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Supreme Court No. 98943-5
(COA No. 79512-1)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JUSTIN BLOCH, Petitioner,

v.

KATHLEEN BLOCH, Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY
CASE NO. 17-2-15636-1 SEA, THE HONORABLE JUDGE
MAUREEN MCKEE PRESIDING

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER & INTRODUCTION

Although the trial court initially found that Petitioner Justin Bloch substantially prevailed and was entitled to attorney's fees, on reconsideration it determined that neither party substantially prevailed, awarding no fees. Rather than reviewing that determination for an abuse of discretion, the Court of Appeals made its own findings on these issues, remanded for a trial-fee award to Kathleen Bloch of potentially more than $255,000.00, and granted appellate attorney fees in excess of $55,000.00.

This appellate decision conflicts with numerous decisions of this Court and of other appellate courts by reviewing *de novo* rather than for an abuse of discretion 1) whether an attorney's fee award to Kathleen was justified; and 2) whether the trial court's denial of a motion for reconsideration was correct. The decision also treats two related but alternate claims as discrete legal theories.

Misapplying the standard of review is sometimes just a legal error, but here it is a policy shift – particularly in the age of citable unpublished opinions. This Court should grant review to correct these conflicts with its own and other appellate courts' decisions on an issue of substantial public import to many, many cases.

B. COURT OF APPEALS DECISION

Petitioner seeks review of:

1) the Division I Court of Appeals unpublished opinion dated May 4, 2020 (App. A1-A9); and
2) of the Order Denying Reconsideration dated July 23, 2020 (App. A10).

C. ISSUES PRESENTED FOR REVIEW

1) Whether the trial court erred in denying the motion for reconsideration?
2) Whether the trial court correctly found neither party substantially prevailed and, therefore, awarded no fees?
3) Whether the Court of Appeals erred in treating two related claims plead in the alternate as discrete legal claims where a) Kate did not prove she was a tenant and therefore RCW 64.12.020 could not apply, b) the trial court made no finding Kate prevailed under RCW 4.24.630 and c) *Marassi* did not apply to this case?

D. STATEMENT OF THE CASE

This case involves two related statutes, which provide for the recovery of attorney fees to the parties under the theory of waste:

RCW 64.12.020 (fees to the prevailing party for a claim of waste committed by a tenant) and RCW 4.24.630 (fees to the landowner for a claim of waste committed by a trespasser).

After a bench trial, the court entered findings of fact and conclusions of law on November 28, 2018 (App. A17-A28). The trial court found, in relevant part:

1) Kate[1] was not a tenant during the period for which Justin asked for damages,[2]

2) Kate caused damage in the amount of $4,115.00 (trebled to $12,345) under RCW 4.24.630 plus damage to one stucco exterior wall for which she was not liable to pay because Justin failed to prove the amount necessary to repair it (App. A26-A27, COL 4 and 5); and

3) Justin prevailed and was entitled to attorney fees to the extent there was statutory, contractual, and equitable basis for such award (App. A28, COL 14)

Kate sought reconsideration, asking the trial court: a) to clarify who prevailed on the two statutory claims authorizing an

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[1] Petitioner Justin Bloch is referred to as Justin and Respondent Kathleen Bloch is referred to as Kate because this is how the Court of Appeals' Opinion makes reference to them.

[2] Justin's Complaint stated: "While defendant solely occupied the premises from approximately June 2016 until June 2017, she damaged the premises" (App. A12 ¶ 19). The trial court found she was only akin to a tenant at will from September 2012 through January 2016 (App. A26; COL 2) and that from May 2016 through June 2017, Kate had no right to be in the home and lived there continuously without permission (App. A25; FOF 12).

award of attorney fees vs. an award of statutory costs under RCW 4.84.030; and b) to find that her entry into the home was not trespass and the damage she did was not "wrongful" under RCW 4.24.630 CP 84-96 (App. A47-A56).

The trial court granted Kate's motion for reconsideration in part and denied it in part, amending the Conclusions of Law:

1) to state Justin failed to prove waste under RCW 64.12.020 (App. A30; COL 3);

2) to reverse the trebled award of $12,345, stating he had no right to relief under RCW 4.24.630 (App. A30; COL 4), but still leaving COL 5 intact that Kate caused damage to an exterior stucco wall (App. A27; COL 5); and

3) to delete and replace COL 14 with, "As both parties have prevailed on major claims, neither party is the substantially prevailing party pursuant to RCW 4.84.010. Consequently, the Court is not awarding attorney's fees for either party." (App A30; COL 14).

Kate appealed the denial of attorney fees, alleging that the trial court erred in denying her attorney fees as the prevailing party on *both* statutory claims. The Court of Appeals agreed she prevailed under RCW 64.12.020, reversing and remanding for an award of costs and fees under that statute (App. A3 & A8).

Justin moved to reconsider the Court of Appeals' Opinion, where neither the trial court nor the Court of Appeals made a

finding that Kate prevailed on both statutory claims. In her answer to Justin's motion, Kate misrepresented to the Court of Appeals that the trial court had changed COL 5 on reconsideration.[3] But, the trial court did not change COL 5 (App. A27 & App. A29-A30). Kate's quote leaves out the sentence saying it was COL 4 that was amended:

> "*Conclusion 4 is deleted and replaced with*: From May 13, 2016 through June 29, 2017, most of Ms. Bloch's attempts to repair the Home constituted mitigation. Ms. Bloch's efforts to repair and maintain the home, even though they caused some minor damage described in Mr. Showalter's testimony, were not "wrongful" within the meaning of RCW 4.24.630. The damage was not intentional or unreasonable. Consequently, Mr. Bloch has no right to relief under RCW 4.24.630."
>
> App. A29-A30, COL 4.

The unchanged Conclusion of Law 5 says:

> While Ms. Bloch damaged one stucco exterior wall, she is not liable for payment since Mr. Bloch provided the Court with little to no guidance regarding the amount necessary to repair this particular wall.
>
> App. A27, COL 5

The Court of Appeals denied reconsideration (App. A10).

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3 "The Motion neglects to note that Conclusion of Law 5 was materially changed on reconsideration to expressly rule Justin had no relief under the statute: From May 13, 2016 through June 29, 2017..." App. A34-A35.

E. WHY THIS COURT SHOULD GRANT REVIEW

1. The Court of Appeals' opinion conflicts with a published decision of the Court of Appeals that a denial of a motion for reconsideration is reviewed under the abuse of discretion standard. RAP 13.4(b)(2).

The Court of Appeals reviews a trial court's denial of a motion for reconsideration for an abuse of discretion. *Hernandez v. Edmonds Memory Care, LLC,* 10 Wash.App.2d 869, 450 P.3d 622 (2019). Here, Kate filed to appeal the trial court's denial of her motion for reconsideration. The abuse of discretion standard was not used or addressed.

2. The Court of Appeals' opinion conflicts with both decisions of the Supreme Court and published decisions of the Court of Appeals that an attorney fee award is reviewed under an abuse of discretion standard. (RAP 13.4(b)(1) and (2)).

Appellate courts apply a two-part review to attorney fee awards: (1) a *de novo* review of whether there is a legal basis for awarding attorney fees by statute, and (2) an abuse of discretion of the trial court's discretionary decision to award or deny attorney fees and the reasonableness of any attorney fee award. *Gander v. Yeager,* 167 Wn. App. 638, 282 P.3d 1100 (2012). The Court of Appeals in this case did not review for an abuse of discretion of the trial court's denial of attorney fees to Kate. It reviewed *de novo* whether RCW 64.12.020 authorizes a fee award to Kate.

It is well settled that the standard of review of an attorney fee award is abuse of discretion. *Fisher Properties, Inc. v. Arden-Mayfair, Inc.,* 115 Wash.2d 364, 798 P.2d 799 (1990) (standard of review of attorney fee award is manifest abuse of discretion); *Scott Fetzer Co. v. Weeks*, 122 Wash.2d 141, 147, 859 P.2d 1210 (1993) (Court of Appeals' review of trial court's attorney fee award is based on abuse of discretion standard). The trial court has discretion in its award. *Bright v. Frank Russell Investments,* 191 Wash.App. 73, 361 P.3d 245 (2015) (in determining whether attorney fees should be awarded, because there is no precise rule or formula, the trial court has discretion in determining the degree of success).

In order to reverse a fee award, a manifest abuse of discretion must be shown. *Scott Fetzer Co. v. Weeks*, 122 Wash.2d 141, 147, 859 P.2d 1210 (1993); *see also American Nursery Products, Inc. v. Indian Wells Orchards,* 115 Wash.2d 217, 797 P.2d 477 (1990) (the amount of attorney fees awarded is discretionary and will only be overturned for manifest abuse); *Boeing Co. v. Sierracin Corp.,*108 Wash.2d 38, 738 P.2d 665 (1987)) (amount of attorney fee award is discretionary, and will be overturned only for manifest abuse).

Here, the Court of Appeals overturned the trial court's decision to award attorney fees to neither party without finding any abuse of discretion.

Moreover, considerable authority holds that where both parties prevail on major issues, neither is entitled to attorney fees. *McGary v. Westlake Investors,* 99 Wash.2d 280, 661 P.2d 971 (1983) (provision of lease entitling prevailing party to reasonable attorney fees was not applicable in declaratory proceeding where neither party prevailed on issue of their rights under commercial lease); *Tallman v. Durussel,* 44 Wash.App. 181, 721 P.2d 985, *review denied,* 106 Wash.2d 1013 (1986) (both seller and buyer prevailed on a major issue in seller's action on promissory note, and thus there was no prevailing party entitled to an award of attorney fees); *Rowe v. Floyd,* 29 Wash.App. 532, 629 P.2d 925 (1981) (both parties were favored by the order appealed from, and neither was the "prevailing party," within statutory definition, so as to be entitled to an award of attorney fees). If neither party wholly prevails in an action, then determination of who the prevailing party is, for purposes of attorney fee award, depends upon who the substantially prevailing party is, and this question depends upon extent of relief afforded parties. *Riss v. Angel,* 131 Wash.2d 612,

934 P.2d 612 (1997). Here, the trial court found Justin and Kate both prevailed on major claims and concluded neither substantially prevailed on major issues and thus awarded neither attorney fees, in line with these decisions to offset them against each other.

The definition of who is a "prevailing party" for an award of costs should be the same in determining the "prevailing party" for an award of attorney's fees. *Stott v. Cervantes,* 23 Wash.App. 346, 595 P.2d 563 (1979). Here, the trial court found neither Justin nor Kate were the prevailing party under RCW 4.84.010 (Costs). Thus, the trial court correctly used the same standard to determine the attorney fee award where each prevailed on one statute.

In her original motion for reconsideration to the trial court, Kate specifically asked the trial court that "Conclusion 14 should clarify (i) Ms. Bloch is the prevailing party on the waste claim against her as a tenant at will under RCW 64.12.020 for purposes of award of attorney fees and costs; (ii) Ms. Bloch is the prevailing party on the waste claim against her as a trespasser under RCW 4.24.630 for purposes of award of attorney fees and costs; and (iii) neither party is the substantially prevailing party under Ch. 4.84 RCW for purposes of award of statutory costs.

The trial court did not issue a conclusion saying Kate was the prevailing party on the waste claim under either RCW 64.12.020 or RCW 4.24.630. It only amended its conclusion to say "Conclusion 14 is deleted and replaced with: As both parties have prevailed on major claims, neither party is the substantially prevailing party pursuant to RCW 4.84.010. Consequently, the Court is not awarding attorney's fees for either party." (App.A30; COL 14).

The trial court did not conclude Kate prevailed under RCW 4.24.630 because it found she did do damage under that statute:

> While Ms. Bloch damaged one stucco exterior wall, she is not liable for payment since Mr. Bloch provided the Court with little to no guidance regarding the amount necessary to repair this particular wall.

App A27, COL 5. RCW 4.24.630 specifically says:

> Damages recoverable under this section include, but are not limited to, damages for the market value of the property removed or injured, and for injury to the land, including the costs of restoration. In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs *and reasonable attorneys' fees* and other litigation-related costs. (Emphasis added).

The trial court's findings and conclusions do not say that Justin is not entitled to attorney fees as the injured party under this statute.

Even an award of nominal damages may make the plaintiff the prevailing party. *Miles v. F.E.R.M. Enterprises, Inc.,* 29 Wash. App. 61, 627 P.2d 564 (1981) (jury verdict finding $0 in damages for plaintiffs who brought race discrimination action against vendor of mobile home lot was not defense verdict, and hence, plaintiffs were entitled to their costs). The Court of Appeals Opinion conflicts with many decisions of this Court, which should grant review.

3. The Court of Appeals Opinion conflicts with published decisions of the Court of Appeals where in determining whether attorney fees should be awarded, claims involving a common core of facts and related legal theories should not be viewed as discrete claims. (RAP 13.4(b)(2)).

Regardless of whether the trial court found Justin prevailed on RCW 4.24.630, the Court of Appeals Opinion does not address that Justin's two legal theories of waste were identical and plead in the alternative because it was impossible for Kate to be a tenant and a trespasser at the same time. While the opinion acknowledges Justin says he alleged damage only between June 2016 and June 2017, and the trial court found Kate to be a tenant only from September 2012 to January 2016, it does not acknowledge that RCW 4.24.630 applied instead, which stemmed from the same core

facts and was the related theory of waste. Kate could not prevail under both the tenant and trespass waste statute, where the claims stem from a common core of facts, especially where she is the one claiming to be in a committed intimate relationship with Justin and thus not a trespasser. Justin thought she was a trespasser.

The Washington Court of Appeals has held that where claims involve a common core of facts and related legal theories, in determining whether attorney fees should be awarded, the lawsuit should not be viewed as a series of discrete claims. *Bright v. Frank Russell Investments,* 191 Wash.App. 73, 361 P.3d 245 (2015). The Opinion conflicts with other Court of Appeals decisions by viewing the two statutes as discrete claims. Since Kate was not a tenant when she allegedly inflicted the damage, the waste claim did not apply; it should not be viewed as a discrete legal claim. This Court should grant review to resolve this conflict.

a. The Court of Appeals overlooked that the trial court found Kate and Justin were not in a committed intimate relationship (CIR), an issue raised by her – not him. Since she was found not to be a tenant, the RCW 64.12.020 waste claim did not apply to her.

The Court of Appeals Opinion says "Justin did not allege specific dates for when he believed Kate was a tenant versus a trespasser in his Complaint." App. A8. Justin specifically alleged

damage between June 2016 and June 2017. App. A12 ¶19. Kate argued in her answer, amended answers, and much of her trial brief that she was in a committed intimate relationship with Justin and not a "purely economic relationship like landlord-tenant." CP 6, 12, 58-60. The undisputed facts from trial confirm the "parties were not in a committed intimate relationship from September 2012 through June 2017. App. A26, COL 1. By the end of 2015 and the beginning of 2016, Justin clearly and consistently conveyed his desire for Kate to move out of his home. App. A2. Kate continued to live in Justin's home from May 2016 through June 2017 continuously, without permission, and despite Justin's clear desire she move out. App. A25, FOF 12.

The Court of Appeals incorrectly says Justin "alleged waste under RCW 64.12.020 requiring Kate to defend against the claims regardless of the alleged timeframe. App. A8. Kate did not defend against a waste claim under RCW 64.12.020 because despite her allegations of being in a CIR with Justin, she was found not to be a tenant during the alleged period of damage so that statute did not apply.

Justin clearly laid out that it was impossible for Kate to have been a tenant and a trespasser at the same time and he used

multiple legal theories to establish Kate's liability because she alleged she was in a committed intimate relationship with him – something she was unable to prove. BR 4. Justin brought action to recover under alternate legal theories depending on whether Kate was entitled to occupy his home or not during the relevant time period of damage between June 2016 and June 2017. If Kate damaged the home while legally entitled to occupy his home, Justin could recover under the theory of waste relating to a tenant (RCW 64.12.020). Alternatively, if Kate had no right to occupy his home when causing damage, he could recover under the theory of waste in relation to trespass (RCW 4.24.630). The alternative claims were mutually exclusive because it is logically impossible for Kate to be both a tenant and a trespasser. BR 14-15. These two related claims cannot be reviewed as two discrete legal claims as they stem from the same core common facts and are related legal theories.

b. The Court of Appeals overlooked that the trial court did not make a finding Kate prevailed under RCW 4.24.630.

COL 5 says "While Ms. Bloch damaged one stucco exterior wall, she is not liable for payment since Mr. Bloch provided the Court with little to no guidance regarding the amount necessary to repair this particular wall." App. A27. The Court of Appeals opinion

does not take into account that the only reason Kate did not have to pay for the damage is because Justin was unable to provide guidance on how much it would cost to repair. There is no ruling she prevailed under RCW 4.24.630 even though she specifically requested it in her motion for reconsideration to the trial court, nor is there any ruling saying she did not commit waste under this statute with regards to that wall. Kate did not appeal any of this. She simply asserted that she prevailed on both, which is untrue.

c. Kate argued that the *Marassi v. Lau* proportional approach applies. However, it does not apply to this case because it requires discrete legal claims.

On appeal Kate incorrectly argued that the *Marassi v. Lau* proportional approach applies to her. She incorrectly argued that she prevailed completely on all aspects of the two fee generating claims. However, the trial court found Kate damaged an exterior wall and applied the trespass statute (RCW 4.24.630) because she was not a tenant. The trial court could not apply the alternative statute (RCW 64.12.020) for waste done by a tenant at all for the period Justin alleged damage because Kate could not prove she was a tenant. Alternative pleadings allow a plaintiff to plead two alternative claims even though they cannot both be true. *Church v. Brown,* 150 Wash. 178, 272 P. 511 (1928).

Justin proved Kate damaged his home, proved Kate had no right to occupy the home during the relevant time period, and defeated Kate's claim they had a committed intimate relationship. Kate heavily relied on *Marassi v. Lau*, 71 Wn.App. 912, 916 859 P.2d 605 (Div.1 1993). However, at oral argument, she correctly ceded that the *Marassi* case did not apply to this case. It is about a prevailing party for attorneys' fees under a contract and RCW 4.84.330, neither of which are at issue in this case. The claims were also not separate and distinct as required for *Marassi* to apply.

4. This Petition for Review involves an issue of substantial public interest that should be determined by the Supreme Court. (RAP 13.4(b)(4)).

Even though this is an unpublished opinion, it may be cited by future litigants because Washington General Rule 14.1(a) allows a court to accord it persuasive value as it deems appropriate. The opinion may also be cited by Washington appellate courts where such courts find it necessary per GR 14.1(c). This is a significant – and negative – change to the law. This Court should grant review.

5. Justin is entitled to an award of costs and fees.

Pursuant to RCW 4.24.630, Justin is entitled to recovery of his costs and fees as the injured party in this action. Pursuant to RAP 18.1, he requests that this Court make such an award per RCW 4.24.630.

F. CONCLUSION

This Court should grant review of the Court of Appeals' opinion.

Respectfully submitted this 24th day of August, 2020.

PIVOTAL LAW GROUP, PLLC

By: Kim Sandher, WSBA No. 42630
Attorneys for Petitioner Justin Bloch

CERTIFICATE OF SERVICE

I, Tara L. Peterson, hereby certify under penalty of perjury in the State of Washington that on August 24th, 2020, I sent, via first class U.S. Mail and via electronic mail, a true and correct copy of the foregoing document to:

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Dated this 24th day of August, 2020, at Seattle, Washington.

Tara L. Peterson

APPENDIX

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State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JUSTIN BLOCH, Respondent, v. KATHLEEN BLOCH, Appellant.	No. 79512-1-I DIVISION ONE UNPUBLISHED OPINION

MANN, C.J. — Kate Bloch appeals the trial court's order denying attorney fees in her dispute against her former husband, Justin Bloch.[1] Kate contends that the trial court erred in declining to award her attorney fees for successfully defending against Justin's statutory waste claim under RCW 64.12.020. We agree and remand to the trial court to award Kate her costs and attorney fees.

I.

Kate and Justin were married in 1997, but their marriage was dissolved in 2000.[2] Prior to their marriage, Justin purchased his home at 1555 Broadway East in Seattle.

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[1] We refer to the parties by their first names in order to avoid confusion. We also use "Kate" instead of "Kathleen" because that is the name used by her counsel in briefs before this court. No disrespect is intended.

[2] The facts are derived from the trial court's unchallenged findings of fact.

Citations and pin cites are based on the Westlaw online version of the cited material.

The house was awarded to Justin in the dissolution. The house is 7,000 to 8,000 square feet and had been featured in magazines such as Seattle Homes & Lifestyle for its unique architecture and design.

After living apart from Justin for several years following their dissolution, Kate moved into the home in the fall of 2012. Kate remained in the home continuously until January 2016. Kate and Justin did not live and interact like a married couple. Justin intermittently asked Kate to move out of the home. While it is unclear whether he expressed this desire prior to the end of 2015, by the beginning of 2016 Justin clearly and consistently expressed his desire that Kate move out. Kate moved to Idaho from January 4, 2016, until May 13, 2016.

At some point after 2005, the home deteriorated from its original state. In 2012, Justin began using methamphetamine daily for several years in or near the home. As a result of Justin's daily methamphetamine use, the interior surfaces of the home and the furniture, furnishing, appliances, and personal effects inside were contaminated with methamphetamine residue. Experts at trial testified that items contaminated by methamphetamine must be discarded because decontamination is near impossible. Further, wood tends to be porous and is hard to decontaminate and there was wood throughout the entire home.

From January 4, 2016, to May 13, 2016, Justin lived in the home, while Kate lived in Idaho. During this time, many people came and went from the home at all times of the day and night. Michelle Wheeler, a friend of Justin's, appeared to both reside in and deal drugs from the home. Another friend of Justin's, Steven Morris-Ridge, also lived in the home for some time during this period.

Kate moved back into the home in May 2016, and lived there until June 29, 2017. During this time, she attempted to repair and make aesthetic improvements to the home, including repairing the exterior stucco. While done with the intention of mitigating damage, Kate's efforts further damaged the home. Justin also significantly damaged the home.

Justin filed an unlawful detainer action in June 2017 and Kate moved out at the end of June. After Kate filed her answer and affirmative defenses, Justin converted his action to one for damages.

Justin pursued five causes of action against Kate at trial: (1) breach of contract for failure to pay rent between May 20, 2017, and June 29, 2017, (2) unjust enrichment for occupying the home from May 7, 2014, until May 20, 2017, (3) statutory waste under RCW 64.12.020 for damage while Kate was a tenant,[3] (4) statutory waste under RCW 4.24.630 for damage while Kate was a trespasser,[4] and (5) conversion for taking or

[3] RCW 64.12.020 addresses waste by a guardian or tenant:

> If a guardian, tenant in severalty or in common, for life or for years, or by sufferance, or at will, or a subtenant, of real property commit waste thereon, any person injured thereby may maintain an action at law for damages therefor against such guardian or tenant or subtenant; in which action, if the plaintiff prevails, there shall be judgment for treble damages, or for fifty dollars, whichever is greater, and the court, in addition may decree forfeiture of the estate of the party committing or permitting the waste, and of eviction from the property. The judgment, in any event, shall include as part of the costs of the prevailing party, a reasonable attorney's fee to be fixed by the court. But judgment of forfeiture and eviction shall only be given in favor of the person entitled to the reversion against the tenant in possession, when the injury to the estate in reversion is determined in the action to be equal to the value of the tenant's estate or unexpired term, or to have been done or suffered in malice.

[4] RCW 4.24.630 addresses liability for damage to land and property by a trespasser:

> (1) Every person who goes onto the land of another and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. For purposes of this section, a person acts

damaging personal property, including Justin's 1991 Lotus X180R. Kate raised three counterclaims against Justin: (1) breach of contract for failure to make payments to Kate under a separation contract, (2) unjust enrichment for Kate's labor and expenses in maintaining and repairing the home, and (3) conversion for selling a massage chair that Justin gifted her.

After a bench trial, the trial court entered findings of fact and conclusions of law on November 28, 2018. The court found that Kate was a tenant at will from September 2012 until January 2016. The court concluded that there was no rental agreement for that period, therefore Justin failed to prove his claim for rent under an unjust enrichment theory. The court also concluded that Kate was not responsible for damage and disrepair to the home during that time period.

For the period from May 13, 2016, through June 29, 2017, the trial court found that Kate had no right to be in the home and lived there continuously and without permission. The court found that Kate was liable for damages to the home during that period under an intentional trespass theory for $4,115. The court trebled these damages under RCW 4.24.630 to $12,345. The court also found that Kate was unjustly enriched during that period at the rate of $1,000 per month for rent, totaling $13,548 for Justin's unjust enrichment claim. The total judgment against Kate to Justin was

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"wrongfully" if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act. Damages recoverable under this section include, but are not limited to, damages for the market value of the property removed or injured, and for injury to the land, including the costs of restoration. In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs.

$25,893. The court concluded that Justin was the prevailing party and awarded attorney fees to the extent there was a statutory, contractual, or equitable basis.

Kate moved for reconsideration, asking the court to "clarify who is the prevailing party for the two statutory claims that authorize award of attorney fees and costs, versus award of statutory costs for the case as a whole" and to find that RCW 4.24.630 did not authorize an attorney fee award in favor of Justin. Kate argued that the "prevailing party" can "differ between (a) award of statutory costs under RCW 4.84.030 to the prevailing party in an action as a whole, and (b) award of reasonable attorney fees and costs under statutes relating only to specific causes of action, such as RCW 64.12.020 and RCW 4.24.630" and the court erred because it only awarded fees in the action as a whole.

The court granted in part and denied in part Kate's motion for reconsideration. The court concluded that Justin failed to prove waste under RCW 64.12.020. The court also struck the award to Justin for waste under RCW 4.24.630 finding that:

> From May 13, 2016 through June 29, 2017, most of Ms. Bloch's attempts to repair the [h]ome constituted mitigation. Ms. Bloch's efforts to repair and maintain the home, even though they caused some minor damage described in Mr. Showalter's testimony, were not "wrongful" within the meaning of RCW 4.24.630. The damage was not intentional or unreasonable. Consequently, Mr. Bloch has no right to relief under RCW 4.24.630.

After the trial court's order on reconsideration, the only remaining award in Justin's favor was $13,548 for unpaid rent. The order granting reconsideration explained that "[a]s both parties have prevailed on major claims, neither party is the substantially prevailing party pursuant to RCW 4.84.010. Consequently, the Court is not awarding attorney's fees for either party."

Kate appeals the denial of attorney fees.

II.

Kate seeks reversal of the trial court's conclusion of law on reconsideration that both parties prevailed on major claims, therefore neither was a prevailing party under RCW 4.84.010. She argues that because she prevailed in defending against Justin's claims for statutory waste under RCW 64.12.030, that she is entitled to fees under that statute.[5] We agree.

"Whether a party is entitled to an award of attorney fees is a question of law and is reviewed on appeal de novo." Durland v. San Juan County, 182 Wn.2d 55, 76, 340 P.3d 191 (2014). In general, attorney fees are not available as a cost of litigation unless authorized by contract, statute, or recognized ground of equity. Durland, 182 Wn.2d at 76.

A.

RCW 64.12.020 allows a landlord to recover damages for waste caused by his or her tenant.

> If a guardian, tenant in severalty or in common, for life or for years, or by sufferance, or at will, or a subtenant, of real property commit waste thereon, any person injured thereby may maintain an action at law for damages therefor against such guardian or tenant or subtenant; in which action, if the plaintiff prevails, there shall be judgment for treble damages, or for fifty dollars, whichever is greater, and the court, in addition may decree forfeiture of the estate of the party committing or permitting the waste, and of eviction from the property. The judgment, in any event, shall include as part of the costs of the prevailing party, a reasonable attorney's fee to be fixed by the court.

[5] In her opening brief before this court, Kate argued that she should be entitled to attorney fees under either RCW 4.23.630 and RCW 64.12.030 because she prevailed in defending against both of Justin's statutory waste claims. In her reply, however, she concedes that RCW 4.24.630 is a "one-way" statute that only awards fees to a successful plaintiff.

RCW 64.12.020 (emphasis added).[6]

Kate contends that as the prevailing party, she is entitled to her reasonable attorney fees in defending against Justin's claims under RCW 64.12.020. Justin contends that RCW 64.12.020 cannot provide attorney fees to a defendant because only a plaintiff can receive a judgment for waste against a defendant and not vice versa. The plain language of the statute supports Kate's argument.

We look first to the plain language of a statute. If the language is unambiguous, we rely solely on the statutory language. State v. Roggenkamp, 153 Wn.2d 614, 621, 106 P.3d 196 (2005). While the statute provides treble damages to the plaintiff if they prevail on their claim for damages, it also provides that "the judgement, in any event, shall include as part of the costs of the prevailing party, a reasonable attorney's fee to be fixed by the court." RCW 64.12.020 (emphasis added). The statute uses "plaintiff" when describing damages, but uses "prevailing party" when describing the costs and attorney fees. The change from plaintiff to prevailing party indicates that the prevailing party may be the defendant. "When the legislature uses different words within the same statute, we recognize that a different meaning is intended." State v. Beaver, 148 Wn.2d 338, 343, 60 P.3d 586 (2002).

Kate was the prevailing party under RCW 64.12.020 after the trial court's order on reconsideration. The trial court revised its judgment on reconsideration and clarified that Justin failed to prove waste under RCW 64.12.020. Kate successfully defended against Justin's waste claim. Therefore, Kate is the prevailing party. The award of fees under RCW 64.12.020 is mandatory. We conclude that the trial court erred when it did

[6] Chapter 64 does not define prevailing party.

not award attorney fees to Kate under RCW 64.12.020 as the prevailing party against Justin's claims for statutory waste.

B.

Justin contends that Kate did not prevail on the waste claim under RCW 64.12.020 because she was unable to prove that she was a tenant during the period Justin alleged damages. Justin contends that he alleged Kate caused damage between June 2016 and June 2017, and the court found that Kate was a tenant at will from September 2012 to January 2016. Therefore, he argues, Kate cannot recover attorney fees under RCW 64.12.020.

The argument is not persuasive. Justin alleged waste under RCW 64.12.020, requiring Kate to defend against the claim regardless of the alleged timeframe. Furthermore, Justin did not allege specific dates for when he believed Kate was a tenant versus a trespasser in his complaint.

III.

Kate requests an award for attorney fees on appeal under RCW 64.12.020. "Where a statute allows an award of attorney fees to the prevailing party at trial, the appellate court has inherent authority to make such an award on appeal." Standing Rock Homeowners Ass'n v. Misich, 106 Wn. App. 231, 247, 23 P.3d 520 (2001). Kate prevailed on appeal; therefore, we award her reasonable attorney fees.

We reverse and remand to the trial court to enter an award of costs and attorney fees for the portion of time spent by Kate defending against Justin's waste claim under RCW 64.12.020.

Mann, C.J.

WE CONCUR:

Verellen, J.

Appelwick, J.

FILED
7/23/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JUSTIN BLOCH, Respondent, v. KATHLEEN BLOCH, Appellant.	No. 79512-1-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Respondent Justin Bloch moved to reconsider the court's opinion filed on May 4, 2020. Appellant Kathleen Bloch filed an answer. The panel has determined that the motion should be denied.

Therefore, it is

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

FILED
17 DEC 19 AM 9:00

KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE NUMBER: 17-2-15636-1 SEA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

JUSTIN BLOCH, Plaintiff, vs. KATHLEEN BLOCH, Defendant.	Case No.: 17-2-15636-1 SEA AMENDED COMPLAINT FOR DAMAGES

COMES NOW the plaintiff, Justin Bloch, by and through his attorneys, the Loeffler Law Group PLLC, and for cause of action, alleges as follows:

PARTIES

1. The plaintiff, Justin Bloch ("Plaintiff") is an individual owning property in King County, Washington. Plaintiff resides in King County.
2. The defendant, Kathleen Bloch ("Defendant") is an individual residing in King County, Washington.

JURISDICTION AND VENUE

3. Venue and jurisdiction are proper in King County Superior Court. All parties reside in King County. The subject property of this lawsuit is located in King County.

FACTS

4. Plaintiff owns real property located at 1555 Broadway East, Seattle, Washington 98102 (the "premises").
5. The parties were previously married and divorced in 2000. They have one daughter together.

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6. The plaintiff was solely awarded the premises in the decree of dissolution dated December 5, 2000, after the parties' marriage dissolved.
7. Plaintiff and defendant lived at the premises together on and off for many years.
8. Defendant occupied the premises as her primary residence from December 2012 until June 2017.
9. Defendant did not pay rent during her occupancy of the premises from December 2012 until June 2017.
10. Plaintiff was absent from the premises from approximately June 2016 until July 2017.
11. Plaintiff has struggled to occupy the premises over the past five years because of defendant's repeated claims of domestic violence and the entry of no-contact orders against the plaintiff by the defendant.
12. Plaintiff served Defendant with a notice of forcible detainer and demand for possession on May 8, 2014.
13. Defendant did not comply with the notice of forcible detainer and demand for possession that was served on May 8, 2014.
14. Plaintiff filed an unlawful detainer action under this cause number on June 15, 2017, after defendant failed to sign a rental agreement or vacate pursuant to a thirty-day notice changing the terms of occupancy.
15. Defendant was served a lease and notice of change in terms of tenancy on April 18, 2017, with the lease taking effect on May 20, 2017.
16. The lease imposed a monthly rental obligation of $12,500.00 per month.
17. Defendant did not pay rent from May 20, 2017, through June 29, 2017, when she vacated the Premises.
18. To date, the defendant has not tendered the back rent owed.
19. While defendant solely occupied the premises from approximately June 2016 until June 2017, she damaged the premises.
20. During her occupancy from approximately June 2016 until June 2017, defendant constructed what is suspected to be a methamphetamines laboratory in the premises.

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21. Upon regaining possession in July 2017, the plaintiff had an environmental sample investigation conducted on the premises. The investigation found toxic levels of methamphetamine throughout the premises, specifically in the master bedroom, main floor hallway and bathroom, the master bathroom, and the garage.
22. Substantial portions of the premises were not habitable in July 2017 upon the move-out of the defendant as a result of the methamphetamines contamination.
23. Substantial portions of the premises are not habitable as of the date of this pleading.
24. The costs to bring the entire premises back to the condition it was in prior to the defendant's occupancy, including repairs and chemical abatement, are estimated to cost in excess of $1.5 million.
25. Upon vacating the premises, the defendant either took or damaged the plaintiff's furniture.
26. The value of the damaged or missing furniture is estimated to be in excess of $100,000.00.
27. Upon vacating the premises, the defendant either took or damaged the plaintiff's audio and video equipment.
28. The value of the damaged or missing audio and video equipment is estimated to be in excess of $50,000.00.
29. Upon vacating the premises, the defendant either took or damaged the plaintiff's tools.
30. The value of the damaged or missing tool is estimated to be in excess of $20,000.00.
31. Upon vacating the premises, the defendant either took or damaged the plaintiff's artwork.
32. The value of the damaged or missing artwork is estimated to be in excess of $10,000.00.
33. The defendant caused severe damage to the plaintiff's sports car while she resided at the premises.
34. The value of the damaged vehicle is estimated to be in excess of $50,000.00.
35. To date, the defendant has not paid for any damages caused to the premises.

FIRST CAUSE OF ACTION: BREACH OF CONTRACT

36. Defendant breached ¶4 of the lease agreement by failing to pay rent.

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37. Defendant is liable for breach of contract in the amount of unpaid rent from May 20, 2017, through June 29, 2017.

SECOND CAUSE OF ACTION: UNJUST ENRICHMENT

38. Defendant accepted a benefit by residing at the Premises for 4.5 years from December 2012 until June 2017 without paying rent.
39. Defendant knew of the benefit she was receiving.
40. Defendant derived a benefit and has been unjustly enriched at the detriment of the plaintiff for her possession of the premises after she was asked to vacate on May 7, 2014.
41. Defendant's acceptance of the benefit without paying is inequitable and unfair to the plaintiff.
42. Defendant is liable for the fair market rental value of the premises from the date she was first asked to vacate on May 7, 2014, until possession was restored to the plaintiff on June 29, 2017.
43. Based on the lease, rent is $12,500.00 per month. Plaintiff estimates using Zillow.com the fair market rental value is close to $16,000.00 per month.
44. Defendant has been unjustly enriched in an amount to be proven at trial but estimated to be in excess of $462,500.00.

THIRD CAUSE OF ACTION: VIOLATION OF RCW 64.12, WASTE AND TRESPASS

45. Defendant caused substantial injury to the premises through unreasonable and improper use.
46. Defendant, as a tenant at will of real property, committed waste thereon.
47. Defendant injured the plaintiff in an amount to be determined at trial but believed to be in excess of $1.5 million.
48. Pursuant to RCW 64.12.020, Plaintiff is entitled to treble his actual damages for waste, including reasonable attorney's fees.

FOURTH CAUSE OF ACTION: VIOLATION OF RCW 4.24.630

49. Defendant intentionally and unreasonably caused waste and injury to the premises.

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50. Defendant injured the plaintiff in an amount to be proven at trial but believed to be in excess of $1.5 million.
51. Pursuant to RCW 4.24.630, Plaintiff is entitled to treble his actual damages for waste, including reasonable attorney's fees.

FIFTH CAUSE OF ACTION: CONVERSION

52. Defendant has willfully interfered with the defendant's furniture, audio and visual equipment, tools, artwork, and vehicle.
53. Defendant did not have lawful justification for interfering with the abovementioned chattels.
54. The plaintiff has been deprived of possession of the abovementioned chattels.
55. The plaintiff has been damaged in an amount to be proven at trial but believed to be in excess of $230,000.00.

WHEREFORE, the plaintiff prays for the following relief:

a. For judgment against the defendant in the amount of the plaintiff's actual damages for repairing and restoring the subject premises to its condition at the time the defendant took possession of the premises.
b. For judgment against the defendant in the amount of the plaintiff's actual damages for the commissive waste committed upon the premises.
c. For said judgement of waste damages to be trebled pursuant to RCW 64.12.020 and 4.24.630.
d. For judgment against the defendant in an amount of the plaintiff's actual damage for converted property.
e. For judgment against the defendant in the amount of fair market rental value for use of the premises from May 7, 2014, through June 29, 2017.
f. For judgment against the defendant in the amount of the plaintiff's attorneys' fees and costs pursuant to RCW 64.12.020 and RCW 4.24.630.
g. For prejudgment interest commencing from the time these amounts became due and owing.

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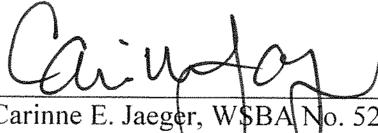
h. For all other relief the court deems equitable, just, and fair.

DATED this 4th day of December, 2017.

LOEFFLER LAW GROUP PLLC



Carinne E. Jaeger, WSBA No. 52564
Evan L. Loeffler, WSBA No. 24105
Attorneys for Plaintiff

VERIFICATION OF PLAINTIFF

I, Justin Bloch, am the plaintiff in this matter. I have reviewed the foregoing amended complaint for damages and verify that the allegations contained herein are true and accurate to the best of my personal knowledge and belief. I make this verification under penalty of perjury.

DATED this 4th day of December, 2017.

Justin Bloch

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FILED
2018 NOV 28
KING COUNTY
SUPERIOR COURT CLERK

CASE #: 17-2-15636-1 SEA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

JUSTIN BLOCH, Plaintiff/Counterdefendant, v. KATHLEEN BLOCH, a single woman, Defendant/Counterclaimant.	NO. 17-2-15636-1 SEA FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER having come on for trial before the Court, and the Court having received evidence and testimony commencing on November 5, 2018, hereby renders the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiff Ms. Bloch and Defendant Ms. Bloch were married in 1997 and divorced in 2000. They have one child together, Tatum Bloch, born in 1998. Although they divorced, Ms. Bloch resided with Mr. Bloch in his house for most of the period between 2012 to 2017. Tatum lived at the property from the early summer 2013 until February 2016 and was parented by both Mr. and Mrs. Bloch during this time period.
2. The property upon which they lived was located at 1555 Broadway East, Seattle, WA 98102 (the "Home") and was purchased by Mr. Bloch prior to his marriage with Ms.

JUDGE MAUREEN MCKEE
KING COUNTY SUPERIOR COURT
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ORIGINAL

1 Bloch. In the divorce, Mr. Bloch was awarded the Home.

2 3. The Home is a 7,000 to 8,000 square foot home in a single-family residential portion of
3 Capitol Hill, with a wide view looking west to Lake Union and Queen Anne. It was
4 substantially renovated and expanded on a design by architect Stuart Silk. Construction
5 was completed in approximately 2004.

6 4. The Home was featured in magazines such as Seattle Homes & Lifestyle Magazine and Mr.
7 Bloch would sometimes rent it out for photoshoots and other events. The evidence
8 provided by the plaintiff - photos of the home in a 2005 edition of Seattle Homes &
9 Lifestyle Magazine - showed a home that was beautifully designed and decorated with top-
10 of-the-line materials.

11 5. After living apart from Mr. Bloch for several years following the divorce, Ms. Bloch
12 moved into the Home in the fall of 2012. The purpose was to resume their romantic
13 relationship. Tatum remained in Idaho in order to finish her school year whereupon she
14 moved back to the Home after her school year was finished in June of 2013.

15 a. While it is far from clear whether Mr. and Ms. Bloch continued to be romantically
16 involved after Tatum moved in to the Home in September of 2013, they continued
17 to cohabitate in the Home in order to co-parent Tatum. Ms. Bloch lived
18 continuously in the Home until January 2016.

19 b. While Ms. Bloch testified otherwise, the persuasive evidence established that Mr.
20 and Ms. Bloch, while cohabiting in the Home, did not live and interact like a
21 married couple.

22 c. Multiple witnesses including Ms. Bloch's mother and Nate Pearson testified that
23 Mr. and Ms. Bloch did not act like a married couple during this time period.

24

d. During this time, Mr. Bloch intermittently asked Ms. Bloch to move out of the Home. The evidence was not clear whether Mr. Bloch consistently and clearly expressed this message to Ms. Bloch from the fall of 2012 to the end of 2015.

e. By the end of 2015 and the beginning of 2016, however, Mr. Bloch clearly and consistently conveyed his desire for Ms. Bloch to move out of the Home. Ms. Bloch moved to Idaho from January 4, 2016 until May 13, 2016.

6. At some point after 2005, the Home deteriorated from its original state.

a. In 2012, Mr. Bloch became addicted to methamphetamine. Per his own testimony, he smoked methamphetamine every day for several years in or near the Home until June of 2016.

b. As a result of Mr. Bloch's daily methamphetamine use in the Home for several years, the interior surfaces of the house of the Home and the furniture, furnishings, appliances and personal effects of the parties kept therein, were contaminated with methamphetamine residue. Defendant's expert Dr. Coreen Robbins credibly explained that methamphetamine contamination has a tenacious hold upon materials which are porous. Consequently, carpeting, drapes, furnishings, drywall, and appliances with insulation that are contaminated with methamphetamine typically have to be discarded due to the level of difficulty of decontamination. Ms. Robbins testified that if wood is contaminated with methamphetamine, the United States Environmental Protection Agency recommends discarding it due to its porous nature and consequent difficulty in decontaminating it from methamphetamine.

c. The plaintiff's expert, Ms. Heidi Hamilton, also credibly testified that because wood tends to be porous, it is hard to decontaminate. Ms. Hamilton explained that

1 the biggest issue with the Home insofar as decontamination from methamphetamine
2 was concerned is that there was a great deal of wood, such as the wooden cabinetry,
3 throughout the entire Home.

4 d. From January 4, 2016 to May 13, 2016, Mr. Bloch continued living in the Home
5 while Ms. Bloch resided in Idaho. During this period of time, there was reliable
6 testimony by Mr. Bloch's next door neighbor, Mr. Kim Stevens, that Ms. Michelle
7 Wheeler, a friend of Mr. Bloch's, appeared to be both residing in and dealing drugs
8 from the Home. There were many people coming to and going from the Home at
9 all times during the day and night. There was also evidence that a friend or
10 acquaintance of Mr. Bloch's, Steven Morris-Ridge, resided in the home for some
11 time during this period. It is possible that any one of these individuals, including
12 Ms. Wheeler or Mr. Morris-Ridge, caused damage to the Home.

13 e. Ms. Bloch moved back into the Home at some point around May 13, 2016 and
14 continued residing in the Home until June 29, 2017. During this period of time,
15 Kathleen attempted to repair and to make aesthetic improvements to the Home.
16 One of these attempts was to the stucco exterior of the Home. The plaintiff's
17 expert, Zach Roberts, roughly estimated that the replacement of the exterior stucco
18 including necessary demolition would be $67,000. Christine Bloch, the mother of
19 Mr. Bloch, testified that the entire exterior of the Home had been painted and the
20 cost was approximately $12,000. There was no credible evidence regarding the
21 cost to repaint the specific portion of the exterior stucco wall that Ms. Bloch painted
22 or if the damage Ms. Bloch caused to the stucco exterior necessitated the entire
23 stucco exterior to be painted. As a result, the Court can only speculate as to the cost
24

1 associated with Ms. Bloch's paint job upon one stucco wall of the exterior of the
2 Home.
3 f. The Court finds that Ms. Bloch damaged items within the Home but with the clear
4 intention of mitigating damage. The defendant's expert, Michael Showalter, had a
5 great deal of experience and testified very persuasively. He observed that the
6 Home had been "savagely treated." He observed disrepair throughout the house,
7 gouges in the floors, two spiral staircases that violated safety codes, rotted
8 windows, the severely weathered exterior of the Home, and other types of damages
9 resulting from various construction projects. Mr. Showalter characterized much of
10 what Ms. Bloch did as mitigation since her work most certainly was not up to
11 professional standards.
12 g. Mr. Showalter credibly testified that the damage Ms. Bloch created resulted in the
13 following approximation of costs: 1) $500 to cleaning; 2) $250 to haul material; 3)
14 $100 to mark physical protection of adjacent areas being painted; 4) $150 to fix
15 cable on the 2nd floor; 5) $1,500 to repair the doors; 6) $230 to replace door
16 hardware; 7) $398 to pay for overhead; 8) $438 for profit; 9) $57 to pay for
17 insurance; and 10) $492 to pay for sales tax. The total amount of damage attributed
18 to Ms. Bloch is $4,115.00.
19 h. Other than Mr. Showalter's testimony, the Court did not receive credible evidence
20 from the Plaintiff regarding damage that was allegedly done by Ms. Bloch nor did
21 the Court receive estimates for this alleged damage that was anything other than
22 speculative. Even if Ms. Bloch damaged items in the Home such as cabinetry in the
23 kitchen and bathrooms, these items were already heavily damaged due to the
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methamphetamine contamination resulting from Mr. Bloch's methamphetamine use within the Home.

i. In addition, there was nothing but speculative amounts provided by the Plaintiff regarding the costs to repair items within the Home that Ms. Bloch allegedly damaged. Zach Roberts provided an estimate for the amount needed "to put [Mr. Bloch's] house back in the condition it was originally." To put this figure together, Mr. Roberts' testified that he spent anywhere from two to five hours developing this assessment. He explained that he gives his specific estimates a reliability rating which provides a rating of "A" to "D", "D" being the roughest type of estimate which he also colloquially termed a "wild ass guess." For almost all of his estimates that he included in his report, Mr. Roberts provided a "D" rating. Even if the Court were to find that Ms. Bloch was responsible for the damage alleged by the Plaintiff per Mr. Roberts' report, the Court was left with costs that were, at best, speculative.

j. Mr. Bloch, himself, damaged the Home in a many different ways. While the evidence showed that Mr. Bloch was a talented developer, builder and designer, the projects he started in the Home during the time period when he was using methamphetamine daily were often left unfinished, shoddily done, and left the Home in a generally damaged state. The estimates provided by Mr. Roberts did not appear to account for all the ways in which Mr. Bloch damaged the Home himself.

7. The Court never received reliable evidence regarding the amounts of the items which belonged to Mr. Bloch and were supposedly taken by Ms. Bloch. While Mr. Bloch testified about how much he spent to purchase certain items, he failed to provide evidence

regarding the current value of the items taking into account the age, the normal wear and tear, and methamphetamine contamination. As a result, the Court is simply left to speculate as to the values of the items with little to no guidance provided by the evidence presented at trial. In addition, there were individuals including Michelle Wheeler and Mr. Morris-Ridge who had access to the Home after May 13, 2016 and who may have taken these at least some of the items.

8. There was, however, considerable evidence presented regarding Mr. Bloch's 1991 Lotus X180R. Ms. Bloch admitted that, while arguing with Mr. Bloch, she inadvertently threw pink fabric paint on to the car but removed it easily within a couple of hours. Additional damage was done to the car including damage to the headlight, one of the doors, tire, scratch to the paint and paint in the interior of the vehicle. The car was left outside of the Home for a period of time by Mr. Bloch until Ms. Bloch moved it into the garage at some point after May 19, 2016. In late May or early June 2016, Ms. Wheeler caused some damage to the car in an effort to retrieve her belongings which were stored inside the car. Mr. Bloch established that while some of the damage may have been caused by Ms. Bloch, he did not prove by a preponderance that it was.

9. On January 4, 2016, Mr. Bloch and Ms. Bloch signed a written agreement that laid out payments Mr. Bloch was to make to Ms. Bloch. In this written agreement, Mr. Bloch agreed to make nine (9) months of payments at $2,500 per month and three (3) months at $5,000; four years (48 months) of payments at $5,000 per month, plus payment of Ms. Bloch's medical bills up to $6,000, dental bills up to $10,000, and moving/transition costs up to $12,000. In exchange for Mr. Bloch's payments, Ms. Bloch would move out of the Home. The Court finds that Mr. Bloch signed and initialed the agreement as well as the

addendum.

a. Although Mr. Bloch signed the agreement, the Court does not find that he entered into the agreement voluntarily. The circumstances surrounding the agreement support this conclusion. First, Mr. Bloch, per his own testimony, was using methamphetamine every day when he signed this agreement. It is possible that his level of appreciation and cognition were impaired due to his drug use. Second, this agreement followed a period during which Mr. Bloch asked Ms. Bloch repeatedly to move out of his home. Indeed, in 2014, Mr. Bloch attempted to evict Ms. Bloch but abandoned his attempts out of fear that she would retaliate. It is likely that Mr. Bloch felt the *only* way to make Ms. Bloch move out of his home was to sign this agreement which benefitted only her. Third, Mr. Bloch signed this agreement which burdened him with financial responsibilities approximately two weeks after he was cut off from his trust and with no clear additional income.

b. The purported consideration by Ms. Bloch to Mr. Bloch was an agreement to move out of the Home. At the time of the agreement, Ms. Bloch had no right to be in the Home because it was owned fully by Mr. Bloch and there was no rental contract or agreement in place.

c. Ms. Bloch testified that the unwritten but understood benefit Mr. Bloch received under this agreement was her agreement not to sue him for civil assault or for allocation of property under a meretricious relationship. The Court does not find this portion of Ms. Bloch's testimony credible.

d. This written agreement was not a binding contract.

10. While it is clear that Ms. Bloch spent a considerable amount of money - $1,230.13 – to buy

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1 supplies in order to repair damages to the Home and to improve the appearance of the
2 Home, it is far from clear that Mr. Bloch was enriched by her repairs. Indeed, Mr. Bloch
3 characterized Ms. Bloch's attempts as "damage" and proceeded to dismantle or undo at
4 least a number of Ms. Bloch's attempts at remediation. In addition, Mr. Bloch repeatedly
5 asked Ms. Bloch to stop performing projects in the Home prior to May of 2016. The Court
6 can only infer that Mr. Bloch would not have wanted Ms. Bloch to perform projects to the
7 Home after May 2016.

8 11. Ms. Bloch and Tatum credibly testified that Mr. Bloch gifted Ms. Bloch a massage chair
9 that cost $4,700 but sold it without Ms. Bloch's consent. The evidence was that this type
10 of chair would currently sell for $2,000. This current estimate, however, does not take into
11 account the methamphetamine contamination which was inevitable per the testimony of
12 Heidi Hamilton and Coreen Robbins. While the credible evidence established that Mr.
13 Bloch used methamphetamine in the Home, not Ms. Bloch, it was Ms. Bloch who made the
14 decision to leave the chair in the Home while Mr. Bloch was using methamphetamine.
15 Therefore, the contamination certainly should not solely be blamed upon Mr. Bloch. The
16 defendant did not provide guidance to the Court regarding the current value of the chair in
17 its contaminated state and therefore, the Court is simply left to speculate.

18 12. Ms. Bloch continued to live in the Home from May of 2016 through June of 2017
19 continuously and without permission despite Mr. Bloch's clear desire that she move out of
20 his Home. During this time, Ms. Bloch did not pay Mr. Bloch rent. Mr. Bloch testified
21 that the rental value of the home was approximately $12,900 per month. While this
22 certainly may have been the case in the state the Home was in prior to 2012, the Home
23 during the 2016 – 2017 time period was in a state of absolute disrepair. The only other
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credible evidence establishing the going monthly rental rate of the Home was the agreement Mr. Bloch signed with Michelle Wheeler and Steve Morris-Ridge. He signed a rental agreement with these two individuals for $1,000 per month. This evidence provides guidance as to the monthly rental rate given the state the Home was in at the time.

CONCLUSIONS OF LAW

1. The parties were not in a committed intimate relationship from September 2012 through June 2017.
2. From September 2012 through January 2016, Ms. Bloch was akin to a tenant at will in the Home. The Plaintiff failed to establish that the parties agreed, or even discussed, a rental agreement incorporating payments by Ms. Bloch to Mr. Bloch in exchange for habitation. As such, Mr. Bloch did not prove his claim for rent during this time period under the theory of unjust enrichment.
3. During this time period, from September 2012 through January 2016, Mr. Bloch damaged items within the Home and the Home itself while engaging in many unfinished projects while using methamphetamine on a daily basis. There was extensive damage and disrepair that occurred and evolved over this time period. There was insufficient evidence that Ms. Bloch caused any damage to the Home during this time period. Therefore, Ms. Bloch cannot be held responsible for this damage and disrepair during this time period.
4. From May 13, 2016 through June 29, 2017, most of Ms. Bloch's attempts to repair the Home constituted mitigation and therefore, she cannot be held liable for the damage that occurred. The exception was for damage she caused per Mr. Showalter's testimony was for the amount of $4,115 for which she is liable to Mr. Bloch under the theory of intentional trespass. Therefore, pursuant to RCW 4.24.630, the Court imposes a judgment of treble the amount of damages, $12,345, against Ms. Bloch to Mr. Bloch for the damage

1 she caused to the Home.

2 5. While Ms. Bloch damaged one stucco exterior wall, she is not liable for payment since Mr.
3 Bloch provided the Court with little to no guidance regarding the amount necessary to
4 repair this particular wall.

5 6. Ms. Bloch is also not liable for damage done to Mr. Bloch's 1991 Lotus X180R. While the
6 car was indisputably damaged, the Plaintiff failed to prove by a preponderance that the
7 damage was caused by Ms. Bloch.

8 7. Mr. Bloch also failed to prove conversion of valuable property by Ms. Bloch. Therefore,
9 no judgment is entered in favor of Mr. Bloch regarding his conversion claim.

10 8. Because the Court finds that the agreement signed on January 4, 2016 between the parties
11 was coercive and not supported by consideration, the Court does not find that Ms. Bloch
12 has proven by a preponderance that the contract was a binding one. Therefore, no
13 judgment is entered in favor of Ms. Bloch arising from her breach of contract claim.

14 9. Ms. Bloch did not prove by a preponderance that Mr. Bloch was unjustly enriched through
15 her attempts to repair the Home which entailed purchase of $1,230.13 in supplies.
16 Therefore, no judgment is entered in favor of Ms. Bloch for her unjust enrichment claim.

17 10. While Ms. Bloch proved by a preponderance of the evidence that Mr. Bloch converted the
18 massage chair that originally cost $4,700, the defendant failed to provide an approximate
19 value of the chair given its state of methamphetamine contamination and normal wear and
20 tear. The Court was provided no guidance as to the actual value – even the approximate
21 value – and therefore, enters no judgment in favor of Ms. Bloch for her claim of
22 conversion.

23 11. Ms. Bloch was unjustly enriched when she resided in the Home from May 13, 2016

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1 through June 29, 2017 despite knowing she did not have the permission of Mr. Bloch. The
2 going monthly rate of the Home as determined by Mr. Bloch, himself, was $1,000 per
3 month per tenant. Therefore, the Court imposes a judgment of $13,548 to Mr. Bloch for
4 his claim of unjust enrichment involving this particular time period.

5 12. The total judgment against Ms. Bloch to Mr. Bloch is $25,893.

6 13. The total judgment against Mr. Bloch to Ms. Bloch is $0.

7 14. Because Mr. Bloch is the prevailing party, the Court awards attorney's fees to the extent
8 there is a statutory, contractual and equitable basis for such an award.

9

10 Dated this 28th day of November, 2018.

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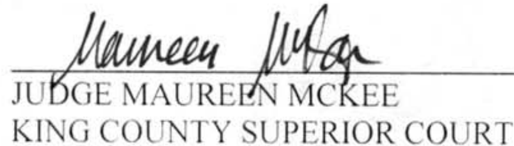
12 

13 JUDGE MAUREEN MCKEE
KING COUNTY SUPERIOR COURT

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KING COUNTY
SUPERIOR COURT CLERK

CASE #: 17-2-15636-1 SEA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

JUSTIN BLOCH, a single man, Plaintiff/Counter defendant, v. KATHLEEN BLOCH, a single woman, Defendant/Counterclaimant.	NO. 17-2-15636-1 SEA ORDER GRANTING IN PART DEFENDANT/COUNTER-CLAIMANT'S MOTION FOR RECONSIDERATION

THIS MATTER, having come on regularly for consideration before the undersigned judge under Defendant/Counterclaimant's Motion for Reconsideration, and the Court, having reviewed the Motion, the Plaintiff's Response, the Defendant's Reply, and the records and files herein and the evidence admitted at trial, now, therefore, it is hereby ORDERED that the Motion is granted in part, and the Court's Findings of Fact and Conclusions of Law dated November 28, 2018, are hereby amended as follows:

1. Finding 5(c) is amended to begin the first sentence, "Multiple witnesses including Mr. Bloch's mother …"
2. A Finding is added as follows: While Mr. Showalter testified about the damage that Ms.

ORIGINAL

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1 Bloch created that amounted to $4,115.00, Mr. Bloch did not prove that the damage was
2 intentional or unreasonable.
3 3. Conclusion 3 is amended to include: Mr. Bloch has failed to prove waste under RCW
4 64.12.020.
5 4. Conclusion 4 is deleted and replaced with: From May 13, 2016 through June 29, 2017,
6 most of Ms. Bloch's attempts to repair the Home constituted mitigation. Ms. Bloch's
7 efforts to repair and maintain the home, even though they caused some minor damage
8 described in Mr. Showalter's testimony, were not "wrongful" within the meaning of
9 RCW 4.24.630. The damage was not intentional or unreasonable. Consequently, Mr.
10 Bloch has no right to relief under RCW 4.24.630.
11 5. Conclusion 12 is deleted and replaced with: The total judgment against Ms. Bloch to Mr.
12 Bloch is $13,548.
13 6. Conclusion 14 is deleted and replaced with: As both parties have prevailed on major
14 claims, neither party is the substantially prevailing party pursuant to RCW 4.84.010.
15 Consequently, the Court is not awarding attorney's fees for either party.
16
17 Dated this 21st day of December, 2018.
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20 JUDGE MAUREEN MCKEE
KING COUNTY SUPERIOR COURT
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Court of Appeals
Division I
State of Washington
7/13/2020 2:47 PM

WASHINGTON STATE COURT OF APPEALS, DIVISION I

JUSTIN BLOCH, Respondent, v. KATHLEEN BLOCH, Appellant.	No. 79512-1-I ANSWER TO JUSTIN BLOCH'S MOTION FOR RECONSIDERATION

I. INTRODUCTION

This appeal was entirely about whether the trial court should have awarded fees to Appellant Kate Bloch for defeating the waste claim brought by Justin Bloch under RCW 64.12.020. This court correctly recognized that the trial court erred in failing to award fees to her for prevailing on that claim under its mandatory provisions.

The touchstone for reconsideration is that the appellate decision "overlooked or misapprehended" points of law or fact. *See* RAP 12.4(c). But the Reconsideration Motion ("Motion") restates arguments already made, mischaracterizes and ignores the record below, and misrepresents the law. It raises no relevant issue the Court has not already fully considered, and thus points to nothing the Court "overlooked or misapprehended," the basis for reconsideration. Justin Bloch's Motion should be denied and Kate allowed her fees for this answer by supplemental declaration.

II. ANSWERING ARGUMENT.

A. Whether Kate Lost A Non-Existent And Irrelevant CIR Claim Does Not Affect This Appeal

The Motion first argues that Kate "lost her committed intimate relationship (CIR) claim." Motion at 1, 5-7. This is irrelevant and not a basis for reconsideration for at least four reasons. ***First,*** there was no claim at trial based on CIR. None of the claims or counterclaims requested relief in the nature of a CIR division of property. Kate's Trial Brief took great pains to make clear that the nature of the relationship between Kate and Justin was relevant only: (1) in determining the legal status of her occupancy; and (2) as context to explain the contact between the parties.[1] The CIR argument, thus, is a red herring.

> [1] …Ms. Bloch and Mr. Bloch were in a domestic, cohabiting relationship. ***Regardless of whether or not it met the full standard of "committed intimate relationship,"*** they lived together because of the relationship. She was not a tenant in any formal sense; she did not pay rent, nor did he demand any.

CP 58 (emphasis added).

> **Defendant's counterclaim here does not request a division of property based on CIR.** Instead, Defendant seeks enforcement of a separation contract agreed to by the parties, which was executed in contemplation of the end of their relationship and Ms. Bloch's moving out of the house.
>
> ***The relevance of CIR here is that it establishes important context for this case***, which began as an unlawful detainer action and was converted to a civil action for damage to property. Despite the use of unlawful detainer procedure, this is not an ordinary landlord-tenant case.

CP 59 (emphasis added).

Second, the trial court's finding that no CIR existed does not matter because there is no basis for award of fees in a CIR and this appeal is about the right to an award of fees under RCW 64.12.020, the waste statute, not CIR.

Third, the non-existent CIR claim, even if it had existed, is irrelevant to the waste claim that provides the basis for fees to Kate. Although the Motion tries to tie the CIR allegation to the waste causes of action in order to reargue Justin's position that his claims under RCW 64.12.020 (waste by tenant) and RCW 4.24.630 (waste by trespasser) were alleged in the alternative,[2] even if true it makes no difference for purposes of determining whether Kate was entitled to fees under RCW 64.12.020.[3] The point is that Kate was in jeopardy of an adverse judgment under each statute. Kate ultimately prevailed on both, with no award to Justin under either statute. CP

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[2] The Motion merely paraphrases the argument Justin made to the trial court on reconsideration, which was repeated in the response brief, citing the same unpublished case. Compare CP 102-103 and Respondent's Brief at p. 16. Kate provided dispositive response briefing. *See* CP 110-111 and Kate's Reply Brief at pp. 2-5. Neither the trial court nor this Court has overlooked or misapprehended this argument. It was unpersuasive both to the trial court and to this court. It still is unpersuasive.

[3] In fact, the two waste statutes were not alleged in the alternative. The trial court clearly differentiated between them when it ruled that Kate was a tenant from September 2012 to January 2016, and a trespasser from May 2016 to June 2017. *See* CP 80 at FOF 12, CP 81 at COL 2 and 3.

115, COL 3 and 4 (reconsideration). The Decision did not overlook or misapprehend this irrelevant argument, but correctly ruled that Kate is entitled to an award of fees under RCW 64.12.020.

Fourth, Justin did not cross-appeal this issue, and did not seek affirmative relief in this Court on the basis of allegedly prevailing on the non-existent CIR claim. He thus did not preserve the right to any relief in this proceeding with a cross-appeal.

B. Justin Did Not Prevail Under RCW 4.24.630 Because The Trial Court Ultimately Ruled On Reconsideration That "Mr. Bloch has no right to relief under RCW 4.24.630," Which Justin Did Not Appeal.

The Motion's second main argument is that Justin technically prevailed under RCW 4.24.630, despite no award of damages, because the trial court concluded that Kate "damaged one stucco exterior wall" even though ultimately "she is not liable for payment since Mr. Bloch provided the court with little to no guidance regarding the amount necessary to repair this particular wall." Motion at 7-9, quoting CP 82, COL 5. But that was the trial court's initial ruling, before reconsideration. The Motion neglects to note that Conclusion of Law 5 was materially changed on reconsideration to expressly rule Justin had no relief under the statute:

> From May 13, 2016 through June 29, 2017, most of Ms. Bloch's attempts to repair the Home constituted mitigation. **Ms. Bloch's efforts to repair and maintain the home, even though they caused some minor damage** described in Mr. Showalter's testimony, **are not "wrongful" within the meaning of RCW 4.24.630. The damage was not intentional or unreasonable**. **Consequently, Mr. Bloch has no right to relief under RCW 4.24.630**.

CP 115, COL 5 on reconsideration (emphases added).

Justin had no right to relief under RCW 4.24.630 because the trial court ultimately determined the minor damage was not "wrongful" under the statute. And as with Justin's CIR argument, he did not cross-appeal this ruling by the trial court. He cannot complain of its application now.

C. Justin's Argument The Case Did Not Involve "Much In Damages" Is Both Disingenuous And Irrelevant.

Justin next argues that this case did "not involve[e] much in damages," Motion at 10, in a vain effort to argue Kate unnecessarily increased her fees at trial. Motion at 9-11. Besides the fact this is actually an argument for the trial court on remand, it also is a highly unusual assertion given that Justin's demand at trial was for $5,392,104.96, of which $4,674,564.00 was based on theories of waste. Perhaps he feels these amounts are "not much" given his inordinate wealth, exemplified by his trust fund income in excess of

$30,000 per month. *See* Reply Dec. of Eric C. Nelsen in Support of Fees, filed herein (6/1/20), ¶ 4 (relating Justin's mother's trial testimony to that effect). Whatever it is to Justin, a $4.6 Million judgment would have been ruinous to Kate, and most other persons.

Nevertheless, the Motion suggests it was unreasonable and unnecessary for Kate to hire contractor and environmental experts to defend against his claims that she contaminated his $4 million mansion by manufacturing methamphetamines, and further caused extensive physical damage to both the interior and exterior of the home. The Motion also uniquely argues that Justin's own failure to properly prepare for trial, or to substantiate his damages, or to retain competent experts also means that Kate should not have had to spend so much defending herself. This argument raises the question: Is the Motion tacitly admitting Justin put on a sham case just to harass Kate and that Justin thinks she should have realized this and foregone a full defense, even though faced with the assertion of ruinous damages of over $4.6 Million in waste claims and an opposing party readily capable of funding expensive litigation?

These arguments go (if anywhere), not to Justin's ***liability*** under RCW 64.12.020 for Kate's fees, but to the ***amount*** of fees the

trial court will determine on remand that he must pay. Thus, these arguments are irrelevant to the question here of Kate's entitlement to fees, *i.e.,* whether a fee award to Kate, of whatever amount, is required under RCW 64.12.020.

D. Justin's Abuse Of Discretion Argument Shows His Fundamental Misunderstanding Of Kate's Appeal, This Court's Decision, The Applicable Law, And The Record, Continuing to Ignore The Trial Court's Reconsideration Ruling Reversing The Prior Ruling For Justin On RCW 4.24.630.

Finally, Justin argues that this Court should have used an abuse of discretion standard in reviewing the trial court's decision not to award costs under RCW 4.84.010 because neither party was the substantially prevailing party. Motion at 11-14. This argument fundamentally misunderstands Kate's appeal, misrepresents the applicable law, and ignores the record, particularly the trial court's reconsideration ruling that took away Justin's initial victory under the trespasser waste statute, RCW 4.24.630.

The point of Kate's appeal, which this Court understood, is that the decision to award fees for prevailing on the fee-bearing statutory waste claim is not made under RCW 4.84.010, which addresses only ***costs*** on an assessment of the prevailing party for the

case as a whole. Rather, Kate argued and the Court agreed, that under the mandatory provisions of the fee-bearing waste statute, RCW 64.12.020, she was entitled to the fees and costs she incurred in prevailing, and that her award on remand is for the fees and costs incurred in defense of that claim. Even if there is an abuse of discretion standard of review for the award of costs for the case as a whole under RCW 4.84.010, that is irrelevant to the separate issue of whether Kate is entitled to her fees and costs incurred in successfully defending the fee-bearing waste claim, since the entitlement to fees under the statute is a legal question reviewed *de novo*. *Durland v. San Juan County*, 182 Wn.2d 55, 76, 340 P.3d 91 (2014).[4]

The distinction is between a substantially prevailing party overall, when allowing ***costs*** under RCW 4.84.010, versus the right to claim-specific ***fee and cost awards*** based on specific fee-bearing statutes, here RCW 64.12.020 and RCW 4.24.630. The trial court determined there was no substantially prevailing party overall for

[4] The determination of prevailing party is a mixed question of law and fact, reviewed on an error of law standard. *Cornish College of the Arts v. 1000 Virginia Ltd. Partnership*, 158 Wn.App. 203, 231, 242 P.3d 1 (2010).

purposes of RCW 4.84.10,[5] but made no express ruling on fees or costs under RCW 64.12.020 or RCW 4.24.630. CP 115 at COL 6. That was error since RCW 64.12.020 ***requires*** an award of attorney fees and costs to the prevailing party as to the waste claims. The statute provides (emphasis added): "The judgment, in any event, **shall include as part of the costs of the prevailing party, a reasonable attorney's fee to be fixed by the court**."[6] Per the statute, Kate is entitled to the fees and costs she incurred in successfully defending against this waste claim, as the Decision holds. Nothing was overlooked or misapprehended.

The Motion at 11-12 cites inapposite case law addressing who substantially prevails overall when there is only a single source of authority for a fee award—a contract provision—and the claims of

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[5] Overall, Justin brought five causes of action and received an award of one-quarter of one percent of his demand on a non-fee-bearing claim; Kate brought three counterclaims and received nothing, but successfully defended against over $5 Million in claimed damages sought by Justin. Under RCW 4.84.010, an award of overall ***costs*** was not necessarily appropriate to either party when viewing the case as a whole.

[6] RCW 4.24.630 also authorizes an award of attorney fees and costs, but only to a prevailing plaintiff. When there are multiple potential bases for an award of fees, the case law provides for a claim-by-claim determination of the prevailing party, and if different parties prevail on different claims allowing awards, they offset each other. *See, e.g., Marassi v. Lau*, 71 Wn.App. 912, 859 P.2d 605 (1993), *overruled on other grounds*, *Wachovia SBA Lending v. Kraft*, 165 Wn.2d 481, 200 P.3d 683 (2009). Since Justin did not prevail on his claim under this statute, he was not entitled to any of his fees on that claim that, if granted, could have been offset against Kate's.

breach are not distinct and severable.[7] While that well may be the appropriate analysis for an award of ***costs*** under RCW 4.84.010 (or other statutes), because that statute addresses the award of costs in a case as a whole, it does not exclude fees when, as here, fees also may be awarded for success on each specific statutory claim.

When there are multiple "distinct and severable" claims which each allow a fee award, and each party prevails on some of the fee-bearing claims, court use the proportionality approach by awarding fees on each distinct and severable claim and then offsetting them. *See Marassi*, 71 Wn.App. at 917 (addressing multiple distinct and severable breaches of the same contract, allowing award of attorney fees); *Cornish College,supra*, 158 Wn.App. at 231-34 (applying *Marassi*). This properly recognizes that a defendant who successfully defeats a particular claim is a prevailing party, just as much as is a plaintiff who receives an award. *Marassi,* 71 Wn.App. at 916-917; *Cornish College*, 158 Wn.App. at 231, ¶ 59 ("a successful defendant can also recover as a prevailing

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[7] A*merican Nursery Prods. v. Indian Wells Orchards,* 115 Wn.2d 217, 797 P.2d 477 (1990); *Phillips Bldg. Co., Inc. v. An*, 81 Wn.App. 696, 915 P.2d 1146 (1996); *Puget Sound Service Corp. v. Bush*, 45 Wn.App. 312, 320-21, 724 P.2d 1127 (1986); *Marine Enter., Inc. v. Security Pacific Trading Corp*., 50 Wn.App. 768, 750 P.2d 1290 (1998).

party…for successfully defending against the plaintiff's claims," citing *Marassi*).[8]

The Motion is mistaken about the standard of review of a prevailing party determination, framing its arguments in terms of the prevailing under the cost statute (*see* Motion at 11 quoting the Decision at p. 5), which is not the issue as discussed *supra* – prevailing under the waste statute is. These arguments show that Justin is still fighting to have the fee award determined under the cost statute on the basis of overall success in the litigation, not based on Kate's claim-specific success under the waste statute. The Motion cites numerous inapplicable cases which, when examined, fail to demonstrate that there is any error under ***any*** standard for the award of fees to Kate under the waste statute's mandatory provision. Rather, examination of the cases shows there is no basis in law on

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[8] The proportionality analysis would have applied here had the trial court's initial ruling that Justin prevailed under RCW 4.24.630 not been reversed on reconsideration. Kate requested a proportionality analysis in her reconsideration papers as an alternative outcome if her motion on that claim was not granted. But that ruling ***was*** reversed, meaning there was ***no*** fee-bearing claim on which Justin prevailed to provide a potential offset against Kate's fees on the RCW 64.12.020 claim. The Motion pretends this reconsideration ruling does not exist.

this record for Justin's arguments which, unfortunately, were made by misrepresentation of the law.[9]

For instance, the Motion at pp. 11 and 12 cites *Phillips Bldg. Co. v. An,* 81 Wn.App. 696, 702-03, 915 P.2d 1146 (1996), for its prevailing party argument. But the Motion neglects to inform this Court that: 1) *Phillips* was an appeal from a contract arbitration; 2) the statute in *Phillips* was ***not*** the waste statute at issue here, but RCW 4.84.330 which converts any contract's "one-way" prevailing party fee provision to go "both ways" as a matter of policy, including allowing fees to a successful defendant; 3) that *Phillips* did not involve a statutory entitlement to fees based on an express statutory provision; or 4) that *Phillips* engaged in an affirmative

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[9] Unfortunately, the misrepresentation can only be deemed intentional because the Motion changed the text of *State v. A.N.W. Seed Corp.*, 116 Wn.2d 39, 50-51, 802 P.2d 1359 (1991), by inserting a misleading preliminary phrase, as follows:

> ***statutes vest*** "discretion in the trial court to determine who is the prevailing party as part of its statutory discretion whether to award attorney fees to that prevailing party."

Motion at 12 (misleading phrase emphasized). The complete passage from the case is:

> ***The statute***, RCW 19.86.080, vests discretion in the trial court to determine whether to award attorney fees to the prevailing party. Apparently, the Court of Appeals reversed, as a matter of law, the trial court's exercise of discretion, but it did not address the standard which it employed as a basis for reversal. We hold that the statute vests discretion in the trial court to determine who is the prevailing party as part of its statutory discretion whether to award attorney fees to that prevailing party.

State v. A.N.W. Seed Corp., 116 Wn.2d at 50-51 (emphases added). Further, as noted in the text of this Answer, the CPA fee award provision is expressly discretionary, while the waste provision is expressly mandatory. This kind of "error" is not how appellate practice normally operates. Such efforts to misdirect the Court should be admonished.

discussion of *Marassi*'s proportionality approach when, ***un***like here, both parties are awarded relief on fee-bearing claims. *Phillips* is in no way contrary to the Decision herein, but supports it.

Similarly, as noted in footnote 8, the Motion at 12 changed the Court's language in *State v. A.N.W. Seed Corp*. to mis-cite it for the general proposition that the statute at issue here, the ***waste*** statute, is a discretionary statute as to whether to award fees, selectively quoting the Supreme Court, which held: "We hold that the statute vests discretion in the trial court to determine who is the prevailing party as part of its statutory discretion whether to award attorney fees to that prevailing party." *A.N.W. Seed,* 116 Wn.2d at 50-51. The Motion materially changed the Court's quote, as noted in footnote 8. It also failed to tell this Court that *A.N.W. Seed* is a Consumer Protection Act case with an entirely different, discretionary statute, rather than the mandatory waste statute at issue here. The CPA provision states as follows: "the prevailing party ***may, in the discretion of the court***, recover the costs of said action including a reasonable attorney's fee." RCW 19.86.080 (emphasis added). In contrast, the waste statute here ***requires*** an award of fees to the prevailing party: "The judgment… ***shall include*** as part of the

costs of the prevailing party, a reasonable attorney's fee to be fixed by the court." RCW 64.12.020 (emphasis added).

As the waste statute uses the mandatory "shall" for fee awards to a party who prevails under that statute, and as the record is clear that Kate prevailed on that statute and Justin did not, the award to Kate for those fees and costs is mandatory per the statute.

None of the cases raised by the Motion as to abuse of discretion apply, much less give the Court any reason to reconsider its decision, which was correct as filed.

III. CONCLUSION

Justin's motion for reconsideration should be denied. Appellant Kate Bloch requests permission to supplement to her fee application to cover the time spent on this answer.

Dated this 13th day of July, 2020.

CARNEY BADLEY SPELLMAN, P.S.

By */s/ Gregory M. Miller*
Gregory M. Miller

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

Attorneys for Plaintiff Justin Bloch T. Kim Sandher, WSBA #42630 Mckean J. Evans Pivotal Law Group 1200 5th Avenue Seattle WA 98101 Email: ksandher@pivotallawgroup.com mevans@pivotallawgroup.com	☐ U.S. Mail, postage prepaid ☐ Messenger ☐ Fax ☐ E-mail ☒ Other – Court's e-service system
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DATED this this 13th day of July, 2020.

/s/ Elizabeth C. Fuhrmann
Elizabeth C. Fuhrmann, PLS,
Legal Assistant/Paralegal to
Gregory M. Miller

CARNEY BADLEY SPELLMAN

July 13, 2020 - 2:47 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	79512-1
Appellate Court Case Title:	Justin Bloch, Respondent v. Kathleen Bloch, Appellant

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