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COURT OF APPEALS NO. 66762-9-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

LAWLESS CONSTRUCTION CORPORATION,
a Washington corporation,

Appellant,

v.

TUYEN DINH NGUYEN and MAI TUYET VAN,

Respondents.

BRIEF OF RESPONDENTS

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Table of Contents

Table of Authorities.....ii

Introduction.....1

Restatement of the Case..... 1

Argument.....16

A. The Trial Judge Properly Dismissed the Plaintiff’s
Claims, Pursuant To CR 41(b)(3)..... 16

1. The Nguyens Are Not Estopped To Deny
The Existence Of A Contract.....17

2. Lawless Did Not Raise Material
Questions About The Validity Of Its Lien.....22

B. Lawless’ Lien Claim Was Frivolous.....27

C. The Fee Award Is Not “Grossly Excessive” And
Contains The Required Findings.....33

D. The Nguyens Are Entitled To Recover Their
Attorney Fees And Costs Incurred On Appeal.....43

1. The Nguyens Are Entitled To Recover
Their Reasonable Attorney Fees And
Costs Under RCW 60.04.181(3)..... 44

2. The Nguyens Are Entitled To Recover
Their Reasonable Attorney Fees And
Costs Under RCW 4.84.330.....45

3. The Nguyens Are Entitled To Recover
Their Reasonable Attorney Fees Under
RCW 4.84.250 And RCW 4.84.270.....47

<i>Conclusion</i>	49
Certificate of ervice.....	50

Table of Authorities

Cases

State Cases

<i>Absher Constr. Co. v. Kent Sch. Dist. No. 415</i> , 79 Wn. App. 841, 917 P.2d 1086 (1995).....	34, 42
<i>Animal Welfare Society v. U.W.</i> , 54 Wn. App. 180, 773 P.2d 114 (1989).....	34
<i>Banuelos v. TSA Washington, Inc.</i> , 134 Wn. App. 607, 141 P.3d 652 (2006).....	42
<i>Blue Diamond Group, Inc. v. KB Seattle 1, Inc. et al</i> , Division 1, Docket Number: 65616-3 (7/25/11).....	26, 45
<i>Boeing Co. v. Sierracin Corp.</i> , 108 Wash.2d 38, 738 P.2d 665 (1987).....	33
<i>Chuong Van Pham v. City of Seattle, Seattle City Light</i> , 159 Wash.2d 527, 151 P.3d 976 (2007).....	33, 39, 43
<i>Colorado Structures, Inc. v. Blue Mountain Plaza, LLC</i> , 159 Wn.App. 654, 246 P.3d 835(2011).....	23, 26, 29
<i>Commonwealth Real Estate Services v. Padilla</i> , 149 Wn.App. 757, 205 P.3d 937(2009).....	7

<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wash.2d 801, 828 P.2d 549 (1992).....	22, 36, 40
<i>DBM Consulting Engineers, Inc. v. U.S. Fidelity and Guar. Co.</i> , 142 Wn. App. 35, 170 P.3d 592 (2007), <i>review denied</i> , 164 Wash.2d 1005 (2007).....	13, 24, 26, 27
<i>Elliott Bay Seafoods, Inc. v. Port of Seattle</i> , 124 Wn.App. 5, 98 P.3d 491 (2004).....	18
<i>Energy Northwest v. Hartje</i> , 148 Wn.App. 454, 199 P.3d 1043 (2009).....	15
<i>First Small Business Inv. Co. of California v. Intercapital Corp.</i> , 108 Wash.2d 324, 738 P.2d 263 (1987).....	37
<i>Herzog Aluminum, Inc. v. General American Window Corp.</i> , 39 Wn. App. 188, 692 P.2d 867.....	15, 46
<i>In re Dependency of Schermer</i> , 161 Wash.2d 927, 169 P.3d 452 (2007).....	7, 17
<i>In re Estate of Lint</i> , 135 Wash.2d 518, 957 P.2d 755 (1998).....	12, 19, 31
<i>In re Estate of Palmer</i> , 145 Wn.App. 249, 187 P.3d 758 (2008).....	13, 19, 31
<i>In re Estate of Pflughar</i> , 35 Wn.App. 844, 670 P.2d 677 (1983).....	13, 19
<i>In re Estate of Tosh</i> , 83 Wn.App. 158, 165, 920 P.2d 1230 (1996).....	49
<i>Intermountain Elec., Inc. v. G-A-T Bros. Const., Inc.</i> , 115 Wn.App. 384, 62 P.3d 548(2003).....	28

<i>Kaintz v. PLG, Inc.</i> , 147 Wn.App. 782, 197 P.3d 710 (2008).....	46
<i>Kim v. Dean</i> , 133 Wn.App. 338, 135 P.3d 978 (2006).....	18
<i>King Aircraft Sales, Inc. v. Lane</i> , 68 Wn.App. 706, 846 P.2d 550 (1993).....	15
<i>Kingsston Lumber Supply Co. v. High Tech Dev. Co.</i> , 52 Wn. App. 864, 765 P.2d 27 (1988).....	48
<i>Lay v. Hass</i> , 112 Wn. App. 818, 51 P.3d 130 (2002).....	42
<i>Lewis v. City of Mercer Island</i> , 63 Wn.App. 29, 817 P.2d 408, review denied, 117 Wash.2d 1024, 820 P.2d 510 (1991).....	17
<i>Lumberman's of Washington, Inc. v. Barnhardt</i> , 89 Wn. App. 283, 949 P.2d 382(1997).....	14, 28
<i>LRS Elec. Controls, Inc. v. Hamre Constr., Inc.</i> , 153 Wash.2d 731, 107 P.3d 721 (2005).....	48
<i>Mahler v. Szucs</i> , 135 Wash.2d 398, 433, 957 P.2d 632 (1998).....	41
<i>Martinez v. City of Tacoma</i> , 81 Wn.App. 228, 914 P.2d 86 (1996).....	40
<i>McAndrews Group, Ltd., Inc. v. Ehmke</i> , 121 Wn.App. 759, 90 P.3d 1123 (2004).....	23
<i>McCombs Construction, Inc. v. Barnes</i> , 32 Wn.App. 70, 645 P.2d 1131 (1982).....	29

<i>Meissner v. Simpson Timber Co.</i> , 69 Wash.2d 949, 421 P.2d 674 (1966).....	18
<i>Nelson Constr. Co. v. Port of Bremerton</i> , 20 Wn.App. 321, 582 P.2d 511, <i>review denied</i> , 91 Wash.2d 1002 (1978).....	17
<i>N. Fiorito Co. v. State</i> , 69 Wash.2d 616, 419 P.2d 586 (1966).....	16
<i>Northside Auto Service, Inc. v. Consumers United Ins. Co.</i> 25 Wn.App. 486, 607 P.2d 890 (1980).....	42
<i>Pacific Cascade Corp. v. Nimmer</i> , 25 Wash.App. 552, 608 P.2d 266 (1980).....	18
<i>Pacific Industries, Inc. v. Singh</i> , 120 Wash.App. 1, 86 P.3d 778 (2003)	24, 26, 29
<i>Public Utility Dist. No. 1 of Klickitat County v. International Ins.</i> , 124 Wash.2d 789, 881 P.2d 1020 (1994).....	37
<i>Schumacher Painting Co. v. First Union Management, Inc.</i> , 69 Wn.App. 693, 850 P.2d 1361(1993).....	41
<i>Starczewski v. Unigard Ins. Group</i> , 61 Wn.App. 267, 810 P.2d 58 (1991).....	12, 19
<i>State ex rel. Carroll v. Junker</i> , 79 Wash.2d 12, 482 P.2d 775 (1971).....	33
<i>State v. Moore</i> , 73 Wn.App. 805, 871 P.2d 1086 (1994).....	15
<i>Steele v. Lundgren</i> , 96 Wn.App. 773, 982 P.2d 619 (1999).....	41
<i>Stieneke v. Russi</i> , 145 Wn.App. 544, 190 P.3d 60 (2008).....	7

<i>Thomas v. French</i> , 99 Wash.2d 95, 659 P.2d 1097(1983).....	12
<i>TPST Soil Recyclers of Wash., Inc. v. W.F. Anderson Constr., Inc.</i> , 91 Wn.App. 297, 957 P.2d 265, 967 P.2d 1266 (1998).....	23
<i>Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.</i> , 122 Wash.2d 299, 858 P.2d 1054 (1993).....	33
<i>Willis v. Simpson Inv. Co.</i> , 79 Wn.App. 405, 902 P.2d 1263 (1995)	6
<i>Whittier v. Puget Sound Loan, Trust & Banking Co</i> , 4 Wash. 666, 30 P. 1094(1892).....	29
<i>Winans v. W.A.S., Inc</i> , 52 Wn.App. 89.758 P.2d 503 (1988).....	41
<i>W.R.P. Lake Union Ltd. P'ship v. Exterior Services, Inc.</i> , 85 Wn. App. 744, 934 P.2d 722 (1997).....	27, 32

Other Federal Cases

<i>Hensley v. Eckerhart</i> , 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983).....	40, 41, 43
--	------------

Statutes.

RCW 4.84.....	42
RCW 4.84.250.....	15, 47, 48, 49
RCW 4.84.270.....	48, 49
RCW 4.84.280.....	48
RCW 4.84.330.....	15, 45, 46

RCW 60.04.....	14
RCW 60.04.011(13).....	14, 22, 23, 39
RCW 60.04.021.....	13, 26, 27, 28
RCW 60.04.081.....	5, 31, 40
RCW 60.04.091.....	14
RCW 60.04.091(1)(b).....	14, 26
RCW 60.04.181(3).....	15, 44, 45

Court Rules

RAP 10.3(a)(6).....	22, 36, 40
RAP 10.4(c).....	12, 19, 20, 30
CR 41(b)(3).....	6, 16
CR 50.....	6
RAP 18.1(b).....	43

Other Authority

4 KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE CR 41, at 55 (5 th ed.2006).....	16
RPC 1.5.....	12
RPC 1.7.....	12
RPC 3.7.....	35, 36

INTRODUCTION

After Plaintiff/Appellant Lawless Construction Company (“Lawless”) put on its case in chief, Defendants/Respondents Tuyen Dinh Nguyen and Mai Tuyet Van (“Nguyen”) moved to dismiss Lawless Construction Corporation’s (“Lawless”) case pursuant to Civil Rule 41(b)(3). The trial court concluded that Lawless had failed to present a *prima facie* case and dismissed its claims. Supported by several independent bases, the trial court awarded the Nguyens their reasonable attorney’s fees and costs.

This Court should affirm the trial court in all respects, and award the Nguyens their additional attorney’s fees and costs incurred in this appeal.

RESTATEMENT OF THE CASE

During a legal malpractice trial against their former attorneys who had represented them in a construction defect case, the defendant attorneys’ expert, Mark Lawless, the Vice-President of Lawless Construction Corporation, testified that he could repair the marble floor in the Nguyen’s home for \$22,500, and their front door for \$3,700, plus Washington State Sales tax.

The Nguyens’ attorney tried to get Mr. Lawless sign a written

agreement to do this work, including a provision that Lawless would start work within 30 days of signing that agreement; and a provision that in the event that the Nguyens were compelled to sue to enforce the agreement, Lawless would pay their attorney fees and costs.

When the Nguyens' attorney asked Mr. Lawless whether he would sign the agreement he had drafted, Mr. Lawless responded by saying, "Under my contract, yes. Not that one."

The Court then stated: "Why don't you sign this one and we will get your more formal contract later, but it will bind you to terms of this contract."

Mr. Lawless responded: "Go ahead and add that language."

Mr. Berry replied: "Well, I don't want to have just an agreement to agree. I want you to be binding yourself to doing the work at this price."

But even though Mr. Berry indicated that he was willing to add the language "Under your [Lawless'] contract" to his agreement, Mr. Lawless still refused to sign. Ex. 1; RP 47-49.

When Lawless asserts that “The Nguyens later followed up, stating that they had ‘accepted’ Lawless’s offer”,¹ it is referring to a letter from the Nguyens’ counsel, dated October 17, 2008, Ex. 4, which stated:

When my clients accepted your offer to repair the floor and door in the manner and at the price to which you testified at trial, and to do so on your contract, they did not agree to your new term that they now deposit \$5,000 with you to have your attorney draft a new contract.

Several months of negotiations followed, during which the Nguyens accepted many new terms upon which Lawless insisted, including having a Vietnamese/ English interpreter available at their expense, a complete indemnity provision, and paying Lawless in full before it even began work, Exs. 3, 6, 7, and 9, and rejected others, like Lawless’ bogus demand for a \$5,000 deposit for his attorney to draft a new contract².

The Nguyens only threatened to sue Lawless if it did not perform its promise to provide its contract containing the terms to

¹ Brief of Appellant (Corrected) at 1.

² At trial, Lawless testified that he paid his attorney \$506.00 to review his proposed contract with the Nguyens. RP 88; CP 1026: CL 13.

which Mark Lawless had agreed at trial, Exs. 4, 6, 8, after he reaffirmed his promise to do so within 30 days of his telephone call with the Nguyens' counsel on October 10, 2011. Ex. 2.

When Lawless finally sent the Nguyens its proposed contract, Ex. 13,³ more than two months later, on December 19, 2009, it omitted key material terms which Mark Lawless had testified at trial he would include, including the attorney fee provision if the Nguyens had to sue Lawless to enforce the contract, and the provision for the work to commence within thirty (30) days of signing. Ex. 13; CP 1024: FF 5; See also, RP 117.

In addition, Lawless' proposed contract contained numerous material terms which had never even been discussed, much less agreed to, between these parties, including but not limited to: a requirement that the owner purchase Builder's Risk/All Risk insurance in the amount of \$250,000 for the benefit of the contractor and other property insurance to cover those portions of the building that might be affected by structural work; provisions regarding construction by owner or by separate contractors;

³ Curiously, Lawless did not include its proposed Construction Contract, Ex. 13, in its Designations of Clerk's Papers.

provisions regarding changes in the work; and limitations of warranties. Ex. 13; CP 1024: FF 6; See also, RP 113-116, 151-156, 167-171, 189-193.

When it became apparent, after nearly three months of negotiations, that Lawless was going to continue to add new terms and omit others to preclude contract formation, the Nguyens decided to discontinue these negotiations and to get the work done by another contractor. CP 1024: FF 7.

Several months later, on March 13, 2009, Lawless recorded a Claim of Lien against the Nguyens' home for \$3,500. Ex. 19; CP 1024: FF 9. No evidence was ever produced to support this monetary amount. CP 1025-1026: FF 13 and 14; See also, RP 103-104, 108-109.

The Honorable Dean Lum denied the Nguyens' Order to Show Cause Why The Claim of Lien Should Not Be Released summarily pursuant to RCW 60.04.081⁴. In addition, two other

⁴ Although Lawless concedes that Judge Lum did not expressly find that the lien was not frivolous, it asserts that Judge Lum could not have denied the Nguyens' motion to release the lien without concluding that the lien was not frivolous. (Brief of Appellant (Corrected), p. 8 fn. 2). No authority supports this speculation.

judges denied the parties' Cross-Motions for Summary Judgment to dismiss this lien. CP 336-339, 750-753.

But no judge made a finding regarding the frivolousness of Lawless' Claim of Lien, until the Honorable James Cayce did, after hearing all of Lawless' evidence at trial, when the Nguyens moved for dismissal, pursuant to CR 41(b)(3)⁵.

CR 41(b)(3) provides that in a bench trial, the court may grant a motion to dismiss at the close of the plaintiff's case either as a matter of law or a matter of fact. Under CR 41(b)(3), dismissal is proper "if there is no evidence, or reasonable inferences therefrom, that would support a verdict for the plaintiff." *Willis v. Simpson Inv. Co.*, 79 Wash.App. 405, 410, 902 P.2d 1263 (1995). If the trial court dismisses the case as a matter of law after the plaintiff rests, "review is de novo and the question on appeal is whether the plaintiff presented a prima facie case, viewing the evidence in the light most favorable to the plaintiff. But if the trial court acts as a fact-finder, appellate review is limited to whether substantial evidence supports the trial court's findings and whether the findings

⁵ Although Lawless repeatedly refers to this motion as a motion for directed verdict, motions for directed verdict are employed when cases are tried to juries, CR 50, rather than to the court as was done here. The standards of review are **not** the same.

support its conclusions of law.” *In re Dependency of Schermer*, 161 Wash.2d 927, 939-40, 169 P.3d 452 (2007).⁶

In this case the trial court acted as a fact-finder. Appellate review is thus limited to whether substantial evidence supports the trial court's findings and whether the findings support its conclusions of law.⁷

Statement of the Case

After hearing all of Lawless' evidence the Honorable James Cayce made the following Findings of Fact (CP 1022-1026):

1. The Plaintiff, Lawless Construction Corporation, is a Washington corporation, duly organized and licensed under the laws of the State of Washington, and with its principal place of business in King County, Washington. Mark Lawless is the Vice-President of Lawless Corporation. At all times material hereto, Lawless Construction

⁶ *Commonwealth Real Estate Services v. Padilla*, 149 Wn.App. 757, 762, 205 P.3d 937(2009).

⁷ It is well recognized that an appellate court may uphold the trial court's ruling on appeal on “any basis supported by the record.” An appellate court can sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof, even if the trial court did not consider it. Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Stieneke v. Russi*, 145 Wn.App. 544, 559-560, 190 P.3d 60 (2008).

Corporation acted solely through Mark Lawless. However, when Mark Lawless testified at the underlying legal malpractice trial, he was acting through his other related corporation, CSMI. Mark Lawless has a 50% interest in CSMI and is not the primary shareholder.

2. The Defendants, Tuyen Dinh Nguyen and Mai Tuyet Van are husband and wife, forming a marital community under the laws of the State of Washington, who at all time relevant hereto have resided in King County, Washington.

3. Nelson Berry represented Tuyen Nguyen and Mai Van in a legal malpractice trial against their former attorneys who had represented them in a construction defect case. On September 25, 2008, the defendant attorneys' expert, Mark Lawless, of Lawless Construction Corporation, testified during trial that he could repair the marble floor in the Nguyen and Van home for \$22,500, and their front door for \$3,700, for a total of \$26,200, plus Washington State Sales tax.

4. Exhibit 1 contains the transcript of the proceedings in the legal malpractice trial. After this testimony, Mr. Berry tried to get Mr. Lawless to sign a written agreement to do this work at that price, including a provision that he would commence this work within 30 days of signing the agreement and a provision that in the event that Nguyen and Van were compelled to sue to enforce that agreement, Lawless Construction Corporation would pay their attorney fees and costs. Mr. Lawless refused to sign that agreement, but promised to sign an agreement containing these terms under "his contract".

5. Several months of negotiations followed, and finally, Mr. Lawless sent Nguyen and Van his proposed contract on December 19, 2008. Mr. Lawless' proposed contract omitted terms which Mark Lawless had agreed to include in the contract during his trial testimony, including the attorney fee provision in the event Nguyen and Van had to sue Lawless to enforce the contract, and the start date to be commenced within thirty (30) days of signing.

6. In addition, Lawless' proposed contract contained numerous terms which had never even been discussed, much less agreed to, between these parties.

7. Nguyen and Van decided to discontinue the negotiations with Lawless and to get the work done by another contractor.

8. At no time was there a meeting of the minds between, Lawless Construction Corporation on the one hand, and Nguyen and Van on the other hand, on the essential terms necessary to form a contract. At no time did LCC or Nguyen and Van sign LCC's proposed contract found at Exhibit 13.

9. Lawless Construction Corporation filed a Claim of Lien against the Defendants' home on March 13, 2009. Mark Lawless admits that LCC never furnished labor, materials, or equipment for the improvement of the property. Instead, LCC contends that it provided professional services rendered in anticipation of performing improvements to the Defendants' real property.

10. Mark Lawless testified that he drew up plans and specifications for part of the remodeling work proposed to be done at the

Defendants' home. Exhibit 23. These "plans and specifications" were incomplete in that they did not include dimensions for the proposed remodeling and other essential information. In addition, the "plans and specifications" were never provided to the Defendants until after the commencement of this legal action and did not result in any improvements to their home.

11. The Claim of Lien, Exhibit 19, filed by Lawless Construction Corporation contains many inaccuracies. In its Claim of Lien, Lawless asserted that it "began to perform labor, provide professional services, supply material or equipment or the date which employee benefit contributions became due" on September 26, 2008. Yet, the only significance of this date is that it is the day after Lawless claims that the colloquy between counsel and Mark Lawless at trial created a contract, notwithstanding the fact that contract negotiations continued for several months thereafter, and no contract was ever formed. In fact, Lawless Construction Corporation did nothing with respect to the proposed remodeling project at the Defendants' home from September 25, 2008 to October 10, 2008, when Mr. Lawless spoke by telephone with Nelson Berry about the prospective remodel job.

12. Lawless Construction Corporation also asserted in the Claim of Lien that the "last date on which labor was performed, professional services were furnished; contributions to an employee benefit plan were due or material, or equipment was furnished" was December 19, 2008. Yet, according to Lawless' Answer to Interrogatory No. 9, the "last work performed by

Lawless Construction for the benefit of the Nguyen/Van property...on December 17, 2008, as alleged in Paragraph 2.11 of its complaint was "Finalization of the formal written contract." Mark Lawless also testified that the professional services he had performed (Exhibit 23) were completed by November 30, 2008, more than 90 days before Lawless Construction Corporation filed its Claim of Lien on March 13, 2009.

13. In the Claim of Lien, Lawless Construction Corporation also asserted that the principal amount for which its lien is claimed was "\$3,500, plus applicable lien fees &/or attorney's fees, &/or interest". At trial, Mr. Lawless testified that of that \$3,500, \$506 was for Lawless' attorney to review the proposed contract with the Defendants, and as for the remainder of the \$2,994, that amount was "an estimate" of the value of the professional services Lawless Construction Corporation claimed to have performed.

14. No time records was produced to support what time Lawless Construction Corporation may have spent doing what services or what costs it incurred.

15. The amount claimed in the Plaintiff's Claim of Lien is excessive.

16. By requesting that the Plaintiff provide the Defendants with its contract, including the terms to which Mark Lawless had agreed at trial, the Defendants did not make a legally binding promise. The Defendants had no reason to expect their request to cause the Plaintiff to change its position by performing "professional services". The Plaintiff did not change its position justifiably relying upon any purported

promise by performing “professional services”, in such a manner that injustice can be avoided only by enforcement of the alleged promise.

17. In its First Amended Complaint, the Plaintiff sought an award of damages in an amount of less than \$10,000.

18. Applying the principals set forth in RPC 1.7⁸, the attorney fees incurred by the Defendants in the amount of \$82,740 and costs and expenses in the amount of \$4,665.60 are reasonable and were necessarily incurred.

Although Lawless assigned error to Findings of Fact 8, 9, 10, 11, 12, 13, 14, 16, and 18, Lawless did not quote or provide the material portions of the challenged findings in its brief, as required by RAP 10.4(c). In addition, Lawless has not demonstrated why these specific findings are not supported by the evidence or to cite to the record in support of that argument.⁹ As a consequence, even those findings to which Lawless assigned error are taken as verities on this appeal.¹⁰

⁸ This is a typo. It should read: RPC 1.5.

⁹ *In re Estate of Lint*, 135 Wash.2d 518, 532, 957 P.2d 755 (1998); *In re Estate of Palmer*, 145 Wn.App. 249, 264–65, 187 P.3d 758 (2008).

¹⁰ *Starczewski v. Unigard Ins. Group*, 61 Wn.App. 267, 276, 810 P.2d 58 (1991) (“The trial court’s findings will be taken as verities if the party challenging them does not supply citations to the record in

Additionally, Lawless did not assign error to any of the trial

court's Conclusions of Law:

1. This Court has jurisdiction over the parties and the subject matter of this action.
2. Statutes creating liens are in derogation of the common law. As such they must be strictly construed. The Defendants never requested the Plaintiff to render any services, professional or otherwise, on their home.
3. Plaintiff and Defendants never formed a contract during the course of their negotiations, and no contract was ever created. Agreements to agree are not enforceable. A judgment should be entered dismissing the Plaintiff's claim for breach of contract.
4. In the absence of an enforceable contract or a legally binding promise to do work on the Defendants' property, Lawless Construction Corporation was not entitled to assert a Claim of Lien, and Lawless' claim for lien foreclosure should be dismissed.
5. "RCW 60.04.021 requires that professional services must result in an improvement to the property in order to give rise to a lien." *DBM Consulting Engineers, Inc. v. U.S. Fidelity and Guar. Co.*, 142 Wn. App. 35, 41 (2007), review

support of the challenges."); *In re Estate of Pflagher*, 35 Wn.App. 844, 845 n. 1, 670 P.2d 677 (1983) (findings of fact not set out verbatim in brief as required by RAP 10.4(c) are treated as verities on appeal).

denied, 164 Wn.2d 1005 (2007). Even if Lawless Construction Corporation performed professional services related to Defendants' home, those services did not result in an improvement to their property. Thus, Lawless Construction Corporation's Claim of Lien is invalid, and Lawless' claim for lien foreclosure should be dismissed.

6. The contract negotiations carried on between Lawless Construction Corporation and the Defendants were not "professional services" as defined in RCW 60.04.011(13). Even if the plans and specifications Mr. Lawless says he prepared may be considered "professional services" under RCW 60.04.011(13), Lawless Construction Corporation's Claim of Lien was recorded more than ninety (90) days after the last day Mr. Lawless testified he prepared the plans and specifications. In order for a lien for professional services to be valid, it must be recorded within ninety days of the date the claimant ceased furnishing such services. RCW 60.04.091. Because Lawless' lien was not recorded within that ninety day period, it is invalid, and Lawless' claim for lien foreclosure should be dismissed.

7. One claiming the benefits of a lien under RCW 60.04 must show he has strictly complied with the provisions of the law that created it. *Lumberman's of Washington, Inc. v. Barnhardt*, 89 Wn. App. 283, 286 (1997). RCW 60.04.091(1)(b) requires every lien claimant to include in his Claim of Lien "The first and last date on which the ... professional services ... [were] furnished[.]" Because Lawless' Claim of Lien contains incorrect information, it is invalid, and Lawless' claim for lien foreclosure should be dismissed.

8. Nor did the Defendants ever make a legally binding promise to the Plaintiff upon which Lawless Construction Corporation was entitled to rely. Plaintiff's claim for promissory estoppel should be dismissed.

9. In the absence of an enforceable contract or a legally binding promise to do work on the Defendants' property, Lawless was not entitled to assert a Claim of Lien. For the reasons stated in Conclusion of Law No.'s 3 through 8, Plaintiff's Claim of Lien was and is frivolous. Judgment should be entered dismissing and releasing Lawless' Claim of Lien.

10. The Defendants are entitled to an award of their reasonable attorney fees and expenses in the amount of \$82,740, pursuant to RCW 60.04.181(3), RCW 4.84.250, RCW 4.84.330, and *Herzog Aluminum, Inc. v. General v. American Window Corp.*, 39 Wn. App. 188, 197, 692 P.2d 867 (1984), and their statutory costs in the amount of \$4,665.60.

Unchallenged conclusions of law become the law of the case.¹¹

¹¹ *Energy Northwest v. Hartje*, 148 Wn.App. 454, 456, 199 P.3d 1043 (2009); *State v. Moore*, 73 Wn.App. 805, 811, 871 P.2d 1086 (1994); *King Aircraft Sales, Inc. v. Lane*, 68 Wn.App. 706, 716, 846 P.2d 550 (1993).

Argument.

A. The Trial Judge Properly Dismissed The Plaintiff's Claims, Pursuant To CR 41(b)(3).

As previously noted, the trial judge did not grant the Nguyens' motion for a directed verdict, as Lawless contends, but rather a motion to dismiss, pursuant to CR 41(b)(3).

In granting a CR 41(b)(3) motion, a trial court may either weigh the evidence and make a factual determination that the plaintiff has failed to come forth with credible evidence of a prima facie case, or it may view the evidence in the light most favorable to the plaintiff and rule, as a matter of law, that the plaintiff has failed to establish a prima facie case. *N. Fiorito Co. v. State*, 69 Wash.2d 616, 618-19, 419 P.2d 586 (1966); see also 4 KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE CR 41, at 55 (5thed.2006). The court must make findings of fact when it enters a judgment on the merits but need not do so when ruling that the plaintiff has failed to state a claim as a matter of law. *Id.*

If the trial court dismisses the case as a matter of law, review is de novo and the question on appeal is whether the plaintiff presented a prima facie case, viewing the evidence in the light most favorable to the plaintiff. But if the trial court acts as a fact-finder, appellate review is limited to whether substantial evidence supports the trial court's findings and whether the

findings support its conclusions of law. *Nelson Constr. Co. v. Port of Bremerton*, 20 Wash.App. 321, 582 P.2d 511, *review denied*, 91 Wash.2d 1002 (1978). The entry of findings strongly suggests that the trial court weighed the evidence because no findings or conclusions are required when the court views the evidence in the light most favorable to the plaintiff and rules as a matter of law. *Nelson Constr.*, 20 Wash.App. at 327, 582 P.2d 511.¹²

In this case, the trial court weighed the evidence and made a factual determination that the plaintiff had failed to come forth with credible evidence to make a prima facie case. Substantial evidence supports the trial court's findings. Those findings, in turn, support the trial court's conclusions of law, and its decision to dismiss the plaintiff's claims.

1. The Nguyens Are Not Estopped To Deny The Existence Of A Contract.

Lawless amended his pleadings to plead promissory estoppel, but not equitable estoppel¹³, alleging that the Nguyens "made a promise to hire it to perform improvements at their home."

¹² *In re Dependency of Schermer*, 161 Wash.2d at 939-940.

¹³ *Lewis v. City of Mercer Island*, 63 Wn.App. 29, 31, 817 P.2d 408, *review denied*, 117 Wash.2d 1024, 820 P.2d 510 (1991). (Matters not urged at the trial court may not be urged on appeal.)

CP 370; RP 12.

A party seeking recovery under a theory of promissory estoppel must prove five prerequisites: (1) A promise that (2) the promisor should reasonably expect to cause the promisee to change his position and (3) that does cause the promisee to change his position (4) justifiably relying upon the promise, in such a manner that (5) injustice can be avoided only by enforcement of the promise.¹⁴

The promise must be a legally binding promise. A statement of future intent is not sufficient to constitute a promise for the purpose of promissory estoppel. An intention to do a thing is not a promise to do it.¹⁵

At the conclusion of Lawless' case in chief, the Honorable James Cayce weighed the evidence and made the following factual determination that Lawless had failed to come forth with credible evidence of a prima facie case:

16. By requesting that the Plaintiff provide

¹⁴ *Kim v. Dean*, 133 Wn.App. 338, 348, 135 P.3d 978 (2006).

¹⁵ *Elliott Bay Seafoods, Inc. v. Port of Seattle*, 124 Wn.App. 5, 13, 98 P.3d 491 (2004); *Pacific Cascade Corp. v. Nimmer*, 25 Wn.App. 552, 556, 608 P.2d 266 (1980), citing *Meissner v. Simpson Timber Co.*, 69 Wash.2d 949, 957, 421 P.2d 674 (1966)

the Defendants with its contract, including the terms to which Mark Lawless had agreed at trial, the Defendants did not make a legally binding promise. The Defendants had no reason to expect their request to cause the Plaintiff to change its position by performing “professional services”. The Plaintiff did not change its position justifiably relying upon any purported promise by performing “professional services”, in such a manner that injustice can be avoided only by enforcement of the alleged promise.

As previously discussed, although Lawless assigned error to Finding of Fact 16, Lawless did not comply with RAP 10.4(c), or demonstrate why this specific finding is not supported by the evidence or cite to the record in support of that argument.¹⁶ As a consequence, even though Lawless assigned error to this finding, it is a verity on this appeal.¹⁷

Indeed, it’s ironic that Lawless now argues that “Lawless reasonably began preparing to perform since time was of the essence...[because] the Nguyens made very clear that they wanted Lawless to start work no more than 30 days after the contract was

¹⁶ *In re Estate of Lint, supra; In re Estate of Palmer, supra* .

¹⁷ *Starczewski v. Unigard Ins. Group, supra; In re Estate of Pflighar, supra*.

signed¹⁸, when it sent the Nguyens a contract on December 19, 2008 which had a start date of February 15, 2009, nearly two months later. Ex. 13; CP 105; RP 76.

In addition, after weighing the evidence at the close of Lawless' case in chief the trial judge found:

8. At no time was there a meeting of the minds between, Lawless Construction Corporation on the one hand, and Nguyen and Van on the other hand, on the essential terms necessary to form a contract. At no time did LCC or Nguyen and Van sign LCC's proposed contract found at Exhibit 13.

Once again, as previously noted, even though Lawless assigned error to Finding of Fact 8, Lawless did not comply with RAP 10.4(c), or demonstrate why this specific finding is not supported by the evidence or cite to the record in support of that argument. Thus, even though Lawless assigned error to this finding, it is a verity on this appeal as well.

Lawless did not assign error to the following findings:

5. Several months of negotiations followed, and finally, Mr. Lawless sent Nguyen and Van his proposed contract on December 19, 2008. Mr. Lawless' proposed contract omitted terms which Mark Lawless had agreed to include in

¹⁸ Brief of Appellant (Corrected) at 16.

the contract during his trial testimony, including the attorney fee provision in the event Nguyen and Van had to sue Lawless to enforce the contract, and the start date to be commenced within thirty (30) days of signing.

6. In addition, Lawless' proposed contract contained numerous terms which had never even been discussed, much less agreed to, between these parties.

These unchallenged findings are verities on appeal. In addition, as previously discussed, Lawless did not assign error to any of the Conclusions of Law, including:

3. Plaintiff and Defendants never formed a contract during the course of their negotiations, and no contract was ever created. Agreements to agree are not enforceable. A judgment should be entered dismissing the Plaintiff's claim for breach of contract.

8. Nor did the Defendants ever make a legally binding promise to the Plaintiff upon which Lawless Construction Corporation was entitled to rely. Plaintiff's claim for promissory estoppel should be dismissed.

These unchallenged conclusions of law are now the law of the case.

Accordingly, the Nguyens were not and are not estopped to deny the existence of a contract.

2. Lawless Did Not Raise Material Questions About The Validity Of Its Lien.

Since there was no contract and the Nguyens are not estopped to deny the existence of a contract with Lawless for the reasons set forth above, there is no basis for Lawless' contention that it is somehow "entitled to value of his work in equity", whatever that might mean, regardless of "whether the lien is valid or whether Lawless performed any professional services".¹⁹ In any event, Lawless cites no legal authority for this dubious proposition.²⁰

RCW 60.04.011 defines professional services as follows:

(13) "Professional services" means surveying, establishing or marking the boundaries of, preparing maps, plans, or specifications for, or inspecting, testing, or otherwise performing any other architectural or engineering services for the improvement of real property.

Findings of Fact 9 and 10, and Conclusion of Law 6,

¹⁹ Brief of Appellant (Corrected) at 17.

²⁰ An appellant must provide "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." RAP 10.3(a)(6). Arguments that are not supported by any reference to the record or by citation of authority need not be considered. *Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 809, 828 P.2d 549 (1992).

CP 1024-1025, 1027-1028, do **not** “assume that Lawless performed professional services”, as Lawless contends. Rather, those Findings and Conclusion indicate why, even if the “plans and specifications” Lawless claims he prepared might be considered “professional services” under RCW 60.04.011(13), they would be insufficient to support its Claim of Lien. Minor preparatory activities do not amount to “improvement” of realty.²¹

The trial court found:

10. Mark Lawless testified that he drew up plans and specifications for part of the remodeling work proposed to be done at the Defendants’ home. Exhibit 23. These “plans and specifications” were incomplete in that they did not include dimensions for the proposed remodeling and other essential information. In addition, the “plans and specifications” were never provided to the Defendants until after the commencement of this legal action and did not result in any improvements to their home.

In addition, not all services that relate to property qualify for

²¹ *Colorado Structures, Inc. v. Blue Mountain Plaza, LLC*, 159 Wn.App. 663, 246 P.3d 835(2011); *McAndrews Group, Ltd., Inc. v. Ehmke*, 121 Wn.App. 759, 90 P.3d 1123 (2004) (placement of surveying stakes and other markers); *TPST Soil Recyclers of Wash., Inc. v. W.F. Anderson Constr., Inc.*, 91 Wn.App. 297, 957 P.2d 265, 967 P.2d 1266 (1998) (removal of contaminated soil from realty).

a lien.²² Development services, including contract negotiations and meetings with subcontractors, are not lienable.²³ Accordingly, Lawless' claim for services purportedly rendered for "conferences with subcontractor to confirm pricing, scope, and ability to meet quality standards", "negotiations with the Nguyens' attorney regarding details of the requested work" and "drafting a written contract" are not lienable. CP 1027: CL 6.

The trial court made the following Findings of Fact:

11. The Claim of Lien, Exhibit 19, filed by Lawless Construction Corporation contains many inaccuracies. In its Claim of Lien, Lawless asserted that it "began to perform labor, provide professional services, supply material or equipment or the date which employee benefit contributions became due" on September 26, 2008. Yet, the only significance of this date is that it is the day after Lawless claims that the colloquy between counsel and Mark Lawless at trial created a contract, notwithstanding the fact that contract negotiations continued for several months thereafter, and no contract was ever formed. In fact, Lawless Construction Corporation did nothing with respect to the proposed remodeling project

²² *DBM Consulting Engineers, Inc. v. U.S. Fidelity and Guaranty Co.*, 142 Wn.App. at 40.

²³ *Pacific Industries, Inc. v. Singh*, 120 Wn.App. 1, 8, 86 P.3d 778 (2003)

at the Defendants' home from September 25, 2008 to October 10, 2008, when Mr. Lawless spoke by telephone with Nelson Berry about the prospective remodel job.

12. Lawless Construction Corporation also asserted in the Claim of Lien that the "last date on which labor was performed; professional services were furnished; contributions to an employee benefit plan were due or material, or equipment was furnished" was December 19, 2008. Yet, according to Lawless' Answer to Interrogatory No. 9, the "last work performed by Lawless Construction for the benefit of the Nguyen/Van property...on December 17, 2008, as alleged in Paragraph 2.11 of its complaint was "Finalization of the formal written contract." Mark Lawless also testified that the professional services he had performed (Exhibit 23) were completed by November 30, 2008, more than 90 days before Lawless Construction Corporation filed its Claim of Lien on March 13, 2009²⁴.

Nonetheless, Lawless argues that he performed at least one professional service, namely, hiring a subcontractor, less than 90

²⁴ See also, RP 98. The mere fact that the trial court was not asked to find or conclude, and accordingly, did not find or conclude that Lawless' belatedly claimed "mistaken belief" as to what constituted "professional services" "was in bad faith or so unreasonable as to render the lien frivolous", does not, as Lawless suggests [Brief of Appellant (Corrected), p. 23] mean that the lien was not frivolous. A finding or conclusion of "bad faith" or of "so unreasonable" is immaterial and not required.

days before filing the lien on March 13, 2009.²⁵ However, hiring or consulting with a subcontractor is not a “professional service”.²⁶

Lawless’ lien thus was not filed within 90 days of the last day it purportedly furnished professional services, as required by, RCW 60.04.091(1)(b). CP 1028: CL 7.

Moreover, RCW 60.04.021 requires that professional services must result in an improvement to the property in order to give rise to a lien.²⁷ Here, none of the “professional services” allegedly performed by Lawless resulted in an improvement to the Nguyens’ property. His “drawings and specifications” were not provided to the Nguyens until after Lawless sought to foreclose its

²⁵ Brief of Appellant (Corrected),pp.17-18.

²⁶ *Colorado Structures, Inc. v. Blue Mountain Plaza, LLC*, 159 Wn.App. at 663; *Pac. Indus., Inc. v. Singh*, 120 Wn.App. at 8 (“services-contract negotiation and execution-do not constitute ‘labor’ because they are administrative tasks that do not ‘improve’ the subject property and are not performed ‘at the site.’); *Blue Diamond Group, Inc. v. KB Seattle 1, Inc. et al*, Division 1, Docket Number: 65616-3 (7/25/11) (construction management services are not lienable under Washington law.).

²⁷ *DBM Consulting Engineers, Inc. v. U.S. Fidelity and Guar. Co.* 142 Wn.App. at 41.

lien, and were not used to repair the Nguyens' home. RP 99. They were not even provided to Lawless' subcontractor. RP 103.

Lawless' reliance on RCW 60.04.021 for its contention that the "professional services rendered in preparation for construction and the like are the improvement" [Brief of Appellant (Corrected), p. 19] is misplaced. According to this logic, Lawless would have a lien on its "plans and specifications", but not the Nguyens' home. But for a lien to attach, the "professional services must result in an improvement *to the property*".²⁸ [emphasis added]. Here, whatever "professional services" Lawless claimed it performed did not result in an improvement to the Nguyens' property.

B. Lawless' Lien Claim Was Frivolous.

For a lien to be frivolous, the court must determine that it is clear and beyond legitimate dispute that the lien was improperly filed.²⁹ This is not merely a case where a particular statutory requirement was not satisfied, but rather where most of the statutory requirements were not satisfied.

²⁸ *Id.*

²⁹ *W.R.P. Lake Union Ltd. P'ship v. Exterior Services, Inc.*, 85 Wn. App. 744, 752, 934 P.2d 722 (1997).

For each of the reasons set forth in the preceding section of this brief, as well as for any one of the reasons which follow, (much less taken together collectively), there are no debatable issues of law or fact about whether this lien was improperly filed. It was. And accordingly, it is frivolous.

Statutes creating liens are in derogation of the common law. As such they must be strictly construed.³⁰ One claiming the benefits of the lien statute must show strict compliance with the provisions of the law that created it.³¹

RCW 60.04.021 provides in pertinent part:

... any person furnishing labor, professional services, materials, or equipment for the improvement of real property shall have a lien upon the improvement *for the contract price* of labor, professional services, materials, or equipment *furnished at the instance of the owner*, or the agent or construction agent of the owner.

In the first instance, in the absence of a contract, there is no valid basis for Lawless to record a Claim of Lien against the

³⁰ CP 1027: CL 2; *Intermountain Elec., Inc. v. G-A-T Bros. Const., Inc.*, 115 Wn.App. 384, 390, 62 P.3d 548(2003).

³¹ *Lumberman's of Washington, Inc. v. Barnhardt*, 89 Wn.App. 283, 286, 949 P.2d 382 (1997).

Nguyens' home.³² CP 1027: CL 4. Not surprisingly, there was no "contract price" for any purported "professional services". The professional services which Lawless alleges it performed were "not part of a larger, lienable labor and materials contract between an owner and general contractor", and are, therefore, not lienable.³³

In addition, although Lawless contends that it rendered "professional services" in anticipation of performing work on the Nguyens' property, the only "professional services" which may be lienable are those "professional services...*furnished at the instance of the owner*, or the agent or construction agent of the owner."³⁴

Yet, the Nguyens never requested Lawless to render any services, professional or otherwise, on their home, as required by

³² CP 1028: CL 9; *Colorado Structures, Inc. v. Blue Mountain Plaza, LLC*, 159 Wn.App. at 664("Any other construction reads the words 'contract price' out of the statute in derogation of the duty to render no part meaningless"...[and] "would leave property owners subject to multiple liens from failed bidders who performed tests or other services to facilitate the bidding decision."). Lawless' counsel admitted that promissory estoppel does not give rise to lien rights. RP 18-19. Since the parties had no contract, there was no legitimate basis for Lawless to record its Claim of Lien.

³³ *Pacific Industries, Inc. v. Singh*, 120 Wn.App. at 9.

³⁴ See eg. *McCombs Construction, Inc. v. Barnes*, 32 Wn.App. 70, 73-74, 645 P.2d 1131(1982); *Whittier v. Puget Sound Loan, Trust & Banking Co*, 4 Wash. 666, 30 P. 1094(1892).

the statute. CP 1027: CL 2; See also, RP 138.

The trial court also made the following findings CP 1025-1026):

13. In the Claim of Lien, Lawless Construction Corporation also asserted that the principal amount for which its lien is claimed was "\$3,500, plus applicable lien fees &/or attorney's fees, &/or interest". At trial, Mr. Lawless testified that of that \$3,500, \$506 was for Lawless' attorney to review the proposed contract with the Defendants, and as for the remainder of the \$2,994, that amount was "an estimate" of the value of the professional services Lawless Construction Corporation claimed to have performed.

14. No time records was produced to support what time Lawless Construction Corporation may have spent doing what services or what costs it incurred.

15. The amount claimed in the Plaintiff's Claim of Lien is excessive.

Once again, although Lawless assigned error to Findings of Fact 13, 14 and 15, it did not comply with RAP 10.4(c), or demonstrate why these specific findings are not supported by the

evidence, much less, cite to the record in support of that argument.³⁵ Accordingly, they are verities on appeal.

Finally, Lawless contends that its “lien claim cannot be frivolous for the additional reason that the trial court³⁶ denied the Nguyens’ motion to release the lien and twice denied summary judgment.”³⁷

First, while a court may resolve factual issues in a summary hearing, pursuant to RCW 60.04.081, it is not required to do so. In this case, the Honorable Dean Lum made no factual determinations. He simply denied the Nguyens’ motion to summarily dismiss the lien. When the record contains no clear resolution of factual disputes, the appellate court accords the decision no deference and proceeds with a de novo review in light of the applicable burden of proof.³⁸

³⁵ *In re Estate of Lint*, 135 Wash.2d at 532; *In re Estate of Palmer*, 145 Wn.App. at 264–265.

³⁶ Lawless misspeaks. The trial court concluded that Lawless’ lien claim was frivolous. CP 1028: CL 9. The other courts to which Lawless refers were not the trial court.

³⁷ Brief of Appellant (Corrected) at 23.

Similarly, neither the Honorable Mary Roberts nor the Honorable Brian Gain made any findings one way or the other regarding the frivolousness of Lawless' lien claim when they denied both parties' cross-motions for summary judgment. Each ruled only that there were material issues of fact about whether a contract existed, whether Lawless performed any "professional services", and whether the Nguyens requested Lawless to perform any such services. CP 338; CP 752.

But neither judge reached the issue of whether Lawless' lien claim was frivolous. The presence of these particular factual issues did not mean that its lien claim was not frivolous, as Lawless contends.

In sum, the evidence established that Lawless chose to file a Claim of Lien, even when there was no legal or factual basis for doing so, in an attempt to extort money from the Nguyens to which it was not entitled. This is not a valid or legitimate basis to record a Claim of Lien. Its recording was frivolous.

³⁸ *W.R.P. Lake Union Ltd. P'ship v. Exterior Services, Inc.*, 85 Wn. App. at 750.

C. The Fee Award Is Not “Grossly Excessive” And Contains The Required Findings.

Significantly, Lawless does not contest the Nguyens’ entitlement to an award of its reasonable attorney fees. Nor does it challenge the award of costs. Rather it challenges only the amount of attorney fees awarded.

In order to reverse an attorney fee award, an appellate court must find the trial court manifestly abused its discretion. *Boeing Co. v. Sierracin Corp.*, 108 Wash.2d 38, 65, 738 P.2d 665 (1987). That is, the trial court must have exercised its discretion on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).³⁹

Whether attorney’s fees are reasonable is a factual inquiry depending on the circumstances of a given case, and the trial court is given broad discretion to fix the award.⁴⁰

On appeal, Lawless makes three arguments why this Court should reverse and remand with instructions to revise the fee

³⁹ *Chuong Van Pham v. City of Seattle, Seattle City Light*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007).

⁴⁰ *Washington State Physicians Ins. Exchange & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 335, 858 P.2d 1054 (1993)

award, if it affirms on the underlying issues. None show that the trial court abused its discretion.

Lawless first argues that “the trial court entered only one finding that summarily awards fees without any lodestar analysis”.

This argument is plainly without merit. The evidence is clear from even a cursory review of both parties’ pleadings, CP 901-903, 958-962, 979-989, that both parties argued that the “lodestar method” was the proper way to address the attorney fee issue. There is no basis for Lawless to claim that the trial court did not engage in a lodestar analysis in determining its award.

Even after the lodestar amount is calculated, whether or not a fee is reasonable is an independent determination to be made by the awarding court. There is no legal authority for Lawless’ contention that the trial court is required to enter more than one finding that the attorney fees awarded are reasonable and were necessarily incurred⁴¹.

⁴¹ *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 79 Wn. App. 841, 848, 917 P.2d 1086 (1995) (quoting *Animal Welfare Society v. U.W.*, 54 Wn. App. 180, 187, 773 P.2d 114 (1989)) (determination of the fee award should not be an unduly burdensome proceeding for the court or the parties, and an “explicit hour-by-hour analysis of each lawyer’s time sheets” is unnecessary as long as the award is

Secondly, Lawless contends that “the award includes fees for a massive duplication of effort as well as for many unsuccessful claims.” In support of this contention, Lawless complains that the fees awarded by the trial court included fees generated by Nelson Berry for legal services rendered “after Lawless served him with a witness disclosure identifying him as a witness on May 25, 2010”, and that he was subsequently disqualified from representing the Nguyens at trial, under RPC 3.7⁴². ⁴³ Lawless cites no authority for its contention that identifying opposing counsel in a witness

made with a consideration of the relevant factors, and reasons sufficient for review are given for the amount awarded).

⁴² **RULE 3.7 LAWYER AS WITNESS**

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness *unless*:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature of legal services rendered in the case;
- (3) disqualification of the lawyer would work a substantial hardship on the client; or
- (4) the lawyer has been called by the opposing party and the court rules that the lawyer may continue to act as an advocate.

⁴³ Brief of Appellant (Corrected) at 27-28.

disclosure somehow precludes a party from recovering fees for legal services rendered thereafter.⁴⁴

RPC 3.7 only precludes an attorney from acting “as advocate *at trial* in which the lawyer is likely to be a necessary witness.” It does not require an attorney to withdraw immediately, as Lawless asserts. Hence, the trial court ordered:

C. Nelson Berry may not serve as defendants’ counsel *at trial* pursuant to Rule of Professional Conduct 3.7.

IN retrospect, it is apparent that Lawless’ motion to disqualify was simply a ploy to get rid of the Nguyens’ counsel, and thereby place the Nguyens at a disadvantage at trial. It’s quite clear from a review of the mere eight pages of Mr. Berry’s trial testimony, RP 212-220, that he was not a “necessary witness”, and that his testimony came within the first two exceptions of RPC 3.7. Also,

When interpreting these provisions, courts have been reluctant to disqualify an attorney absent compelling circumstances. [citations omitted].

When an attorney is to be called ...,

⁴⁴ An appellant must provide “argument ...with citations to legal authority and references to relevant parts of the record.” RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley, supra*.

a motion for disqualification must be supported by a showing that the attorney will give evidence material to the determination of the issues being litigated, that the evidence is unobtainable elsewhere, and that the testimony is or may be prejudicial to the testifying attorney's client.⁴⁵

No such showing was made here. Mr. Berry's only communications with Lawless are in letters which were made exhibits at trial, Exs. 2-18, save for one telephone conversation on October 10, 2008, which was memorialized in a letter, Ex. 2. RP 135-136; 174.

Finally, Lawless waited until less than a month before trial, and the day after the parties' mediation failed, before bringing its motion to disqualify. CP 1113. Yet,

A motion to disqualify should be made with reasonable promptness after a party discovers the facts which lead to the motion. This court will not allow a litigant to delay filing a motion to disqualify in order to use the motion later as a tool to deprive his opponent of counsel of his choice after substantial preparation of a case has been completed.⁴⁶

⁴⁵ *Public Utility Dist. No. 1 of Klickitat County v. International Ins.*, 124 Wash.2d 789, 881 P.2d 1020 (1994).

⁴⁶ *First Small Business Inv. Co. of California v. Intercapital*

Under these circumstances, the Nguyens submit that the trial judge granted Lawless' motion only because they told the court, CP 1110-1111:

.....if this Court grants the Plaintiff's Motion to Disqualify Defense Counsel, Mr. Beckett would be available to conduct the entire trial, if it started the week beginning December 13 rather than December 6.

In its Reply, CP 1114, Lawless stated:

In the closing paragraph of Defendants' opposition brief, counsel suggested that continuing the trial to December 13, 2010 would be a viable option that would allow Mr. Berry's colleague to try the case. LCC's attorney and witnesses are also available that week; if Judge Gain is available, a one week continuance would seem to work out for both sides in this dispute.

And that is exactly what the court did. It continued the trial for one week so that Guy Beckett would be available to try the case. CP 1116.

Accordingly, Lawless cannot now complain about its self-inflicted wound that there was "a massive duplication of effort and/or waste of time, where Beckett undoubtedly spent

Corp., 108 Wash.2d 324, 336-337, 738 P.2d 263 (1987)

considerable time Berry would not have had to spend to ‘get up to speed’”,⁴⁷ including preparing for and attending the perpetuation deposition of Greg Herring.⁴⁸

In addition, Lawless complains that the trial court awarded the Nguyens fees for work upon which they did not prevail. But, the fact that the Nguyens may not have been successful on every task is irrelevant. They were successful on every *claim*.

While the trial court has the discretion to reduce a fee award if it finds that time spent on an unsuccessful motion was a “wasted effort” or is otherwise “unproductive”,⁴⁹ it does not abuse its discretion in choosing not to reduce those fees, particularly, where, as here, the unsuccessful motions are reasonably related to the successful claims. Lawless cites no legal authority, and there is

⁴⁷ Brief of Appellant (Corrected) at 29.

⁴⁸ Greg Herring was the Nguyens’ expert, amongst other issues, on the issue of whether the services Lawless allegedly performed were “professional services” within the definition of RCW 60.04.011(13). His deposition was not used at trial only because Lawless’ case was dismissed before the Nguyens were required to put on their evidence.

⁴⁹ *Chuong Van Pham v. City of Seattle, Seattle City Light*, 159 Wash.2d at 539-540 (time “not reasonably related to successful claims”).

none, for its proposition that the Nguyens are only entitled to recover their attorney fees for the discrete tasks upon which they prevailed.⁵⁰ All that is required is that the hours reasonably expended must be spent on claims having a “common core of facts and related legal theories.”⁵¹

So, for example, even though the Nguyens were not successful in getting Lawless’ Claim of Lien summarily dismissed, pursuant to RCW 60.04.081, or with the parties’ two cross-motions for summary judgment, they are still entitled to recover the full amount of the attorney fees incurred, as the prevailing party in this action, since those motions were reasonably related to the claims upon which the Nguyens prevailed, and the claims had a “common core of facts and related legal theories.” In fact, the Nguyens prevailed on *all* of their claims. In a case squarely on point, the

⁵⁰ An appellant must provide “argument ...with citations to legal authority and references to relevant parts of the record.” RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley, supra*.

⁵¹ *Martinez v. City of Tacoma*, 81 Wn.App. 228, 242-43, 914 P.2d 86 (1996) (“where the plaintiff’s claims involve a common core of facts and related legal theories, ‘a plaintiff who has won substantial relief should not have his attorney’s fee reduced simply because the district court did not adopt each contention raised’, quoting *Hensley v. Eckerhart*, 461 U.S. at 438 n. 14 n. 14).

Court held:

Statutory attorney fees awarded to a prevailing party should not be denied or reduced when the party was not successful on only one of several related claims. *Winans*, 52 Wash.App. at 101; *Hensley v. Eckerhart*, 461 U.S. 424, 440, 103 S.Ct. 1933, 1943, 76 L.Ed.2d 40 (1983). Reductions in fees are appropriate only when the fees are unreasonable because they were generated by claims that were distinct in all respects from successful claims. *Hensley*, 461 U.S. at 440, 103 S.Ct. at 1943. First Union was unsuccessful in an appeal regarding proper verification of the notice of claim of lien. But that claim was related to the lien foreclosure action on which it prevailed. The court did not abuse its discretion in the award of attorney fees to First Union and Trust.⁵²

And finally, Lawless asserts that “the award is grossly excessive in light of the amount in dispute.” While the relationship between the amount in dispute and the fee requested is a factor to be considered by the Court when determining the reasonableness of such a request, it is not a conclusive factor.⁵³

Thus, in *Steele v. Lundgren*, 96 Wn.App. 773, 982 P.2d 619

⁵² *Schumacher Painting Co. v. First Union Management, Inc.*, 69 Wn.App. 693, 702, 850 P.2d 1361(1993).

⁵³ *Mahler v. Szucs*, 135 Wash.2d 398, 433, 957 P.2d 632 (1998).

(1999), the Court of Appeals affirmed a trial court's attorney's fee award for the full amount requested of over \$250,000 where the attorneys obtained a jury verdict of only \$43,500 on their client's employment discrimination claim.

In *Banuelos v. TSA Washington, Inc.*, 134 Wn. App. 607, 141 P.3d 652 (2006), the Court of Appeals affirmed a trial court's attorney fee award of \$90,125 under the WCPA where the prevailing plaintiffs obtained a total damage award (including statutory trebling) of only \$17.08.

Finally, in *Lay v. Hass*, 112 Wn. App. 818, 51 P.3d 130 (2002), the Court of Appeals affirmed an attorney's fee award of \$13,545.05 that was over 31 times the amount of the prevailing party's principal judgment.

In fact, the purpose of the attorney fee provisions of RCW Chapter 4.84 is to enable a party to pursue a meritorious small claim without seeing the award diminished in whole or part by legal fees.⁵⁴

⁵⁴ *Absher Const. Co. v. Kent School Dist. No. 415*, 79 Wn.App. at 846; *Northside Auto Service, Inc. v. Consumers United Ins. Co.*, 25 Wn.App. 486, 492, 607 P.2d 890 (1980).

As the Supreme Court has held:

In all cases, but especially in ones as complex as this one, it is the trial judge who has watched the case unfold and who is in the best position to determine which hours should be included in the lodestar calculation. *See Hensley*, 461 U.S. at 437, 103 S.Ct. 1933. That is why the law requires us to defer to the trial court's judgment on these issues. The issue before us is not whether we would have awarded a different amount, but whether the trial court abused its discretion.⁵⁵

The trial court's award was supported by the evidence and the law. Its decision should be affirmed.

D. The Nguyens Are Entitled To Recover Their Attorney Fees And Costs Incurred On Appeal.

Pursuant to RAP 18.1, if the Nguyens prevail on this appeal, they should be awarded their reasonable attorney fees and costs incurred, pursuant the same bases upon which the trial court awarded them, each of which provides an independent basis for such an award.

⁵⁵ *Chuong Van Pham v. City of Seattle, Seattle City Light*, 159 Wash.2d at 540.

1. The Nguyens Are Entitled To Recover Their Reasonable Attorney Fees And Costs Under RCW 60.04.181(3).

An award of reasonable attorney fees and costs to the prevailing party, pursuant to RCW 60.04.181(3)⁵⁶ is discretionary with the Court, and provides a basis for an award of the Nguyens' attorney fees and costs on appeal just as it did for the court below.

When the parties were unable to reach an agreement after several months of negotiations, the Nguyens chose to walk away and find another contractor. Lawless chose to file a Claim of Lien, even when there was no legal or factual basis for doing so. Lawless then chose to commence these proceedings to foreclose its Claim of Line.

Lawless used the lien statute to try to extort money from the

⁵⁶ RCW 60.04.181(3) states in pertinent part:

The court may allow the prevailing party in the action, whether plaintiff or defendant, as part of the costs of the action, the moneys paid for recording the claim of lien, costs of title report, bond costs, and attorneys' fees and necessary expenses incurred by the attorney in the superior court, court of appeals, supreme court, or arbitration, as the court or arbitrator deems reasonable.

Nguyens to which it was not entitled. Under these circumstances, and considering the equities in this case, this Court should exercise its discretion by awarding the Nguyens their “attorneys’ fees and necessary expenses”, pursuant to RCW 60.04.181(3), incurred on appeal, as did the court below.⁵⁷

2. The Nguyens Are Entitled To Recover Their Reasonable Attorney Fees And Costs Under RCW 4.84.330.

Even though the parties never formed a contract, attorney fees may still be awarded to the prevailing party in any action where it is alleged that a party is liable on a contract which contains such a fee-shifting provision, pursuant to RCW 4.84.330⁵⁸.

⁵⁷ *Blue Diamond Group, Inc. v. KB Seattle 1, Inc. et al*, Division 1, Docket Number: 65616-3 (7/25/11).

⁵⁸ RCW 4.84.330 states in pertinent part:

In any action on a contract or lease ..., 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.....

Accordingly, we conclude that the broad language “[i]n any action on a contract” found in RCW 4.84.330 encompasses any action in which it is alleged that a person is liable on a contract. Further, because General American obtained a judgment dismissing Herzog’s cause of action, General American became a “prevailing party” within the meaning of that statutory terminology. Hence, General American was properly entitled to an award of reasonable attorney fees incurred at trial.⁵⁹

During the underlying legal malpractice trial, the Nguyens’ lawyer asked Mark Lawless, if he would agree to the following provision:

If Tuyen Nguyen and Mai Van are compelled to sue to enforce this contract, I agree to pay their reasonable attorney fees and costs for doing so.

Mr. Lawless agreed with these material terms, but only “under [his] contract.” Ex.1. Even though the parties were unable to create an enforceable contract, and no such provision appeared in the contract which Lawless sent to the Nguyens, Lawless admitted:

The term “attorney fee shifting provision” is vague. If the phrase is meant to mean a

As used in this section “prevailing party” means the party in whose favor final judgment is rendered.

⁵⁹ *Herzog Aluminum, Inc. v. General American Window Corp.*, 39 Wn.App. at 197; see also, *Kaintz v. PLG, Inc.*, 147 Wn.App. 782, 787, 197 P.3d 710 (2008).

prevailing party attorneys' fee provision, where the prevailing party is entitled to its attorney fees, LCC did not include such a provision in the written contract sent to Mr. Berry on December 19, 2008. The written contract did not, however, contain an integration provision, and did not exclude any of the terms of the agreement reached during Mr. Lawless's [sic] testimony on September 25, 2009.⁶⁰

If the Nguyens prevail on appeal, they should be awarded their attorney fees and costs on this basis, just as they were at trial.

3. The Nguyens Are Entitled To Recover Their Reasonable Attorney Fees Under RCW 4.84.250 And RCW 4.84.270.

RCW 4.84.250⁶¹ makes an award of attorney's fees

⁶⁰ Plaintiff's Supplemental Responses to Van-Nguyen's First Discovery Requests and Requests for Admission: Response to Request for Admissions No. 26 (Ex. 52); See also, RP 75-76, 178-180.

⁶¹ RCW 4.84.250 states in pertinent part:

Notwithstanding any other provisions of chapter 4.84 RCW and RCW 12.20.060, in any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is seven thousand five hundred dollars or less, there *shall* be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys' fees. After July 1, 1985, the maximum amount of the pleading under this

mandatory when the amount in controversy is less than \$10,000.⁶²

For purposes of this statute, the defendant is the prevailing party when the plaintiff recovers nothing.⁶³

A prevailing defendant is entitled to an award of his/her attorney fees under this statute even if he/she does not make a settlement offer or provide ten days notice of the size of the claim.⁶⁴ The only prerequisite to an award of fees in favor of a

section shall be ten thousand dollars.

⁶² *LRS Elec. Controls, Inc. v. Hamre Constr., Inc.*, 153 Wn.2d 731, 745, 107 P.3d 721 (2005); *See also Kingston Lumber Supply Co. v. High Tech Dev. Co.*, 52 Wn. App. 864, 867, 765 P.2d 27 (1988) (recognizing the mandatory nature of RCW 4.84.250).

⁶³ RCW 4.84.270 states:

The defendant, or party resisting relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250, if the plaintiff, or party seeking relief in an action for damages where the amount pleaded, exclusive of costs, is equal to or less than the maximum allowed under RCW 4.84.250, recovers nothing, or if the recovery, exclusive of costs, is the same or less than the amount offered in settlement by the defendant, or the party resisting relief, as set forth in RCW 4.84.280.

prevailing defendant under RCW 4.84.250 is notice that fees may be recoverable under the statute.⁶⁵ Here, the amount requested by Lawless in his First Amended Complaint was less than \$10,000. CP 371. “Where ... a plaintiff pleads a dollar amount less than the statutory minimum, all parties are put on notice that small claim fee provision applies and the ... notice requirement is satisfied.”⁶⁶

Thus, if the Nguyens prevail on this appeal, they are entitled to an award of their fees under RCW 4.84.250 and .270, just as they were at trial.

CONCLUSION

For each of the foregoing reasons, the Respondents agree with the Appellant that “[T]his Court should affirm”,⁶⁷ and that it should award the Nguyens their reasonable attorney fees and costs

⁶⁴ *In re Estate of Tosh*, 83 Wn.App. 158, 165, 920 P.2d 1230 (1996).

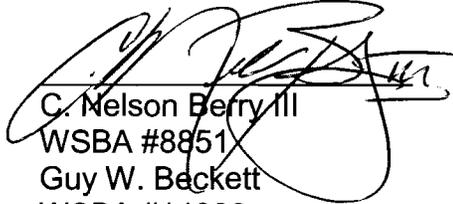
⁶⁵ *Id.* at 164-65.

⁶⁶ *Id.* at 165.

⁶⁷ Brief of Appellant (Corrected) at 33.

incurred on this appeal.

Respectfully submitted this 14th day of September, 2011.

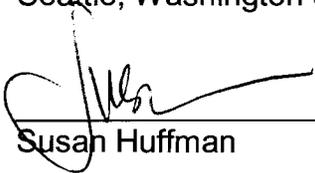

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CERTIFICATE OF SERVICE

I certify that on the 14th day of September, 2011, I mailed a true and accurate copy of the foregoing Brief of Respondent, by first class mail, postage prepaid, to the attorneys for the Appellant

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