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DIVISION II
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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

MICHAEL L. ROESCH,
Appellant,

v.

CARL BOHM and CANDY BOHM,
Respondents.

RESPONSE BRIEF OF CARL BOHM and CANDY BOHM

Appeal from the Superior Court of Pierce County,
Cause No. 15-2-07406-2
The Honorable Philip K. Sorensen, Presiding Judge

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TABLE OF CONTENTS

	<u>Page</u>
I. RESTATEMENT OF THE CASE	
A. Factual Background	1
B. Procedural Background.....	7
II. ARGUMENT	
A. Appellant Roesch mischaracterizes the issues on appeal and misstates the standard of review applicable to the admission of the evidence of the purchase and sale agreements.	13
1. Mr. Roesch misidentifies the purpose for which the evidence was admitted at trial.	15
2. Mr. Roesch misidentifies the standard of review applicable to the admission of the evidence.	19
3. The trial court did not abuse its discretion in admitting evidence of the purchase and sale agreements as evidence of Ms. Bohm’s affirmative defense.	20
B. The trial court did not exceed its jurisdiction by instructing the jury on Ms. Bohm’s defense.	22
C. The trial court did not err in denying Appellant Roesch’s motions for judgment pursuant to CR 50(a) and (b).	23
D. The trial court did not err in denying Appellant Roesch’s motion for new trial or reconsideration under CR 59(a)(1)(6), (8), and (9).	25

1.	Standard of review for denial of a motion for new trial or reconsideration	27
2.	Admission of evidence of the purchase and sale agreements was not an “irregularity” under CR 59(a)(1)	27
3.	The trial court did not abuse its discretion in denying Appellant Roesch’s motion for new trial or judgment under CR 59(a)(6).....	28
4.	The trial court did not abuse its discretion in denying Appellant Roesch’s motion for new trial or judgment under CR 59(a)(8).....	29
5.	The trial court did not abuse its discretion in denying Appellant Roesch’s motion for new trial or judgment under CR 59(a)(9).....	29
E.	The trial court did not err in entering an Order on the Jury’s verdict.....	29
F.	The trial court did not err in awarding attorneys fees to Ms. Bohm.	30
1.	Standard of review	30
2.	Contractual and statutory bases exist for an award of attorney’s fees to Ms. Bohm. ...	31
3.	The trial court’s findings of fact are supported by substantial evidence and the findings support the conclusions of law and the judgment.....	32
G.	Respondent Bohm requests attorney’s fees on appeal.....	34
III.	CONCLUSION	34

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>Table of Cases</u>	
<u>Washington Cases</u>	
<i>Andersonian Investment Co. v. Wade</i> , 108 Wn. 373, 184 P. 327 (1919).....	16
<i>De Koning v. Williams</i> , 47 Wn.2d 139, 286 P.2d 694 (1955)	22
<i>Fergen v. Sestero</i> , 182 Wn.2d 794, 346 P.3d 708 (2015).....	22
<i>Foisy v. Wyman</i> , 83 Wn.2d 22, 515 P.2d 160 (1973)	16
<i>Gander v. Yeager</i> , 167 Wn.App. 638, 282 P.3d 1100 (2012).....	30
<i>Holaday v. Merceri</i> , 49 Wn.App. 321, 742 P.2d 127 (1987).....	27
<i>Income Properties Investment Corp. v. Trefethen</i> , 155 Wn. 493, 284 P. 782 (1930).....	16
<i>Martin v. Huston</i> , 11 Wn. App. 294, 522 P.2d 192 (1974).....	23
<i>Munden v. Hazelrigg</i> , 105 Wn.2d 39, 711 P.2d 295 (1985) ...	16, 19, 22, 27
<i>Mut. of Enumclaw Ins. Co. v. Gregg Roofing, Inc.</i> , 178 Wn. App. 702, 315 P.3d 1143 (2013).....	23
<i>Phillips v. Hardwick</i> , 29 Wn. App. 382, 628 P.2d 506 (1981).....	15
<i>Sac Downtown Ltd. P'ship v. Kahn</i> , 123 Wn.2d 197, 867 P.2d 605 (1994).....	30
<i>Singleton v. Frost</i> , 108 Wn.2d 723, 742 P.2d 1224 (1987)	34
<i>Soper v. Clibborn</i> , 31 Wn. App. 767, 644 P.2d 738 (1982)	32
<i>State v. Atsbeha</i> , 142 Wn.2d 904, 16 P.3d 626 (2001)	20

<i>State v. Lord</i> , 161 Wn.2d 276, 165 P.3d 1251 (2007)	20
<i>State v. Quaale</i> , 182 Wn.2d 191, 340 P.3d 213 (2014)	20, 21
<i>State v. Williams</i> , 137 Wn.App. 736, 154 P.3d 322 (2007).....	20
<i>Stiles v. Kearney</i> , 168 Wn.App. 250, 277 P.3d 9, <i>review denied</i> , 175 Wn.2d 1016, 287 P.3d 11 (2012).....	31

Washington Statutes

RCW 4.84.010	31
RCW 4.84.330	31
RCW 59.19.290	32

Other Authorities

CR 50	23
CR 59	25-26
RAP 18.1.....	33

I. RESTATEMENT OF THE CASE

A. Factual Background

Respondent Candy Bohm is the daughter of Geraldine Rudolph.¹ In 2007, Fred Roesch approached Ms. Bohm and inquired about purchasing Ms. Bohm's home at 16220 60th St. E in Sumner and her parents' home located at 16224 60th St. E in Sumner.²

Ms. Bohm made clear to Fred Roesch that a condition of the sale of her and her parents' property was that she and her parents had to find a new home and property to move to that would accommodate Ms. Bohm's extended family.³ Ms. Bohm met with Fred Roesch several times before meeting with Fred Roesch and John Troupe at Fred Roesch's office.⁴ John Troupe is a real estate broker who initially represented Ms. Bohm and both Fred and Michael Roesch but after February 2008 Mr. Troupe no longer represented the interests of Ms. Bohm.⁵

On January 30, 2008, Fred Roesch and the Rudolphs signed a purchase contract for Fred Roesch to purchase the Rudolph's property.⁶ Under this agreement, Fred Roesch was supposed to pay the Rudolphs \$750,000 for their property and the Rudolphs were supposed to get a

¹ RP 184, 321.

² RP 321-324, 359-362.

³ RP 363.

⁴ RP 363-364.

boundary line adjustment to their property.⁷

An Addendum to the January 30, 2008 purchase contract between the Rudolphs and Fred Roesch indicated that Fred Roesch was supposed to redevelop the Bohm and Rudolph properties and the Rudolphs would purchase Michael Roesch's property.⁸ This Addendum also stated that it was the intent of the parties that the Rudolphs would not be obligated to pay any funds out-of-pocket for the transactions to close and that all funds necessary to complete the transactions would be paid from the purchase funds provided by Fred Roesch.⁹ This Addendum also clearly referenced the "concurrent transaction between the [Rudolphs] (as purchasers therein), and the seller therein, Michael L. Roesch, with regards to the real property commonly known as 14712 72nd St. E, Sumner."¹⁰

Also on January 30, 2008, Ms. Bohm and Michael Roesch executed a Residential Purchase and Sale Agreement under which Ms. Bohm and her husband, Carl, would purchase a property owned by Michael Roesch located at 14712 72nd St. E. in Sumner, Washington.¹¹ Addendum number 1 to the January 30, 2008 purchase and sale agreement between the Bohms

⁵ RP 183, 190.

⁶ RP 199; CP 192-199.

⁷ RP 197-198; CP 192-194.

⁸ CP 196.

⁹ CP 199.

¹⁰ CP 198.

¹¹ CP 145-152.

and Michael Roesch¹² summarized the desires of all the parties to the transaction and explained what all the parties to the transaction believed the transaction would entail.¹³ The addendum made clear that the transaction involved Michael Roesch as well as Fred Roesch and Fred Roesch's acquisition of the Bohm's and Rudolph's properties.¹⁴ Michael Roesch signed the addendum.¹⁵

The Addendum to the agreement between the Bohms and Michael Roesch was not a separate Purchase and Sale Agreement but was a standalone agreement to tie together what the parties were agreeing to and how the various properties were to be dealt with.¹⁶ According to the addendum, the transaction involved the Bohms purchasing Michael Roesch's property "in conjunction with" the sale of the Rudolph's property to Fred Roesch.¹⁷ The addendum made clear that the Bohms were not obligated to pay any funds out of pocket for the transactions to be closed but that "all funds necessary to complete the[] transactions [would] be paid by Fred A. Roesch" and that the Bohms could move into Michael Roesch's property as soon as his current renters vacated the property.¹⁸

¹² CP 148-151; Ex. 37.

¹³ RP 218-219.

¹⁴ RP 251.

¹⁵ RP 251-252.

¹⁶ RP 218-219.

¹⁷ CP 145; RP 189.

¹⁸ CP 147-148.

Additional Provision G to the January 30, 2008 Purchase and Sale Agreement Addendum between the Bohms and Michael Roesch also made clear that the Bohms' obligation to close on Michael Roesch's property was contingent on the adjustment of the boundary line between the Rudolph and Bohm properties and on the closing of the sale of the Rudolph property to Fred Roesch.¹⁹

On February 7, 2008, the Bohms and Fred Roesch executed a residential purchase and sale agreement whereby Fred Roesch agreed to purchase the Bohm's property subject to the closing of the sales of the Rudolph's property to Fred Roesch and the sale of Michael Roesch's property to the Bohms.²⁰ The understanding of the parties was that the transaction between the parties was a "land swap" where Rudolphs and Bohms would trade their properties for Michael Roesch's property on 72nd street.²¹ Fred Roesch was supposed to develop the Rudolph property and either sell, or refinance the mortgage on, the property and use the proceeds to pay off Michael Roesch's property.²²

The Bohms and Rudolphs completed the boundary line adjustment

¹⁹ CP 151.

²⁰ CP 153-157; RP 206-208; Ex. 17.

²¹ RP 281-282, 329, 372, 375-376.

²² RP 213-214, 337, 372.

(BLA) between their properties²³ but the transaction governed by the January 30, 2008 purchase and sale agreement did not close because the initial sale between the Rudolphs and Fred Roesch did not close.²⁴

On October 15, 2008, Michael Roesch and the Bohms executed another purchase and sale agreement relating to Michael Roesch's 72nd Street property.²⁵ Michael Roesch's sale of the 72nd Street property was supposed to close on either October 15, 2010, or upon the sale or refinance of the Rudolph's property at 16224 60th Street East.²⁶

The October 15, 2008 purchase and sale agreement between the Bohms and Michael Roesch stated that the possession date is "lease prior to closing (attached form 65A)."²⁷ The October 15, 2008 purchase and sale agreement between Michael Roesch and the Bohms included a rental agreement titled, "Rental Agreement (Occupancy Prior to Closing)" that had "Form No. 65A" in the upper left hand corner.²⁸ The Rental Agreement was dated November 1, 2008 and indicated that the Bohms were entitled to possession of Michael Roesch's 72nd St. property beginning on November 1,

²³ RP 194-196, 279. NOTE: The effect of the BLA was to take the "land" from the Bohm's property and add it to the smaller Rudolph property, thereby effectively transferring the Bohm's "equity" to the Rudolph's property which was then acquired by Fred Roesch. See also Trial Exhibits Nos. 55 & 56.

²⁴ RP 197-198.

²⁵ RP 198-199; CP 165-174; Ex. 9.

²⁶ RP 199; CP 165.

²⁷ CP 165.

²⁸ CP 169-172.

2008.²⁹ The lease was to terminate on October 15, 2010 unless the Bohms purchased the property from Michael Roesch, in which case the lease would terminate on the closing of the sale.³⁰ The lease stated that the rent was \$802.75 per month.^{31 32}

Fred Roesch took possession of the Bohm's property and the Bohms moved to the 72nd St. property owned by Michael Roesch.³³

On November 29, 2008, Fred Roesch and the Rudolphs executed a new Purchase and sale agreement whereby Fred Roesch would purchase the Rudolph property for \$415,000.³⁴ The parties agreed to a final sale price of \$400,000 for the Rudolph's property and that sale closed.³⁵

The sale of the Rudolphs' property at 16224 60th St. E. in Sumner was completed,³⁶ but Fred Roesch never sold or refinanced the Rudolph's

²⁹ CP 169; RP 140-142.

³⁰ CP 169; RP 140-142.

³¹ CP 169-170; RP 142.

³² It has been the Bohm's position, from day one, that they were not "tenants" but "purchasers" of the subject property and that the "Rental &/or Lease Agreements" upon which Mr. Michael Roesch based his Unlawful Detainer action was not a "stand alone" separate contract, but merely a "placeholder" document establishing that the Bohms were entitled to possession of the premises and that they would be put into "title" when Mr. Fred Roesch completed the financial requirements of either reselling, or refinancing the loan on, the former Rudolph (16224) property and paying off the mortgage then owing on the Michael Roesch property (72nd St.). See CP 165, section 12 – which is also page 1 of *Trial Exhibit #9* and RP 146, 199, 211-214, 227, 270-271, 274 & 337.

³³ RP 208.

³⁴ CP 200-202; Ex. 13; RP 201.

³⁵ RP 201-202.

³⁶ RP 201-202.

property.³⁷ Fred Roesch was supposed to pay all future mortgage payments on the Bohm's property but he did not and the bank ultimately foreclosed the Bohm's property.³⁸

The Rudolphs paid Fred Roesch over \$258,000 for purposes of Fred Roesch paying off the mortgage on the 14712 72nd St. property but Fred Roesch did not pay off the mortgage.³⁹

The sale of the 14712 72nd St. property from Michael Roesch to the Bohms never finalized.⁴⁰ Michael Roesch never received any (rent or other) payment from the Bohms.⁴¹ The sale of the 72nd St. property from Michael Roesch to the Bohms also was not finalized as Fred Roesch never resold or refinanced the Rudolph property at 16224 60th, an obligation which he was solely responsible for.⁴²

B. Procedural Background

On April 1, 2015, Michael Roesch filed this unlawful detainer action seeking to evict the Bohms and the Rudolphs from the 72nd St. property.⁴³ Michael Roesch asserted that the Bohms had breached the November 1, 2008 rental agreement that was attached to the October 15, 2008 Purchase

³⁷ RP 227-228.

³⁸ RP 226-228.

³⁹ RP 335-336 & CP 211 (see also Ex. 16).

⁴⁰ RP 138.

⁴¹ RP 146 & 151.

⁴² RP 213-214.

⁴³ CP 1-12.

and Sale Agreement between the Bohms and Michael Roesch.⁴⁴

On April 17, 2015, Ms. Candy Bohm filed a pro-se answer and affirmative defense.⁴⁵

On April 30, 2015, counsel for Ms. Bohm filed a notice of appearance.⁴⁶

On May 7, 2015, Michael Roesch filed a motion and affidavit to show cause why a writ of restitution should not issue giving possession of the 72nd St. property to him and why a judgment should not be entered against Ms. Bohm requiring her to pay Michael Roesch over \$26,000 in unpaid rent and late charges.⁴⁷

On May 27, 2015, counsel for Ms. Bohm filed an Answer and Counterclaim.⁴⁸ The counterclaims included breach of contract and equity skimming.⁴⁹

On June 24, 2015, a Superior Court Commissioner entered an order denying Michael Roesch's motion of a writ of restitution.⁵⁰ The Commissioner found that "there is a significant issue as to the right of possession of the subject property...and the court [could not] decide [the]

⁴⁴ CP 1-12.

⁴⁵ CP 21-24.

⁴⁶ CP 25.

⁴⁷ CP 26-18.

⁴⁸ CP 35-44.

⁴⁹ CP 35-44.

⁵⁰ CP 272-274.

right of possession on the show cause calendar.”⁵¹ The Commissioner ordered the parties to secure an expedited trial date on the issue of possession pursuant to RCW 59.18.380.⁵²

On June 30, 2015, Ms. Bohm filed a jury demand.⁵³

On July 6, 2015, Michael Roesch filed a motion for summary judgment dismissal of Ms. Bohm’s counterclaims arguing that the trial court lacked subject matter jurisdiction to hear the counterclaims in an unlawful detainer action, third party claims are not permitted in an action for unlawful detainer, and that Candy Bohm could not bring a counterclaim on behalf of her parents.⁵⁴

On July 9, 2015, Ms. Bohm filed a motion to intervene and for joinder of parties and claims.⁵⁵ Ms. Bohm sought to join Geraldine Rudolph and her claims against Michael Roesch and Fred Roesch.⁵⁶

On July 17, 2015, the court entered an order denying Ms. Bohm’s motion to intervene and for joinder and continuing the Michael Roesch’s Motion for Summary Judgment until August 17, 2015.⁵⁷ At the hearing on the motion to intervene, Michael Roesch argued that the trial court

⁵¹ CP 272-274.

⁵² CP 272-274.

⁵³ RP 275-276.

⁵⁴ CP 280-292.

⁵⁵ CP 320-323.

⁵⁶ CP 320-323.

⁵⁷ CP 411-412.

lacked subject matter jurisdiction to hear any claim other than the unlawful detainer claim and claims about the right to possession.⁵⁸

Michael Roesch also argued that the jury could consider no evidence outside of the November 1, 2008 rental agreement, including the purchase and sale agreement of which the rental agreement was part.⁵⁹ The court held that it was denying the motion to intervene but was “not foreclosing presenting any of this evidence at trial.”⁶⁰

At the August 17, 2015 hearing, Michael Roesch again argued that the only document relevant to the case was the “Form 68” lease attached to the October 15, 2008 purchase and sale agreement and that none of Ms. Bohm’s counterclaims could be heard in this unlawful detainer action.⁶¹ Ms. Bohm argued that all of the documents relating to the purchase and of Michael Roesch’s property and the sale of the Rudolph and Bohm property were relevant to the issue of Ms. Bohm’s possession of Michael Roesch’s property.⁶²

The trial court held that it did not have jurisdiction to deal with any counterclaims and granted the motion to dismiss the counterclaims.⁶³

On August 19, 2015, after Ms. Bohm had rested, Michael Roesch

⁵⁸ RP 10-11.

⁵⁹ RP 7-12, 16-17.

⁶⁰ RP 17.

⁶¹ RP 24-34, 57-63, 70-71, 75-77.

moved for judgment as a matter of law pursuant to CR 50(a)(1), arguing that Ms. Bohm had presented no competent evidence that would sustain a jury verdict in her favor. Specifically, Michael Roesch argued that the January 30, 2008 purchase and sale agreement had been superseded by the terms of the October 15, 2008 purchase and sale agreement and that the October 15, 2008 purchase and sale agreement had terminated and thus did not provide a defense in the unlawful detainer action.⁶⁴ The trial court denied the motion.⁶⁵

Jury instruction number 2 informed the jury that the claim the jury had to decide was the unlawful detainer claim brought by Michael Roesch.⁶⁶ Jury instruction number 2 also informed the jury that Ms. Bohm claimed she was excused from making any rent payments and asserted that she had the right to possess the 72nd St. property based on Fred Roesch's breach of his contractual obligations to pay off the mortgage of the property and transfer the title to the property to Ms. Bohm.⁶⁷ Jury instruction number 11 informed the jury that Ms. Bohm had the burden of establishing the affirmative defense that she was not in breach of her contractual obligations or that she was excused from the

⁶² RP 34-57, 63-70, 71-75, 77-82.

⁶³ CP 598-600, RP 82-83.

⁶⁴ RP 456-458.

⁶⁵ RP 461-464.

contractual obligations and that she was harmed by Fred Roesch breaching his contractual obligations to pay off the mortgage and provide for Michael Roesch to transfer the title to the 72nd St. property.⁶⁸

The jury found that Ms. Bohm was excused from making rental payments on the lease.⁶⁹

On August 28, 2015, the trial court entered an order on the jury verdict dismissing Michael Roesch's claims against Ms. Bohm, both for back "rent" payments AND for possession of the premises⁷⁰, with prejudice.⁷¹

On September 14, 2015, Michael Roesch filed a motion for a new trial alleging that the trial court exceeded its subject matter jurisdiction by allowing admission of the purchase and sale agreements relating to the Rudolph and Bohm properties.⁷²

Also on September 14, 2015, Michael Roesch filed a Motion for Judgment as a matter of law regarding the counterclaims Ms. Bohm had attempted to raise but that were dismissed pretrial.⁷³

On September 15, 2015, Michael Roesch filed a motion for a new

⁶⁶ CP 970.

⁶⁷ CP 970.

⁶⁸ CP 979-980.

⁶⁹ CP 989-991.

⁷⁰ CP 2-3 (the relief sought in the Complaint).

⁷¹ CP 1055-1056.

⁷² CP 1100-1108.

trial identical to the one he filed on September 14, 2015.⁷⁴ Also on September 15, 2015, Michael Roesch filed a Motion for Judgment as a matter of law regarding the counterclaims Ms. Bohm had attempted to raise but that were dismissed pretrial that was identical to the one he filed on September 14, 2015.⁷⁵

On September 23, 2015, Ms. Bohm filed a Response to Michael Roesch's Motions for New Trial and for Judgment.⁷⁶

On September 25, 2015, the trial court entered an order denying Michael Roesch's motions for new trial or reconsideration and for judgment as a matter of law.⁷⁷

Michael Roesch filed his notice of appeal on September 25, 2015.⁷⁸

III. ARGUMENT

A. Appellant Roesch mischaracterizes the issues on appeal and misstates the standard of review applicable to the admission of the evidence of the purchase and sale agreements.

The arguments made by Michael Roesch in his Opening Brief are

⁷³ CP 1121-1129.

⁷⁴ CP 1139-1147.

⁷⁵ CP 1155-1162.

⁷⁶ CP 1201-1207.

⁷⁷ CP 1219-1220.

⁷⁸ CP 1217-1218.

the same arguments, in some places verbatim,⁷⁹ that he has been making since the end of the trial. The primary “error” Mr. Roesch complains of is the trial court admitting numerous exhibits relating to the agreements between the Bohms, Rudolphs, and Roesches to exchange their real estate properties.⁸⁰ Mr. Roesch argues that this “error” manifested itself in numerous ways throughout the trial and gives rise to the issues he raises on appeal: the trial court erroneously instructed the jury on the Bohms’ defense to the unlawful detainer claim⁸¹; the trial court “exceeded its subject matter jurisdiction” by allowing the Bohms to “litigate a civil claim...in an unlawful detainer” action⁸²; the trial court erred in denying Michael Roesch’s Motion for Judgment under CR 50(a) because all of Ms. Bohm’s exhibits admitted by the trial court did not support Ms. Bohm’s defense⁸³; the trial court erred in denying Michael Roesch’s motion for judgment pursuant to CR 50(b)⁸⁴ because all of Ms. Bohm’s exhibits admitted by the trial court did not support Ms. Bohm’s defense⁸⁵; the trial court erred in denying Mr. Roesch’s motion for new trial or

⁷⁹ Compare: Brief of Appellant, p. 25-28, to Plaintiff’s Motion for New Trial or Reconsideration, p. 4-7, CP 1103-1106; Brief of Appellant, p. 32-34, to Plaintiff’s Motion for Judgment, p. 4-5, CP 1158-1159.

⁸⁰ Brief of Appellant, p. 23-28.

⁸¹ Brief of Appellant, p. 28-31.

⁸² Brief of Appellant, p. 31.

⁸³ Brief of Appellant, p. 32-41.

⁸⁴ CP 1121-1129, 1155-1162.

⁸⁵ Brief of Appellant, p. 41.

reconsideration⁸⁶ because of the “irregularity” of the trial court admitting Ms. Bohm’s “inadmissible” exhibits⁸⁷; the trial court erred in dismissing Michael Roesch’s claims against Ms. Bohm on the basis of the jury verdict because the trial court erred in admitting Ms. Bohm’s exhibits⁸⁸; and the trial court erred in awarding attorney fees to Ms. Bohm because the court committed reversible error in admitting Ms. Bohm’s exhibits at trial.⁸⁹

1. Mr. Roesch misidentifies the purpose for which the evidence was admitted at trial.

Appellant Roesch does not dispute that the trial court dismissed Ms. Bohm’s counterclaims.⁹⁰ However, Appellant Roesch appears to argue that the dismissal of Ms. Bohm’s counterclaims rendered the evidence that would have supported the counter claims irrelevant and inadmissible for any other purpose. This is simply incorrect.

All relevant evidence is admissible, except as limited by constitutional requirements, statute, the evidentiary rules, or other rules applicable in Washington courts.⁹¹ To be relevant, evidence must have a tendency to make the existence of any fact that is of consequence to the

⁸⁶ CP 1100-1108.

⁸⁷ Brief of Appellant, p. 42-43.

⁸⁸ Brief of Appellant, p. 43.

⁸⁹ Brief of Appellant, p. 44.

⁹⁰ Brief of Appellant, p. 17-18, 23.

⁹¹ ER 402.

determination of the action more probable or less probable than it would be without the evidence.⁹²

Unlawful detainer actions under RCW 59.18 are special statutory proceedings with the limited purpose of hastening recovery of possession of rental property, and the superior court's jurisdiction in such action is limited to the primary issue of the right of possession, plus incidental issues such as restitution and rent, or damages. Any issue not incident to the right of possession within the specific terms of RCW 59.18 must be raised in an ordinary civil action.⁹³

“In order to protect the summary nature of the unlawful detainer proceedings, other claims, including counterclaims, are generally not allowed...An exception to the general rule is made when the counterclaim, **affirmative equitable defense, or set-off is based on facts which excuse a tenant's breach.**”⁹⁴

The trial court admitted Ms. Bohm's exhibits regarding the purchase and sale agreements for all the properties as evidence of an affirmative equitable defense that excused Ms. Bohm's breach. The trial court denied Ms. Bohm's motion to allow Ms. Rudolph to intervene and

⁹² ER 401.

⁹³ *Phillips v. Hardwick*, 29 Wn. App. 382, 385-86, 628 P.2d 506, 509 (1981).

⁹⁴ *Munden v. Hazelrigg*, 105 Wn.2d 39, 45, 711 P.2d 295 (1985) (emphasis added). See, e.g., *Foisy v. Wyman*, 83 Wn.2d 22, 515 P.2d 160 (1973) (The affirmative defense of breach of implied warranty of habitability goes directly to the issue of rent due and owing); *Income Properties Investment Corp. v. Trefethen*, 155 Wn. 493, 506, 284 P. 782 (1930) (rent cannot be recovered where landlord by his own acts has deprived the lessees of the beneficial use of the property); *Andersonian Investment Co. v. Wade*, 108 Wn. 373, 378-79, 184 P. 327 (1919) (If facts exist which excuse a defendant's breach, the defendant ought to be permitted to show them before ouster).

for her claims against Fred Roesch to be joined in this action,⁹⁵ but the trial court's statements at the July 17, 2015 hearing make clear that the court considered the evidence of the purchase and sale agreements for all three properties to be evidence that Ms. Bohm could introduce to establish an affirmative defense that excused her breach of the rental contract.

During argument on Ms. Bohm's joinder motion the court noted that "the lease has been incorporated into this other agreement and incorporated by reference into some other agreement" and commented that this case was "much more complicated than just simply a landlord tenant."⁹⁶ While counsel for Michael Roesch was arguing in response, the trial court asked counsel, "Doesn't [Ms. Bohm] have an opportunity to provide some sort of excuse for why she didn't pay?"⁹⁷ and "how is [Ms. Bohm] going to present to the Court an excuse for not paying, an excuse for why she's been on this property, an excuse for her circumstance if she's not allowed to explain what she thinks the circumstances were that she was living under?"⁹⁸ In denying Ms. Bohm's motion for intervention and joinder the trial court stated that it was "not foreclosing presenting any

⁹⁵ CP 411-412.

⁹⁶ RP 5.

⁹⁷ RP 8.

⁹⁸ RP 10.

of this evidence [about the purchase and sale agreements] at trial”⁹⁹ and that “I’m not telling you it’s not a relevant defense.”¹⁰⁰

The trial court ultimately granted Michael Roesch’s motion to dismiss the counterclaims but reserved ruling on the issue of the admissibility of the evidence relating to the various purchase and sale agreements.¹⁰¹

The trial court held that exhibit 7, the January 30, 2008, purchase and sale agreement was admissible

to establish a framework of how things were - - how things existed in 2008... we engaged in a contract with them, they engaged in a contract with us, we moved into this property, we agreed to pay them rent, at some point we didn't, that's the extent to which we are going to get into the other properties, that there was a framework that they were operating in.¹⁰²

The court specifically stated that it ruled the [Bohms] are not going to be able to present counterclaims, and that's exactly what I intended to do. I don't intend to foreclose them from offering up some rationale for why they stopped making payments on the property. And you know, I think that means you are going to be stuck with some Purchase and Sale Agreements that are -- we are all going to be stuck with some Purchase and Sale Agreements that include [the 72nd St. property] lease, in addition to whatever was wrapped around the property on 60th.¹⁰³

⁹⁹ RP 17.

¹⁰⁰ RP 20.

¹⁰¹ RP 81-84.

¹⁰² RP 88, 91.

¹⁰³ RP 93.

In discussing the admissibility of the exhibits, the court stated numerous times that “the only issue that I think the jury needs to be concerned about, is was there a lease, was it enforceable, did they have a reason to stop paying? And so, I’m going to give the[Bohms] the opportunity to present some sort of rationale for why that happened”¹⁰⁴ and, “Again I’m going to allow them to provide a basis for why they thought they had the remedy of not paying...I’m not sure exactly how to frame it, other than I’m going to give the[Bohms] the opportunity to explain why it is they thought that they didn’t have to pay.”¹⁰⁵

The trial court’s rulings and statements make crystal clear that the trial court was admitting the evidence of the purchase and sale agreements for purposes of allowing Ms. Bohm to attempt to establish an affirmative equitable defense explaining why she didn’t pay as opposed to admitting the evidence to support a counterclaim. The trial court admitted the evidence of the purchase and sale agreements for the permissible and proper purpose of allowing Ms. Bohm to establish an affirmative equitable defense based on facts that excused her breach.¹⁰⁶ The trial court did not, as Appellant Roesch asserts, admit the evidence for the purpose of allowing Ms. Bohm to argue counterclaims against Michael Roesch.

¹⁰⁴ RP 96-97.

¹⁰⁵ RP 102-103.

2. *Mr. Roesch misidentifies the standard of review applicable to the admission of the evidence.*

Appellant Roesch asserts that this court should review the trial court's decision to admit Ms. Bohm's exhibits de novo because the trial court exceeded its subject matter jurisdiction by admitting Ms. Bohm's exhibits. However, as discussed above, the trial court did not exceed its subject matter jurisdiction by admitting the evidence. The trial court admitted evidence of the purchase and sale agreements for the permissible and proper purpose of allowing Ms. Bohm to establish an affirmative equitable defense based on facts that excused her breach.¹⁰⁷

A trial court's decision to exclude or admit evidence is reviewed for an abuse of discretion.¹⁰⁸ The standard of review applicable to the issues raised by Appellant Roesch is whether or not the trial court abused its discretion in admitting the evidence, not a de novo review of whether the trial court had subject matter jurisdiction over the case.

3. *The trial court did not abuse its discretion in admitting evidence of the purchase and sale agreements as evidence of Ms. Bohm's affirmative defense.*

The trial court has considerable discretion to determine if evidence

¹⁰⁶ See *Munden*, 105 Wn.2d at 45, *supra*.

¹⁰⁷ See *Munden*, 105 Wn.2d at 45, *supra*.

¹⁰⁸ *State v. Lord*, 161 Wn.2d 276, 294, 165 P.3d 1251 (2007).

is admissible.¹⁰⁹ A trial court abuses its discretion when its decision is based on untenable grounds or untenable reasons.¹¹⁰ An abuse of discretion is found when the trial court adopts a view that no reasonable person would take.¹¹¹ The Court of Appeals may uphold a trial court's evidentiary ruling on any grounds the record supports.¹¹²

“Where reasonable persons could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion.”¹¹³ The trial court abuses its discretion when its decision is “manifestly unreasonable or based on untenable grounds or reasons.”¹¹⁴

Appellant Roesch has failed to make any argument as to why it was an abuse of discretion for the trial court to allow Ms. Bohn to present evidence to support her defense. This is because it was not an abuse of discretion. As recognized in *Munden, supra*, a defendant in an unlawful detainer action may present evidence to establish an equitable affirmative defense based on facts that explain why the defendant breached the lease.

Ms. Bohm's defense was that she never paid any rent because she was supposed to receive title to the 72nd street property free and clear

¹⁰⁹ *State v. Quaaile*, 182 Wn.2d 191, 196, 340 P.3d 213 (2014).

¹¹⁰ *Lord*, 161 Wn.2d at 28384.

¹¹¹ *State v. Atsbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001).

¹¹² *State v. Williams*, 137 Wn.App. 736, 743, 154 P.3d 322 (2007).

¹¹³ *Quaaile*, 182 Wn.2d at 196 (quoting *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001)).

¹¹⁴ *Quaaile*, 182 Wn.2d at 196 (quoting *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d

without paying any money. The evidence relating to the purchase and sale agreements explained why Ms. Bohm had that belief and explained how the parties ever came to be in, what Mr. Roesch asserted was a “landlord-tenant relationship”¹¹⁵. It was not an abuse of discretion, therefore, for the trial court to admit evidence of the purchase and sale agreements related to the “land swap” to support Ms. Bohm’s defense.

B. The trial court did not exceed its jurisdiction by instructing the jury on Ms. Bohm’s defense.

Appellant Roesch mischaracterizes the trial court allowing Ms. Bohm to assert an affirmative defense as the trial court allowing Ms. Bohm to assert a counterclaim. As discussed above, a defendant in an unlawful detainer action may assert an affirmative equitable defense based on facts that excuse that defendant’s breach of a lease.¹¹⁶ The trial court took pains to explain repeatedly that it admitted the evidence of the purchase and sale agreements not to allow Ms. Bohm to pursue a counterclaim, but for the permissible and proper purpose of allowing Ms. Bohm to establish an affirmative equitable defense based on facts that excused her breach.

Contrary to Appellant Roesch’s assertions¹¹⁷, the effect of the trial court giving jury instructions numbers 2 and 11 was to permit Ms. Bohm

1239 (1997)).

¹¹⁵ See FN 32, *supra*.

¹¹⁶ *Munden*, 105 Wn.2d 45, 711 P.2d 295.

to raise an affirmative equitable defense, not to assert a counterclaim. The trial court did not exceed its subject matter jurisdiction by instructing the jury on Ms. Bohm's affirmative defense.

"Each party is entitled to have his theory of a case presented to the jury by proper instructions, if there is any evidence to support it, and this right is not affected by the fact that the law is covered in a general way by the instructions given."¹¹⁸

"Whether to give a certain jury instruction is within a trial court's discretion and so is reviewed for abuse of discretion."¹¹⁹

Again, it was not an abuse of the trial court's discretion to allow evidence to be admitted that would support Ms. Bohm's affirmative defense. It was also not an abuse of discretion for the trial court to instruct the jury on Ms. Bohm's affirmative defense. Ms. Bohm had the right to raise a defense and the evidence she offered was relevant to that defense and not otherwise inadmissible.

C. The trial court did not err in denying Appellant Roesch's motions for judgment pursuant to CR 50(a) and (b).

CR 50(a) provides, in pertinent part,

If, during a trial by jury, a party has been fully heard with

¹¹⁷ Brief of Appellant, p. 28-31.

¹¹⁸ *De Koning v. Williams*, 47 Wn.2d 139, 141, 286 P.2d 694, 695-96 (1955).

¹¹⁹ *Fergen v. Sesteró*, 182 Wn.2d 794, 802, 346 P.3d 708, 712 (2015).

respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim, counterclaim, cross claim...that cannot under the controlling law be maintained without a favorable finding on that issue.

“In reviewing the grant or denial of a motion for a judgment as a matter of law [appellant courts] engage in the same inquiry as the trial court, admitting the truth of the nonmoving party's evidence and all reasonable inferences that can be drawn from it.”¹²⁰ A plaintiff's motion for judgment as a matter of law under CR 50(a) should be granted “only if [the court] can say there is no evidence at all to support defendant's claims.”¹²¹

Appellant Roesch's argument both in the trial court and on appeal as to why the trial court should have granted judgment to Appellant Roesch as a matter of law is premised on the presumption that Ms. Bohm was pursuing a counterclaim against Appellant Roesch based on breach of one or more of the purchase and sale agreements. Appellant's Roesch's misunderstanding of why evidence of the purchase and sale agreements was admitted is fatal to his argument that the trial court erred in denying his motion for judgment as a matter of law pursuant to CR 50.

Again, the purchase and sale agreements were not admitted as the

¹²⁰ *Mut. of Enumclaw Ins. Co. v. Gregg Roofing, Inc.*, 178 Wn. App. 702, 725, 315 P.3d 1143, 1154 (2013).

¹²¹ *Martin v. Huston*, 11 Wn. App. 294, 522 P.2d 192 (Div. 1, 1974), citing *In re Thornton's Estate*, 81 Wn. 2d 72, 499 P.2d 864 (1972).

basis for a counterclaim on Ms. Bohm's part. Ms. Bohm was not allowed to litigate any counterclaim based on the purchase and sale agreements. The purchase and sale agreements were admitted to provide the jury with a factual background and context for how the Bohms and Rudolphs wound up in Michael Roesch's property and as support for Ms. Bohm's affirmative defense of why she never paid rent.

At trial and on appeal Appellant Roesch makes complex and involved arguments as to why the January 30, 2008, the October 15, 2008, purchase and sale agreements and addenda thereto were superseded, lapsed, or otherwise no longer enforceable at the time of trial. Ultimately, however, all of these arguments are irrelevant because Ms. Bohm was not allowed to bring a counterclaim against Michael or Fred Roesch based on those documents.

When all of Ms. Bohm's evidence and the reasonable inferences that can be drawn from it are assumed to be true, it is clear that the trial court did not err in denying Appellant Roesch's motion for judgment as a matter of law and motion for reconsideration. A reasonable jury could and, in fact, did, find that the purchase and sale agreements supported Ms. Bohm's defense that she should be excused from failing to pay rent. Because Ms. Bohm was not asserting any counterclaim against Michael Roesch, the trial court properly denied Appellant Roesch's motion for judgment under CR 50(a).

D. The trial court did not err in denying Appellant Roesch's motion for new trial or reconsideration under CR 59(a)(1)(6), (8), and (9).

CR 59 provides, in pertinent part,

(a) Grounds for New Trial or Reconsideration. On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial;

(6) Error in the assessment of the amount of recovery, whether too large or too small, when the action is upon a contract, or for the injury or detention of property;

(8) Error in law occurring at the trial and objected to at the time by the party making the application; or

(9) That substantial justice has not been done;

In his motion for new trial or reconsideration¹²², Appellant Roesch

argued that the admission of Ms. Bohm's exhibits was an "irregularity"

¹²² CP 1100-1108.

under CR 59(a)(1)¹²³ that required a new trial, that this “irregularity” required a new trial under CR 59 (a)(6) because the jury did not award Appellant Roesch any money¹²⁴, that this “irregularity” was an error of law that required a new trial under CR 59(a)(8)¹²⁵, and the admission of the exhibits resulted in substantial justice not being done because Appellant Roesch did not win.¹²⁶

The trial court denied this motion¹²⁷ and took pains to point out that the exhibits were admitted as evidence of Ms. Bohm’s defense, not as evidence to support a counterclaim.¹²⁸

Appellant Roesch reasserts these same arguments on appeal and argues that the trial court erred in denying his motion for new trial or reconsideration.¹²⁹

1. Standard of review for denial of a motion for new trial or reconsideration.

Motions for reconsideration under CR 59 are reviewed for an abuse of discretion.¹³⁰ A trial court abuses its discretion when it bases its

¹²³ CP 1103-1106.

¹²⁴ CP 1106.

¹²⁵ CP 1107.

¹²⁶ CP 1107-1108.

¹²⁷ CP 1219-1220.

¹²⁸ RP 4-5, 9-25-15. The report of proceedings for the September 25, 2015 is not numbered continuously with the rest of the report of proceedings. Reference will be made to this transcript by giving the page number followed by the date.

¹²⁹ Brief of Appellant, p. 42-43.

¹³⁰ *Holaday v. Merceri*, 49 Wn.App. 321, 324, 742 P.2d 127 (1987).

decision on untenable grounds or untenable reasons.¹³¹

2. *Admission of evidence of the purchase and sale agreements was not an "irregularity" under CR 59(a)(1).*

As discussed above, in an unlawful detainer action a defendant may assert an affirmative equitable defense if it is based on facts that excuse the tenant's breach.¹³²

As set out above, the trial court took pains to repeatedly state on the record that the evidence of the purchase and sale agreements was being admitted to explain the history of the case and as evidence of Ms. Bohm's affirmative defense. In denying Appellant' Roesch's motion for new trial or reconsideration the trial court again reminded counsel for Appellant Roesch that the purchase and sale agreements

provided the basis for [the] lease to be in existence in the first place...provided a basis for why Candy Bohm intended to be in that home, as opposed to her own home...provided Candy Bohm with some rationale for why she should pay her rent up to a certain point...provided a basis for why Candy Bohm behaved in the way that she did behave...[and] gave the jury a basis, or not, for determining whether or not there was a reason to excuse Candy Bohm from making payment under the lease.¹³³

It was not an "irregularity" for the trial court to admit relevant and admissible evidence in support of Ms. Bohm's affirmative defense. The

¹³¹ *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

¹³² *Munden*, 105 Wn.2d at 45, 711 P.2d 295.

trial court did not abuse its discretion in deny Appellant Roesch's motion for new trial or reconsideration on this basis.

3. *The trial court did not abuse its discretion in denying Appellant Roesch's motion for new trial or judgment under CR 59(a)(6).*

CR 59(a)(6) does not apply to this case because the jury believed Ms. Bohm's affirmative defense and found that no recovery was possible. The jury's verdict was supported by properly admitted evidence and the jury did not err in assessing that no recovery was warranted since it found Ms. Bohm was excused from paying rent. The trial court did not abuse its discretion in denying Appellant Roesch's motion for new trial or reconsideration under Cr 59(a)(6).

4. *The trial court did not abuse its discretion in denying Appellant Roesch's motion for new trial or judgment under CR 59(a)(8).*

As discussed above, no error of law occurred when the trial court allowed Ms. Bohm to present evidence of the purchase and sale and the agreements to support her affirmative defense. The trial court did not abuse its discretion in denying Appellant Roesch's motion for new trial or judgment under CR 59(a)(8).

5. *The trial court did not abuse its discretion in denying Appellant Roesch's motion for new trial or judgment under CR 59(a)(9).*

¹³³ RP 4, 9-25-15.

As discussed above, the trial court did not exceed its subject matter jurisdiction by admitting evidence of the purchase and sale agreements. The trial court did not abuse its discretion in denying Appellant Roesch's motion for new trial under CR 59(a)(9).

E. The trial court did not err in entering an Order on the Jury's verdict.

Appellant Roesch presents no new arguments in his challenge to the trial court's Order on Jury Verdict. Instead, in section VI G Appellant Roesch "incorporates the arguments and authorities" from sections VI A-F.

Again, as discussed above no error occurred when the trial court admitted evidence of the purchase and sale agreements to support Ms. Bohm's affirmative defense. The admission of the evidence caused no other errors at the trial. Respondent Bohm adopts and incorporates the arguments and authorities set out in section III A-D, above.

F. The trial court did not err in awarding attorneys fees to Ms. Bohm.

Appellant Roesch assigns error to all of the trial court's Findings of Fact and Conclusions of Law RE: Attorney's Fees & Costs¹³⁴ as well as the Order on Defendant's Motion for Attorney Fees and Costs and Judgment.¹³⁵ Appellant Roesch then requests this Court reverse the

¹³⁴ CP 1093-1097.

¹³⁵ CP 1098-1099.

findings, conclusions, and Judgment for attorney's fees. Appellant Roesch's argument fails.

1. *Standard of review.*

Whether a statutory, contractual, or equitable basis exists for an attorney fees award is reviewed de novo.¹³⁶ Because the trial court has weighed the evidence, appellate review is limited to determining if the trial court's findings of fact are supported by substantial evidence and, if so, whether the findings support the conclusions of law and the judgment.¹³⁷ Substantial evidence is a quantum of evidence sufficient to persuade a rational person that the premise is true.¹³⁸

2. *Contractual and statutory bases exist for an award of attorney's fees to Ms. Bohm.*

Paragraph "q" of Form 21 that was part of the October 15, 2008 residential purchase and sale agreement signed by the parties contained a provision that stated that "if Buyer or Seller institutes suit against the other concerning this Agreement the prevailing party is entitled to reasonable attorneys' fees and expenses."¹³⁹ This same provision was also included at paragraph 10 of the Rental Agreement and Paragraph 11 of the Lease/Rental Agreement which both were part of Exhibit 9.¹⁴⁰

¹³⁶ *Gander v. Yeager*, 167 Wn.App. 638, 282 P.3d 1100 (2012).

¹³⁷ *Sac Downtown Ltd. P'ship v. Kahn*, 123 Wn.2d 197, 202, 867 P.2d 605 (1994).

¹³⁸ *Stiles v. Kearney*, 168 Wn.App. 250, 260, 277 P.3d 9, *review denied*, 175 Wn.2d 1016, 287 P.3d 11 (2012).

¹³⁹ Ex. 9.

¹⁴⁰ CP 169 & 171 and Ex. 9.

In addition to the provisions of the October 15, 2008 purchase and sale agreement and rental agreements, the trial court also awarded attorneys' fees pursuant to RCWs 59.18.410, 4.84.330, and 4.84.010.¹⁴¹

Under RCW 4.84.330,

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 4.84.010 allows for the recovery of specific fees incurred by the prevailing party.

Finally, under RCW 59.19.290(2) the prevailing party in an unlawful detainer suit may recover his or her costs and attorney's fees.

The tenant in an unlawful detainer action which was dismissed because of inadequate notice is the party in whose favor the judgment was entered and is, therefore, entitled to recover reasonable attorney fees under RCW 59.18.290(2), notwithstanding that his or her counterclaim was dismissed.¹⁴²

Here, even though she was not allowed to bring any counterclaims,

¹⁴¹ CP 1098-1099.

¹⁴² *Soper v. Clibborn*, 31 Wn. App. 767, 768, 770, 644 P.2d 738, 738-39 (1982).

Ms. Bohm was the prevailing party because the jury found in her favor and denied all of Appellant Roesch's claims for relief.¹⁴³

There were both statutory and contractual bases for the trial court to award Ms. Bohm attorney's fees and costs.

3. *The trial court's findings of fact are supported by substantial evidence and the findings support the conclusions of law and the judgment.*

Findings of Fact RE: Attorney's Fees 1 through 3 are based on the language of the October 15, 2008 purchase and sale agreement.¹⁴⁴ Finding of Fact RE: Attorney's Fees 4 is based on the language of the rental agreement documents.¹⁴⁵ Findings of Fact RE: Attorney's Fees 5 and 8 are based on the jury verdict.¹⁴⁶ Findings of Fact RE: Attorney's Fees 6, 7, and 9 are based on declarations of Ms. Bohm's counsel.¹⁴⁷ Findings of Fact 10 and 11 set out the trial court's findings of what was a reasonable amount of fees and costs to award to Ms. Bohm.¹⁴⁸

Appellant's Roesch's only apparent argument as to why the Trial Court's findings of fact were not supported by substantial evidence is his same argument that the trial court exceeded its subject matter jurisdiction in admitting the evidence. However, as has been discussed numerous

¹⁴³ CP 989-991, 1055-1056.

¹⁴⁴ CP 1094.

¹⁴⁵ CP 1094-1095.

¹⁴⁶ CP 1095.

times already, the trial court did not exceed its subject matter jurisdiction or commit any other error in admitting the evidence of the purchase and sale agreements.

The trial court's findings of fact re: attorney's fees and costs are supported by more than substantial evidence and are more than sufficient to support the trial court's conclusions of law.

G. Respondent Bohm requests attorney's fees on appeal.

RAP 18.1 allows the prevailing party in an appeal to be awarded attorney fees and expenses if applicable law grants the party a right to recovery reasonable attorney fees or expenses. As discussed above, Respondent Bohm was the prevailing party at trial and was awarded attorney's fees and costs under both statutory and contractual provisions.¹⁴⁹ An award of damages to the prevailing party is mandatory under RCW 4.84.330.¹⁵⁰

Should this court find in Ms. Bohm's favor, Ms. Bohm respectfully requests an award of attorney's fees and costs incurred on appeal.

V. CONCLUSION

Appellant Roesch's appeal is, at its core, an argument that the trial court's findings of fact re: attorney's fees and costs are not supported by substantial evidence.

¹⁴⁷ CP 1095.

¹⁴⁸ CP 1096.

¹⁴⁹ CP 1093-1097, 1098-1099.

¹⁵⁰ *Singleton v. Frosi*, 108 Wn.2d 723, 727-28, 742 P.2d 1224 (1987).

court admitted evidence improperly. Appellant Roesch either intentionally misrepresents or fundamentally misunderstood the purpose for which the trial court admitted the evidence of the purchase and sale agreements. Appellant Roesch mischaracterizes the admission of the evidence as the trial court exceeding its subject matter jurisdiction and uses that primary "error" as the foundation for his arguments on appeal.

The trial court properly admitted evidence of the purchase and sale agreements as evidence that supported Ms. Bohm's affirmative defense. Appellant Roesch is simply wrong in his characterization of the admission of the evidence relating to the purchase and sale agreements. All of Appellant Roesch's arguments fail because Appellant Roesch appears to not understand the difference between admitting evidence to support a counterclaim and admitting evidence to support an affirmative defense.

For the reasons stated above, this court should deny Mr. Roesch's appeal, affirm the jury verdict and orders of the trial court, and award Ms. Bohm reasonable attorney fees and costs in this appeal.

Respectfully submitted this 12th day of April, 2016.

SNYDER LAW FIRM, LLC

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CERTIFICATE OF SERVICE & DELIVERY VIA EMAIL

The undersigned does hereby declare that on **APRIL 12, 2016**, the undersigned emailed a copy of **RESPONSE BRIEF OF CARL BOHM and CANDY BOHM** filed in the above-entitled case i to the following persons:

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BY  DEPUTY

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