CASENOTE: ATTORNEY FEES NOT RECOVERABLE FOR TRIP AND FALL ON RENTAL PROPERTY AS INCIDENT DID NOT ARISE UNDER THE RENTAL AGREEMENT

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

TAMMY JO RAMOS, Plaintiff and Appellant, v. BAY BREEZE #60 et al., Defendants and Respondents.	D069175 (Super. Ct. No. 37-2013-70552-CU-PO-CTL)

APPEAL from an order of the Superior Court of San Diego County, Joan M. Lewis, Judge. Affirmed.

Law Offices of Thomas Leary and Thomas A. Leary for Plaintiff and Appellant.

Law Office of Cleidin Z. Atanous and Cleidin Z. Atanous for Defendants and Respondents.

Plaintiff Tammy Jo Ramos appeals an order denying her motion for attorney fees after the jury returned a verdict in her favor in her personal injury action against defendants Bay Breeze #60, L.P. (doing business as Bay Breeze Apartments), Dennis Pennell, and Pennell Property Management, Inc. (together Landlord). On appeal, she contends the trial court erred by concluding her rental agreement did not provide for an award of attorney fees to the prevailing party in an action alleging personal injury caused by Landlord's negligence. Based on our reasoning below, we conclude the trial court correctly denied her motion because the rental agreement did not create a contractual obligation to pay the prevailing party's attorney fees in the circumstances of this case. In particular, the agreement's attorney fees provision, which applies to actions "arising out of this agreement," and the agreement's implicit acknowledgement that Landlord may be liable for personal injuries resulting from its negligence, did not create a contractual obligation for Landlord to pay the attorney fees that Ramos incurred in her successful personal injury action against it.

[1]

FACTUAL AND PROCEDURAL BACKGROUND

In 2011, when Ramos was a tenant of the Bay Breeze Apartments, owned and operated by Landlord, she tripped and fell in its parking lot. Ramos filed an action against Landlord alleging the injuries that she suffered from the fall were caused by Landlord's negligence. Before trial, the parties stipulated that Landlord was liable for all of Ramos's losses, leaving for trial the issues of the nature, extent, and value of the damages she sustained. The jury found Landlord's negligence was a substantial factor in causing Ramos's harm and awarded her $400 for lost earnings, $600 for medical expenses, and $7,500 for noneconomic damages. The trial court entered judgment awarding Ramos $8,500 in damages. On appeal, we affirmed that judgment. (*Ramos I*, *supra*, at p. 16.)

Ramos filed a motion for an award of her attorney fees and costs. Citing, inter

[2]

alia, Code of Civil Procedure section 1021 and *Hemphill v. Wright Family, LLC* (2015) 234 Cal.App.4th 911 (*Hemphill*), she argued Landlord was obligated under her rental agreement to pay her attorney fees because she prevailed in the action. The rental agree-

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[1] Our discussion of the factual and procedural background is based in part on our prior opinion in this case, *Ramos v. Bay Breeze #60* (Apr. 26, 2016, D068035) [nonpub. opn.] (*Ramos I*).

[2] All statutory references are to the Code of Civil Procedure unless otherwise specified.

ment (Agreement) between Ramos and Landlord was signed by the parties on September 10, 2010, and provided in part:

> "21. ADDENDA: By initialing as provided, [Ramos] acknowledges receipt of the following applicable addenda, as indicated, copies of which are attached hereto, and are incorporated as part of this Agreement. [¶] X Community Guidelines . . . [¶] . . . [¶]
>
> "23. ATTORNEY'S FEES: In any action or proceeding *arising out of this agreement*, the prevailing party shall be entitled to reasonable attorney's fees and costs." (Italics added.)

The Community Guidelines, which were expressly incorporated into the Agreement, were also signed by the parties on September 10, 2010, and provided in part:

> "NON LIABILITY AND INDEMNIFICATION OF [LANDLORD]: [Landlord] shall not be liable except for [Landlord's] negligence to [Ramos] or to any other person for or on account of any injury, loss or damage of any kind whatsoever to persons or property occasioned on or about the premises or anywhere else, or resulting from any acts of god, war, riot, insurrection, disease, or any cause out of [Landlord's] control. [Ramos] indemnifies [Landlord] against and agrees to hold [Landlord] harmless from any loss, damage, claim of damage, liability or expense arising out of or resulting from any damage or injury to any person or the property of any person arising from the use of the premises by [Ramos] or by any other person by license or invitation of [Ramos] or from the failure of [Ramos] in any respect to comply with any of the requirements or provisions of this agreement and from and against any expense, including cost of litigation and reasonable attorney's fees incurred in investigating, resisting, or compromising any claim asserted with respect to any of the foregoing."

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[3] Ramos does not appear to argue on appeal, nor could she successfully argue, that the attorney fee language in the indemnification provision of the Community Guidelines applies to her negligence cause of action against Landlord. Accordingly, we need not, and do not, discuss the effect of that provision.

Ramos argued that because her presence—and her right to be present—on the premises on which she was injured arose out of the Agreement, she was entitled to an award of attorney fees under the Agreement.

Landlord opposed Ramos's motion for attorney's fees and costs, arguing neither the Agreement, *Hemphill*, nor section 1021 authorized an award of attorney fees in this case. In reply, Ramos argued the Agreement's attorney fee provision was sufficiently broad to support an award of attorney fees in her personal injury action against Landlord. She also cited the Community Guidelines, arguing it provided that Landlord was liable to Ramos for any injury suffered on the premises caused by its negligence.

The trial court issued a tentative ruling denying Ramos's motion for attorney fees of $372,554, stating in part:

> "The Court finds *Hemphill* distinguishable. In *Hemphill*, . . . the lease agreement between the parties contained three independent bases upon which the fees could be awarded for any action arising out of the (1) homeowner's tenancy, (2) the agreement, or (3) the provisions of the Mobilehome Residency Law. . . . [¶] [*Hemphill*] concluded that Mr. Hemphill's claims arose out of his tenancy. Here, there is no similar language—i.e., no provision that fees would be awarded to [Landlord's] tenant for actions arising out of [Ramos's] tenancy.
>
> "There is nothing in the two page rental agreement that would support a finding that [Ramos's] action here arose out of the rental agreement.
>
> "With respect to the Community Guidelines that formed a part of the rental agreement, the Court finds there similarly to be no support for the award of fees. To the extent [Ramos] is claiming an entitlement

> to fees under the attorneys' fee language found in the Non Liability and Indemnification of [Landlord] provision, the Court rejects that argument because the award of fees there would be with respect to any action for which [Ramos] was required to indemnify [Landlord], a situation not present here. Moreover, if [Ramos] is contending that the language found in this section that [Landlord] would 'not be liable except for [its] negligence' makes her complaint an action 'arising out of this agreement,' the Court rejects that argument. The Court concludes this sentence and related paragraph simply provides that [Ramos] would not be obligated to indemnify [Landlord] for [its] own acts of negligence. This language does not, however, make [Ramos's] action for negligence an action 'arising out of this agreement.' "

After hearing arguments of counsel, the trial court confirmed its tentative ruling. On September 4, 2015, the court issued an order denying Ramos's motion for attorney fees of $372,544 and awarding her $33,692.39 in costs. Ramos timely filed a notice of appeal challenging that order.

DISCUSSION

I

Awards of Attorney Fees Generally

" ' " 'An order granting or denying an award of attorney fees is generally reviewed under an abuse of discretion standard of review; however, the "determination of whether the criteria for an award of attorney fees and costs have been met is a question of law." [Citations.]' " ' An issue of law concerning entitlement to attorney fees is reviewed de novo." (*Carpenter & Zuckerman, LLP v. Cohen* (2011) 195 Cal.App.4th 373, 378.) Likewise, we apply de novo review and exercise our independent judgment in interpret-

ing a contract if there is no disputed extrinsic evidence on its interpretation. (*Campbell v. Scripps Bank* (2000) 78 Cal.App.4th 1328, 1336.)

"[S]ection 1021 provides the basic right to an award of attorney fees." (*Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1341 (*Xuereb*).) Section 1021 provides that, in general, "the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties . . . ." However, "[t]here is nothing in [section 1021] that limits its application to contract actions alone. It is quite clear . . . that 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 in contract." (*Xuereb*, at p. 1341.) In particular, if an agreement provides for an award of attorney fees to the prevailing party in any action arising out of the agreement, the prevailing party on a tort cause of action that arises out of the agreement is contractually entitled to an award of reasonable attorney fees incurred with respect to that cause of action. (§ 1021; *Santisas v. Goodin* (1998) 17 Cal.4th 599, 608 (*Santisas*) [" 'arising out of the execution of [this] agreement' "]; *Johnson v. Siegel* (2000) 84 Cal.App.4th 1087, 1101 [" '*arising out of this Agreement*' "]; *Lerner v. Ward* (1993) 13 Cal.App.4th 155, 159 [" 'arising out of this agreement' "]; *Palmer v. Shawback* (1993) 17 Cal.App.4th 296, 299 [" 'arising out of the execution of this agreement or the sale, or to collect commissions' "]; *Drybread v. Chipain Chiropractic Corp.* (2007) 151 Cal.App.4th 1063, 1066 [" 'arising out of this Sublease' "]; cf. *Xuereb*, at p. 1343 [" '[I]f this Agree-

ment *gives rise* to a lawsuit' "]; *Cruz v. Ayromloo* (2007) 155 Cal.App.4th 1270, 1277 [" '*in connection with this Agreement*' "].)

In interpreting a contract, the parties' mutual intention at the time the contract is formed governs (Civ. Code, § 1636) and, if possible, we infer that intent from its written provisions (Civ. Code, § 1639). If a contract's language is not ambiguous (i.e., not reasonably susceptible to two alternative meanings), we apply the plain meaning of that language. (*Santisas*, *supra*, 17 Cal.4th at p. 608.)

II

Attorney Fees Provision in This Case

Ramos contends the trial court erred by denying her motion for an award of her attorney fees because her negligence cause of action against Landlord arose out of the Agreement, thereby entitling her to an attorney fees award as the prevailing party under its attorney fees provision. However, because neither the Agreement nor the cases cited by Ramos show she is entitled to an award of contractual attorney fees, we agree with the trial court's ruling that she is not entitled to an award of attorney fees.

A

The Agreement. The Agreement included an attorney fees provision, which stated: "In any action or proceeding *arising out of this agreement*, the prevailing party shall be entitled to reasonable attorney's fees and costs." (Italics added.) The Agreement consisted of a two-page document, together with certain other documents, including the Community Guidelines, which were expressly incorporated therein. Accordingly, in construe-

ing the Agreement's phrase "arising out of this agreement," we must consider not only the main two-page agreement, but also those documents expressly incorporated therein (e.g., the Community Guidelines).

We begin by first considering the language in the main two-page agreement and concluding it is not reasonably susceptible to an interpretation that the Agreement's attorney fees provision applied to Ramos's personal injury action in this case. That two-page agreement consisted of a printed form rental agreement that provided for, inter alia, Ramos's month-to-month rental of an apartment at the Bay Breeze Apartments complex. Pursuant to that document, Ramos became a tenant of the Bay Breeze Apartments, which Landlord owned and operated. As Ramos argues, she, as a tenant, had the right to be present on the premises at the time of her fall. However, the fact that she was a tenant with the right to be on the premises at the time of her fall did not make her personal injury action based on her fall an action that *arose out of* the two-page agreement. There is no language in that agreement that imposed any specific contractual duty on Landlord to maintain the premises in a certain manner and/or made Landlord liable for any injuries suffered by tenants due to its breach of any such duty. Rather, it simply made Ramos a tenant of Landlord. Neither Ramos's fall, nor her action based thereon, arose out of that agreement.

Based on our review of relevant case law, we conclude that there must be a primary causal relationship between a claim for relief and the terms and conditions of an agreement, or transaction contemplated thereby, for a tort cause of action to arise out of

an agreement. (Cf. *Santisas*, *supra*, 17 Cal.4th at pp. 603, 608, 622 [tort causes of action for negligence, deceit, negligent misrepresentation, and suppression of fact arose out of execution of real estate purchase agreement and transaction contemplated thereby]; *Johnson v. Siegel*, *supra*, 84 Cal.App.4th at pp. 1091, 1101-1102 [tort causes of action for fraud and negligent misrepresentation arose out of real estate purchase agreement]; *Lerner v. Ward*, *supra*, 13 Cal.App.4th at pp. 158-161 [tort cause of action for fraudulent representation arose out of real estate purchase agreement]; *Palmer v. Shawback*, *supra*, 17 Cal.App.4th at pp. 299-301 [tort causes of action for fraud, concealment, and negligent misrepresentation arose out of execution of real estate purchase agreement or sale contemplated thereby]; *Drybread v. Chipain Chiropractic Corp.*, *supra*, 151 Cal.App.4th at pp. 1066, 1077 [tort cause of action for unlawful detainer based on unlawful holding over after expiration of lease arose out of sublease]; *Cruz v. Ayromloo*, *supra*, 155 Cal.App.4th at pp. 1273, 1277 [tort causes of action for forcible detainer, wrongful eviction, and negligent infliction of emotional distress were in connection with lease agreements]; *Keystone Floor & More, LLC v. Ariz. Register of Contractors* (Ariz.Ct.App. 2009) 219 P.3d 237, 240 [under statutory attorney fees provision allowing award of fees to prevailing party in action arising out of a contract, the contract must be the main factor causing the dispute].) Alternatively stated, for a tort cause of action to arise out of an agreement within the meaning of an attorney fees provision, it must be dependent on the basic contractual arrangement and arise from the underlying transaction contemplated by the agreement. (Cf. *Xuereb*, *supra*, 3 Cal.App.4th at p. 1344.) Therefore, an action does not

arise out of an agreement if the agreement is merely a factual predicate to the action and only peripherally or tangentially related to the action.

In this case, Ramos did not allege any causes of action for wrongful eviction, negligent misrepresentation, fraud, or other tort primarily caused by, or arising out of, her rental transaction with Landlord. Her tort cause of action against Landlord for negligence was based on injuries that she suffered from her fall on its premises, rather than on any tort primarily caused by, or arising out of, the rental agreement or the transaction contemplated thereby. Although Ramos became a tenant of Landlord pursuant to the rental agreement, her tenancy was merely a factual predicate to, and only peripherally or tangentially related to, her personal injury cause of action based on Landlord's negligence. In particular, although the agreement made Ramos a tenant, Landlord's common law duty of care regarding maintenance of its premises existed separate from, and independent of, her tenancy and the agreement. Therefore, Ramos's negligence cause of action against Landlord did not arise out of the main two-page agreement.

Considering the Community Guidelines together with the main two-page rental agreement, we likewise conclude her negligence cause of action did not arise out of the entire Agreement, including the incorporated Community Guidelines. Contrary to Ramos's apparent assertion, the Community Guidelines did not impose any contractual duty of care on Landlord (e.g., duty to maintain the premises in a certain manner) independent of its existing common law duty of care or make Landlord liable for any breach of that purported contractual duty (which, for lack of a better term, we refer to as "con-

tractual negligence"). Instead, the Community Guidelines included an indemnification provision that provided in part:

> "NON LIABILITY AND INDEMNIFICATION OF [LANDLORD]: [Landlord] *shall not be liable except for* [Landlord's] *negligence* to [Ramos] or to any other person for or on account of any injury, loss or damage of any kind whatsoever to persons or property occasioned on or about the premises or anywhere else, or resulting from any acts of god, war, riot, insurrection, disease, or any cause out of [Landlord's] control. [Ramos] *indemnifies* [Landlord] against and agrees to hold [Landlord] harmless *from any* loss, damage, claim of damage, *liability* or expense arising out of or resulting from any damage or injury to any person or the property of any person arising from the use of the premises by [Ramos] or by any other person by license or invitation of [Ramos] or from the failure of [Ramos] in any respect to comply with any of the requirements or provisions of this agreement and from and against any expense, including cost of litigation and reasonable attorney's fees incurred in investigating, resisting, or compromising any claim asserted with respect to any of the foregoing." (Italics added.)

In general, that paragraph provided, as the trial court found, that Ramos must indemnify Landlord for any and all liability it may suffer or incur as a result of personal injury or property damage from the use of the premises by Ramos or any person invited by her to use the premises, except for any liability due to Landlord's negligence. Contrary to Ramos's assertion, that provision did not create any independent contractual duty of care or make Landlord liable for its breach (i.e., contractual negligence). Rather, the exclusion from Ramos's indemnification obligation for Landlord's negligence was based solely on its existing common law duty of care, so that Ramos would not be contractually obligated to indemnify Landlord for liability for any personal injury losses suffered by Ramos

or any of her invitees to the extent those losses or liability were due to Landlord's breach of its common law duty of care (i.e., common law negligence).

The Community Guideline's language regarding Landlord's negligence simply acknowledged that Ramos would not have any indemnification obligation for liability due to Landlord's common law negligence. Therefore, the incorporation of the Community Guidelines into the two-page rental agreement did not create any contractual duty of care or otherwise contractually expand Landlord's liability for its negligence. Accordingly, Ramos's citation of that indemnification provision does not persuade us to change our analysis above regarding the main two-page agreement. Specifically, we conclude Ramos's personal injury cause of action based on Landlord's negligence did not arise out of the Agreement. Therefore, the trial court correctly concluded that the Agreement's attorney fees provision did not apply to her negligence cause of action against Landlord and it properly denied her motion for an award of her attorney fees as the prevailing party on that cause of action.

B

Hemphill. *Hemphill*, *supra*, 234 Cal.App.4th 911, cited by Ramos, is inapposite to this case and does not persuade us to reach a contrary conclusion. In *Hemphill*, the plaintiff became a tenant of a manufactured home park under a lease agreement. (*Id*. at p. 913.) He fell and was injured when he stepped into an uncovered drainage hole on the common area lawn. (*Ibid*.) He filed an action against the landlord, alleging causes of action for negligence and premises liability. (*Ibid*.) After the jury returned a verdict in his

favor, he filed a motion for an award of attorney fees pursuant to the lease agreement's attorney fees provision. (*Ibid*.) That provision stated "that in 'any action aris[ing] out of the Homeowner's tenancy, this Agreement, or the provisions of the Mobilehome Residency Law, the prevailing party or parties shall be entitled to recover reasonable expenses, including without limitation' attorney fees and costs." (*Id*. at p. 914.) The trial court denied the motion. (*Id*. at p. 913.)

On appeal, *Hemphill* noted that the lease agreement's attorney fees provision set forth three independent or alternative bases on which attorney fees could be awarded (i.e., actions arising out of the tenancy, the agreement, *or* the Mobilehome Residency Law). (*Hemphill*, *supra*, 234 Cal.App.4th at p. 914.) The court also noted the lease agreement imposed on the landlord a duty to maintain all physical improvements, including common area lawns, in good working order and condition for the nonexclusive use by its homeowner tenants. (*Ibid*.) In the circumstances of that case, *Hemphill* concluded that the plaintiff's action arose out of the "[h]omeowner's tenancy" within the meaning of the lease agreement's attorney fees provision. (*Id*. at p. 915.) The court stated: "[The] tenant's fall while walking across a common area lawn arose out of the homeowner's tenancy and entitled him to an award of attorney fees as the prevailing party in the action [under the lease agreement's attorney fees provision]." (*Id*. at p. 913.) Accordingly, the court reversed the order denying the attorney fees motion and remanded the matter for a determination of the reasonable amount of attorney fees and costs to be awarded to the plaintiff for trial and the appeal. (*Id*. at p. 915.)

Although the facts of the falls and injuries in *Hemphill* and this case are analogous, we nevertheless conclude that their underlying agreements and, in particular, their attorney fees provisions are inapposite and therefore *Hemphill* does not provide any support for Ramos's assertion that the Agreement's attorney fees provision requires an award to her of attorney fees she incurred in this action. In particular, unlike *Hemphill*, the Agreement's attorney fees provision did *not* provide for fee awards to a party prevailing in any action arising out of Ramos's *tenanc*y, but rather, as discussed above, provided for awards only in actions arising out of the *Agreement*. Also, unlike the Agreement in this case, the lease agreement in *Hemphill* expressly imposed a contractual duty on the landlord to maintain the common areas in good working order and condition for use by its tenants. (*Hemphill*, *supra*, 234 Cal.App.4th at p. 914.) Therefore, *Hemphill* does not support a conclusion that the Agreement's attorney fees provision in this case requires an award of attorney fees to the prevailing party in an action alleging personal injury based

on Landlord's negligence in maintaining its common areas.

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We also conclude *Gonzales v. Personal Storage, Inc.* (1997) 56 Cal.App.4th 464, cited by Ramos, is inapposite to this case. The contract provision in *Gonzales* was much broader than the attorney fees provision in this case, providing for awards of attorney fees to prevailing parties in " 'any legal action or proceeding between the parties.' " (*Id*. at p. 478.) Based on that broader attorney fees provision in a self-storage lease agreement, *Gonzales* held that because the plaintiff prevailed on her contract and tort causes of action (e.g., negligence and conversion claims) for loss of personal property and other damages, she was entitled to an award of her attorney fees. (*Id*. at pp. 471, 478-481.)

C

Ramos asserts that because the Agreement's attorney fees provision is ambiguous whether it provides for fee awards in actions arising out of the Agreement, we must apply the rule that an ambiguity in an agreement is to be construed against the party who drafted the agreement or caused that ambiguity to exist. (Civ. Code, § 1654.) However, based on our review of the record, we conclude neither the attorney fees provision, nor the indemnification paragraph of the Community Guidelines, is reasonably susceptible to the interpretation proffered by Ramos. Absent any ambiguity in those provisions regarding attorney fees, the rule of construction cited by Ramos does not apply and does not persuade us to reach a contrary conclusion.

DISPOSITION

The order is affirmed. The parties shall bear their own costs on appeal.

HUFFMAN, J.

WE CONCUR:

BENKE, Acting P. J.

NARES, J.