**Case No. 100308-1**
**Court of Appeals Case No. 81482-6-I**

**SUPREME COURT OF THE STATE OF WASHINGTON**

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**JAMES W. CHERBERG and NAN CHOT CHERBERG,**

**Plaintiffs-Respondents,**

**v.**

**HAL E. GRIFFITH and JOAN I. GRIFFITH,**

**Defendants-Appellants.**

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# ANSWER TO PETITION FOR REVIEW

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# I. INTRODUCTION

Faithful to a threat made ages ago, Griffiths have pursued this matter to the Supreme Court without any appropriate basis. The petition is so bereft of any legitimate argument or attempt to satisfy the RAP 13.4 standard that the only reasonable inference is Griffiths' intent to further delay Cherbergs' ability to permit and build the dock they contracted and paid for *almost ten years ago*.

Ignoring the appellate rules, Griffiths fail to establish any "conflict" with other precedent or other permissible basis for review by this Court. Instead, they base their petition wholly on interpretation of evidence the trial court plainly weighed and found wanting. They claim the trial court "fixated" on one piece of evidence and ignored the rest. The problem with that completely unhinged theory is that the evidence Griffiths rehash – and improperly construe in their own favor – is explicitly addressed and rejected in the trial court's extensive oral ruling, findings and conclusions.

Griffiths' most audacious contention is that the appellate

affirmation of the trial court's order of specific performance was "contrary to the *only reasonable interpretation of the contract*…" – meaning Griffiths' interpretation, of course.[1] This claim had previously been rejected–the 2017 appellate panel that reversed summary judgment in Cherbergs' favor specifically held "…there are at least two reasonable competing interpretations of the purchase and sale agreement…" *Cherberg v. Griffith*, No. 75276-6-I Wn. App. LEXIS 2615, *16 (Nov. 20, 2017). The trial court on remand evaluated those competing interpretations, gauged the credibility of witnesses, weighed the evidence, and found in Cherbergs' favor.

Given this history, Griffiths' argument is stunning in its hubris. Despite the original trial court granting specific performance to Cherbergs, despite the subsequent trial court's evaluation of all evidence and finding in favor of Cherbergs for specific performance, and despite the appellate panel's order

[1] Significantly, the 2017 and 2021 appellate opinions were both authored by Judge Mann, with Judge Dwyer on both panels.

sustaining the trial court's ruling, Griffiths still insist their interpretation of the contract is the only reasonable interpretation.

Griffiths simply refuse to take no for answer and continue to escalate litigation costs, evidently hoping Cherbergs will surrender or go bankrupt.[2] Their disagreement, however, is not a legitimate basis for review.

Given the lack of any attempt to comply with the appellate rules to establish entitlement for review, the improper construing of facts in their own favor, and the transparent intent of further delaying resolution of this action, Griffiths' petition is frivolous and in violation of RAP 18.9. Review should be denied and an award of fees/sanctions granted to Cherbergs for having to answer.

## II. STATEMENT OF THE CASE

### A. Factual Statement of the Case

Substantial evidence supports the order of specific

[2] Griffiths claim that Cherbergs "repeatedly introduced the 'previously resolved' easement issue" "in order to maintain the title company's financial support" knowing full well that the title insurer reneged on coverage prior to the first appeal and the Cherbergs are paying out of pocket.

performance. The parties' PSA contained two addendums relating specifically to Cherbergs' proposed dock. There is no dispute the two addendums contain the following seminal and binding provisions:

> Sellers hereby agree to assist Buyers in their effort to obtain a dock permit.
>
> They agree not to challenge in any way the Buyers solicitation of said permit.
>
> Sellers agree to allow Buyers to encroach into the normal 35-foot setback between ~~docks but no closer than 25 feet~~.
>
> This may entail changing the easement, which is in place regarding the landscape on the Western most property along the waterfront.
>
> Sellers agree to cooperate with Buyers in order to obtain a permit for a dock along the Western line of the property.
>
> Seller acknowledges receipt of the NEW DOCK email copy from Ted Burns outlining the proposed dock Buyer intends to pursue.
>
> Seller further acknowledges the receipt of a copy of the lateral lines plot from King County Records and the proposed dock sketch.
>
> ~~Seller agrees to remove the floating dock at such time as the Buyer asks for it to be removed, but not prior to that time and cooperate with Buyers and the piling company to pursue a permit to obtain the dock~~.
>
> Seller further agrees to sign a Joint Use Agreement as attached which will allow the Buyer to place the proposed dock within the 35-foot setback usually required.

*See Appendix to Petition*, pp. 23-34 *(Addendums 1 & 2 and the "New Dock" email; see also* RP 477:2-482:5 *(excerpt from Hal Griffith's trial testimony).* The trial court's related findings and

the parties' intent ascertained therefrom are cited at CP 679-680 *(¶¶ 1.12-1.18).* Additional findings support the trial court's analysis of the parties' acceptance of the "proposed dock" contained in the "New Dock" email. CP 684 – 686 (¶¶ 1.56-1.70).

The trial court's conclusions confirm the details of the "proposed dock" that Cherbergs may submit for permitting:

> 2.4 The parties' agreement as to Cherbergs' right to pursue the proposed dock laid out in the New Dock email and the Griffith's obligation to cooperate, not challenge, and sign a JUA related to the permitting of the proposed dock are essential terms of the PSA. CP 691
>
> 2.5 The parties' proposed dock agreement is fully defined and enforceable: This dock is 21 feet from the Griffiths' dock at the closest point, it is 75 feet over the water, and it has a U-shape at the end. CP 691
>
> 2.7 Cherbergs have proven by clear and unequivocal evidence that leaves no doubt as to the terms, character and existence of the agreement that the Griffiths promised not to object to an actual dock with placement and dimensions and an easement modification. Cherbergs have proven the agreement not to object to the proposed dock, as indicated in the two addendums and the New Dock email and sketch. CP 691-692.
>
> 2.15 Cherbergs are not entitled to have a dock pursuant to the PSA. They are entitled to have the Griffiths' support the proposed dock in the New Dock email and sketch, to refrain from obstructing the permitting process and building of the dock, and to sign the JUA. CP 693
>
> 2.19 The Griffiths shall sign the JUA and are ordered not to object to any dock that is no closer to their property line

than agreed to in the New Dock email sketch, and no closer to the Griffiths' dock at any point than agreed to in the New Dock email sketch, and no closer to any part of the ELL at the ed of their dock than agreed to in the New Dock email sketch. CP 693

2.20 The Griffiths are also ordered to agree to modification of the easement as necessary to accommodate Cherbergs' dock within the exclusive landscape easement area as stated in the first addendum and in accordance with the "New Dock" email and sketch and the terms of these findings. CP 693

*See also* RP 937:9-20 (excerpt from oral ruling).

### B. Procedural Statement of the Case

The matters at issue in this petition for review were first decided on summary judgment in 2016. CP 375-388. Griffiths appealed and the matter was remanded for trial. CP 372-373; CP 389-402. A bench trial took place in 2019, resulting again in an award of specific performance and attorney's fees in favor of Cherbergs. CP 677-695; CP 1599-1601. Griffiths again appealed and the appellate court affirmed the trial court. CP 16-11-1615; Appendix to Pet., pp. 1-20. Griffiths seek review of the decisions of the trial and appellate courts.

## III. ARGUMENT AND AUTHORITY

### A. Review Should be Denied for Failure to Satisfy RAP 13.4.

RAP 13.4(b) provides four bases for a petition to this Court under these circumstances:

> **Considerations Governing Acceptance of Review.** A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Disagreement with the trier of fact is plainly not a basis for review. Recognizing that, Griffiths manufacture a claim that the trial court's order on specific performance conflicts with "decisions of this Court" (RAP 13.4(b)(1)) and that the fee award conflicts with "a decision of the Court of Appeals." RAP 13.4(b)(2). Griffiths fail to establish any such conflict with binding precedent, nor could they when their argument is based solely upon once contested but now resolved questions of fact. A mere disagreement with the trial court's findings and analysis will not support review:

> We reject the Dissenters' arguments because they amount to no more than disagreement with the trial

> court's analysis and ultimate adoption of Beaton's valuation.

*EagleView Techs., v. Pikover*, 192 Wn. App. 299, 311, 365 P.3d 1264, 1270 (2015), *review denied*, 185 Wn.2d 1038, 377 P.3d 734 (2016) The Court should deny review for failure to establish any proper basis under RAP 13.4.

## B. Standard of Review for Specific Performance and Bench Trials

A decree of specific performance rests within the sound discretion of the trial court and is reviewed for abuse of discretion. *Craft v. Pitts*, 161 Wn.2d 16, 29, 162 P.3d 382, 389 (2007). Appellate review of the trial court's weighing of the evidence in a bench trial is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law. *Tacoma v. State*, 117 Wn.2d 348, 361, 816 P.2d 7 (1991). A respondent in a bench trial appeal is "entitled to the benefit of all evidence and reasonable inference therefrom in support of the findings of fact entered by the trial court." *Mason v. Mortgage Am.,* 114 Wn.2d 842, 853, 792 P.2d

142 (1990). Reviewing courts presume the trial court's findings are correct, and the party claiming error has the burden of showing a finding of fact is not supported by substantial evidence. *Fisher Props. v. Arden-Mayfair,* 115 Wn.2d 364, 369, 798 P.2d 799 (1990).

In determining the sufficiency of evidence, the Court need consider only evidence favorable to the prevailing party. *Nguyen v. Seattle*, 179 Wn. App. 155, 163, 317 P.3d 518 (2014) (emphasis added), citing *Bland*, *supra*, at 155. This Court must view the evidence in the light most favorable to the prevailing party and defer to the trial court regarding witness credibility and conflicting testimony. *Weyerhaeuser v. Tacoma-Pierce Cnty Health Dep't*, 123 Wn. App. 59, 65, 96 P.3d 460 (2004).

When evidence is conflicting, the trial court's determination is decisive and the reviewing court must determine only whether the evidence most favorable to the prevailing party supports the challenged findings. *Du Pont*, *supra*, at 479. Within that framework, substantial evidence is a quantity of evidence

sufficient to persuade a fair-minded person of the truth of the asserted premise. *Fred Hutchinson Cancer Research. Ctr. v. Holman*, 107 Wn.2d 693, 712, 732 P.2d 974 (1987). If that standard is satisfied, the appellate court will not substitute its judgment for that of the trial court even though it may have resolved disputed facts differently. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879–80, 73 P.3d 369 (2003); *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d 162 (2010) ("We will not disturb findings of fact supported by substantial evidence even if there is conflicting evidence.").

### C. Trial Court's Order for Specific Performance is Supported by Substantial Evidence and Not in Conflict with any Binding Precedent.

#### 1. RAP 13.4 does not allow this Court to reweigh evidentiary and credibility determinations of the trial court.

Griffiths assert a conflict with the holding in *Tanner Elec. Co-op. v. Puget Sound Power and Light Co*., 128 Wn.2d 656, 674, 911 P.2d 1301 (1996), that "when only one reasonable inference can be drawn from the extrinsic evidence, interpretation of a

contract presents a question of law." *Petition*, p. 17, ¶ 1. Their claim is not that any court disagreed with, misapplied or conflicted with *Tanner,* it is that the appellate panels and trial court disagreed with Griffiths' contention that the facts could only be interpreted one way. Disagreement over facts does not a caselaw conflict make. Indeed, four courts have already addressed Griffiths' claim that only one interpretation could possibly exist, and each (including pivotally the trial court) rejected their contention:

> Honorable Mariane Spearman (retired) found on summary judgment that Cherbergs' interpretation of the parties' contract supported specific performance;
>
> Court of Appeals found "there are at least two reasonable interpretations of the parties' intent" and remanded for trial."
>
> Honorable Steve Rosen found, after weighing all evidence, including the specific extrinsic evidence cited by Griffiths, the evidence supported Cherbergs' interpretation of the contract and an award of specific performance.
>
> Court of Appeals affirmed the award of specific performance.

Griffiths repeatedly recite conflicting trial evidence, append 42

additional pages of trial exhibits, and then invite this Court to improperly construe those facts in their favor. Binding precedent, of course, forbids that, as in determining the sufficiency of evidence the appellate court considers only evidence favorable to the prevailing party. *Bland*, *supra*, at 155.

Ultimately, the trial court considered and weighed all disputed facts and evidence and reached the same conclusion reached three years prior on summary judgment; Cherbergs are entitled to an award of specific performance. A second appellate panel (including two of the judges that remanded for trial in 2017) agreed and affirmed. There was obviously more than one "reasonable interpretation" of the purchase and sale agreement ("PSA") and Cherbergs' interpretation was supported by substantial evidence at trial. Those facts cannot be rehashed in yet another forum to change the outcome in Griffiths' favor – the question has been weighed in the proper forum and found wanting. The matter is decided.

2. Griffiths' assertion regarding the terms of the order of

specific performance raises an improper question of fact, not law.

Griffiths also assert that the award of specific performance "require[es] Griffiths to do something materially different even from what the trial court (erroneously) found Griffiths had agreed to do." Griffiths' own argument on this point is so obviously fact driven that it defeats itself as to establishing any requisite for review. *Petition*, pp. 21-22.

Again, Griffiths intentionally contort and misconstrue the facts without regard for the record (let alone the truth). They claim that the order of specific performance *"bind[s] Griffiths to accept any dock Cherbergs choose that is a specified distance from various points." Petition*, p. 22, ¶ 2. Griffiths offer this canard in a vacuum, ignoring the multitude of findings and conclusions that require Cherbergs to seek a permit for a dock that conforms with the specified distances, but also the design of the "proposed dock" contained in the New Dock email referenced in Addendum 2 and more specifically described in numerous ways in the findings of

fact. *See e.g.* CP 679-680 (¶¶ 1.15-1.18); CP 685 (¶ 1.63) ("The second addendum uses the word "proposed" three times…"). The foundational proposed dock is defined by location, shape and dimension – ignoring these facts cannot establish a proper basis for review under RAP 13.4.

Griffiths append trial exhibits purporting to negate the above findings, despite those exhibits clearly having been considered by the trial court prior to rendering its verdict. Indeed, an entire month passed between conclusion of the trial on June 13, 2019 and closings on July 15, 2019. *See* RP 612 & RP 811. During his oral ruling, Judge Rosen confirmed that during the ensuing weeks he had reviewed "all of the trial testimony and spent some significant time with the exhibits[.]" RP 927:22-23.

> When I consider all of those things together, I find that the plaintiffs have proven by a preponderance of the evidence that there was an agreement not to object to an actual dock with placement and dimensions and an easement modification. I find that the plaintiffs have proven this by clear and unequivocal evidence that leaves no doubt as to the terms, character, and existence of the agreement. I find that they have proven the agreement not to object to the proposed

dock, as indicated in the two addendums.

RP 937:9-20. The suggestion that the trial court gave short shrift to any of the evidence by "fixating on one piece of extrinsic evidence (the Burns sketch)" ignores not only the record but also the detailed and well-reasoned findings of fact and conclusions of law that verify its consideration of all Griffiths' evidence. CP 677 – 694. Findings so obviously based upon the weighing of the evidence and credibility of witnesses could only be overturned by withholding any deference whatsoever to the trial court's determinations following trial on the merits.

In short, Griffiths simply disagree with the underlying courts as to the interpretation of evidence, not any conflict with precedent that satisfies any prerequisite for this Court's review of the award of specific performance.

### D. The Fee Award is Supported by Substantial Evidence and Properly Identifies Cherbergs as the Prevailing Party.

Griffiths claim that the "Court of Appeals' affirmance of the fee award conflicts with *Transpac Dev. v. Young Suk Oh*, 132 Wn.

App. 212, 217-19, 130 P.3d 892 (2006)." However, *Transpac*'s facts are inapposite and analysis thereunder leads to a contrary conclusion; here the trial court did not have before it "multiple distinct and severable contract claims at issue" at trial and only Cherbergs "prevailed on major issues."

*Transpac* involved breach of contract between landlord (Transpac) and tenant (Oh) and a dispute regarding fees on dueling contract claims; the trial court determined that Oh had breached the lease, justifying termination thereof, and that Transpac itself breached the lease by its failure to mitigate unpaid rent. The trial court awarded no attorney's fees and Oh appealed. *Id*., at 217-218. On appeal, the court determined that the two claims were distinct, Transpac's based upon the original breach by Oh and Oh's based upon Transpac's failure to mitigate its damages. *Id*.

Because the claims were distinct and separable, premised upon different facts, the appellate court agreed the parties were both entitled to fees for breach of the contract and the fees should offset because "each party avoided the remedies the other party

sought." *Id*., at 217.

*Transpac* is distinguishable in that both of the parties' claims were based upon direct breach of the contract, were distinct and capable of segregation, and both parties avoided some portion of the remedies sought. The analysis below further evidences the distinction.

1. The contract and misrepresentation claims arose out of a common core of facts which were not subject to or capable of reasonable segregation.

Cherbergs originally alleged, as alternative theories premised upon the same facts, that Griffiths breached the PSA and misrepresented facts relevant to the purchase. In their misrepresentation claim, Cherbergs alleged that Griffiths failed to disclose two "exclusive easements" that would have precluded Cherbergs from building their proposed dock and resulted in a significant devaluation of their property. While the misrepresentation claim was dismissed and did not proceed to trial, the facts of Griffiths' failure to disclose the easements and the resulting limitations on Cherbergs' ability to build their dock

remained a seminal topic throughout litigation and at trial.

The 2016 summary judgment dismissal of the misrepresentation claim was based upon the Declaration of Kris Robbs stating that she had advised Cherbergs of the easements. [3] The court's ruling considered Cherbergs' duty to prove their claim upon the higher evidentiary standard of clear, cogent and convincing evidence. CP 274-276; *Lawyers Title Ins. Corp. v. Soon J. Baik*, 147 Wn.2d 536, 545, 55 P.3d 619 (2002).

The easement issue continued to impact the case in that it affected Cherbergs' ability to permit a dock extending from the outcropping as drawn in the "New Dock sketch." *See Appendix to Petition*, pp. 27-30. Although the misrepresentation claim regarding *disclosure* of the easements was dispelled, the controversy on the facts related to the easement raged on as Griffiths continued to challenge Cherbergs' right to invade the easement to permit their dock. *See* CP 361-363; CP 365-366.

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[3] *CP 696-698 (Order Granting Motion to Reopen Evidence to Admit Exhibit 460 (Robbs Decl.)*

Ultimately the trial court ruled that Griffiths are required to "modify" the "exclusive" easement pursuant to the PSA, allowing Cherbergs to build their dock in the easement area. CP 680-681 (¶¶ 1.17-1.21; ¶¶ 1.25-1.27); CP 691 (¶ 2.7); CP 693 (¶ 2.20). Cherbergs' allegations of failure to disclose were very much at issue during trial. Not only were Cherbergs unable to segregate time spent on the different claims based upon the same set of facts, under the circumstances they were not required to do so. *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 672–73, 880 P.2d 988, 997 (1994), citing *Hume v. Am. Disposal Co.*, 61 Wn. App. 656, 447-48, 810 P.2d 952, 815 P.2d 812 (1994), *review denied*, 118 Wn.2d 1008, 824 P.2d 490 (1992) ("[t]he trial court found that the [plaintiff's] claims were based upon a common core of facts and that no reasonable segregation of successful and unsuccessful claims could be made. This was a judgment clearly falling within the trial court's discretion.")

Conversely, excision of fees on unsuccessful claims should occur only as to wholly distinct claims: "[w]here the plaintiff has

failed to prevail on a claim that is *distinct in all respects* from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee." *Brand*, *supra*, at 672 (emphasis added). Here the underlying facts to the misrepresentation and breach claims were inextricably intertwined; no segregation is necessary or required.

Finally, specific performance is intended to return the parties to the condition they would have been in had the contract been performed. *Kofmehl v. Steelman*, 80 Wn. App. 279, 285–86, 908 P.2d 391, 394 (1996), citing *Northwest Television Club v. Gross Seattle*, 96 Wn.2d 973, 983–84, 634 P.2d 837, 640 P.2d 710 (1981). Granting Griffiths an offset for fees related to the misrepresentation claim, where that ruling had absolutely no impact on the trial or its outcome, would be contrary to the equitable principles at play. *Landberg v. Carlson*, 108 Wn. App. 749, 758, 33 P.3d 406 (2001), *review denied,* 146 Wn.2d 1008, 51 P.3d 86 (2002) (supporting an award of attorney's fees under equitable principles, in addition to statute and contract). This

includes all fees, costs, expenses and "necessary disbursements" during litigation and on appeal. *See Singleton v. Frost*, 108 Wn.2d 723, 729, 742 P.2d 1224, 1227 (1987).

Cherbergs were granted specific performance on summary judgment and again at trial. RCW 4.84.330 requires fees be awarded to the prevailing party and equitable principles allow this Court to do so in a manner sufficient to make that party whole. Cherbergs wholly prevailed on the matters tried, which were inextricably linked by the same core set of facts surrounding the transaction and Griffiths' breach of the contract. Griffiths prevailed only upon an alternative legal theory to the theory on which Cherbergs ultimately and fully prevailed. No offset would have been appropriate, and the trial court certainly did not abuse its discretion in so holding.

2. The dismissal of the misrepresentation claim resulted in no benefit to Griffiths; they did not avoid the remedy sought against them.

Griffiths' claim regarding the misrepresentation claim they prevailed on at summary judgment is nonsense. While there was

testimony at trial that the estimated reduction in the value of the Cherberg property with and without a dock was between $400,000 and $1.2 million, the issue was relevant only in the context of Cherbergs being *denied* a dock. RP 311:14-313:8; RP 773:19–774:9. As noted, the claim was merely an alternative to Cherbergs' chief request – that the court order Griffiths to abide by the PSA so Cherbergs could permit a dock. In short, the trial court's order providing Cherbergs the right to proceed with their dock located on the "exclusive" easement at issue nullifies the "dock vs. no dock" valuation aspect of the misrepresentation claim.

In general, a prevailing party is one who receives an affirmative judgment in his or her favor. *Riss v. Angel*, 131 Wn. 2d 612, 633–34, 934 P.2d 669, 681 (1997*)*. If neither wholly prevails, then the determination of who is a prevailing party depends upon who is the substantially prevailing party, and this question depends upon the extent of the relief afforded the parties. *Id*., citing *Rowe v. Floyd*, 29 Wn. App. 532, 535 n.4, 629 P.2d 925 (1981) (emphasis added). Griffiths have been afforded no relief at

all and there is no legitimate argument they were a prevailing party in any sense.

The Supreme Court's holding in *Riss,* arising on a challenge for an offset of fees to the substantially prevailing party, is directly on point. Riss submitted a building plan to their homeowner's association ("HOA") for a residence they intended to build. The HOA denied the request, citing the HOA covenants. *Id*., at 617-618. The trial court found that while the covenants were valid, the HOA acted unreasonably in their denial. *Id*., at 638. The court upheld the covenants but granted specific performance for Riss to build the home regardless. *Id*., at 634 ("Plaintiffs will essentially be able to build the house they sought to have approved. The trial court correctly concluded that that Plaintiffs are prevailing parties).

In a parallel outcome, the "exclusive easements" that Cherbergs challenged for Griffiths' failure to disclose remained intact after dismissal of the misrepresentation claim, but Cherbergs were still allowed to permit a dock encroaching on the "exclusive

easement" pursuant to the PSA. Griffiths' "victory" on summary judgment was meaningless. Griffiths cannot be considered a prevailing party for the purpose of a fee offset.

3. The merger doctrine precludes an award of fees under the PSA for the misrepresentation claim.

In support of their argument for contractual fees Griffiths cite *Brown v. Johnson*, 109 Wn. App. 56, 59, 34 P.3d 1233 (2001). The application of *Brown*, however, would lead to a result contrary to the remedy Griffiths seek. The merger doctrine governs claims which arise out of the sale of real property. Most such contracts include a provision entitling the prevailing party in a dispute to an award of contractual fees. Not all claims *related* to a real-estate contract are subject to prevailing party fees, however. *Barber v. Peringer*, 75 Wn. App. 248, 251-252, 877 P.2d 223, 225 (1994).

In general, the provisions of a real-estate sales agreement merge into the deed, although there may be exceptions to this rule when there are "collateral contract requirements" that are not contained in or performed by the execution and delivery of the

deed, are not inconsistent with the deed, and are independent of the obligation to convey. *Id*., at 253-254. Claims based upon terms of the contract that relate to "*title or other terms contained in the deed*" are considered "merged" with the deed at the time of closing and cannot be the basis for a claim of fees under the contract. *Id*., at 254. A misrepresentation claim may be the basis for fees, so long as it does not involve claims directly related to the seller's obligation to convey clean title.

In *Brown*, the action for misrepresentation was based upon seller's failure to disclose defects in the house itself, thus the claim "did not relate to title or any other terms contained in the deed" and did not merge with the deed upon closing. The obligation to disclose defects in the house was collateral to the duty to convey clear title, thus allowing for a contractual fee award to the prevailing party. *Brown, supra*, at 60.

Here, however, the misrepresentation was based upon allegations that the Griffiths failed to disclose exclusive easements directly affecting clear title to the property. As such, the claim

merged with the deed upon closing, is not a collateral duty, and it is not a claim on the contract that is subject to an award of prevailing party fees: *S. Kitsap Family Worship Ctr. v. Weir*, 135 Wn. App. 900, 914, 146 P.3d 935, 942 (2006) ("…involved an agreement to convey an easement...This claim is central to the conveyance of title, and the merger doctrine therefore applies, barring the fee award based on the REPSA").

In sum, the trial court awarded Cherbergs prevailing party fees for breach of the parties' contract, but also upon equitable principles intended to make the only non-breaching party whole. The award is supported by substantial evidence and must be upheld in deference to the trial court's analysis of the evidence presented.

## IV. CHERBERGS ARE ENTITLED TO AN AWARD OF THEIR ATTORNEY'S FEES AT ALL LEVELS

The standard of review for an award of attorney's fees is abuse of discretion. *Greenbank Beach & Boat Club, Inc. v. Bunney*, 168 Wn.App.517, 524, 280 P.3d 1133 (2021). Being the

prevailing party at trial and upon appeal, the Cherbergs are entitled to an award of their attorney's fees at all levels. Pursuant to RAP 18.1(j) and the prevailing party provision of the PSA, Cherbergs request this Court affirm the trial court fee award and grant them their fees for answering Griffiths' frivolous petition for review. The prevailing party fee provision includes fees incurred at trial and all appellate levels. *Granite Equip. Leasing Corp. v. Hutton*, 84 Wn.2d 320, 328, 525 P.2d 223, 227 (1974); RCW 4.84.330. Indeed, such an award to Cherbergs is mandatory. *Singleton*, *supra*, at 729.

Cherbergs are alternatively entitled to an award of their fees as sanctions under for Griffiths filing of their frivolous appeal and failure to comply with the rules of appellate procedure. RAP 18.9(a). Griffiths' request for fees is baseless and should be denied as contrary to the law.

## V. CONCLUSION

Cherbergs respectfully request this Court bring this matter finally to a close by denying Griffiths' frivolous petition for review

and granting Cherbergs their fees for answering the same.

Pursuant to RAP 18.17(b), I certify that this Answer contains 4927 words.

RESPECTFULLY SUBMITTED this 18th day of November 2021.

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## CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury according to the laws of the United States and the State of Washington that on this date I caused to be served in the manner noted below a copy of this document entitled **RESPONDENTS' ANSWER TO PETITION FOR REVIEW** on the following individuals:

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DATED this 18th day of November, 2021.

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