COURT OF APPEALS CASE NO. 55456-9-II

CASE NO. 101353-1

SUPREME COURT OF THE STATE OF WASHINGTON

CHRIS HAMILTON and JANE DOE HAMILTON, husband and wife, HG ENTERPRISES, LLC, a Washington limited liability Company,

Petitioners

v.

BEN GERVAIS,

Respondent

PETITION FOR REVIEW

James B. Meade, WSBA #22852
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A. IDENTITY OF PETITIONER AND INTRODUCTION

Petitioner Christopher Hamilton and Jane Doe Hamilton seek review of the decision identified in Part II.

This Petition involves a case completely litigated on the basis of a lease containing an attorneys' fee provision, the subsequent award of attorneys' fees and costs after the Plaintiff failed at trial to use the lease he participated in drafting to pressure his former partner through litigation into paying him more money for the sale of property they owned through a limited liability company and the Court of Appeals reversal of the fee award based on hopelessly confusing and conflicting case law.

B. COURT OF APPEALS DECISION

Petitioners Hamilton seek review of the decision filed on September 7, 2022, by Division II, attached in the Appendix.

C. ISSUE PRESENTED FOR REVIEW

1. Does Washington law allow a litigant to sue to enforce a lease or contract containing an attorneys' fee provision and then avoid the consequences of that fee provision by claiming they were not a party to the very contract they sued to enforce?

D. STATEMENT OF THE CASE

Division II's opinion accurately states much of the record, with one critical exception.

The Court does not mention the fact that in all three versions of Mr. Gervais' Complaint that he filed (two against Mr. Hamilton and one against Heritage Bank, where he alleged that the Bank tortiously interfered[1] with

[1] In support of his motion and after citing the tortious interference with business expectancy elements, he wrote in support of his last-minute amendment:

> Given the numerous communications in the record between Plaintiff and Hamilton where the requirement of a second appraisal is discussed, ***Plaintiff had an expectancy that the Option*** would be exercised according to its terms with a second appraisal. Mr. Shott and through Mr. Shott [sic] Heritage Bank was clearly aware of the terms of ***the Option*** and, that exercise of ***the Option*** would involve an expectation on the part of Plaintiff of a payout based on 2 appraisals. Mr. Shott interfered in the [option] transaction for the purpose of pecuniary gain for his employer…

CP 3875, lns. 1-19 (emphasis added). In his suit against Heritage Bank, which was ultimately joined with the suit against Mr. Hamilton, Mr. Gervais asserted his intent to enforce his "rights" under the lease:

> 4.2 Shott, acting on behalf of Heritage Bank was fully aware of Plaintiff's contractual right and business expectancy that a sale of the S. Adams property would be consummated ***at their market value*** as required under the terms of the option. . . . Shott and Heritage intentionally interfered in Plaintiff's ***contractual rights and business expectancy***. The interference resulted in a sale of the S. Adams property at a price $300,000 less than fair market value causing a termination of Plaintiff's expectation that the S. Adams property would sell for fair market value as determined under the terms of the Option. . .

CP 657-58 (emphasis added).

his contractual lease rights), he specifically referenced and attached the lease and claimed that an appraisal obtained under the agreed fair valuation provision of the lease was the basis for Mr. Hamilton's liability. CP 1-47; 318-24; 349-59; 593-636; 652-72; 1772-1814; 4004-10. Instead, the Court writes "Gervais alleged that Hamilton breached certain fiduciary duties by selling the South Adams property" and "acted with gross negligence or engaged in willful misconduct under former RCW 25.15.155." App. 6.

The case was entirely about whether under the fair valuation provision of the lease Mr. Gervais was trying to enforce, Mr. Hamilton owed him personally a duty (even though the property was 50% owned by him through their LLC) and whether he breached that duty (CP 2, ¶ 3.3). As Mr. Gervais' multiple motions[2] and amended complaints made clear, the

[2] Throughout the entire litigation, Mr. Gervais made the lease central to the dispute. For example, Mr. Gervais asserted in March 2019 that the alleged "restrictive use" of the Johnston appraisal acted as a barrier to Mr. Hamilton using it in the option transaction that Mr. Gervais had negotiated:

> For the same reason, I do not believe there is any cogent argument that the Heritage Bank Appraisal complies with the requirements of the Lease Option which, in my opinion, clearly contemplates that the intended user of the MAI appraisal would be one or both of the parties to the Lease Option. Mr. Hamilton's testimony with respect to the use restriction was: "I did not read that paragraph. No." So, any reliance on the Report is patently unreasonable. That I would characterize as gross negligence in relation to a transaction where Mr. Hamilton, as the manager of HG was the sole decision maker in a transaction whereby he sold the sole asset of HG to himself.

lease purchase option was the centerpiece of his case. CP 1-3; 652-72; 1255-389; 1772-814; 1825-958; 2021-66; 2348-68; 2619-37; 2966-67; 3189-91; 3210-21; 3232-98. Putting a fine point on how Mr. Gervais viewed the case, his seven-page "Proposed Finding of Facts," filed with the court on the eve of trial, repeatedly concedes that his case was grounded in the lease purchase option, and at paragraph 20, Mr. Gervais makes claim to attorneys' fees and costs as the "prevailing party." CP 4004-10.[3]

The fair valuation provision of the lease was central to the post-closing communications between Mr. Gervais' trial counsel (Paul Brain),

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CP 3831, ¶ 8; 3259. The trial court rejected this legal argument, putting "restricted use" language into historical context. CP 232, ln. 25 – 233, ln. 14; CP 238, ln. 22 – 245, ln. 8.

[3] All of Mr. Gervais' complaints and his Proposed Findings of Fact ask for attorney fees and costs, CP 1-3; 657-58; 1772-75; 4004-10, and his conduct throughout the litigation indicated that he believed he was entitled to attorney fees if he prevailed based on what Mr. Gervais individually articulated were enforceable rights under a lease. *Id.*, see also CP 1255-39; 2619-37. The complaint repeatedly refers to "Ben's" or "Plaintiff's", *i.e.*, Mr. Gervais' interest in the building and his "contractual right." CP 652-57, ¶¶ 3.5, 4.2. The allegations in the complaints directly concern Mr. Hamilton's actions on the lease between HG, owned by Mr. Gervais and Mr. Hamilton, and G&H, owned by Mr. Hamilton: "Chris Hamilton caused HG to sell the Property." CP 1773, ¶¶ 3.3-3.6. The complaint also repeatedly refers to the alleged injury to Mr. Gervais as "the sale of the property in violation of the Option at less than fair market value." CP 1772-75, ¶¶ 3.2-3.2, 3.5; CP 652-57, ¶¶ 3.5, 4.2. See also CP 4004-10. Mr. Gervais clearly saw himself and Mr. Hamilton as bound by the lease containing the option. Thus, Mr. Gervais prayed for relief, including, notably, an award of his own attorneys' fees and costs. CP 1-3, 657-58; 1772-75; 4004-10.

and Mr. Hamilton, and HG and G&H's business attorney (Chris Huss), which focused on Mr. Gervais' refusal to accept Mr. Johnston's appraised value, even though he was an MAI appraiser.[4] After closing the sale, Mr. Hamilton continued to offer Mr. Gervais the opportunity to resolve his concerns by selecting an unbiased MAI appraiser. However, on advice of counsel, he elected not to do so. CP 65, ¶ 41, 66, ¶ 46; 251-53.

After closing arguments on December 9, 2020, the trial court ruled from the bench, rejecting Mr. Gervais' multiple arguments. Using the lease

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[4] Mr. Huss to Mr. Brain: "As promised, I have attached the list from Heritage Bank . . . To preserve confidentiality and avoid the possibility of undue influence, this process is done on the basis of bid price only. . . This seems to be the fairest way to proceed and gives no party any advantage on prior knowledge of the appraisers. . . In short, we should treat this as if the court had appointed the appraiser and forbade ex parte communication." Trial Exh. 170;

Mr. Brain to Mr. Huss: "This does not identify the bidding appraisers." Trial Exh. 170;

Mr. Huss to Mr. Brain: "Exactly. . . The anonymity assures the selection process is completely unbiased." Trial Exh. 170;

Mr. Brain to Mr. Huss: "I am not choosing an unknown." Trial Exh. 170;

Mr. Huss to Mr. Brain: "Paul: On August 20 your client told mine that he wanted a second appraisal and would pick an appraiser off the list that Heritage provided. . . Within the next (sic) 48 hours your client showed up with "appraiser" Percival who bragged about how he could get the "value" as high as he needed. We believe the Johnston appraisal was "truly independent" and what we now seek is essentially an objective second opinion." Trial Exh. 170; and

Mr. Brain to Mr. Huss: "I am not going to pick an unknown. I am not going to pick a lender appraisal." Trial Exh. 170.

as the measuring stick, the trial court concluded that Mr. Hamilton had acted in good faith toward Mr. Gervais by doing everything the lease required and more (selecting a "blind appraisal") to fairly value the property according to the lease's option to purchase provision. The trial court explained its reasoning as to how Mr. Hamilton's actions equated to good faith under the lease:

> Mr. Hamilton solicited Mr. Gervais' opinion so that he could say, "I was treating you fairly. If you come up with a fair approach, I was willing to do that. I think a fair approach is to have a blind, neutral MAI appraisal picked by Heritage." He, apparently, was open to some other possibility. Again, that it be a blindly picked person so that one side or the other couldn't have influenced that person. That was a fair process. I think this is a fair process.[5]
> . . .
>
> And the 30-day business (lease notice provision) at that point – because at least from Mr. Hamilton's point of view, there's an agreement how to do a certain process, and now Gervais has said, "In no uncertain terms, we are going to do it my way or the highway." I think it was clear to Mr. Hamilton, at that point in time, that the 30 days was futile. There was no point in it.
>
> As it turned out in a way – he did close the deal before the 30 days ran out. For more than 30 days after, he was still trying to make the deal go down in exactly those same terms and was clearly open to it. Mr. Gervais did not play that game because he said, "I'm not going to give you somebody off the list that Heritage keeps." He might have agreed to an MAI appraiser, but it was pretty clear, through counsel, he

[5] CP 247, lns. 1-9. The trial court further reasoned about a "blind appraisal": "What I'm trying to assess, to the extent that Mr. Hamilton was reasonable, I don't know what else he could have done." CP 245, lns. 5-68.

was going to insist on knowing who the appraiser was, and he wasn't going to pick one off any lender's list. I think that was Mr. Brain's – one of his e-mails back to Mr. Huss. So there was never another MAI appraiser that was requested to go in there on behalf of Mr. Gervais.[6]

. . .

It seemed to me that this was – ***Hamilton was acting within the option***. The one business has the right to buy the property. The dispute mechanism was not invoked by Mr. Gervais and Mr. Hamilton. **Although strictly speaking, Mr. Gervais was not a party to the deal (lease), he was perfectly willing to follow the tenets of that deal because that was the spirit of the deal**. And in doing so, it was the only real guidance he had.

Otherwise you have this problem: No matter what he (Hamilton) did, he would be in violation of being on both sides of the transaction. It seems to me, you can't place him in that position. You might say, "Well, he put himself there." ***The parties put themselves there because they agreed to the lease term*** in the way that they set it up in the circumstance of what the Operating Agreement was.

Mr. Hamilton was nevertheless willing to treat Mr. Gervais as if he was the other party to that thing (lease), and Mr. Gervais didn't follow that protocol because he never nominated an MAI appraiser. I can see the argument about the lease, but I think the lease protected both sides of the transaction.

When Mr. Brain sends this letter to Mr. Hamilton in the first instance – this Exhibit 150 . . . In the final paragraph, in the last sentence – the first sentence says, "My client is not willing to accept the purchase price without a truly independent appraisal."

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[6] CP 247, ln. 21 - CP 248, ln. 16; CP 65, ¶ 41. In less than thirty-two pages of transcript, the Court referenced "appraisal" 46 times, MAI 27 times, "option" agreement 9 times, the lease 8. CP 223-25.

> Mr. Percival's appraisal (Gervais') I do not regard as qualified. Even it if did, it wasn't pursuant to the (lease) agreement. He was not an MAI appraiser. . . .
>
> I find that there was no breach of any duty or loyalty or of care by Mr. Hamilton. While I wish that these guys had worked this thing out and followed the letter of that thing, it would have been futile to follow that option. Therefore I excuse him from doing so. I find no breach of anything by Mr. Hamilton and the transaction stands.

CP 252, ln. 4 – CP 254, ln. 5.

After extensively exploring during discovery and at trial every conceivable fault Mr. Gervais could lay on the appraisal to discredit it, the trial court boiled the case down to its essence, which was the lease provision regarding the appraisals:

> There were provisions ***in the lease for having one appraisal***. There didn't have to be two. Certainly, if the parties didn't agree, there could be two, and then we get to sort of the crux of this case.
>
> The appraisals on some level -- we talked about this from here to yonder. I don't much care about them. I care about the question that I put to Mr. Brain this morning, which is if the second appraiser had come up exactly the same as first one or if it had been different in some way, even if they were both wrong, **Mr. Gervais would have been required to (under the lease)** -- assuming Mr. Hamilton still wanted to go through with it, Mr. Gervais would have had to go through with it on that level ***because he contracted for it that way***. The fact that he got, if you will, disadvantaged or screwed or however you want to put it because the appraisals were wrong, if they were still honestly arrived at, he was stuck with that outcome, and he'd have no basis for a lawsuit.

CP 232, ln. 21 – CP 233, ln. 14 (emphasis added). Even though Mr. Gervais repeatedly refused to obtain the services of an MAI appraiser during the events leading up to the filing of the first lawsuit, or at any time before the trial court rendered its decision, the lease and whether to proceed with one or two MAI appraisals was the issue he put at the center of the dispute. While his decision not to obtain an MAI appraisal remains a mystery, the fact that this issue was central to the dispute is irrefutable. CP 65, ¶ 41.

If there had been no lease, no option to purchase, no Paragraph 4 of the lease, then there would never have been a debate about whether the MAI appraiser (blindly selected by the Bank) Mr. Hamilton used, whether the appraisal was ordered early or out of sequence (according to the lease), by a bank vs. G&H directly, who could have relied upon it, whether a second appraisal should have been ordered or by whom. As explained by the trial court in ruling on Mr. Hamilton and Heritage's motions for fees, the lease was the entire basis for and focus of Mr. Gervais' case:

> **Mr. Hamilton**, in order to carry out all of this stuff…**had to follow the contract, the Lease Agreement**, as to how to exercise the option to purchase the piece of realty from one entity to the other would be done. In substantial measure, **Mr. Gervais claimed that the breach of the duties towards him was because he breached the Lease Agreement** by not waiting, not giving the opportunity for a 30-day other appraisal, and so on. **And Hamilton and Gervais acted towards each other as if that agreement was between the two of them throughout.**

1/22/2021 RP 31 (emphasis added). While Mr. Gervais' may have styled his claims as alleging breach fiduciary duties, the lease entirely defined whether Mr. Hamilton breached those duties. Mr. Gervais used the lease as a sword and Mr. Hamilton measured his actions against the lease to defend himself using the lease as a shield.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

This Court should review Division II's opinion under RAP 13.4(b)(2) and (4) because it conflicts with decisions of the Court of Appeals, ignores the plain reading of RCW 4.84.330 which does not require a litigant to be a party to a contract or lease for purposes of awarding fees if the suit was brought on that contract and because it involves an issue of substantial public interest (having clear law on the contractual award of attorneys' fees under RCW 4.84.330) that should be determined by the Supreme Court.

RCW 4.84.330, intended to afford mutuality of remedy in unilateral non-reciprocal attorney fee provisions by making them bilateral, *see Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 489, 200 P.3d 683 (2009), provides as follows:

> In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing

> party, **whether he or she is the party specified in the contract or lease or not**, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.

RCW 4.84.330 (emphasis added). Notably, the statutory language is mandatory; the trial court has no discretion to decide whether fees should be allowed, only how much should be allowed. *Singleton v. Frost*, 108 Wn.2d 723, 728-30, 742 P.2d 1224 (1987). The statutory language also specifically allows that a prevailing litigant who defended against an action brought on a contract with a fee shifting provision is entitled to recover fees under that contract. RCW 4.84.330's applicability is limited only by its own language, *i.e.*, that it applies to claims arising "on a contract or lease," and to unilateral,[7] rather than bilateral, attorney fee provisions. *See, e.g., Hawk v. Branjes*, 97 Wn. App. 776, 779-80, 986 P.2d 841 (1999).

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[7] Lease paragraph 20 is plainly non-reciprocal because it only allows prevailing *plaintiffs* to recover attorney fees, not prevailing *defendants*:

> Should either party **bring any action** to enforce suit or to enforce any provision of this lease, **such party** shall, upon prevailing in such action or suit, be entitled, in addition to the relief therein granted, to such a sum as the court may adjudge reasonable as attorney's fees at both the trial and appellate court levels.

CP 919 (emphasis added). On its face, Paragraph 20 only allows for attorney fee recovery by a person or entity *bringing* an action to enforce a provision of the lease and only if that person or entity *prevails*. Consequently, only *prevailing plaintiffs* may recover fees under this provision. The exclusion of prevailing defendants from the fee provision in the lease proves the non-reciprocal nature of this attorney fee provision and the applicability of RCW 4.84.330's remedial reciprocity. *Peabody v. Tunison*, No. 52891-6-II, 2020 Wash. App. LEXIS 876 (2020), and *State v. Farmers Union Grain Co.*, 80 Wn. App. 287, 908 P.2d 386 (1996)

Contrary to Division II's citation to *4518 256th, LLC v. Karen Gibbon, P.S.*, 195 Wn. App. 423, 447, 382 P.3rd 1 (2016), it is not well settled that "a contractual attorney fee provision cannot authorize the recovery of fees from a nonparty." App. At 9. The controlling legal standard was enunciated by this Court in *Seattle First Nat'l Bank v. Wash. Ins. Guar. Ass'n,* 116 Wn.2d 398, 413, 804 P.2d 1263 (1991): "[u]nder Washington law, for purposes of a contractual attorneys' fee provision, an action is on a contract if the action arose out of the contract and if the contract is central to the dispute." Washington courts have made clear that "the court may award attorney fees for claims other than breach of contract when the contract is central to the existence of the claims, *i.e.*, when the dispute actually arose from the agreements." *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229, 278, 215 P.3d 990 (2009). A contract is central to a dispute where "[t]he contract cannot be overlooked in the analysis of [the] circumstances." *W. Stud Welding, Inc. v. Omark Indus., Inc.*, 43 Wn. App. 293, 299, 716 P.2d 959 (1986). Here the trial court clearly determined that the lease was central to the entire case and was the measuring stick as to whether Mr. Hamilton acted in good faith.

Applying this rule of law, Washington courts have repeatedly awarded prevailing party contractual attorneys' fees even when the plaintiff's claim sounded in tort so long as the contract is central to the parties' dispute. *See Deep Water*, 152 Wn. App. at 278-79 (tortious interference claim arose from contract and therefore triggered attorneys' fees provision); *Brooks v. Nord*, 16 Wn. App. 2d 441, 448-52, 480 P.3d 1167 (2021) (although action was not a contract dispute but an alleged tort for breach of common law duties, contractual fee provision still applied because action was "on the contract"); *Brown v. Johnson*, 109 Wn. App. 56, 58-59, 34 P.3d 1233 (2001) (contractual provision for attorneys' fees was applicable to plaintiff's tort claim of misrepresentation where "the purchase and sale agreement was central to her claims"); *Hill v. Cox*, 110 Wn. App. 394, 411-12, 41 P.3d 495 (2002) (contractual fees awarded when prevailing party elected to proceed on statutory tort claim rather than contract); *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn. App. 834, 855-56, 942 P.2d 1072 (1997) (contract-based fees awarded for negligence and breach of fiduciary duty claims when duty breached was created by parties' agreement); *W. Stud Welding*, 43 Wn. App. at 299 (contract-related tortious interference and breach of fiduciary duty claims justified awarding of contract-based fees); 25 DAVID K. DEWOLF ET AL., WASHINGTON PRACTICE: CONTRACT LAW AND PRACTICE § 14:18, at 357 (2d ed. 2007)

(even in cases where plaintiff's claims are founded in tort or another legal theory, award of contract attorney fees may be appropriate).

RCW 4.84.330 does not contain any requirement that the parties to the litigation be the identical parties to the contract or lease, and, in fact, it broadens otherwise agreed upon contractual language in that regard: "the prevailing party, **whether he or she is the party specified in the contract or lease or not**, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements." RCW 4.84.330 (emphasis added). As Washington courts have recognized by reference to California's sister statute, RCW 4.84.330 uses broad language and does not exclude extension to nonparties to the contract or lease:

> The language of the statute is unclear as to whether it shall be applied to litigants who like defendants have not signed the contract. The section refers to "any action on a contract" thus including any action where it is alleged that a person is liable on a contract, whether or not the court concludes he is a party to that contract. Nevertheless the terms "parties" and "party" are ambiguous. It is unclear whether the Legislature used the terms to refer to signatories or to litigants.

Herzog Aluminum, Inc. v. General Am. Window Corp., 39 Wn. App. 188, 195, 692 P.2d 867 (1984) (internal citations omitted). Washington cases applying RCW 4.84.330's "broad language '[i]n any action on a contract,'" *Id*. at 197, also confirm that circumstances exist where awarding attorneys'

fees to a prevailing party is justified even though the parties to the lawsuit may not be the parties or signatories to a valid contract.

One such circumstance arises where there is not even an enforceable lease or contract at all, but the lawsuit was nevertheless "on the contract" so as to invoke RCW 4.84.330 and support awarding attorney fees to the prevailing party despite the lack of enforceable underlying contractual fee provision. *See, e.g., Labriola v. Pollard Group, Inc*., 152 Wn.2d 828, 839, 100 P.3d 791 (2004) (although invalid non-compete was the instrument that contained the unilateral fee provision, RCW 4.84.330 still applied to support awarding attorney fees to prevailing party); *Herzog*, 39 Wn. App. at 196-97 (even though no contract had been formed, the prevailing party was entitled to fees and cost pursuant to RCW 4.84.330 because the action was "on the contract" as the statute requires); *Park v. Ross Edwards, Inc*., 41 Wn. App. 833, 838-39, 706 P.2d 1097 (1985), *rev. denied*, 104 Wn.2d 1027 (1985) (allowing recovery of attorneys' fees and costs under RCW 4.84.330 even where unenforceable contractual fee provision was bilateral); *Bogle & Gates, P.L.L.C. v. Holly Mountain Res*., 108 Wn. App. 557, 563-64, 32 P.3d 1002 (2001) (although not a party to or signatory of the written representation agreement that contained the attorney fees' provision, defendant Holly Mountain still entitled to recover fees under RCW 4.84.330); *Mt. Hood Beverage Co. v. Constellation Brands, Inc.*, 149 Wn.2d

98, 121-122, 63 P.3d 779 (2003) (defending against an action based on a statute by successfully arguing the statute is unconstitutional allows an award of attorney fees under that unconstitutional statute). These cases confirm that, even though the parties to the litigation were never actually parties to a contract at all, this Court may uphold a trial court's decision to award attorney fees to the prevailing party where the dispute still centered on an alleged contract.

Accordingly, citing to *Gibbon* case[8] as "well-settled" law requiring a litigant who claims fees under a contract to be a party to that contract does

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[8] *Gibbon* is neither analogous nor does it give sufficient weight to RCW 4.84.330's principle of mutuality of remedy that must apply in the instant case. Rather, as discussed in *Columbia State Bank v. Invicta Law Grp. PLLC*, 199 Wn. App. 306, 334, 402 P.3d 330 (2017), the key factor in determining applicability of contractual attorney fees to contract non-parties is whether or not the non-party is a "stranger" to the contract. If the individual is not a "stranger" to the contract, the fact that he or she is not a formal party or signatory to the contract does not preclude invoking a contractual attorney fee provision. For this reason, *Columbia* discussed but distinguished *Gibbon* on the same grounds that apply here: while "Jordan was not a party to the loan agreements with CSB, Jordan was certainly not a 'stranger' to the agreements. He signed all of the documents on behalf of the PLLC." *Id.* In that case, the Court of Appeals affirmed the trial court's award of attorneys' fees against Jordan, the non-signatory defendant sued "on the contract."

Neither Mr. Gervais nor Mr. Hamilton was a stranger to the lease that they created; that they were not formal parties to the lease is therefore not dispositive. The facts support the trial court's decision to award attorneys' fees to prevailing party Mr. Hamilton in this instance. Mr. Gervais and Mr. Hamilton were expressly identified on the lease, and their company, HG, and Mr. Hamilton's company, G&H, were signatories to it. CP 757; Trial Exh. 175, ¶ 5; CP 1960; Trial Exh. 181, ¶ 4; CP 4004-05, ¶¶ 2, 5; CP 55-56, ¶¶ 9-10. HG—both a party to the lawsuit and a party to the lease—was member-owned and operated by Mr. Gervais and Mr. Hamilton. CP 1-3; 652-57; 1772-75.

not square with the plain language of RCW 4.84.330 and/or a substantial body of Washington law. Providing clarity on this issue would help parties analyzing risk and trial courts which are required to apply RCW 4.84.330 in at best murky conditions.

The action against Mr. Hamilton unquestionably arose from and was central to the lease so as to trigger RCW 4.84.330's reciprocal attorney fees provision. It is hard to imaging a clearer case of an action being brought "on contract" than this one, and is a clear example of where a trial court correctly applied the law to the fact of the case before it, but was later reversed because of the competing understandings of whether "suing on the contract" requires a litigant to be a party to that contract.

F. CONCLUSION

For the foregoing reasons, Mr. Hamilton respectfully asks the Supreme Court to review Division II's opinion.

Given Mr. Hamilton's and Mr. Gervais' involvement in the lease, it is unsurprising that the trial court found that "Hamilton and Gervais acted toward each other as if the agreement was between the two of them." 1/22/2021 RP 30. Mr. Gervais' actions in suing in his own name, referencing and attaching the lease to the three versions of his filed Complaints, the fact that he believed he had a right to oppose the sale, the fact that under advice of his original counsel he promised to get his own MAI appraisal, and Mr. Gervais' clear pronouncements in filing a Complaint against Heritage Bank for tortious interference with a contractual interest erase any doubt that he believed he was entitled to a contractual interest in the lease personally. CP 1-3; 657-58; 1774; 4004-10.

I hereby certify that this document contains 4,040 words in accordance with RAP 18.17.

RESPECTFULLY SUBMITTED this 7th day of October, 2022.

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CERTIFICATE OF SERVICE

I declare under penalty of perjury of the laws of the State of Washington that on the date below a copy of the foregoing document was filed with the Washington Court of Appeals and forwarded for service upon counsel of record as follows:

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Signed at Tacoma, Washington this 7th day of September, 2022.

s/ John Drashil
John Drashil
Legal Assistant

Appendix

Filed
Washington State
Court of Appeals
Division Two

September 7, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

BEN GERVAIS, Appellant v. CHRISTOPHER HAMILTON and JANE DOE HAMILTON, husband and wife, and HG HOLDINGS LLC, a Washington limited liability company, Respondents, BEN GERVAIS, Appellant. v. AL SHOTT and JANE DOE SHOTT, husband and wife, and HERITAGE BANK, a federally regulated banking institution, Respondents.	No. 55456-9-II UNPUBLISHED OPINION

VELJACIC, J. — Ben Gervais appeals the trial court's order granting attorney fees and costs to Christopher Hamilton, Heritage Bank, and the bank's vice president, Al Shott (Heritage and Shott collectively referred to as "Heritage Bank"). Gervais argues that the trial court did not have a legal basis to award attorney fees and costs to Hamilton and Heritage Bank because neither he nor they were parties to the lease agreement at issue. Hamilton and Heritage Bank request attorney fees and costs on appeal.

We agree with Gervais and hold that the trial court erred in granting attorney fees and costs to Hamilton and Heritage Bank and reverse the trial court's order. We also deny Hamilton's and Heritage Bank's requests for attorney fees and costs on appeal.

FACTS

I. FACTUAL BACKGROUND[1]

A. Hamilton and Gervais's Business Relationship

In 2008, Gervais and Hamilton formed G&H Enterprises, Inc. (G&H) in order to operate Rainbow International, a business which was previously owned and operated by Gervais and his former spouse. At the time G&H was created, Hamilton owned 51 percent of the shares and Gervais owned 49 percent.

In 2012, Gervais and Hamilton formed HG Holdings, LLC (HG), where they were equal members. Under HG's operating agreement, Hamilton is the managing member and is therefore in charge of the company's business needs. Despite being a limited liability company, Gervais and Hamilton ran HG as a partnership, similar to their other business ventures.

HG held title in certain real property located on Fawcett Avenue. In late 2013, through HG, Gervais and Hamilton sold the Fawcett property.

B. The Acquisition of the South Adams Property and Lease Agreement Pertaining Thereto

In November 2013, after selling the Fawcett property, Gervais and Hamilton identified certain commercial real estate located at 6035 South Adams Street (South Adams property) in Tacoma, which they believed would suit the needs of Rainbow International (operated by G&H). Through HG, Gervais and Hamilton purchased the South Adams property for $725,000. HG

[1] The substantive facts are drawn from the trial court's unchallenged findings of fact, which are verities on appeal. *Seven Hills, LLC, v. Chelan County*, 198 Wn.2d 371, 384, 495 P.3d 778 (2021).

rented the South Adams property to G&H for $5,000 per month. This tenancy had no written lease.

In May 2016, Gervais and Hamilton decided to separate most of their joint business interests, except for the ownership of the South Adams property. Hamilton redeemed Gervais's stock ownership in G&H and bought out his interest in Rainbow International. In exchange, Gervais and Hamilton agreed on the terms of a lease agreement between G&H and HG, which provided G&H with an option to purchase the South Adams property during the term of the lease. The decision to have HG enter into the lease with the purchase option had the effect of putting G&H and Hamilton on both sides of a transaction if G&H elected to exercise the option, per HG's operating agreement.

The lease agreement included a provision that set the valuation method for the South Adams property in the event G&H exercised its purchase option. Paragraph 4(a) of the lease provided that,

> 4. **Option to Purchase:** Landlord hereby grants Tenant an exclusive option to purchase the premises at any time during the lease term on the following terms and conditions:
>
> (a) Option Price: The purchase price for the premises upon exercise of the option shall be determined by MAI appraisal. The parties shall attempt to agree on a single MAI appraiser. If, after 30 days following the exercise of the option by Tenant, the parties are unable to agree on the selection of an appraiser, each party shall proceed with their own MAI appraiser and the purchase price shall be an average of the two appraisals. If one appraiser is agreed upon the parties shall each pay ½ of the cost of the appraisal; if two appraisals are done each party shall pay the cost of their own appraisal.

Clerk's Papers (CP) at 38. This provision was drafted so that there would be a fair way to value the South Adams property.

The only parties to the lease agreement were the landlord, HG, and the tenant, G&H. Hamilton signed the lease in his capacity as the managing member of HG and president of G&H. Gervais did not sign the lease.

The lease agreement also contained an attorney fees provision. That provision reads,

> 20. **Attorneys' Fees:** Should either party bring any action or suit to enforce any of the provisions of this lease, such party shall, upon prevailing in such action or suit, be entitled, in addition to the relief therein granted, to such sum as the court may adjudge reasonable as attorneys' fees at both the trial and appellate court levels.

CP at 41.

C. The Sale of the South Adams Property

By late 2017 and early 2018, G&H and Rainbow International entered into a new fire restoration market which increased G&H's need for space to conduct business. In April 2018, Hamilton contacted Gervais about his interest in purchasing the property or having G&H exercise its purchase option in the lease agreement. Gervais stated that he was not interested in selling the South Adams property.

On or about June 4, invoking the language of the lease, Hamilton contacted Gervais about obtaining a Member Appraisal Institute (MAI) appraiser, blindly selected from Heritage Bank's list, to establish the purchase price of the South Adams property. That same day, Heritage Bank provided Hamilton with a pricing list of the blind bids submitted to conduct the appraisal. Hamilton selected the lowest bidder. On that basis, Heritage Bank sent an engagement letter to Patrick Johnson of Montro & Johnson, requesting him to conduct an appraisal of the South Adams property.

On June 12, Gervais responded to Hamilton, stating that he believed "it would be best if we both got appraisals done on the building so we are not just held to one." CP at 57.

On or about June 14, Gervais contacted his friend, Scott Krause, a business broker primarily involved in the sale of marijuana businesses under Initiative 502. Krause advised Gervais that the South Adams property was worth between $1,100,000 and $1,300,000.

On July 3, Hamilton received a copy of Johnson's appraisal from Heritage Bank, which valued the South Adams property at $900,000. Although the Johnson appraisal might have been on the low end of value, it was based on a reasoned assessment of the market and did not reveal any evidence of bias.

Heritage Bank then began preparing documents for a loan in the amount of $700,000, pursuant to Hamilton's request. Heritage Bank was aware that Hamilton was utilizing the Johnston appraisal to exercise the purchase option under the lease. It did not participate in, advocate for Hamilton, or otherwise interfere with any negotiation between Gervais and Hamilton.

Gervais believed he could oppose the sale of the South Adams property and had a right to be included in the selection of appraisers to value the property. However, on August 16, Gervais learned that Hamilton did not need his permission or involvement to sell the South Adams property. Hamilton did not realize that he could proceed without Gervais's consent until mid-July 2018.

On August 20, Gervais invited Hamilton over to his home to discuss the proposed sale of the South Adams property. Gervais told Hamilton that he believed the property was worth $1,200,000. Gervais then agreed to have an MAI appraiser value the property.

Gervais then contacted Mark Percival to appraise the South Adams property. Percival was not an MAI appraiser.

On August 21, Percival met with Gervais and Hamilton at the South Adams property. CP 63. At this meeting, Percival made a number of statements that caused Hamilton to believe that

he approached the appraisal from a biased standpoint. Despite Hamilton's concerns, Gervais insisted on having Percival as the appraiser he trusted to value the South Adams property.

On August 21 and 22, Hamilton signed the purchase and sale agreement and sent a letter to Gervais formally exercising the purchase option in the lease agreement based on the Johnson appraised value of $900,000. The transaction closed on August 30 and Gervais received all net proceeds.

II. PROCEDURAL HISTORY

On April 23, 2019, Gervais filed an amended complaint against Hamilton and HG. Relevant here, Gervais alleged that Hamilton breached certain fiduciary duties by selling the South Adams property under its fair market value from HG to G&H. Gervais also alleged that Hamilton acted with gross negligence or engaged in willful misconduct under former RCW 25.15.155 (1994), which governs the obligations of Hamilton as the managing member of HG. Gervais also requested attorney fees and costs.

On June 30, 2020, Gervais filed a separate action against Heritage Bank. Gervais alleged that Heritage Bank intentionally interfered with his "contractual rights and business expectancy" by agreeing to and authorizing the Johnson appraisal. CP at 657. Gervais also alleged that Heritage Bank "engaged in a civil conspiracy by agreeing and acting in concert to accomplish an unlawful purpose, the sale of the [South Adams] property in violation of the [purchase option in the lease agreement] at less than fair market value." CP at 658. Gervais further contended that Heritage Bank engaged in unfair and deceptive practices with respect to the Johnson appraisal in violation of Washington's Consumer Protection Act (CPA). Gervais claimed $200,000 in damages, which included the legal fees incurred in litigation with Hamilton and caused by Heritage Bank.

On August 21, the trial court consolidated the above actions pursuant to CR 42. The consolidated matter proceeded to a bench trial.

On January 8, 2021, the trial court entered findings of fact (discussed above) and conclusions of law. Relevant here, the court entered the following conclusions of law that dismissed all of Gervais's claims:

> 3. . . . Hamilton did not breach any fiduciary duty with respect to HG or [] Gervais.
>
> 4. [] Gervais was a participant in the creation of the lease.
>
> . . . .
>
> 9. [] Heritage Bank did not otherwise commit a per se violation of RCW 19.86, the [CPA]. [] Heritage Bank [is] therefore entitled to a Judgment of Dismissal of any and all claims alleging a violation of RCW 19.86, the [CPA].
>
> 10. [] Heritage Bank did not engage in or commit any tortious interference with a contract, lease or prospective economic advantage of [] Gervais, [and is] therefore entitled to a Judgement of Dismissal of that cause of action.
>
> 11. [] Heritage Bank did not engage in a civil conspiracy with [] Hamilton, and [is] therefore entitled to a Judgment of Dismissal of that cause of action.

CP at 67-69. The court expressly declined to conclude that Gervais was an intended third party beneficiary of the lease agreement.

Hamilton moved for attorney fees and costs under RCW 4.84.330 and paragraph 20 of the lease agreement. Hamilton argued that the trial court should award attorney fees and costs because the action arose out of the lease agreement and because the lease agreement was central to the case.

Heritage Bank also moved for attorney fees and costs. Heritage Bank appeared to contend that such an award was proper because the lease was central to the case and because Gervais had requested fees from it under equity.

Gervais argued that the trial court should deny Hamilton's and Heritage Bank's request for attorney fees because neither he nor they were parties to the lease agreement. Gervais also argued that they were not entitled to fees because the action was not on the contract.

On January 22, the trial court entered an order awarding attorney fees and costs to Hamilton and Heritage Bank. The court awarded $108,244.75 to Heritage Bank and $237,891.61 to Hamilton. Gervais appeals.[2]

ANALYSIS

I. ATTORNEY FEES BELOW

Gervais argues that the lease agreement does not authorize a reasonable attorney fee award to Hamilton and Heritage Bank because neither he nor they were parties to that agreement. We agree.

Here, paragraph 20 of the lease agreement, in conjunction with RCW 4.84.330 would, in other circumstances, authorize attorney fees to the prevailing parties, here Hamilton and Heritage Bank, because the claims are "on the contract" and the contract provision would be made bilateral

[2] Hamilton filed a notice of cross-appeal challenging the trial court's reduction of attorney's fees and costs. However, Hamilton has elected to withdraw his cross-appeal. Accordingly, the only issue before us is whether the trial court had a legal basis to award attorney fees and costs to Hamilton and Heritage Bank, not the amount of those fees.

by application of RCW 4.84.330.[3] *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 489, 200 P.3d 683 (2009). But due to the fact that none of the litigants here are parties to the lease agreement, the fee provision therein simply does not apply to them even if it is made bilateral by operation of RCW 4.84.330. *Mut. Sec. Fin. v. Unite*, 68 Wn. App. 636, 642-43, 847 P.2d 4 (1993).

A. The Trial Court Erred in Awarding Attorney Fees to Hamilton and Heritage Bank

"The general rule in Washington is that attorney fees will not be awarded for costs of litigation unless authorized by contract, statute, or recognized ground of equity." *Durland v. San Juan County*, 182 Wn.2d 55, 76, 340 P.3d 191 (2014). "We review whether there is a legal basis for an award of attorney fees de novo." *Allen v. Dan and Bill's RV Park,* 6 Wn. App. 2d 349, 372, 428 P.3d 376 (2018).

It is well-settled that "a contractual attorney fee provision cannot authorize the recovery of fees from a nonparty." *4518 S. 256th, LLC v. Karen L. Gibbon, P.S.*, 195 Wn. App. 423, 447, 382 P.3d 1 (2016). Division One of this court has stated that "it 'would be both unfair and contrary to law' to enforce [an attorney fee] provision against the nonparty who was a 'stranger[ ]' to that agreement." *Id*. (quoting *Watkins v. Restorative Care Ctr., Inc*., 66 Wn. App. 178, 195, 831 P.2d

[3] RCW 4.84.330 provides that,

> In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.
>
> Attorneys' fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorneys' fees is void.
>
> As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

1085 (1992)). "Similarly, because a contract does not confer benefits on nonparties, it would also be contrary to law to award attorney fees to [a nonparty] based on [an agreement they were not a party to]." *Karen L. Gibbon, P.S.*, 195 Wn. App. at 448-49.

Paragraph 20 of the lease agreement provides that, "[s]hould either party bring any action or suit to enforce any of the provisions of this lease, such party shall, upon prevailing in such action or suit, be entitled . . . to such sum as the court may adjudge reasonable as attorneys' fees." CP at 41.

Here, Gervais, Hamilton, and Heritage Bank are not parties to the lease agreement because they did not sign that document, and if they did, they did not do so in their individual capacities.[4] *Karen L. Gibbon, P.S.*, 195 Wn. App. at 446. Rather, the only parties identified in the lease agreement is the landlord, HG, and the tenant, G&H. Because Gervais was not a party to the lease agreement, a court could not enforce the attorney fee provision in that document against him. *Id*. at 447. Similarly, because a contract does not confer benefits on nonparties, a court could not award attorney fees to Hamilton and Heritage Bank based on the lease agreement. *Id*. at 447-48. Accordingly, we reverse the trial court's order awarding attorney fees and costs to Hamilton and Heritage Bank.

C. Washington Case Law Does Not Support Hamilton's Position

In an apparent argument to extend the law, Hamilton argues that he can enforce the contractual fee provision as a nonparty against another nonparty because a valid contract is not necessary to invoke an attorney fee provision against certain non-parties to the contract. Hamilton relies on several inapposite cases to support this proposition.

[4] Heritage Bank correctly concedes that they were not a party to the lease agreement.

First, Hamilton contends that *Herzog Aluminum, Inc. v. General American Window Corp.*, 39 Wn. App. 188, 692 P.2d 867 (1984), and its progeny support the trial court's award of attorney fees. We disagree.

In *Herzog*, the court held that a defendant who successfully defends a breach of contract lawsuit by proving the absence of an enforceable contract is entitled to attorney fees on the purported contract sued upon which would have allowed attorney fees. *Id*. at 189-90, 197. There, the court applied RCW 4.84.330 to render the contractual fee provision at issue bilateral to benefit the prevailing defendant. *Herzog Alum., Inc.*, 39 Wn. App. at 196-97.

Hamilton cites several cases that apply the *Herzog* court's holding. *See Labriola v. Pollard Grp., Inc*., 152 Wn.2d 828, 839, 100 P.3d 791 (2004) (holding that the employee, as the prevailing party, was entitled to an award of attorney fees under RCW 4.84.330, regardless of whether the contract is invalidated in whole or in part); *Mt. Hood Beverage Co. v. Constellation Brands, Inc.*, 149 Wn.2d 98, 121-22, 63 P.3d 779 (2003) (holding that a party may collect attorney fees pursuant to a statute when that party successfully argues the statute is unconstitutional); *Bogle and Gates, PLLC, v. Holly Mountain Res.*, 108 Wn. App. 557, 563-64, 32 P.3d 1002 (2001) (holding that prevailing defendant in breach of contract and promissory estoppel action was entitled to attorney fees where the fee provision was unilateral); *Park v. Ross Edwards, Inc*., 41 Wn. App. 833, 838-39, 706 P.2d 1097 (1985) (holding that the defendants who had proved no contract existed were entitled to reasonable attorney fees despite the contract's invalidity and the fee provision being bilateral).

Contrary to Hamilton's contention, *Herzog* and its progeny are not applicable here. It is true that parties to a purported contract cease being parties if the contract is later invalidated by the court. And in those cases the courts nevertheless allowed would-be parties to the contract to

collect attorney fees under the fee provisions in the undermined contracts. But those cases are a far cry from what we have here in that neither Hamilton nor Gervais were the contracting parties, validity of the contract aside. Moreover, not only were they not the contracting parties, but the contract here has not been undermined. They are not in the same position as those would-be parties in the cases cited. Accordingly, Hamilton's reliance on those cases fails.[5]

Second, Hamilton contends that, under *Deep Water Brewing, LLC v. Fairway Resources Limited*, 152 Wn. App. 229, 215 P.3d 990 (2009), he (as a nonparty) can recover contractual attorney fees from Gervais (also a nonparty) because the lease agreement was central to Gervais's tort claims. We disagree.

Deep Water discussed the award of fees where the recovering party was not a party to a contract. There, Division Three of this court concluded that the trial court properly awarded attorney fees to the Kenagys. *Deep Water*, 152 Wn. App. at 279. The Kenagys bought a restaurant with a lake view from the Ahlquists. *Id*. at 241. The Ahlquists had entered into an easement agreement and a right-of-way agreement with developers to preserve the restaurant's view.[6] *Id*. at 239-40. These latter agreements contained attorney fees provisions. *Id*. at 245-46. The Kenagys sued the developers to enforce the agreements and prevailed. *Id*. at 242-44. Division Three of this

[5] Hamilton's position is also inconsistent with the general law of business entities. As discussed above, the parties to this contract were business entities with statutorily-created liability limitations. One of the fundamental purposes of these business entities is to insulate individuals from risking personal assets from liability for business debts and obligations. Absent a reason to disregard these business structures (and no party argues there are facts to support disregarding the corporate form), the limitation of personal liability enjoyed by both Hamilton and Gervais also functions to prevent their recovery of fees under the lease as surrogates for the business entities.

[6] On this point, Hamilton contends that the fee provision in the right of way and easement agreement required Jack Johnson, the sole shareholder of the development company in *Deep Water*, to pay attorney fees despite his non-party status. Hamilton is mistaken. The facts of that case show that Johnson was a party to that agreement because he signed it both individually and in his capacity as president of the development company. *Deep Water*, 152 Wn. App. at 240.

court explained that the Kenagys were not third party beneficiaries to the agreements "but nonetheless [could] enforce the agreements (with attorney fees provisions) as running covenants protecting the view from their restaurant." *Id*. at 278.

But in *Deep Water*, because the covenants ran with the land, the successor owner held the exact rights to the covenant as the previous owner. The case is distinguishable on this basis alone. Gervais and Hamilton are not successors in interest. Rather, they are simply non-parties to the contract. Accordingly, Hamilton's reliance on *Deep Water* is unavailing.

Third, Hamilton argues that he can enforce the contractual fee provision against Gervais because neither he nor Gervais "was a stranger to the lease that they created." Br. of Resp't Hamilton at 44. Hamilton relies on *Columbia State Bank v. Invicta Law Group, PLLC*, 199 Wn. App. 306, 402 P.3d 330 (2017), to support this argument. We disagree.

In *Columbia State Bank*, Division One of this court affirmed an award of contractual attorney fees against a non-signing third party based on a theory of successor liability. 199 Wn. App. at 334-35. There, the court reasoned that there is no fundamental difference between successor liability for judgment on an unpaid promissory note and successor liability for attorney fees. *Id*. at 335.

Hamilton's reliance on *Columbia State Bank* is inapposite because neither he nor Gervais are successors to G&H or HG. Absent successor liability or third-party beneficiary status (which the trial court expressly declined to find and Hamilton does not dispute on appeal), there is no authority to award contractual attorney fees against a non-signing third party. Accordingly, we hold that Hamilton's reliance on case law fails.

D. The Doctrine of Mutuality of Remedy Does Not Apply Under These Circumstances

Next, Hamilton contends that the equitable doctrine of mutuality of remedy supports the trial court's attorney fee award. Heritage Bank contends that the attorney fee award was proper based on an extension of the doctrine to situations where: (1) the plaintiff seeks to recover fees pursuant to an equitable indemnity theory, (2) the defendant successfully defends the claim, and (3) the plaintiff fails to argue that they did not cause the defendant's fees.

The crux of Hamilton and Heritage Bank's argument is the notion that the trial court did not err in awarding them attorney fees because Gervais had sought to collect attorney fees from them under the lease and in equity. We disagree.

Mutuality of remedy is a "'well recognized principle of equity'" in Washington. *Kaintz v. PLG, Inc.*, 147 Wn. App. 782, 789,197 P.3d 710 (2008) (quoting *Mt. Hood Beverage Co.*, 149 Wn.2d at 121). The doctrine provides that if one party would be entitled to receive attorney fees should it prevail, then the opposing party is likewise entitled to fees if it prevails. *Rowe v. Klein*, 2 Wn. App. 2d 326, 342 n.2, 409 P.3d 1152 (2018). As explained above, Washington courts have applied this doctrine to allow a prevailing party to collect attorney fees authorized under a contract or statute even though that party prevailed by establishing the invalidity of that contract or statute. *Fairway Estates Ass'n of Apt. Owners v. Unknown Heirs*, 172 Wn. App. 168, 182, 289 P.3d 675 (2012). Under this equitable doctrine, the trial court determines whether to award attorney fees by looking to the terms of the contract. *Kaintz*, 147 Wn. App. at 789-90.

Here, mutuality of remedy does not apply because, again, Gervais, Hamilton, and Heritage Bank are not parties to the lease agreement – they are not entitled to fees. Mutuality of remedy would operate much as RCW 4.84.330 does: to make the unilateral fee provision bilateral. But just as RCW 4.84.330 is immaterial to the question of whether they are parties, mutuality of

remedy is also immaterial. Absent being parties to the lease, Hamilton and Heritage Bank have no basis for a mutuality of remedy argument. Therefore, to the extent that the parties request an extension of the doctrine to allow a nonparty to a contract to receive attorney fees from another nonparty, we decline their invitation to do so because it reaches far beyond the recognized bounds of the doctrine.

Therefore, we hold there was no legal basis for the trial court to award attorney fees and costs to Hamilton or Heritage Bank. Accordingly, we reverse.

II. ATTORNEY FEES ON APPEAL

Hamilton requests attorney fees and costs on appeal pursuant to RAP 18.1 and RCW 4.84.330. Heritage Bank also requests attorney fees on appeal pursuant to RAP 18.1, RCW 4.84.330, and the doctrine of mutuality of remedy.

RAP 18.1(a) authorizes a party to recover reasonable attorney fees and expenses so long as the party "request[s] the fees or expenses" and "applicable law grants to [the] party the right to recover." The party must do so in a separate section of their opening brief. RAP 18.1(b).

As explained above, the trial court erred by awarding attorney fees and costs based on paragraph 20 of the lease agreement and RCW 4.84.330 because Gervais, Hamilton, and Heritage Bank are not parties to that agreement. Because Hamilton and Heritage Bank were not entitled to attorney fees and costs below, we deny their request for attorney fees and costs on appeal.

CONCLUSION

We reverse the trial court's order granting attorney fees and costs to Hamilton and Heritage Bank.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Veljacic, J.

We concur:

Lee, P.J.

Price, J.

FAIN ANDERSON, ET AL

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