suffered by Property Owner resulted, by his attorney's admission, solely from Property Owner's own unresponsiveness, a fact that is clearly, and indisputably, set out in his attorney's Withdrawal Motion. (Supp. L.F. 1-3.) That Withdrawal Motion, which was filed less than one week before the initially scheduled trial date, informed the trial court that: (1) Property Owner's counsel "has attempted to contact [Property Owner] on numerous occasions to discuss this case and prepare for trial[,] but "has not received any response or communication from [Property Owner] in regards to this case[,] (2) Property Owner "has been notified of the trial date on numerous occasions since it was originally set on October 23, 2008," and asked the trial court: (a) for leave to withdraw "[d]ue to [Property Owner's] failure to communicate with counsel" and (b) to continue the case "from the trial setting of January 8, 2009, so that [Property Owner] can obtain alternate counsel and/or adequately prepare for himself for trial." (Supp. L.F. 1-2.)

Fewer than two days after the trial court had denied his counsel's Withdrawal Motion, Property Owner again requested a continuance at the initial trial setting. (L.F. 4.) In response to this second continuance request, the trial court granted Property Owner a one-week continuance—until January 15, 2009—but specified that “no further continuances” would be granted. (L.F. 4.)

Property Owner is hard pressed to claim prejudice when Contractor's Petition notified him of Contractor's intent to request recovery of attorneys' fees and the trial court provided him ample time to prepare and present any arguments. It belies belief that Property Owner would attempt to shift any blame to Contractor for his acknowledged neglect of his obligation to assist his attorney in preparing for the trial of this case.

Contractor satisfied Missouri's pleading requirements for recovery of attorneys' fees, which are fully authorized in this case under the PPPA. Moreover, any prejudice to Property Owner's defense resulted solely from his own actions (and inactions). Property Owners' argument is thus meritless and should be denied.

CONCLUSION

The PPPA was enacted to “level the playing field” between the parties with respect to the often small amounts at stake in construction payment disputes. Absent the fee-shifting provisions of the PPPA, the party that requested the work would be able to avoid paying small amounts owed (such as the \$4,900.00 in this case) by undertaking delaying tactics both prior to, and during, litigation. The PPPA clearly allows for an award of attorneys’ fees to the prevailing party in any action for failure to pay under a private construction contract, whether the contract calls for a lump-sum payment or multiple payments. *See Vance*, 181 S.W.3d at 564 n. 4. In this case, Contractor specifically requested recovery of attorneys’ fees in its Petition and satisfied the proof requirements of the PPPA in prevailing on its suit. As such, the trial court properly awarded attorneys’ fee to Contractor on its claims under the PPPA against Property Owner and its award should be affirmed. Contractor also asks this Court to remand this case to the trial court for the sole purpose of determining the additional attorneys’ fees to be awarded Contractor for defending this appeal.

Respectfully submitted,

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IN THE MISSOURI SUPREME COURT

LUCAS STUCCO & EIFS DESIGN,)
L.L.C.,)
)
Plaintiff/Respondent,)
)
vs.) Appeal No. SC90771
)
LOREN L. LANDAU,)
)
Defendant/Appellant.)

CERTIFICATE OF COMPLIANCE

COME NOW counsel for Plaintiff/Respondent Lucas Stucco & EIFS Design, L.L.C., and for their certificate of compliance, state as follows:

1. The undersigned does hereby certify that Plaintiff/Respondent’s brief filed herein complies with the page limits of Rule 84.06 and contains 5,004 words of proportional type.
2. Microsoft Word was used to prepare Plaintiff/Respondent’s brief.
3. The undersigned does hereby certify that a CD provided with this notification is virus-free.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that two copies of the foregoing brief and one copy of accompanying CD were mailed, postage prepaid, to the following this 15th day of July 2010, to: John W. Moticka and Andrew J. Scavotto, Stinson Morrison Heckert, LLP, 168 N. Meramec, Suite 400, St. Louis, MO 63105, *Attorneys for Defendant/Appellant.*
