

No. 41677-8-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION II

IN RE: WASHINGTON BUILDERS BENEFIT TRUST,

RE SOURCES FOR SUSTAINABLE COMMUNITIES, *et al.*,

Appellants/Cross-Respondents,

v.

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON and
MASTER BUILDERS ASSOCIATION OF KING AND SNOHOMISH
COUNTIES, *et al.*,

Respondents/Cross-Appellants.

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(Hon. Carol A. Murphy)

BRIEF OF RESPONDENT AND CROSS-APPELLANT MASTER
BUILDERS ASSOCIATION OF KING AND SNOHOMISH COUNTIES

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I. INTRODUCTION AND STATEMENT OF JOINDER

Petitioners are five employers who participated in a retrospective rating program established by Respondent Building Industry Association of Washington (“BIAW”). Petitioners sued BIAW, its affiliate, the trust created to hold and invest the premium refunds earned in the program and its trustees (the “BIAW Defendants”) claiming that the BIAW Defendants breached fiduciary duties by, among other things, improperly transferring trust funds designated as “marketing assistance fees” to local associations from which the program draws its members. Petitioners also named these local associations as defendants in their lawsuit, including Respondent Master Builders Association of King and Snohomish Counties (“MBA”).

While some of Petitioners’ claims against the BIAW Defendants would ultimately proceed to trial, the trial court dismissed MBA and the other local associations as a matter of law. That ruling must be affirmed. The trial court properly concluded that there was no evidence that MBA was an actual or *de facto* trustee or otherwise owed fiduciary duties to Petitioners. Nor was there any evidence that MBA knowingly received trust funds in breach of trust. Indeed, the trial court separately concluded that the BIAW Defendants were *required* to transfer the marketing assistance fees to MBA and the other local associations under the terms of the trust. That ruling was correct and must be affirmed as well.

MBA cross-appeals, however, the trial court's subsequent order denying MBA's motion for an award of attorneys' fees. MBA wholly prevailed in the action below. MBA was therefore entitled to fees as a matter of law pursuant to the express attorneys' fee provision contained in the program enrollment agreements between Petitioners and BIAW. Petitioners conceded that MBA was an intended third-party beneficiary of those agreements. Moreover, or in the alternative, the trial court had discretion under TEDRA to award MBA its attorneys' fees and it abused that discretion in failing to recognize MBA's prevailing party status and the contribution its successful defense had on the proper administration of the trust. For these reasons too, MBA is entitled to its fees on appeal.

MBA also asks this Court to affirm the September 13, 2010 Order on Cross-Motions for Summary Judgment and the December 17, 2010 Findings and Conclusions for the reasons set forth in the BIAW Defendants' brief, which MBA joins. *See* RAP 10.1(g). Finally, even if any aspect of those rulings is reversed, it cannot result in a finding of liability against MBA on this record. Petitioners never moved for judgment against MBA on any theory and, because it had previously been dismissed from the case, MBA was not a party to nor did it participate in the cross-motions for summary judgment or the trial. There has never been a finding that MBA violated any duty owed to Petitioners.

II. ASSIGNMENT OF ERROR ON CROSS-APPEAL

For its cross-appeal, MBA assigns error to the (a) Findings of Fact, Conclusions of Law and Order Denying All Motions for Awards of Attorney Fees and Costs and (b) Judgment, entered on March 4, 2011, to the extent that the order and judgment resulted in the denial of MBA's motion for an award of attorneys' fees and costs in this matter. CP 8109-8114 (Fee FF, ¶¶ 4 & 5); CP 8115-8156 (Judgment).

III. STATEMENT OF THE ISSUES

Issue Pertaining To Petitioners' Appeal

Did the trial court properly dismiss MBA as a matter of law when there was no legal authority or genuine issue of material fact to support Petitioners' theory that MBA and the other Local Associations were trustees of the WBBT or owed fiduciary duties to Petitioners? **Yes.**

Issue Pertaining To MBA's Cross-Appeal

Did the trial court err in refusing to award MBA its attorneys' fees when (a) as a matter of law, MBA was entitled to fees under the plain terms of the Enrollment Agreements, to which MBA was a third-party beneficiary, and (b) it was an abuse of discretion to deny MBA fees under TEDRA given the fact that MBA wholly prevailed on Petitioners' baseless claims and, in the process, benefited the trust. **Yes.**

IV. STATEMENT OF THE CASE

MBA incorporates and joins the statement of facts set forth in the BIAW Defendants' brief, but adds the following abbreviated factual and procedural background as it particularly relates to MBA.

MBA is a not-for-profit local trade association. MBA is one of the oldest and largest local homebuilders associations in America, with more than 3,600 member companies representing all facets of housing industry in King and Snohomish counties. CP 4721. During the relevant period, most of MBA's members were beneficiaries of the Washington Builders' Benefit Trust ("WBBT"), a trust established by BIAW to hold and invest the insurance premium refunds it received from the Department of Labor and Industries under BIAW's retrospective rating program, called Return on Industrial Insurance ("ROII"). CP 7141-7143. A 1994 Declaration of Trust and ROII enrollment agreements between BIAW and participating employers ("Enrollment Agreements") required BIAW to pay 10% of the premium refunds to participating employers' local associations as a marketing assistance fee ("MAF"). CP 7145. The MAF was critical to the services and activities MBA provided its members. CP 4783.

Petitioners, five employers who had participated in the ROII program, commenced this action in February 2009, and filed a Second Amended Petition on November 18, 2009. CP 1015-1050. The Second

Amended Petition asserted claims against the BIAW Defendants, MBA and various other local trade associations (the “Local Associations”) under the Trustees’ Accounting Act, chapter 11.106 RCW and the Trust and Estate Dispute Resolution Act (“TEDRA”), chapter 11.96A RCW. *Id.*¹ The Petition alleged that MBA and the Local Associations “took trust funds [the MAF] subject to the trust and all corresponding obligations, thereby assuming all fiduciary duties of a trustee.” CP 1027. The Petition further demanded that MBA and the Local Associations account for and return all MAF funds to the WBBT. CP 1037-1039.

In January 2010, the Local Associations filed a motion for summary judgment, in which they sought dismissal because, among other reasons, they were not trustees of the WBBT and, thus, owed no fiduciary duties to the Petitioners with respect to the MAF. At a May 27, 2010 hearing, the trial court granted the Local Associations’ motion. CP 4965-4969. In its June 25, 2010 summary judgment order, the trial court ruled:

The allegations against the local associations are violations of fiduciary duty owed to the ROII beneficiaries. Therefore, for any liability to be established against the local associations, those local associations must be trustees with respect to the money they receive and thus owe fiduciary duties. The court finds that there are no questions of

¹ Petitioners later sought leave to file a Third Amended Petition that would have included additional allegations and an expanded basis for liability against the Local Associations generally and MBA specifically, but the trial court denied Petitioners’ motion for leave. CP 1258-1261.

material fact as to this threshold question and that all local associations joined in this action by the Second Amended Petition are entitled to judgment as a matter of law ...[.]

CP 8179-8182. The Local Associations were dismissed with prejudice. *Id.*² Although MBA also would have been dismissed, Petitioners and MBA jointly requested that the trial court exclude MBA from its summary judgment order because they had entered into a tentative settlement agreement that was subject to the court's approval. CP 8172-8177.

The trial court, however, rejected the settlement. Immediately thereafter, MBA filed a motion for judgment on the pleadings. CP 4882-4885. The grounds for the motion were straightforward. MBA asked the court to include MBA in its prior summary judgment ruling because, like the other Local Associations, MBA was not a trustee of the WBBT and, therefore, owed no trust or fiduciary duties to Petitioners. CP 4883. The hearing on MBA's motion was set for August 27, 2010, but was continued to September 10 to allow Petitioners more time to respond (RP (8/27/10) at 12-13)—although Petitioners never did file any additional materials. At the hearing, the trial court granted MBA's motion, and it entered an order dismissing MBA with prejudice that same day. *Id.* at 19; CP 4983.

² As explained below, although Petitioners cursorily challenge the summary judgment order because it served as the basis for the trial court's dismissal of MBA, Petitioners do not appeal the order against the Local Associations, who are not party to this appeal. Appellants' Br. at 41 n. 12.

Meanwhile, Petitioners and the BIAW Defendants filed cross-motions for summary judgment on various issues. With respect to the MAF, the trial court concluded that both the 1994 Declaration of Trust and the Enrollment Agreements *required* BIAW to pay the MAF to the Local Associations, and that the funds did not need to be used for any specific purpose. CP 5007-5010. The trial court did, however, require Petitioners and the BIAW Defendants to proceed to trial on other issues, which resulted in entry of findings and conclusions on December 17, 2010. CP 7140-7156. The court refused to award Petitioners any monetary relief because of the insignificant amounts involved. CP 7155 (CL, ¶ 9).

After prevailing, MBA moved for an award of attorneys' fees. MBA argued that it had wholly prevailed on Petitioners' claims and was entitled to fees because (a) the Enrollment Agreements contained an express attorneys' fee provision, and (b) the trial court had discretion under TEDRA to award MBA fees. CP 7458-7466. The BIAW Defendants sought an award of fees on the same grounds. CP 7467-7482. Petitioners opposed MBA's and the BIAW Defendants' respective motions and, for their own part, asked the trial court to require the BIAW Defendants to pay all of Petitioners' attorneys' fees. CP 7165-7179.

The trial court refused to award fees to any party. RP (2/11/11) at 43-47; CP 8109-8114. The court focused almost entirely on Petitioners'

claims against the BIAW Defendants. It concluded that “the enrollment agreement does not provide a basis for fees in this case and that, even if the agreement provided a basis for fees ..., it is not clear which party is the substantially prevailing party given the result in this case.” CP 8111 (Fee CL, ¶ 2); *also* CP 8110 (Fee FF, ¶ 4). With respect to TEDRA, the court concluded that “the proper equitable decision here is to require that the parties bear their own costs and fees.” CP 8112 (Fee CL, ¶ 11). The trial court entered judgment on March 4, 2011. CP 8115-8116. Petitioners appealed, and MBA timely cross-appealed for the purpose of challenging the denial of its motion for an award of attorneys’ fees.

V. ARGUMENT

A. **The Trial Court Properly Dismissed MBA Because There Is No Evidence That MBA Owed Fiduciary Duties To Petitioners.**

1. Standard of Review

The trial court granted MBA’s CR 12(c) motion for judgment on the pleadings, and dismissed MBA with prejudice. CP 4983. This Court reviews a judgment on the pleadings *de novo*. *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005). To the extent the court predicated MBA’s dismissal on the summary judgment previously entered in favor of the Local Associations, MBA’s motion would be treated as a motion for summary judgment. *Perrin v. Stensland*, 158 Wn. App. 185, 192, 240 P.3d 1189 (2010); CR 12(c). In that case, this Court’s review is likewise

de novo. *Id.* Summary judgment is proper if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). For the reasons set forth below, under any standard of review, the trial court properly dismissed MBA as a matter of law.

2. The Trial Court Properly Granted Summary Judgment To The Local Associations Because There Was No Evidence That They Owed Fiduciary Duties To Petitioners.

MBA moved for judgment on the pleadings based on the trial court's earlier June 25, 2010 order granting summary judgment to the other Local Associations. CP 4882-4885. In that earlier order, the trial court ruled that Petitioners failed to raise a genuine issue of material fact to show that the Local Associations owed any fiduciary duties with respect to the MAF. CP 8179-8182. As Petitioners correctly recognize in their brief, the trial court ruled that MBA should be treated like all the other Local Associations, and granted MBA's motion on that basis. Appellants' Br. at 15 & 41. Petitioners therefore argue that the underlying June 25, 2010 summary judgment order was erroneous, although they do not appeal the order as to the Local Associations themselves. *Id.* at 41-42 & n. 12. Petitioners' argument is both procedurally and substantively flawed.

Petitioners' argument fails procedurally because it is not developed sufficiently in Petitioners' brief. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); RAP 10.3(a)(6). Petitioners

claim the June 25, 2010 summary judgment order was erroneous because the Local Associations became *de facto* trustees when they received MAF “funds with knowledge of the trustee’s breach of fiduciary duty.” Appellants’ Br. at 41-42. Petitioners’ two paragraph argument on this issue is nothing more than a legal conclusion followed by a string-cite of authorities for this general proposition of law. *Id.* Petitioners provide no argument to explain why this theory applies to the Local Associations or MBA on the facts of this case, nor is there even a single reference to the record. This Court should consider this argument waived. *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998) (“Passing treatment of an issue ... is insufficient to merit judicial consideration.”).³

Petitioners’ argument also fails on the merits because there is no evidence to show that the Local Associations or MBA knew they were receiving the MAF in breach of trust. As Petitioners note, a transferee of trust property is treated as a trustee only if (a) the transfer was made in breach of trust *and* (b) the transferee knew it. *Paysse v. Paysse*, 86 Wash. 349, 354-55, 150 Pac. 622 (1915); *Huber v. Coast Inv. Co., Inc.*, 30 Wn.

³ Indeed, even though Petitioners purport to challenge the June 25, 2010 summary judgment order in favor of the Local Associations (Appellants’ Br. at 1 & 41 n. 12), Petitioners did not designate for inclusion in the Clerk’s Papers all of the materials identified in that order. *See* RAP 9.12. Indeed, Petitioners failed to designate any of the materials filed by the Local Associations in support of summary judgment.

App. 804, 810, 638 P.2d 609 (1981); Restatement (Second) of Trusts, § 288 (1959). Neither element is present here. As a threshold matter, there was no breach of trust. In granting summary judgment to the BIAW Defendants on the issue, the trial court concluded that the trust documents *required* the BIAW Defendants to pay the MAF to the Local Associations. CP 5007-5010. That conclusion was correct and must be upheld for all the reasons set forth in the BIAW Defendants' brief, which MBA joins.

Further, even if the BIAW Defendants breached a fiduciary duty when paying a flat 10% MAF to the Local Associations, neither the Local Associations nor MBA knew that their receipt and use of those funds was a breach of trust. On the contrary, it was inherently reasonable for the Local Associations and MBA to rely in good faith on the trust documents. After all, the Enrollment Agreements expressly "authorize[d] the Trustees to transfer ten percent (10%) of the Participants' Premium Returns applicable to the Coverage Period to local associations[.]" CP 4470. And the 1994 Declaration of Trust specifically stated that "the Trustees shall pay to any local association ... a marketing assistance fee of 10%[.]" CP 4482. Even were this Court to disagree with the trial court's interpretation of these documents, Petitioners point to no evidence in the record to show that MBA and the Local Associations had that kind of clairvoyance.

3. The Trial Court Properly Granted MBA Judgment On The Pleadings Because There Was No Evidence That MBA “Colluded” In A Breach Of Trust.

Petitioners next argue that, even if summary judgment were proper as to the Local Associations, the trial court erred in dismissing MBA because MBA “participated in setting up the WBBT and colluded with the trustees in carrying out the breaches.” Appellants’ Br. at 40. According to Petitioners, these purported activities “distinguish MBA from the other local associations who the Court dismissed on summary judgment,” and were sufficient to hold MBA “to the standard of a fiduciary.” *Id.* Petitioners provide absolutely no legal authority to support this theory and, once again, their argument should be rejected on this basis alone. RAP 10.3(a)(6); *Fishburn v. Pierce County Planning and Land Serv. Dep’t*, 161 Wn. App. 452, 468, 250 P.3d 146 (2011) (“Under RAP 10.3(a)(6), we will not consider arguments not supported by citation to legal authority and we will not comb the record to find support for an appellant’s argument.”).

Petitioners’ theory is untenable in any event. Petitioners argue that MBA “should be held to the standard of fiduciary” because it helped in “setting up the WBBT.” Appellants’ Br. at 40. MBA’s *predecessor* merged its retro program with BIAW’s *former* retro program in 1990 to create an *earlier* version of the WBBT that is not at issue in this litigation. CP 7143 (FF, ¶ 12); CP 4723-4724. But Petitioners do not explain how

this merger constitutes “collusion” that can impose an ongoing fiduciary duty upon MBA over the intervening twenty years. It can’t. MBA is not, by virtue of the 1990 merger or otherwise, a *de facto* trustee of the WBBT, nor does it owe fiduciary duties to ROII participants. It is undisputed that BIAW appoints the trustees, the trustees manage the WBBT, and the WBBT holds and invests participants’ premium rebates. CP 7140-7156 (FF, ¶¶ 3, 23, 27-31, 38-39). Only the trustees owe fiduciary duties to Petitioners. *Goodman v. Goodman*, 128 Wn.2d 366, 372, 907 P.2d 290 (1995) (“An express trust ... involves a fiduciary relationship in which the trustee holds property for the benefit of a third party).

Petitioners also suggest MBA’s “involvement in the management and operation of the WBBT” gave rise to fiduciary duties, but they point to nothing that supports such a theory. MBA does not manage or operate the WBBT; as noted, the trial court found that the BIAW Defendants exclusively occupy that role. Instead, Petitioners point to the fact that “MBA solicits employer participants in the ROII program.” Appellants’ Br. at 40.⁴ But here too, Petitioners do not explain why that would create

⁴ Petitioners cite CP 421-22 for this proposition. Appellants’ Br. at 40. Those two pages, however, are part of a BIAW ledger and were attached to a declaration filed by Petitioners’ expert in connection with an unrelated motion. The records have nothing to do with MBA or its marketing efforts. *See* CP 163-165 (Declaration of Stephan Sefcik, ¶¶ 49-50 (referring to Exh. W, which contains CP 421-22)).

a fiduciary duty, especially since promotion of the ROII program is a reason why the Local Associations receive the MAF in the first place—which Petitioners agreed to and authorized in the Enrollment Agreements. CP 4470 (“Member further authorizes the Trustees to transfer [the MAF] ... to local associations ... for marketing and promotion of the Plan”).

To be sure, Petitioners offered no evidence (and they cite to none on appeal) to show that MBA said or did anything in the promotion of the ROII program that would create a fiduciary duty that did not exist by virtue of the trust documents themselves. *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 732, 741-43, 935 P.2d 628 (1997) (a fiduciary relationship arises only if circumstances allow the plaintiff to justifiably rely on the defendant to act the plaintiff’s best interests). Nor was there any evidence to suggest that any ROII program participant viewed MBA as a trustee or fiduciary. Petitioners’ vague and unsupported argument that MBA “colluded” in a breach of trust must be rejected. The trial court properly dismissed MBA from the case with prejudice.

B. The Trial Court Erred In Denying MBA’s Motion For An Award Of Attorneys’ Fees And Costs.

The trial court refused to award MBA its reasonable attorneys’ fees and costs for two reasons. *First*, the court concluded that the Enrollment Agreements did “not provide a basis for fees in this case.” CP 8111 (Fee CL, ¶ 2). *Second*, without distinguishing Petitioners’ claims against MBA

from their claims against the BIAW Defendants, it concluded that, even if the Enrollment Agreement did provide a basis for fees, “it is not clear which party is the substantially prevailing party in this case.” *Id.* Based on the same prevailing party analysis, the trial court declined to exercise its discretion under TEDRA to award fees to any party. CP 8110-8112 (Fee FF, ¶¶ 4-6; Fee CL, ¶¶ 3-11). The trial court erred in both respects.

1. The Enrollment Agreements Required The Trial Court To Award MBA Its Attorneys’ Fees As A Matter Of Law.

Where a contract specifically provides for an award of attorneys’ fees, the trial court has no discretion to deny fees to the prevailing party. *CHD, Inc. v. Boyles*, 138 Wn. App. 131, 140, 157 P.3d 415 (2007); *State v. Farmers Union Grain Co.*, 80 Wn. App. 287, 294, 908 P.2d 386 (1996); RCW 4.84.330. Here, the ROII program Enrollment Agreements signed by Petitioners contain such a clause:

Attorneys’ Fees. In the event BIAW or the Trust is required to hire legal counsel to enforce the Member’s obligations under this Agreement, the Member agrees to pay all legal fees incurred by the Trust or BIAW in any action or proceeding.

CP 4471 (Section 9). Whether a party is entitled to an award of attorneys’ fees pursuant to a contractual provision is a question of law that this Court reviews *de novo*. See *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 517, 210 P.3d 318 (2009). This Court should hold that the Enrollment Agreements entitle MBA to such an award as a matter of law.

In the “Obligations and Agreements of the Member” section of the Enrollment Agreements, Petitioners agreed to “authorize[] the Trustees to transfer ten percent (10%) of the Participants’ Premium Returns applicable to the Coverage Period to local associations[.]” CP 4470 (Section 4(b)). Petitioners repudiated this express obligation when they challenged the BIAW Defendants’ authority to pay, and MBA’s right to receive, the MAF. Like the BIAW Defendants, MBA was forced “to hire legal counsel to enforce” Petitioners’ obligation and successfully defend itself, thereby triggering the Enrollment Agreement’s attorneys’ fee clause. And, as discussed below, there is no dispute that MBA wholly prevailed. The trial court not only dismissed MBA with prejudice, it concluded that its receipt of the MAF was entirely proper. CP 4983; CP 5007-5010.

To the extent the trial court concluded that the Enrollment Agreement’s fee provision did not apply because there was no breach of contract claim, it erroneously exulted form over substance. Even in the absence of a breach of contract claim, “an action is on a contract for purposes of a contractual attorney fees provision if the action arose out of the contract and if the contract is central to the dispute.” *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn. App. 834, 855, 942 P.2d 1072 (1997) (citation omitted); *see also Hill v. Cox*, 110 Wn. App. 394, 411-12, 41 P.3d 495 (2002); *Brown v. Johnson*, 109 Wn. App. 56, 58, 34 P.3d 1233

(2001). Here, Petitioners' own allegations, arguments and theory of the case show that the Enrollment Agreement was central to their claims.

In the Second Amended Petition, Petitioners alleged that the Enrollment Agreement exclusively established the existence of the trust and the trustees' authority (CP 1023 (¶ 25); CP 1035 (¶ 60)); prohibited the MAF (CP 1026 (¶¶ 35, 36); CP 1027 (¶ 39); CP 1028 (¶ 42)); and that MBA and the Local Associations "breached their fiduciary duties by ... using money for purposes not authorized by the [Enrollment Agreement]" (CP 1027 (¶ 40); CP 1037 (¶ 67)). Likewise, on summary judgment, Petitioners repeatedly argued that the Enrollment Agreement was the only document that defined the settlors' intent (CP 1535-1537; CP 2222-2228), and that it did not allow the MAF (CP 1537-1539; CP 2228-2232; CP 3044-3046). In short, the Enrollment Agreement was central to this suit because, under Petitioners' own theory of the case, without it, there would be no trust and no breach of fiduciary duty claim against MBA.

Finally, the fact that MBA is not a signatory to the Enrollment Agreement does not prevent MBA from recovering under the agreement's attorneys' fee clause, and Petitioners have conceded as much. A third-party beneficiary is entitled to receive benefits under a contract to which it is not a party, including a right to recover fees. *Wolfe v. Morgan*, 11 Wn. App. 738, 524 P.2d 927 (1974). Third-party beneficiary status requires

the contracting parties to intend that the promisor assume a direct obligation to the beneficiary. *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 361-62, 662 P.2d 385 (1983). “If the terms of the contract necessarily require the promisor to confer a benefit upon a third person, then the contract, and hence the parties thereto, contemplate a benefit to the third person.” *Id.* (citation omitted). The key is “whether performance under the contract would necessarily and directly benefit” the third-party. *Id.*

Under the Enrollment Agreement’s plain and unambiguous terms, Petitioners agreed that their participation in the ROII program would necessarily and directly benefit MBA and the Local Associations. As described above, that benefit—Petitioners’ express authorization that the Local Associations were entitled to the MAF—was the primary basis of Petitioners’ claims against MBA. CP 4470 (“Member ... authorizes the Trustees to transfer ten percent (10%) of the Participants’ Premium Returns ... to local associations”). Having agreed to provide the MAF benefit to MBA, and then having forced MBA to incur significant legal fees to defend that benefit, MBA was entitled to enforce the Enrollment Agreement’s attorneys’ fees clause against Petitioners.

Critically, Petitioners have already recognized that MBA and the other Local Associations were third-party beneficiaries of the Enrollment Agreement. In opposing the Local Associations’ motion for summary

judgment, citing the very same law and MAF provision described above, Petitioners argued that, “the Local Associations were clearly third party beneficiaries of the Enrollment Agreements because, pursuant to those Agreements, they received 10% of the retro funds,” and “[t]here is no doubt that this provision conferred a benefit upon the Local Associations.” CP 2844. If nothing else, Petitioners were right about that. The trial court’s refusal to award MBA attorneys’ fees pursuant to the Enrollment Agreement was an error of law, and must be reversed.

2. In The Alternative, The Trial Court Abused Its Discretion In Denying MBA An Award Of Fees Under TEDRA.

Even if MBA did not have a contractual right to fees, it was an abuse of discretion for the trial court to deny MBA its fees under TEDRA. *In re Estate of Black*, 153 Wn.2d 152, 173, 102 P.3d 796 (2004) (TEDRA fee awards reviewed for abuse of discretion). TEDRA provides in part:

The superior court ... may, in its discretion, order costs, including reasonable attorneys’ fees, to be awarded to any party ... [f]rom any party to the proceedings[.] The court may order the costs, including reasonable attorneys’ fees, to be paid in such amount and in such manner as the court determines to be equitable. ...

RCW 11.96A.150(1). Consistent with TEDRA’s “any party” language, courts may order unsuccessful litigants to pay fee awards if their claims do not benefit the trust. *In re Irrevocable Trust of McKean*, 144 Wn. App. 333, 345, 183 P.3d 317 (2008); *Villegas v. McBride*, 112 Wn. App. 689,

697, 50 P.3d 678 (2002). Indeed, where a disappointed beneficiary forces a trust to defend a meritless claim, public policy supports an award of fees. *In re Estate of Kerr*, 134 Wn.2d 328, 342, 949 P.2d 810 (1998); *McDonald v. Moore*, 57 Wn. App. 778, 783, 790 P.2d 213 (1990).

As the trial court's summary dismissals of the Local Associations and MBA show, Petitioners had no sound legal or factual basis to drag MBA into this case. Nor can it be said that Petitioners' claims against MBA resulted in any benefit to the WBBT or its beneficiaries. There was never a finding that MBA breached a fiduciary or contractual duty to Petitioners, and no aspect of Petitioners' pyrrhic declaratory or injunctive victory against the BIAW Defendants applied to MBA. It was a manifest abuse of discretion for the trial court to simply lump MBA in with the BIAW Defendants, find that both sides had "prevailed" only in part, and declare the fee issue a wash. That analysis is questionable as between Petitioners and the BIAW Defendants, but it is plainly wrong as to MBA. Equity demands that Petitioners compensate MBA for the fees it incurred defending claims that never should have been brought in the first place.

Moreover, MBA's defense benefited the trust. Petitioners' claims threatened the proper administration of the WBBT and, in particular, the settlors' intent that the trust pay an MAF to Local Associations to promote and market the ROII program and provide services to members. MBA's

successful defense helped defeat Petitioners' effort to thwart that intent. *See In re Estate of Morris*, 89 Wn. App. 431, 434, 949 P.2d 401 (1998) (“a trustee who successfully defends his right to continue administering the trust has conferred a benefit on the trust”). Petitioners' claims against MBA conferred no commensurate benefit to the trust. Indeed, Petitioners forced MBA to divert resources that otherwise would have been directed to its members—who were among the same beneficiaries that Petitioners purported to represent. This Court should reverse the trial court's order denying MBA an award of attorneys' fees and remand with instructions to award MBA the reasonable fees it incurred defending this case.

C. MBA Is Entitled To Its Attorneys' Fees On Appeal.

For the reasons stated above, MBA is also entitled to its attorneys' fees on appeal. *See* RAP 18.1(a); *Villegas*, 112 Wn. App. at 697. Indeed, this Court should use its equitable discretion to award MBA its fees on appeal under RCW 11.96A.150(1) even if it affirms the trial court's denial of fees below. Although insisting that MBA remain party to this appeal, Petitioners give short-shrift to MBA in their brief and provide no colorable reason to reverse the trial court's orders dismissing the Local Associations generally or MBA specifically. Nevertheless, MBA has been forced—once again—to devote significant resources defending itself rather than focusing on providing services to its members. Enough is enough.

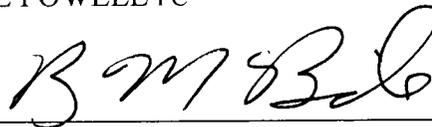
VI. CONCLUSION

For the foregoing reasons, this Court should affirm dismissal of MBA with prejudice, reverse the order denying MBA an award of attorneys' fees and costs, and remand the fee issue to the trial court for a determination of the reasonableness of MBA's fee request.

RESPECTFULLY SUBMITTED this 23rd day of December, 2011.

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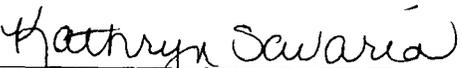
CERTIFICATE OF SERVICE

I certify under penalty of perjury that on December 23, 2011, I caused to be served a copy of this **Brief of Respondent and Cross-Appellant Master Builders Association of King and Snohomish Counties** on the following person(s) in the manner indicated below at the following address(es):

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