

Case No. 45667-2-II

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

Grays Harbor Superior Court Cause No. 08-2-00254-0

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JERRY MULDER and SALLY MULDER

Plaintiffs/Respondents,

v.

CABINET DISTRIBUTORS, INC.

Defendant/Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
2014 APR 10 PM 2:41  
STATE OF WASHINGTON  
BY         

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**PETITIONER'S OPENING BRIEF**

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## INTRODUCTION

Appellant Cabinet Distributors, Inc. (hereinafter “CDI”) petitions this court to reverse the trial court’s Order Granting Plaintiffs’ Motion for Attorney’s Fees and Costs and the entry of Final Judgment that included the award of attorney fees and costs to plaintiffs’ attorney, Allen T. Miller. CP 199-203.

Jerry Mulder and Sally Mulder (hereinafter “plaintiffs”) are the respondents in this matter. Jury trial was conducted on their multiple claims against CDI in June of 2011. A verdict on all claims was rendered on June 10, 2011. With respect to plaintiffs’ claim of fraud against CDI, the jury found in favor of CDI. With respect to CDI’s counter claim against plaintiffs, the jury found in favor of CDI. With respect to plaintiffs’ claim of breach of contract due to mold contamination, the jury found in favor of CDI. Plaintiffs prevailed on one claim of breach of contract due to installation defect. In that respect the jury awarded plaintiffs \$7,600.00 in actual damages. However, the jury also found against plaintiffs by finding that plaintiffs had both waived and interfered with CDI’s duties under the contract. The jury also found that plaintiffs breached their contract with CDI and awarded CDI actual damages in the amount of \$2,400. The net total recovery for plaintiffs was \$5,200, which is just over 5% of the \$95,000 that was requested during opening statements. Prior to trial, the Court also dismissed the Consumer

Protection Act claim against CDI. All total, CDI prevail outright on **five** claims to the plaintiffs' one.

After the jury verdict was entered, plaintiffs' moved for attorneys' fees as the prevailing party, CDI requested that the trial court find that plaintiffs did not recover due to the findings of waiver and interference – the proper legal consequence of those findings. In opposition to this request, plaintiffs motioned for, and were granted, a new trial on all claims and issues presented in the original trial. The trial court presumably found inconsistencies between the jury's finding that plaintiffs' incurred damages and their finding of waiver and interference. The actual basis of the court's grant of a new trial on the remaining claims and issues is unknown.

CDI appealed the trial court's grant of a new trial and the Court of Appeals reversed the trial court's order for a new trial. The matter was then remanded to the trial court for entry of judgment in conformity with the jury's verdict and to consider whether an award of attorney fees was proper.

On remand, plaintiffs moved for entry of judgment, including a request for attorney fees under RCW 4.84.010 and 4.84.330, which was granted by the trial court in an order, and subsequent final judgment, entered on September 5, 2013. The final judgment awarded plaintiffs damages in the amount of \$5,200.00 and attorney's fees and costs totaling \$48,594.96.

It was error for the court to enter judgment awarding attorney's fee against CDI. The court should have entered judgment in favor of CDI, based on the clear direction of the jury's verdict. The jury's findings lead to only one answer – that CDI prevailed on all but a single claim at trial. As a result, CDI was the prevailing party and should have been awarded its attorney's fees (or, at very least) there should have been no award of fees to either party.

### **ASSIGNMENT OF ERROR AND ISSUES**

#### **A. Assignment of Error**

##### **1. An awarded attorney's fees should not have been entered for either party**

The trial court erred by finding that the contract between plaintiff and CDI contained a provision allowing the award of attorney's fees in actions to enforce the provisions of the contract.

##### **2. Attorney's fee award should have been entered in favor of CDI**

In the alternative, the trial court erred by finding that plaintiffs were the substantially prevailing party and entering an award of attorney's fees in their favor as it was CDI that was the substantially prevailing party in the underlying matter.

#### **B. Assignment of Issues**

1. Whether the trial court erred in finding that the contract between plaintiffs and CDI contained a provision that allowed for the

unilateral recovery of attorney's fees in an action to enforce the contract, thereby triggering RCW 4.84.330

2. Whether the trial court erred in awarding attorney's fees to plaintiffs as the substantially prevailing party.

## STATEMENT OF THE CASE

### A. General Background and Plaintiffs' Claims

This matter arises out of a contractual agreement between plaintiffs and CDI regarding the purchase and installation of cabinets and countertops in plaintiffs' home. CP 131. Plaintiffs filed the lawsuit against CDI in February 2008 alleging the following causes of action: (1) breach of contract for installation/construction defect; (2) breach of contract for mold infestation; (3) fraud; (4) violation of the Consumer Protection Act ("CPA"); and (5) an action against the contractor's bond. Id. In response, CDI brought a counter-claim against plaintiffs to collect amounts owed on the contract. Id. The action against the bond was dismissed by plaintiffs. Id. CDI filed a Motion for Summary Judgment seeking dismissal of the CPA claim, which was granted. Id.

### B. Jury Trial and First Appeal

The case was tried to a jury verdict in June 2011. CP 131. At trial, plaintiffs' breach of contract claims for installation/construction defect and mold infestation, as well as their fraud claim were still viable, as was CDI's counter-claim to collect monies owed. Id. Plaintiffs requested \$95,000.00 during their opening statement at trial. Id. The jury, by way

of a special verdict form, rendered a verdict on both plaintiffs' breach of contract claims, plaintiffs' fraud claim, and CDI's counter-claim to collect monies owed. CP 123-124. The jury found in favor of CDI on its counter-claim and awarded \$2,400.00 in amounts due and owing under the contract. Id. The jury also found in favor of CDI on plaintiffs' fraud claim. Id. The jury additionally found in favor of CDI on plaintiffs' breach of contract claim alleging mold infestation. Id. Finally, the jury found in favor of plaintiffs on their breach of contract claim for installation/construction defect and awarded \$7,600.00 to plaintiffs on that claim. Id.

In post-trial motions, plaintiffs requested a new trial, which was granted by the court. CP 132. CDI appealed. Division II of the Court of Appeals reviewed the matter and remanded it to Grays Harbor County Superior Court "for entry of judgment in conformity with the jury's verdict, finding actual damages for each party, and we remand for the trial court to consider whether any attorney fee award is proper." CP 3.

**C. Motion for Entry of Judgment and Attorney's Fees**

After remand, plaintiffs submitted their Motion for Entry of Judgment and for Attorney's Fees and Costs. CP 6-11. CDI opposed this motion and filed its own Cross-Motion for Attorney's Fees. CP 130-143. After briefing by the parties the trial court held a hearing on July 1, 2013. RP 3. During the hearing, plaintiffs and CDI presented arguments to the trial court setting forth their respective arguments as to how the trial court

should rule regarding awarding attorney's fees. RP 3-7. After reviewing the submitted materials and hearing arguments from the parties, the trial court entered a ruling based upon the opinion that the determination of prevailing party is made in the same way that the winner of a ball game is determined. RP 9. Specifically, the trial court stated as follows:

Now we're here for the attorney's fees part. And bear in mind the analysis. Quote, neither a trial court nor an appellate court may substitute its judgment for that which is within the jury's province. Well, I can't supplant my intelligence for what they told me. And what they told me when I look at this is that I was wrong, first of all, by ordering a new trial and that order was appealed and they sent back, said no. So what they did find is that basically it would appear that the plaintiff prevailed more than the defendants. **And I don't know how to put it any different than when you have a ball game, whether you kick a field goal at the end or you beat them by 20 points, you prevailed.**

And so therefore I am going to grant the attorney's fees request by the plaintiff.

RP 8-9 (emphasis added).

Following its ruling, the trial court appeared to indicate that it was aware that the ruling would likely be appealed and pondered who would address any subsequent issues on remand. RP 9. Specifically, the trial court stated:

So submit your order and – and I - I don't know what you're going to do with this, but I have a sneaking hunch - let's see. I - I issued this thing in - was it '09, something like that? When did I do that? Anyway, I don't know what's going to happen here, because if and when this goes up and they send it back in - in three years to say I was stupid again, the good news is I won't be here. So if they send it back to the trial court judge to make a decision, I don't

know who's going to do it or you guys are going to have to pay me by the hour to come back.

RP 9.

The trial court found that plaintiffs were the prevailing party and instructed counsel to submit an agreed order. RP 8 – 11. Subsequent to the July 1, 2013 hearing, plaintiffs' counsel filed a revised declaration for attorney's fees and costs. CP 146-181. This declaration **increased** the amount request from \$42,309 to \$53,614.17. CP13, CP 147. In light of this revision, the parties were unable to reach an agreement as what were reasonable fees.

CDI had specific objections to the plaintiffs' proposed figures, namely that the requested award of fees included fees associated with the first appeal. Then, when plaintiffs re-submitted its declaration rather than reducing the amount that was originally sought, through the reduction of appellate fees and costs, the request increased. CP 185-189, CP 191-194, RP 14. The only explanation provided by plaintiffs' counsel was that there was an alleged typographical error in the original submission. RP 14, CP 189.

As a result, the parties appeared before the trial court in a hearing on August 8, 2013, to have the trial court determine the reasonable fees and costs. RP 12-13. The trial court heard the arguments of the parties and then issued an edict directly to the attorneys for both parties. RP 16-17. That edict was that the parties would come upon an agreed order that encompassed the fees incurred from “when the gentleman walked in your office you started with zero and the day we came in and when I ruled that there ought to be a new trial.” RP 17. That was the time period that the trial court deemed to be a reasonable amount of fees for plaintiffs. *Id.*

The trial court continued, however, and advised both counsel that they would face CR 11 sanctions if they failed to agree on an order awarding plaintiffs' their fees and costs. RP 18. Specifically, the trial court stated:

There's a thing called CR 11 and I'm going to nail one of you or both of you, because you better be absolutely correct...And then the one that loses, and it might even be both of them, I'm going to assess you terms personally. Personally, not your clients. And then you can appeal that, gentlemen, up to the higher court about, gee, you know that judge, he says you're all smarter than he is. All he wanted us to do is come up with a good common sense answer and be honest with him, but you know what, we went to court and he said, well, we weren't honest with him, and you know what, he hammered me for good. If this is wrong, what's the difference between 43 and 58 that's 15,000 bucks. And what if he's correct? That's 15,000 bucks. And you want to know the final statement, I don't kid people.

It's kind of a bummer because Judge Edwards got the last lawyers for \$60,000. And if you gentlemen can get the figures higher I will be able to assess you that and break his record. Now, we're done. I either get the e-mail that it's over and here's the agreed order or I will see you on the other day.

RP 18-19.

Based upon the above-quoted admonition from the trial court, CDI agreed to the Order Granting Plaintiffs' Motion for Attorney's Fees and Costs, as to form only. CP 199-200. As a result, the trial court entered an order finding the plaintiff to be the prevailing party and awarding attorney's fees and costs. *Id.* The trial court entered Final Judgment in accordance with that order on the same day. CP 201-203.

### **SUMMARY OF ARGUMENT**

This case presents questions regarding the trial court's discretion in finding that plaintiff was the prevailing party in the underlying litigation and awarding attorney's fees and costs. *First*, the contract between

plaintiffs and CDI does not contain a unilateral attorney-fee provision, thereby triggering RCW 4.84.330. The fee provision contained within the contract between the parties relates solely to collection actions. Plaintiffs' reliance upon the language in the contract is in error, as it pertains to their actions against CDI. As such, the contract does not provide for recovery of attorney's fees in this matter, except for CDI's action to collect monies due and owing from plaintiffs, **which CDI prevailed upon at trial.**

*Second*, even if the contract allows for plaintiffs recovery of attorney's fees and costs, plaintiffs are not the substantially prevailing party. Plaintiffs were afforded minimal recovery for one of their claims against CDI – a mere 5% of the \$95,000 that they requested during opening statements. For the application of RCW 4.84.330 there must be a prevailing party. Wachovia SBA Lending v. Kraft, 138 Wash.App. 854, 158 P.3d 1271 (2007) *aff'd sub nom.* Wachovia SBA Lending, Inc. v. Kraft, 165 Wash. 2d 481, 200 P.3d 683 (2009). If neither party wholly prevails, then the party who substantially prevails is the prevailing party for the purpose of awarding attorney's fees. Crest Inc. v. Costco Wholesale Corp., 128 Wash.App. 760, 115 P.3d 349 (2005); Transpac Development, Inc. v. Oh, 132 Wash.App. 212, 130 P.3d 892 (2006); Mike's Painting, Inc., v. Carter Welsh, Inc., 95 Wash.App. 64, 975 P.2d 532 (1999). Determination of the substantially prevailing party depends on the relief afford to the parties. Id.

Here, the plaintiffs cannot be the substantially prevailing party. CDI prevailed over plaintiffs on their fraud claim. CDI was awarded damages on its counter-claim. Plaintiffs alleged two theories for their breach of contract claim, and only prevailed on one. Moreover, plaintiffs' total recovery was significantly less than their valuation of that claim at

trial. Plaintiffs requested \$95,000.00 in their opening statement, but their net recovery was only \$5,200.00, which is just over 5% of their request to the jury.

CDI is the substantially prevailing party. Four separate claims were presented to the jury. CDI prevailed on three of them. *In addition, CDI previously prevailed against plaintiffs' CPA claim by way of summary judgment.* For the purpose of awarding attorney's fees, focus is not limited to whether a party prevailed on the cause of action giving rise to the claim for attorney's fees (breach of contract). Instead, the focus is the relief affording to the parties for the **entire suit**. Hertz v. Riebe, 86 Wash.App. 102, 936 P.2d 24 (1997).

An objective analysis of the foregoing shows that CDI is the substantially prevailing party and should be awarded its fees. As the substantially prevailing party, CDI should recover the entirety of its reasonable attorney's fees as represented in CDI's Cost Bill. CP 64-119.

## **ARGUMENT**

### **A. Standard of Review**

The applicability of RCW 4.84.330 is a question of law. Wachovia SBA Lending, Inc. v. Kraft, 165 Wash. 2d 481, 200 P.3d 683 (2009). The court will review questions of law de novo. Mohr v. Grant, 153 Wash.2d 812, 823, 108 P.3d 768 (2005).

Whether a party is a "prevailing party" is a mixed question of law and fact that is reviewed under an error of law standard. Wright v. Dave Johnson Ins. Inc., 167 Wash. App. 758, 782, 275 P.3d 339, 353 *review denied*, 175 Wash. 2d 1008, 285 P.3d 885 (2012) *citing* Eagle Point

Condo. Owners Ass'n v. Coy, 102 Wash.App. 697, 706, 9 P.3d 898 (2000).

In this matter CDI is seeking review of both the applicability of RCW 4.84.330 and the determination that plaintiffs were the prevailing party.

**B. RCW 4.84.330 Does Not Apply As the Attorney's Fee Clause in Contract Applies Only to Collections Actions**

The contract clause relied upon by plaintiffs for recovery of reasonable attorney's fees **does not** afford the recovery sought. The contract clause at issue reads as follows:

Late payments shall be subject to interest charges of 18% per annum, and in no event higher than the interest rate provided by law. In the event *collections action* or court proceedings are instituted to enforce this agreement or any portion thereof, PURCHASER agrees to pay the cost of *said collection and/or reasonable attorney fees and costs in addition to any sum due herein*. The laws of the State of Washington govern this contract and venue of any dispute is placed in Grays Harbor County, Washington. CDI has retained National Revenue Corp., *a collection agency*, to manage any delinquent accounts.

CP 15.

If a party intends to rely upon the language in a contract as a means to recover attorney fees, the language must contain a specific attorney fee clause. A contract fee provision awarding attorney's fees is strictly interpreted and limited to what the precise provision provides. Hindquarter Corp. v. Property Development Corp., 95 Wash. 2d 809, 816, 631 P.2d

923, 926 (1981). Here, the clear intent of the contract clause above is to control only collections actions. Plaintiffs' reliance upon this language is in error, as it pertains to their actions against CDI. As such, the contract does not provide for recovery of attorney's fees in this matter, except for CDI's action to collect monies due and owing from plaintiffs, which CDI prevailed upon at trial.

**C. Plaintiffs are Not the Substantially Prevailing Party**

Should the Court find that the contract language provides plaintiffs with the right to recover attorney's fees, plaintiffs are **not the prevailing party** in this matter. By applying current Washington law, plaintiffs cannot recover attorney's fees under the contract at issue and have no statutory right to do so either.

**1. Plaintiffs Have Not Substantially Prevailed and CDI Has**

a. Plaintiffs are not the Substantially Prevailing Party

Plaintiffs have been afforded minimal recovery for one of their claims. CP 123-124. This alone does not make them the prevailing party for the purpose of determining an award of attorney's fees. Unlike determining whether costs should be awarded under RCW 4.84.010, an affirmative judgment in favor of a party does not make them the prevailing party. For the application of RCW 4.84.330, there **must be** a prevailing party. Wachovia SBA Lending v. Kraft, 138 Wash. App. 854, 859, 158 P.3d 1271, 1274 (2007).

If neither party wholly prevails, then the party who **substantially prevails** is the prevailing party for the purpose of awarding attorney's fees. Wright v. Dave Johnson Ins. Inc., 167 Wash. App. 758, 783, 275 P.3d 339, 353 *review denied*, 175 Wash. 2d 1008, 285 P.3d 885 (2012). Determination of the substantially prevailing party depends on the relief afforded to the parties. Id.

Based upon the statements of the trial court, it appears as though no weight was given to the relief that CDI obtained throughout the entire course of the litigation. The trial court has attempted to streamline the analysis for determining who is the substantially prevailing party with the creation of the “ball game” analysis where whoever is awarded at least \$1 more than the other party must be the substantially prevailing party. This analysis, however, does not account for the defense victories obtained by CDI where the “victory” was the lack of an award for plaintiff as opposed to an affirmative award of monetary damages to CDI.

Here, the plaintiffs cannot be the substantially prevailing party. CDI prevailed over plaintiffs on their fraud claim. CP 123-124. CDI was awarded damages on its counter-claim. Id. Plaintiffs alleged two theories for their breach of contract claim, and only prevailed on one. Moreover, plaintiffs' total recovery was significantly less than their valuation of that claim at trial. Finally, Plaintiffs requested \$95,000.00 in their opening statement, but their net recovery was only \$5,200.00, which is just over 5% of their request to the jury.

Though the ball game/sports metaphor and analysis is a simpleton's methodology that is contrary to the law as it would unfairly penalize every defendant such that in order to receive an award of fees and costs, the threshold would be reduced from "substantially prevailing party" to "any award of damages to the plaintiff or a verdict for the defense." However, even if the Court is persuaded to adopt the trial court's "ball game" methodology then CDI would win with the final score of 5 to 1, based upon the number of claims won. CDI would still prevail if the analysis was based upon percentage of final award in relation to amount demanded in that plaintiffs sought \$95,000 and received \$5,200. By either measure, CDI wins the "ball game" analysis.

In addition, such a standard would drive an already over-crowded court system past the breaking point as members of the plaintiff's bar would roll the dice with trial knowing that, if they had a claim that provided for attorney's fees, the bar to recover would be simply getting an award \$1 greater than the defendant.

b. CDI is the Substantially Prevailing Party

CDI argues that the analysis under existing Washington law regarding determination of the substantially prevailing party should be enforced and that this Court find that CDI is the substantially prevailing party. Five separate claims were presented to the jury. CDI prevailed on four of them. CP 123-124. In addition, CDI previously prevailed against plaintiffs' CPA claim by way of summary judgment. For the purpose of

awarding attorney's fees, focus is not limited to whether a party prevailed on the cause of action giving rise to the claim for attorney's fees (breach of contract). Instead, the focus is the relief afforded to the parties for the **entire suit**. Hertz v. Riebe, 86 Wash. App. 102, 105, 936 P.2d 24, 26 (1997). Furthermore, for the purposes of this analysis, plaintiffs' fraud claim should be considered "inextricably intertwined" with their breach of contract claim. Mehlenbacher v. DeMont, 103 Wash. App. 240, 247, 11 P.3d 871, 875 (2000).

Therefore, if plaintiffs are correct and the breach of contract claim provides them some grounds for recovery of fees, then the remainder of the claims and their outcomes must be considered in determining the prevailing party for the purpose of awarding fees. This review shows that four of the five claims which – according to plaintiffs' argument should provide an award of attorney's fees – were won by CDI. This figure does not, however, account for the previous summary judgment ruling. In total, CDI prevailed on five claims to plaintiffs' one.

Beyond the breach of contract claims, CDI should recover attorney's fees for prevailing against plaintiffs' fraud claim as it was inextricably linked with the other claims tried together. However, what is most curious is that plaintiffs are brazenly attempting to recover **their own** attorney fees for the fraud action, which they lost at trial! CP 16-30; CP 146-181. An objective analysis of the foregoing clearly shows that CDI is the substantially prevailing party and should be awarded its fees. As the

substantially prevailing party, CDI should recover the entirety of its reasonable attorney's fees as represented in CDI's Cost Bill. CP 64-118.

**2. No Prevailing Party - No Fees**

In the alternative, the Court may determine that no party substantially prevailed in this matter. In the event that both parties prevail on **major issues**, neither party is a prevailing party and each party would bear their own costs and fees. Wright v. Dave Johnson Ins. Inc., 167 Wash. App. 758, 783, 275 P.3d 339, 354 *review denied*, 175 Wash. 2d 1008, 285 P.3d 885 (2012).

Similarly, in the event that both parties are afforded some measure of relief, neither party may be entitled to attorney fees. Id. See also Phillips Bldg. Co., Inc. v. An, 81 Wash.App. 696, 915 P.2d 1146 (1996). Here, both parties prevailed on single allegations of breach of contract. The jury rendered a verdict for CDI on plaintiffs' breach of contract claim for mold, while it awarded plaintiffs damages for breach of contract for construction/installation defect. CDI prevailed on all other claims at trial, including its counter-claim against plaintiffs. So, at the very least, CDI prevailed on two of the three claims arising from the contract, and five out of six claims when looking at the whole litigation. Based on the circumstance, if CDI is not the prevailing party, at a minimum neither party has recovered substantially entitling it to attorney's fees.

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### 3. Proportionality Approach - Offset of Fees

In the event the Court determines that CDI is not the prevailing party and determines that fees should be awarded to plaintiff, then the proportionality approach should be employed. When there are conflicting claims at issue in an action, a defendant should be awarded fees for those claims it successfully defends and plaintiff awarded fees for those claims in which it prevails and those awards should offset. Marassi v. Lau, 71 Wash.App. 912, 917, 859 P.2d 605 (1993), *overruled on other grounds by Wachovia SBA Lending, Inc. v. Kraft*, 165 Wash.2d 481, 490–92, 200 P.3d 683 (2009). The Court has the authority to offset an attorney's fees award based on a determination that both parties prevailed on severable and distinct claims under a contract. Mike's Painting, Inc. v. Carter Welsh, Inc., 95 Wash. App. 64, 68-69, 975 P.2d 532, 535 (1999).

In cases with contractual attorney fees at issue and **both parties prevailing on discrete contractual issues**, the trial court should award fees on a proportional basis. *See* Marassi v. Lau, 71 Wash.App. 912, 859 P.2d 605 (1993); Transpac Dev., Inc. v. Young Suk Oh, 132 Wash.App. 212, 130 P.3d 892 (2006). Divisions I and III have adopted the “proportionality approach” to deal with the award of attorney fees on actions based in contract. The proportionally approach awards each party attorney's fees for which that party prevailed and then those fees are offset. *See* Mike's Painting, Inc. v. Carter Welsh, Inc., 95 Wash. App. 64, 68-69, 975 P.2d 532, 535 (1999); Marassi at 917, 859 P.2d 605 (1993), *overruled*

on other grounds by Wachovia SBA Lending, Inc. v. Kraft, 165 Wash.2d 481, 490–92, 200 P.3d 683 (2009).

Here, CDI prevailed on its counter-claim and it prevailed against plaintiffs' allegation of breach of contract based on mold investigation. This Court previously dealt with an issue similar to the segregation between the mold and installation issues underlying plaintiffs' breach of contract claim. In Bloor v. Fritz, 143 Wash.App. 718, 180 P.3d 805 (2008), the court determined that segregation between successful and unsuccessful issues may be necessary for the determination of attorney fees. *See also* Kastanis v. Educ. Employees Credit Union, 122 Wash.2d 483, 501-02, 859 P.2d 26, *opinion amended by* 865 P.2d 507 (1993).

In sum, if the court finds an award of attorney's fees is warranted, any recovery should be proportionate to the claims prevailed upon at trial. CDI should recover its fees for successfully prosecuting its counter-claim and for defending plaintiffs' fraud and mold infestation claims. Using the proportionality approach, this would undoubtedly result in a net recovery of attorney's fees in favor of CDI.

**4. Plaintiffs have not Discounted Their Fee Request Based on Their Trial Losses**

Plaintiffs ultimately recovered on only one of their five original claims in this matter and CDI recovered on its only claim. CP 123-124. Plaintiffs have not segregated their fees. CP 146-181. As a result, they **must** be seeking recovery of attorney's fees incurred prosecuting and/or defending claims **which they lost**. The affidavits filed in support of

plaintiffs' motion by Mr. Miller do not indicate which hours or tasks were devoted to which claim and do not indicate that any billed fees have been excluded from plaintiffs' overall request based on the (apparently unimportant) fact that the plaintiffs lost on the majority of their claims at trial. Finally, by seeking recovery of all fees on all claims, plaintiffs have taken the position that fees are recoverable on all claims, regardless of whether they arise from the contract. Of course, that benefits CDI's position as it won on the fraud claim.

#### **ATTORNEY'S FEES**

Pursuant to RAP 18.1, CDI requests herein its reasonable attorney's fees and expenses based on the subject contract between plaintiffs and CDI and plaintiffs' continued assertions of their right to recover the same. Specifically, CDI requests its reasonable attorneys fees incurred in recovery of amounts due and owing under the subject contract, as alleged in CDI's counter-claim.

#### **CONCLUSION**

The trial court erred in this matter by determining that plaintiffs were the substantially prevailing party based upon the "ball game" analysis. Instead, the foregoing arguments outlined above establishes that the contract between plaintiff and CDI does not provide for an award of attorney's fees. However, if the Court finds that the contract provision does provide for an award of fees and costs, plaintiffs are not entitled to such an award given that they were not the substantially prevailing party in this matter.

There is no legal basis to support the trial courts finding that plaintiffs are the substantially prevailing party in this matter. The trial court should have applied the above-referenced case law and determined that: 1) CDI was the prevailing party and should be awarded attorney's fees and costs; or 2) that neither party was the substantially prevailing party and therefore not award attorney's fees to either party. By implementing its own analysis of RCW 4.84.330, the trial court committed an error of law and neglected the simple fact that CDI prevailed on 5 claims to plaintiffs' one claim, and that based upon the monetary award, plaintiffs recovered approximately 5% of what they sought.

Based on the foregoing, CDI respectfully requests that this Court reverse the trial court's order and vacate the judgment that was entered. Furthermore, CDI respectfully requests that this Court find that CDI is the substantially prevailing party and award CDI attorney's fees in the amount of \$82,354.50, and remand this matter for entry of judgment in accordance with that finding.

In the alternative, CDI requests that this Court vacate the trial court's order and judgment and find that neither party is entitled to an award of attorney's fees given the neither party meets the standard for being the substantially prevailing party.

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Finally, if the Court finds that CDI is not the prevailing party and attorney's fees are warranted in this matter that the award of fees should be based upon the proportionality approach resulting in an offset of fees.

DATED this 10<sup>th</sup> day of April, 2014.

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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

I am employed by the law firm of Scheer & Zehnder LLP.

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date set forth below I served the document(s) to which this is attached, in the manner noted on the following person(s):

2014 APR 10 PM 2:41  
COURT OF APPEALS  
WASHINGTON  
JERRY & SALLY MULDER

PARTY/COUNSEL	DELIVERY INSTRUCTIONS
<b><u>CO/ Plaintiffs Jerry &amp; Sally Mulder</u></b> Allen Miller, WSBA #12936 Law Offices of Allen T. Miller, PLLC 1801 West Bay Drive NW, Suite 205 Olympia, WA 98502 P: (360) 754-9156 F: (360) 754-9472 <a href="mailto:allen@atmlawoffice.com">allen@atmlawoffice.com</a>	<input checked="" type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via E-Mail

DATED this 10th day of April, 2014 at Seattle, Washington.

  
Mallory Lynch, Legal Secretary