

**IN THE  
SUPREME COURT OF MISSOURI**

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SC90771

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LOREN LANDAU,

Defendant-Appellant,

vs.

LUCAS STUCCO & EIFS DESIGN, LLC,

Plaintiff-Respondent.

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

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**SUBSTITUTE BRIEF OF DEFENDANT-APPELLANT**

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## **JURISDICTIONAL STATEMENT**

This case was tried in the Circuit Court of St. Louis County, Missouri on January 15, 2009. The Circuit Court entered judgment in favor of Plaintiff-Respondent Lucas Stucco and EIFS Design, LLC ("Respondent") on April 14, 2009. Defendant-Appellant Loren L. Landau ("Appellant") appealed, and on February 2, 2010 the Missouri Court of Appeals, Eastern District, reversed the trial court and ruled in favor of Appellant. Respondent filed a Motion to Transfer pursuant to Supreme Court Rule 83.05, which this Court granted on April 20, 2010.

## STATEMENT OF FACTS

On November 1, 2007, Respondent filed its Petition (the "Petition") for breach of contract, action on account, quantum meruit and detrimental reliance, alleging that Appellant was indebted to Respondent in the amount of \$4,900.00 for work, labor and materials allegedly provided by Respondent to Appellant. (Legal File ("LF"), pp. 8-15). The contract that Respondent sought to enforce, which was attached to the Petition as Exhibit A, did not contain a provision entitling Respondent to its attorneys' fees in the event of a dispute. (LF, 13-14).

In the Petition, Respondent made a general request for its attorneys' fees in the prayer for relief following each count, but did not specifically plead the basis for its alleged entitlement to attorneys' fees in the body of the Petition. Respondent did not plead that the Missouri Private Prompt Payment Act, R.S.Mo. § 431.180 (the "Act") applied to its claims, much less that it was entitled to recover its attorneys' fees pursuant to the Act. *Id.*

One week prior to trial Respondent advised Appellant that Respondent intended to seek its attorneys' fees pursuant to the Act. The case was tried on January 15, 2009. Following trial Respondent filed a motion for attorneys' fees pursuant to the Act, seeking \$10,567.04 (LF, 21-24). On April 14, 2009, the trial court entered judgment in favor of Respondent for \$4,900.00, interest on that sum in the amount of \$2,832.20, and \$10,567.04 in attorneys' fees (the "Judgment"). (LF, 29-32). In its Judgment, the trial court cited the Act as the basis for its award of attorneys' fees. *Id.* On April 23, 2009, Appellant filed his Notice of Appeal, seeking to overturn the trial court's

award of attorneys' fees to Respondent. Appellant did not challenge, and in fact has paid, the principal amount sought by Respondent (\$4,900.00), plus interest. (LF, 33-39).

On February 2, 2010 the Missouri Court of Appeals, Eastern District, ruled in favor of Appellant, finding that Respondent failed to properly plead its entitlement to attorneys' fees under the Act. Thereafter, the Court of Appeals denied Respondent's Motion for Hearing under Missouri Supreme Court Rule 84.17 and Motion to Transfer under Missouri Supreme Court Rule 83.02. On April 20, 2010, this Court sustained Respondent's Application to Transfer under Missouri Supreme Court Rule 83.05.

**POINT RELIED ON**

**I. THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR ATTORNEYS' FEES BECAUSE A PARTY SEEKING ITS ATTORNEYS' FEES IS REQUIRED TO SPECIFICALLY PLEAD THE BASIS FOR ITS ALLEGED ENTITLEMENT TO ATTORNEYS' FEES AND RESPONDENT DID NOT SO PLEAD.**

Missouri Supreme Court Rule 55.19

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

## STANDARD OF REVIEW

When the issue to be determined on appeal is a matter of law, the trial court's judgment is reviewed *de novo*. *Schwab v. National Dealers Warranty, Inc.*, 2009 WL 2870208 \*2; *City of Richmond Heights v. Waite*, 280 S.W.3d 770, 774 (Mo. App. E.D. 2009). The issue before the Court – whether the trial court erred in awarding Respondent its attorneys' fees when Respondent did not specifically plead the basis for its request – is a question of law and, therefore, the *de novo* standard of review applies. *See Ridgway v. TTnT Development Corp.*, 249 S.W.3d 226, 230 (Mo. App. W.D. 2008).

## ARGUMENT

### **I. THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR ATTORNEYS' FEES BECAUSE A PARTY SEEKING ITS ATTORNEYS' FEES IS REQUIRED TO SPECIFICALLY PLEAD THE BASIS FOR ITS ALLEGED ENTITLEMENT TO ATTORNEY'S FEES AND RESPONDENT DID NOT SO PLEAD.**

Over Appellant's objection, Respondent requested its attorneys' fees at trial and in a post-trial motion, stating that it was seeking its attorneys' fees under the Act. Prior to trial, however, Respondent never alleged that the Act applied to its claims, much less that Respondent was entitled to recover its attorneys' fees pursuant to the Act. (*See the Petition*; LF, 7-12). It was not until the morning of the initial trial setting, one week before the actual trial, that Appellant's counsel first learned that Respondent was seeking to invoke the Act – when Respondent's counsel advised Appellant's counsel that

Respondent would be seeking more than \$10,000.00 in attorneys' fees in this \$4,900.00 case.<sup>1</sup>

It is well-established that claims for attorneys' fees constitute special damages, which must be specifically pleaded in order to be recovered. Missouri Supreme Court Rule 55.19; *Conley v. Rauschenbach*, 863 S.W.2d 617, 610 (Mo. App. E.D. 1993); *Washington Univ. v. Royal Crown Bottling Co.*, 801 S.W.2d 458, 470 (Mo. App. E.D. 1990). In Respondent's Petition, however, there is no mention of the Act, nor does Respondent set forth any other basis that might allow Respondent to recover its attorneys' fees. (LF, 7-12). The only mention of attorneys' fees in Respondent's Petition, and in fact in any pleading prior to trial, is in the prayers following each count in the Petition. There, Respondent simply included a general request for attorneys' fees without citation to a contract, a statute, or any other alleged basis for the request. As a matter of law, these general requests are insufficient to satisfy Rule 55.19 and preserve Respondent's claim for attorneys' fees.

Before the Appellate Court, Respondent argued that because Appellant did not move to strike its general prayers for relief, or move for a more definite statement under Rule 55.27, Appellant waived his complaint that Respondent's requests for attorneys' fees

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<sup>1</sup> Plaintiff also filed a Motion for Its Attorney's Fees in the Appellate Court, in which Plaintiff sought an additional \$20,540.10 in fees for the appellate process. Therefore, Plaintiff's claim for attorneys' fees now exceeds \$31,000.00, not including its fees incurred after its Application to Transfer was sustained.

were not specifically pled. It is well-established, however, that the 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), citing *Stafford v. McCarthy*, 825 S.W.2d 650, 658 (Mo. App. 1992). Because a prayer is not considered part of a petition, it does not affect the petition's sufficiency. *Willett v. Farm Mortgage & Loan Co.*, 263 S.W. 234 (Mo. App. 1924).

In *Buckner*, the plaintiff ("Buckner") filed suit against public officials for judicial enforcement of the freedom of information statute, seeking to compel the defendants to produce records of a public official's telephone calls. 908 S.W.2d at 909. In addition, Buckner sought to recover his attorneys' fees under R.S.Mo. § 627.023. *Id.* at 909. Like Respondent here, however, Buckner failed to specifically plead the basis for his alleged entitlement to fees. Rather, Buckner simply set forth a general claim for "reasonable attorneys' fees" in his prayer for relief. *Id.* at 911. The Court of Appeals denied Buckner's request for attorneys' fees, holding that Buckner failed to specifically plead sufficient facts to give notice of his claim. *Id.* at 912. In its holding, the Court stated, "that his prayer for relief asked for reasonable attorneys' fees does not aid him (Buckner). The prayer is no part of the petition and may be disregarded in determining what relief, if any, is authorized by the petition." *Id.* at 912. Because Buckner failed to plead specific facts, in the body of his Petition, to indicate that he was seeking his attorneys' fees under § 627.023, the Court affirmed the trial court's ruling and denied Buckner's request for attorneys' fees.

The *Buckner* case is directly on point. Because the prayer is "no part" of the petition under Missouri law, Respondent's general request for fees in its prayer for relief is insufficient to invoke the Act, and Appellant was not obligated to file a motion to strike or move for a more definite statement in response to the Petition.

In its Application to Transfer this case to this Court, Respondent now seeks to save its pleading insufficiency by arguing that the Act is a remedial statute that must be liberally construed. The standard of construction that should be applied to the Act itself, however, has nothing to do with the applicable pleading standard, which mandates that special damages such as attorneys' fees must be specifically pled. Because Respondent failed to specifically plead its alleged entitlement to attorneys' fees under the Act, the trial court's award of attorneys' fees in this case was improper.

Finally, Respondent's failure to cite the Act in its Petition obviously prejudiced Appellant, who believed that he was facing a maximum liability of \$4,900.00, plus interest. If Appellant had been informed from the outset that his liability might exceed \$15,000.00 (at the trial court) or \$35,000.00 (after appeal), Appellant could, and likely would, have made different decisions regarding discovery, trial strategy, and settlement. Rule 55.19 exists to prevent this prejudice, and Respondent's failure to comply with Rule 55.19 means that Respondents' motion for attorneys' fees should have been denied.

### **CONCLUSION**

Respondent is not entitled to recover its attorneys' fees in this case, because its Petition fails to specifically plead a basis for attorneys' fees. The inclusion of

Respondent's attorneys' fees in the trial court's Judgment, therefore, was contrary to the law in Missouri and must be reversed.

Respectfully submitted,

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LOREN L. LANDAU*

**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 1752 words;
4. The number of lines of monospaced type in the brief is 246.
5. The floppy disk submitted herewith containing a copy of this brief has been scanned for viruses and is virus-free.

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Andrew J. Scavotto

**CERTIFICATE OF SERVICE**

On this 24<sup>th</sup> day of May, 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:

Norbert Glassl, Esq.  
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**APPENDIX**

1.	Amended Judgment filed April 14, 2009 (L.F. 32).....	A1
2.	R.S.Mo. § 431.180.....	A2
3.	Missouri Supreme Court Rule 55.19.....	A3