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NO. 45281-7-II

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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*See*  
STATE OF WASHINGTON  
MAY 22 11 59 AM '09  
COURT OF APPEALS  
DIVISION II

THOMAS PRICE and PATRICIA PRICE, husband and wife, individually  
and their marital community composed thereof; and HYUN UM and JIN  
S. UM, husband and wife, individually and their marital community  
composed thereof, d/b/a P & U CAPITAL PARTNERS, LLC, a non-  
existent Washington limited liability company,

Appellants,

v.

SOUNDBUILT NORTHWEST, LLC, a Washington limited liability  
company,

Respondent.

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APPELLANT'S BRIEF

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## I. INTRODUCTION

The trial court erroneously ignored this Court's prior directives and denied Thomas Price and Hyun Um's motion for attorney fees following entry of mandate and remand from this Court in cause number 40925-9-II. The trial court ignored orders from the Bankruptcy Court directing the Trustee of Price and Um's bankruptcy estates to pursue collection of attorney fees incurred on appeal and at the trial court level. The trial court also ignored this Court's direction to award attorney fees to Price and Um, finding that this Court did not allow it to award Price and Um attorney fees for work done at the trial court level. The trial court's finding is contrary to this Court's prior decision holding that Price and Um are entitled to attorney fees under a Real Estate Purchase and Sale Agreement as well as RCW 4.84.330, which requires the trial court award Price and Um their attorney fees as the prevailing party.

Price and Um respectfully request that this Court vacate the trial court's order to the extent that it denied Price and Um the appellate attorney fees incurred after the bankruptcy filings and for work performed at the trial court level. Given the trial court's undisturbed and unchallenged finding that the appellate level attorney fees were "ordinary, necessary, and reasonable," Price and Um request that this Court remand and direct the trial court to enter judgment in favor of Price and Um for the full amount of appellate attorney fees - \$83,118.00. Additionally, Price and Um request that this Court remand and direct the trial court to enter judgment in favor of Price and Um for attorney fees incurred at the

trial court level, including those fees incurred on remand. Price and Um respectfully request that this Court remand this matter before a different trial court judge.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in awarding Price and Um only \$51,283.50. CP at 1384.

2. The trial court erred in finding that she would not award appellate fees incurred after the bankruptcy filings absent an order from the Bankruptcy Court affirming the employment of appellate counsel. CP at 1384.

3. The trial court erred in finding that in the absence of any reference to the Defendants' ability to recover attorney fees incurred at the trial court level being contained in the Court of Appeals decision, this Court lacks authority to grant such an award. CP at 1384.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. The trial court erred in finding that the appellants were not entitled to appellate attorney fees after the filing of the bankruptcy petition because (1) there is no authority in bankruptcy law requiring such an order and (2) the Bankruptcy Court ordered multiple times that appellate and trial court attorney fees were to be recovered for the bankruptcy estate's benefit. (Assignments of Error Nos. 1, 2, and 3).

2. The trial court erred in finding that appellants were not entitled to an award of attorney fees at the trial court level because they were not the prevailing party when (1) this Court previously found that

appellants were the prevailing party and (2) the trial court entered judgment in appellants' favor, making appellants the prevailing party. (Assignments of Error Nos. 1 and 3).

3. As the prevailing parties, the appellants were entitled to an award of attorney fees for all reasonable fees incurred at trial and on appeal. To the extent the trial court's determination of the amount of attorney fees is a matter of discretion, the trial court abused its discretion in awarding only \$51,283.50 in attorney fees. (Assignments of Error Nos. 1, 2, and 3).

#### **IV. FACTS**

In 2000, Price and Um formed P & U I, a Washington limited liability company. CP at 1032.<sup>1</sup> Racca formed Washington corporations Soundbuilt in 1992 and Sunridge in 2000. On October 4, 2000, Sunridge and P & U I formed 176th Street, LLC to develop a residential subdivision called Frederickson Estates in Pierce County, Washington. Soundbuilt originally purchased the undeveloped Frederickson Estates property on May 8, 2002, for \$2,586,600. 176th Street, LLC's principal asset was the right to develop Frederickson Estates. Sunridge and P & U I were the only two members of 176th Street, LLC, each owning a 50 percent interest. CP at 1032.

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<sup>1</sup> Price and Um's statement of facts relating to events prior to this Court's mandate are taken from this Court's earlier unpublished opinion on this case, which is included in the Clerk's Papers from pages 1028 – 40.

On August 27, 2003, the parties executed two contracts. CP at 1032. First, the parties signed an “Agreement for Purchase and Sale of Membership Units” (Membership Agreement). The Membership Agreement listed Sunridge as the seller of all its membership units in 176th Street, LLC to P & U, the buyer, for \$650,000. Second, a “Real Estate Purchase and Sale Agreement” (REPSA) listed Soundbuilt as buyer of the Frederickson Estates property and 176th Street, LLC as seller. Under the REPSA, 176th Street, LLC assumed the obligation to purchase the Frederickson Estates property from Soundbuilt, complete development of all 181 lots, and sell the finished lots back to Soundbuilt. CP at 1032.

In 2005, 176th Street, LLC notified Racca that 176th Street, LLC would no longer pursue the Frederickson Estates project because it was “under water” or unprofitable. CP at 1033. In Pierce County Superior Court on August 29, Soundbuilt sued 176th Street, LLC for breach of the REPSA requesting declaratory relief and specific performance. CP at 1033.

On October 31, 176th Street, LLC executed a “Deed in Lieu of Foreclosure” conveying by quit claim deed the Frederickson Estates to lender Michael Mastro. CP at 1033. On November 30, Mastro, Soundbuilt, and Sunridge signed real estate purchase and sale agreements (Mastro REPSAs) conveying the unfinished Frederickson Estates property from Mastro to Soundbuilt and Sunridge. The Mastro REPSA with Soundbuilt contained a clause regarding pending litigation which provided, “Upon the completed Closing of the sale of the Property to

Buyer and recordation of the plat of the Property, Buyer shall dismiss the pending Pierce County Superior Court lawsuit brought by Buyer against 176th Street, LLC with prejudice.” CP at 1033 – 34 (citing Clerk's Papers (CP) at 101)).

On December 30, Um executed an assignment of rights for Frederickson Estates, assigning to Soundbuilt all rights, privileges, obligations, and responsibilities related to the property. Mastro conveyed the property to Soundbuilt and Sunridge by statutory warranty deeds on February 9, 2006. CP at 1034. Soundbuilt and 176th Street, LLC signed and filed with the court a stipulation and order of dismissal with prejudice of Soundbuilt's claims against 176th Street, LLC on February 15. The order stated, “The parties hereby stipulate and agree that all claims asserted in this case have been fully compromised and settled.” CP at 1034.

On February 25, 2008, Soundbuilt sued Price and Um, individually and their marital communities, claiming breaches of the Membership Agreement and the REPSA, or alternatively, unjust enrichment. CP at 1034.

After a six-day bench trial, on March 19, 2010, the trial court made an oral ruling in favor of SBNW. CP at 1034. On April 2, the trial court entered a written judgment finding Price and Um jointly and severally liable for \$5,897,513.80 in damages, \$91,120.50 in attorney fees, and \$2,281.78 in costs under the REPSA. CP at 1034 – 35. This judgment

was one of the main events that precipitated Price and Um's bankruptcy filings, which occurred during Price and Um's appeal. CP at 1226.

On October 18, 2011, this Court reversed the trial court's judgment, holding that the doctrine of res judicata barred Soundbuilt's second action. CP at 1031. This Court reversed the trial court's ruling in favor of Soundbuilt, vacated the subsequent charging order, and remanded for entry of a final order dismissing Soundbuilt's action against Price and Um. CP at 1031. Because this Court "reverse[d] on res judicata grounds, [it did] not reach the parties' other arguments on appeal with respect to successors in interest, scrivener's error, mutual mistake, collateral estoppel, LLC veil piercing, statutory personal liability, damages, or the charging order." CP at 1031.

This Court also held that Price and Um were entitled to attorney fees on appeal pursuant to the REPSA and RAP 18.1 and that "[e]xcept for those costs the commissioner of this court will determine pursuant to RAP 14.3 and 14.6, the trial court should determine the reasonable amount of the award on remand." CP at 1040. The Supreme Court denied review on June 6, 2012. *Soundbuilt Northwest, LLC v. Price*, 174 Wn.2d 1007 (2012). Mandate issued September 20, 2012. CP at 1028 – 29.

On May 20, 2013, Price and Um's counsel in the bankruptcy matters moved for an order approving the appointment of counsel to pursue collection of the attorney fees Price and Um incurred at trial and on appeal. CP at 1189 – 90. The Bankruptcy Court approved the request and on "under the terms set forth in the Application" and ordered that

all fees and expenses that are allowed and collected pursuant to the award of attorneys fees in the Soundbuilt Northwest LLC v. Thomas Price, et al. Pierce County Superior Court No. 08-2-05542-1 (hereinafter the "Soundbuilt Lawsuit") shall be deposited in the trust account of Counsel for the Debtors for the benefit of this bankruptcy estate.

CP at 1195. Thus, the Bankruptcy Court directed Price and Um's counsel to seek trial and appellate fees on behalf of their bankruptcy estates.

On remand, Price and Um moved for an award of attorney fees in the trial court matter in amount of \$110,321.75 plus \$4,908.73 in costs. CP at 1042 – 43, 1106. Price and Um also requested \$83,118.00 and \$4,908.00 for appellate fees and costs. CP at 1106. The total fee request totaled \$193,466.75 in attorney fees and \$4,908.73 in costs. CP at 1106.

On June 29, the trial court vacated the earlier judgment and charging order and dismissed Soundbuilt's claims with prejudice and without costs. CP at 1107. However, the trial court reserved the issue of attorney fees and costs for future determination. CP at 1108.

Soundbuilt subsequently opposed Price and Um's request for attorney fees on two bases. First, they contended that although this Court held that Price and Um were the prevailing party on appeal, they were not the prevailing party at the trial court level because Soundbuilt had prevailed on the issue of whether the REPSA should be reformed. CP at 1109. Second, Soundbuilt argued that Price and Um were not entitled to attorney fees on appeal because their appellate counsel had allegedly not complied with the requirement to be appointed as counsel by the

Bankruptcy Court. CP at 1110. Soundbuilt argued that in the absence of such an appointment, Price and Um were not entitled to appellate attorney fees. CP at 1110. Soundbuilt did not dispute the reasonableness of the rates charged by Price and Um's counsel, only Price and Um's entitlement to attorney fees. CP at 1111.

In response, Price and Um demonstrated that the United States Bankruptcy Court for the Western District of Washington authorized Price and Um's counsel to pursue the award and collection of attorney fees on behalf of Price and Um's Chapter 11 bankruptcy estates. CP at 1186 - 1208 -09. This authorization included the pursuit of fees both at the trial and appellate level. Price and Um also demonstrated that the attorney fees belonged to the bankruptcy estate and the Bankruptcy Court alone had authority to determine ownership of those fees. CP at 1210. Furthermore, to the extent that Soundbuilt based their opposition to fees on the basis of its own Objection to Third Interim Application for Compensation Filed by Debtors' Counsel, the Bankruptcy Court had denied that objection. CP at 1187, 1206 – 07.

Price and Um further argued that they alone prevailed. This Court ordered the dismissal with prejudice and without costs of Soundbuilt's entire action. CP at 1211. Moreover, Price and Um prevailed on one of its affirmative defenses and was not required to prevail on all affirmative defenses in order to be considered the prevailing party. CP at 1211.

The trial court set over the motion for fees for a later date. CP at 1399 – 1400.

On December 5, 2013, Price and Um filed an additional motion for attorney fees. The Bankruptcy Court had appointed Eric Orse as trustee of their bankruptcy estates and Mr. Orse took control of the pursuit of Price and Um's affirmative claims for the benefit of the bankruptcy estate's creditors. CP at 1213 – 15, 1227. On November 5, 2013, the Bankruptcy Court had granted Mr. Orse trustee management authority over Prium Companies, LLC, and that authority specifically included the pursuit of appellate attorney fees in this matter:

13. The Trustee may seek to collect the attorney's fees award rendered in the SoundBuilt Superior Court litigation in favor of the Debtors and take control of those funds for the benefit of the Debtors' estates. This order shall constitute a direction and authorization that any attorney's fees due either of the Debtors or to Prium are to be paid to the Trustee, *including any fees incurred by any attorneys retained by the Debtors or Prium in connection with the appeal.*

CP at 1214, 1234 (emphasis added). Mr. Orse requested that the trial court

order that all reasonable attorney fees and costs incurred by Price and Um's counsel at trial and on appeal should be paid to [him] as the Chapter 11 Trustee, regardless of whether some or all of those expenses have been paid to counsel by Price, Um, Prium, or any other parties. If any party has a claim for repayment or reimbursement of fees advanced with respect to this case, that will constitute a claim in the Bankruptcy Court for which [he] will have administrative responsibility.

CP at 1228.

Based on the additional work performed, Price and Um requested an award of attorney fees in the amount of \$194,396.75 plus costs in the amount of \$4,908.73. CP at 1215.

Soundbuilt again opposed the motion for attorney fees arguing that (1) this Court did not find that Price and Um prevailed at the trial level, (2) this Court did not sufficiently explain why Price and Um were entitled to attorney fees under the Membership Agreement and they were not entitled to fees under the REPSA, (3) Price and Um's appellate counsel allegedly performed work after the bankruptcy filing, but before obtaining approval from the Bankruptcy Court to represent Price and Um, and (4) Price and Um were not entitled to attorney fees on appeal because a third party paid the attorney fees. CP at 1241 – 42, 1246 - 47. Soundbuilt also argued again that Price and Um were not entitled to fees because Soundbuilt prevailed at trial and Price and Um did not prevail on all of their affirmative defenses. CP at 1247 – 48. Soundbuilt continued to argue that either neither party substantially prevailed or that it was entitled to a proportional offset for its fees associated with the allegedly successful trial. CP at 1247 – 48. Soundbuilt also attempted to distract the trial court by arguing that fees could not be awarded in the superior court litigation until certain issues were explained to the Bankruptcy Court and creditors. CP at 1249 – 50. Soundbuilt incorrectly argued that the Bankruptcy Court had not determined whether appellate fees could be awarded and thus the trial court had no authority to award those fees. CP at 1250 – 51.

Price and Um argued in reply that (1) Price and Um prevailed entirely in this action, (2) this Court's determination that Price and Um were entitled to attorney fees under the REPSA was binding, and (3) whether the Bankruptcy Court appointed appellate counsel is irrelevant because bankruptcy law does not require appointment of an attorney by the court before work is conducted, only approval from the Bankruptcy Court before that attorney is paid fees out of the bankruptcy estate. CP at 1369 – 70.

The trial court granted Price and Um's motion for attorney fees, but limited the award to only \$51,283.50 in attorney fees and \$4,908.00 in costs. CP at 1382. The trial court found that the attorney fees incurred on appeal were "ordinary, necessary, and reasonable." CP at 1384. However, the trial court limited the award of appellate attorney fees to the fees incurred prior to Price and Um's bankruptcy filing, which totaled \$51,283.50. CP at 1384. The trial court refused to award appellate attorney fees incurred after the bankruptcy filings "absent an order by the Bankruptcy Court affirming the employment of [appellate counsel]." CP at 1384. Additionally, the trial court denied Price and Um's request for attorney fees at the trial court level because "in the absence of any reference to the Defendants' ability to recover attorney's fees incurred at the trial court level being contained in the Court of Appeals decision of this matter, this Court lacks authority to grant such an award." CP at 1384.

Price and Um timely appealed. CP at 1386 – 92. On February 12, 2014, the Bankruptcy Court entered an Amended Ex Parte Order Granting Trustee Authority to Employ Special Counsel Nunc Pro Tunc (“Order”). *Appendix A.*<sup>2</sup> The Order specifically authorized the bankruptcy trustee to retroactively employ Appellant’s appellate counsel in the prior appeal in this case under cause number 40925-9-II. *Appendix A* at 2. The Bankruptcy Court ordered that appellate counsel’s “representation of the Debtors and their bankruptcy estates in the *Soundbuilt* appeal is ratified and approved *nunc pro tunc.*” *Appendix A* at 2. The Bankruptcy Court further ordered that “the Pierce County Superior Court is authorized to enter an award against Soundbuilt for payment to the Trustee of [appellate counsel’s] fees and costs in the *Soundbuilt* matter, whether incurred before or after the Debtor’s bankruptcy petitions were filed. *Appendix A* at 2.

## V. ARGUMENT

### A. Standard of Review

The Court of Appeals applies a two-part test in reviewing a trial court’s award of attorney fees. First, whether there is a basis for attorney fees under contract, statute, or equity is a legal question that this Court reviews *de novo*. *Gander v. Yeager*, 167 Wn. App. 638, 646 – 47, 282 P.3d 1100 (2012). Second, this court then reviews a discretionary decision to award or deny attorney fees and the reasonableness of any attorney fee award for abuse of discretion. *Gander*, 167 Wn. App. at 647. An abuse of

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<sup>2</sup> Appellants have filed a Motion to Add Additional Evidence to ensure that the Bankruptcy Court’s Order is properly before this Court.

discretion occurs when the trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons. *Bay v. Jensen*, 147 Wn. App. 641, 651, 196 P.3d 753 (2008).

**B. The trial court erred in finding that it had no authority to award (1) appellate attorney fees incurred after the bankruptcy filings absent further order of the Bankruptcy Court and (2) trial level attorney fees absent specific reference to such an award from this Court.**

The trial court erred in limiting its award of attorney fees on appeal to only those fees incurred prior to the bankruptcy filings. There is no authority in bankruptcy law requiring such an order. The error is particularly apparent given the fact that the Bankruptcy Court ordered multiple times that appellate and trial court fees were to be recovered for the benefit of the bankruptcy estate. Additionally, the trial court erred in denying attorney fees at the trial court level. Price and Um were the prevailing party at all levels of this case and were entitled under the REPSA to an award of attorney fees.

Soundbuilt spent a great deal of time below arguing that Price and Um could not recover their attorney fees on appeal because the Bankruptcy Court allegedly never approved appellate counsel's employment. Even if it is true he was never employed by the Bankruptcy Court, this argument is irrelevant and did not constitute grounds to deny Price and Um their appellate attorney fees.

Soundbuilt argued that "in the absence of an Order approving the hiring of [appellate counsel], after August 17, 2010, no compensation

could be paid.” CP at 1244. This is not true and Soundbuilt failed to produce any state or bankruptcy case law supporting this proposition. All the Bankruptcy Code requires is that a debtor’s attorney be approved by the court before the attorney is paid out of the *funds and assets of the bankruptcy estate*. *C.f. Lamie v. U.S. Trustee*, 540 U.S. 526, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004) (Section 330(a)(1) of the Bankruptcy Code does not authorize compensation to debtor’s attorneys *from the bankruptcy estate* unless they are employed in a chapter 7 by a trustee under Section 327 with court approval). The Code says nothing about whether a creditor who sues a debtor can avoid paying fees because the debtor’s counsel has not been employed by the Bankruptcy Court. Moreover, Mr. Mungia could still obtain approval for his fees at this point in time: a Bankruptcy Court may approve a debtor’s professional’s employment and fees *nunc pro tunc* for valuable but unauthorized services. *See, e.g., Atkins v. Wain, Samuel & Co. (In re Atkins)*, 69 F.3d 970 (9th Cir. 1995).

Soundbuilt argued that 11 U.S.C. § 327 required that the Bankruptcy Court appoint appellate counsel before any entitlement to attorney fees could accrue. This is a blatant misrepresentation of 11 U.S.C. § 327. That section provides authority for the *trustee* to hire certain professional persons, such as attorneys, to represent or assist the trustee in carrying out the trustee’s duties or for another specified special purpose with the court’s approval. 11 U.S.C. § 327(a), (e). There is no mention in this statute that absent such an order the bankruptcy estate is

not entitled to attorney fees. Additionally, no such order could have been obtained because the Bankruptcy Court did not appoint Mr. Orse as trustee until *after* this Court's mandate issued in favor of Price and Um.

The Plaintiff is conflating two separate issues in an attempt to mislead the Court: (1) whether the Defendants are entitled to attorney's fees under the Membership Agreement and the REPSA, and (2) whether, after the fees are awarded and turned over to the bankruptcy trustee, Mr. Mungia can collect his fees from the bankruptcy estate as the debtors' attorney. These are not the same inquiry and the Plaintiff has not cited a single case or statute for the proposition that the Defendants are precluded from recovering their attorney fees in this state-court action. Sections 327 and 330 of the Bankruptcy Code are designed to ensure the orderly, fair and transparent administration of a bankruptcy estate for the benefit of creditors; *they are not provisions for a debtor's creditor to shield itself from liability to the debtor for attorney's fees after a creditor sues a debtor and loses* (which is what the Plaintiff is attempting to do in this case). The fees are property of the bankruptcy estate and will be disbursed under the control of the Bankruptcy Court, but the Plaintiff cannot avoid paying the fees merely on the alleged ground that Mr. Mungia has not yet been employed.

Indeed, the Bankruptcy Court explicitly authorized Trustee Eric Orse:

“...to collect the attorney's fees award rendered in the SoundBuilt Superior Court

litigation in favor of the Debtors and take control of those funds for the benefit of the Debtors' estates. This order shall constitute a direction and authorization that any attorney's fees due either the Debtors or Prium are to be paid to the Trustee, including any fees incurred by any attorneys retained by the Debtors or Prium in connection with the appeal."

The Bankruptcy Court entered this decision on November 5, 2013, well after the unsecured creditors claimed that Mr. Mungia should not be paid because he had not been approved. Thus, the Bankruptcy Court has ruled that the Trustee is entitled to trial and appellate fees, whether they are due to the Defendants or their company, and did not concern itself with the fact that Mr. Mungia has allegedly never been approved in the bankruptcy case.

Further compounding the error, the Bankruptcy Court has subsequently entered an order ratifying and approving prior appellate Counsel's representation of Price and Um, directing the Superior Court to enter an award against Soundbuilt for payment to the Trustee of appellate fees incurred in the prior appeal. *Appendix A* at 2. The appellate attorney fees, like all fees involved in this matter, belong not to any attorney that has represented Price or Um, to Price or Um, or to any company or entity owned by Price or Um. The fees belong to the bankruptcy estates and the Bankruptcy Court's Order must be followed.

Additionally, the trial court erred in denying fees incurred by Price and Um at the trial court level. This Court has already determined that

Price and Um are the prevailing party and awarded Price and Um attorney fees under the REPSA. The trial court had no authority to ignore this Court's undisturbed determinations. Moreover, Price and Um are the prevailing parties in this matter at all levels and the trial court had no authority to deny them attorney fees.

Under the law of the case doctrine, the parties, the trial court, and the appellate courts are bound by the holdings of the appellate court on a prior appeal until such time as they are authoritatively overruled. *Humphrey Indust., Ltd. v. Clay Street Assoc., LLC*, 176 Wn.2d 662, 669, 295 P.3d 231 (2013).

In *Humphrey Industries*, the Supreme Court reversed an award of attorney fees in favor of Clay Street Associates and awarded Humphrey Industries its attorney fees for the appeal because it was the prevailing party. 176 Wn.2d at 668. The Court awarded Humphrey Industries its attorney fees as the prevailing party on appeal and remanded the case for consideration of whether Humphrey Industries was entitled to attorney fees. *Humphrey Indust.*, 176 Wn. App. at 667 – 68. On remand, the trial court reinstated the attorney fee award in favor of Clay Street Associates finding that it was entitled to award Clay Street Associates fees on the same basis on which the Supreme Court had already reversed. *Humphrey Indust.*, 176 Wn. App. at 669.

The Supreme Court again reversed the trial court, holding that it had already determined that Humphrey Industry's conduct did not justify an award of attorney fees, that this "became the law of the case, and the

trial court was not authorized to reconsider fees against Humphrey.”  
*Humphrey Indust.*, 176 Wn.2d at 671 – 72.

Similarly, as Price and Um argued below,<sup>3</sup> this Court’s holdings are binding, including that (1) Price and Um were the prevailing parties and (2) Price and Um were entitled to attorney fees under the REPSA. Soundbuilt sought discretionary review of this Court’s opinion, which the Supreme Court denied. This Court’s holding is the law of the case. The trial court had no authority to determine that Price and Um were not entitled to attorney fees at the trial court level.

Additionally, as the prevailing parties, Price and Um are entitled to attorney fees under the REPSA. In any action on a contract “where such contract...specifically provides that attorneys’ fees and costs, which are incurred to enforce the provisions of such contract..., shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract...or not, shall be entitled to reasonable attorneys’ fees in addition to costs and necessary disbursements.” RCW 4.84.330. As used in RCW 4.84.330, “prevailing party” means “the party in whose favor final judgment is rendered.”

Price and Um obtained a complete dismissal of Soundbuilt’s litigation with prejudice as a result of this Court’s decision. CP at 1107 - 08. Final judgment was entered in favor of Price and Um and they are the prevailing parties. RCW 4.84.330.

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<sup>3</sup> CP at 1370.

Furthermore, Soundbuilt's attempts to confuse the issue should be soundly rejected. Soundbuilt received no judgment in its favor. Soundbuilt cannot rely on the fact that it initially prevailed at trial as a basis for claiming that there is no prevailing party because this Court reversed that judgment. Additionally, Soundbuilt cannot credibly argue that Price and Um did not prevail because they did not prevail on each of their affirmative defenses. This Court specifically stated that res judicata operated to bar Soundbuilt's claims and declined to reach the remaining issues raised in the prior appeal. CP at 1031. Price and Um are the prevailing party and Soundbuilt did not prevail in any measure.

This Court determined that Price and Um are entitled to attorney fees and costs under the REPSA. CP at 1040. This is the undisturbed judgment of this Court. The trial court erroneously concluded that this Court did not grant it authority to award attorney fees to Price and Um for work done at the trial court level. Because Price and Um are entitled to prevailing party attorney fees under the REPSA, such fee "shall be awarded." RCW 4.84.330. The trial court had no authority to deny Price and Um's attorney fees for work done at the trial court level. *Erection Co. v. Dep't of Labor*, 121 Wn.2d 513, 518, 852 P.2d 288 (1993) ("The word "shall in a statute thus imposes a mandatory requirement unless a contrary legislative intent is apparent").

Appellants respectfully request that this Court hold that the trial court erred in denying Price and Um attorney fees for work performed at the trial court level. Given the trial court's undisturbed and unchallenged

finding that the appellate level attorney fees were “ordinary, necessary, and reasonable,” Price and Um request that this Court remand and direct the trial court to enter judgment in favor of Price and Um for the full amount of appellate attorney fees - \$83,118.00. Additionally, Price and Um request that this Court remand and direct the trial court to enter judgment in favor of Price and Um for attorney fees incurred at the trial court level, including those fees incurred on remand. Price and Um respectfully request that this Court remand this matter before a different trial court judge.

**C. The trial court abused its discretion in limiting the award of attorney fees to only those fees incurred on appeal before the bankruptcy filings.**

The trial court did not exercise any discretion in determining the reasonable attorney fees. The trial court’s findings were based solely on an erroneous interpretation of the law. However, to the extent that this Court might determine any of the trial court’s findings were discretionary, the trial court abused its discretion in limiting Price and Um’s attorney fees to just those fees incurred by prior appellate counsel before Price and Um filed for bankruptcy.

As stated above, a trial court abuses its discretion when the decision is manifestly unreasonable or based upon untenable grounds or reasons. *Bay*, 147 Wn. App. at 651.

A court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable

grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

*Bay*, 147 Wn. App. at 531 (quoting *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)).

“In determining reasonable attorney fees, the trial court must first calculate the ‘lodestar’ figure,” which “represents the number of hours reasonably expended (discounting hours spent on unsuccessful claims, duplicated effort, and otherwise unproductive time) multiplied by the attorney’s reasonable hourly rate.” *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 341, 54 P.3d 665 (2002).

Here, the trial court’s determination of reasonable fees was an abuse of discretion. The trial court specifically found that the attorney fees incurred at the appellate court level were ordinary, necessary, and reasonable. CP at 1384. However, as explained above, the trial court misapplied the law in determining that it had no authority to award appellate attorney fees incurred after the bankruptcy filings. The Bankruptcy Court had issued several orders directing the Trustee to pursue recovery of appellate and trial court attorney fees for the benefit of the bankruptcy estates. In addition, the Bankruptcy Court has since entered an Order ratifying and approving prior appellate counsel’s representation of Price and Um on appeal and directing the trial court to enter an award of appellate attorney fees. Appendix A at 2.

Moreover, to the extent that the trial court's decision not to award trial court attorney fees was discretionary, such discretion was abused. As stated above, the trial court had no authority to deny Price and Um attorney fees incurred at the trial court level as (1) this Court previously held that Price and Um were the prevailing parties, (2) this Court previously awarded Price and Um attorney fees, and (3) this Court previously determined that Price and Um were entitled to attorney fees under the REPSA. These holdings are the law of this case. Moreover, RCW 4.84.330 denies the trial court any ability to deny Price and Um attorney fees under the REPSA. To the extent that the trial court's determination on this matter was discretionary, the trial court abused that discretion.

**D. Price and Um are entitled to attorney fees on appeal.**

If this Court finds that Price and Um are the prevailing party, Price and Um request an award of attorney fees on appeal. Pursuant to RAP 18.1(b), the REPSA, and this Court's prior decision, Price and Um are entitled to prevailing party attorney fees and costs incurred in this appeal. Such fees belong to the trustee.

**VI. CONCLUSION**

Price and Um respectfully request that this Court vacate the trial court's order to the extent that it denied Price and Um the appellate attorney fees incurred after the bankruptcy filings and for work performed at the trial court level. Given the trial court's undisturbed and unchallenged finding that the appellate level attorney fees were "ordinary,

necessary, and reasonable,” Price and Um request that this Court remand and direct the trial court to enter judgment in favor of Price and Um for the full amount of appellate attorney fees - \$83,118.00. Additionally, Price and Um request that this Court remand and direct the trial court to enter judgment in favor of Price and Um for attorney fees incurred at the trial court level, including those fees incurred on remand. Price and Um respectfully request that this Court remand this matter before a different trial court judge.

RESPECTFULLY SUBMITTED this 22 day of May, 2014.

EISENHOWER CARLSON, PLLC

By:   
Donald L. Anderson, WSBA #8373  
Attorneys for Appellants

**CERTIFICATE OF SERVICE**

I hereby certify that on the 22<sup>nd</sup> day of May, 2014, I caused all parties hereto to be served with the foregoing *Appellant's Brief* and this *Certificate of Service* by directing delivery as follows:

By U.S. first-class mail, postage prepaid, and by e-mail, on May 22, 2014, to Attorney for Respondent:

Paul Brain  
Brain Law Firm  
1119 Pacific Avenue, Suite 1200  
Tacoma, WA 98402  
[pbrain@paulbrainlaw.com](mailto:pbrain@paulbrainlaw.com)

I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 22<sup>nd</sup> day of May, 2014, at Tacoma, Washington.

  
\_\_\_\_\_  
Angela Tracy

FILED  
COUNT OF APPEALS  
DIVISION II  
2014 MAY 22 PM 3:29  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
SERVITY

# APPENDIX A

Below is the Order of the Court.



*Paul B. Snyder*

**Paul B. Snyder**  
**U.S. Bankruptcy Judge**  
(Dated as of Entered on Docket date above)

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UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF WASHINGTON

In re:

HYUN J. UM and JIN S. UM,  
  
THOMAS W. PRICE and PATRICIA  
A. PRICE,  
  
Debtors.

Case no: 10-46731-PBS

(Jointly Administered with  
Case No. 10-46732-PBS)

AMENDED *EX PARTE* ORDER  
GRANTING TRUSTEE AUTHORITY TO  
EMPLOY SPECIAL COUNSEL *NUNC PRO*  
*TUNC*

THIS MATTER came before the Court upon the *ex parte* application of Eric D. Orse, the duly appointed Chapter 11 Trustee ("Trustee"), pursuant to 11 U.S.C. § 327(e) and Bankruptcy Rule 2014, for authority to employ Salvador Alejo Mungia II ("Mungia") and the firm of Gordon Thomas Honeywell ("GTH") as his special counsel, *nunc pro tunc*. The Court finds that notice was given to the Office of U.S. Trustee, and there being no objections from same, and no additional notice being necessary, and it appearing that the appointment of Mungia and GTH does not represent any interest adverse to the Debtor or the estate in connection with the matters

TRUSTEE'S AMENDED *EX PARTE* ORDER GRANTING  
TRUSTEE AUTHORITY TO EMPLOY SPECIAL COUNSEL  
*NUNC PRO TUNC* - 1  
#923087 v2 / 40594-006

KARR TUTTLE CAMPBELL  
701 Fifth Avenue, Suite 3300  
Seattle, Washington 98104  
Main: (206) 223 1313  
Fax: (206) 682 7100

1 on which they are employed, and the Court determining that it is appropriate to enter an order  
2 employing Mungia and GTH as the Trustee's counsel, it is hereby,

3 ORDERED that the Trustee is authorized to employ Salvador Alejo Mungia II  
4 ("Mungia") and the firm of Gordon Thomas Honeywell ("GTH") as his special counsel, *nunc*  
5 *pro tunc* as special counsel with respect to his representation of the Debtors in the matter of  
6 *Soundbuilt Northwest LLC v. Price and Um*, Washington State Court of Appeals, Division Two,  
7 Case No. 40585-1-11, consolidated with Case No. 40925-9-11 (appeal from Pierce County  
8 Superior Court Case No. 08-2-05542-1);

9  
10 IT IS FURTHER ORDERED that Mungia's representation of the Debtors and their  
11 bankruptcy estates in the *Soundbuilt* appeal is ratified and approved *nunc pro tunc*; and

12 IT IS FURTHER ORDERED that the Pierce County Superior Court is authorized to enter  
13 an award against Soundbuilt for payment to the Trustee of Mungia's and GTH's fees and costs in  
14 the *Soundbuilt* matter, whether incurred before or after the Debtor's bankruptcy petitions were  
15 filed; and

16  
17 IT IS FURTHER ORDERED that neither Mungia nor GTH, nor any other party that  
18 previously paid their fees, shall have a claim in these bankruptcy estates for any fees relating to  
19 the *Soundbuilt* matter.

20  
21 /// END OF ORDER ///

22 Presented by:

23 KARR TUTTLE CAMPBELL

24 /s/ Mark A. Bailey

25  
26 Mark A. Bailey, WSBA #26337  
Attorneys for Chapter 11 Trustee Eric D. Orse

27 TRUSTEE'S AMENDED *EX PARTE* ORDER GRANTING  
TRUSTEE AUTHORITY TO EMPLOY SPECIAL COUNSEL  
*NUNC PRO TUNC* - 2  
#923087 v2 / 40594-006

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