

COURT OF APPEALS  
DIVISION II

2014 JUL 20 PM 4:59

STATE OF WASHINGTON

BY *[Signature]*

Case No. ~~45281-7-II~~ <sup>45821-7</sup>

---

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

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.

---

**RESPONDENT'S RESPONSE BRIEF**

---

Paul E. Brain, WSBA #13438  
BRAIN LAW FIRM PLLC  
1119 Pacific Avenue, Suite 1200  
Tacoma, WA 98402  
Tel: 253-327-1019  
Fax: 253-327-1021  
Email: pbrain@paulbrainlaw.com  
Counsel for Respondent

**TABLE OF CONTENTS**

**I. INTRODUCTION .....1**

**II. RESPONDENT’S STATEMENT OF THE CASE.....2**

**III. APPLICABLE AUTHORITY AND DISCUSSION .....5**

**IV. CONCLUSION .....8**

**TABLE OF AUTHORITIES**

**Cases**

*Hertz v. Reibe*, 86 Wn. App. 102, 936 P.2d 37 (1997) ..... 5, 6  
*Int'l Raceway, Inc.*, 97 Wn. App. 1, 970 P.2d 343 (1999)..... 7  
*Marassi v. Lau*, 71 Wn. App. 912 (1993) ..... 5, 7  
*Tomlinson v. Clarke*, 60 Wn. App. 344, 803 P.2d 828 (1991) ..... 6  
*Transpac Development, Inc. v. Oh*, 132 Wn. App. 212, 130 P.2d 892  
(2006)..... 6  
*Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wash.App. 697, 706,  
9 P.3d 898 (2000) ..... 7

**Statutes**

RCW 4.84.330 ..... 5, 6

## I. INTRODUCTION

The claims made by Respondent Soundbuilt Homes Inc., a predecessor entity to SoundBuilt Northwest LLC were based on the contention that Thomas Price (“Price”) and Hyun Um (“Um”), together with their respective marital communities (collectively “Appellants”), could be held personally responsible for the concurrent breach of two interrelated agreements by a limited liability company under the control of Appellants (*see CP 3-45*), on multiple grounds including the fact that the limited liability company in operative agreement (*CP 12-15*) had never been formed.

In addition to the res judicata defense which was ultimately the basis for decision in this Court, Appellants asserted, among other things, that Appellants were entitled to affirmative relief in the form of reformation of the operative agreement on theories of scrivener’s error and mutual mistake. These were major issues in the case as to which the Trial Court found against Appellants. Since the Trial Court also found that Respondent had prevailed on all issues, there was no issue about whether both parties prevailed on major issues.

When this Court ruled in the initial appeal in this case (*see App. I hereto*), it concluded that Respondent’s claims were barred by a prior stipulation for dismissal in related litigation to which Appellants were not parties. This Court remanded directing the Trial Court to award fees on appeal. But, this Court did not address the issue of whether both parties had prevailed on major issues, which has a direct bearing on any fee award and is ordinarily the province of the Trial Court. This is one of the reasons

we are here again, because the Trial Court would not rule on this issue without explicit direction from this Court.

The second reason is that Appellants repeatedly ignored explicit direction from the Trial Court. In response to the initial fee motion, in July 2013, Respondent asserted that the Trial Court should not award fees on appeal until the Bankruptcy Court properly appointed Appellants' appellate counsel. (*CP 1113, 1115-1116*). By the time of the second motion in December 2013, Appellants still had not obtained an Order which was the Trial Court's explicit basis for denying fees on appeal incurred after the Price and Um bankruptcy filings.

Making the determination as to "prevailing party" is an exercise of discretion by the Trial Court. Denying an award of fees based on Appellants' repeated failure to follow the Trial Court's Orders would also be within the discretion of the Trial Court. What this Court should do is remand for the Trial Court to make these determinations.

## **II. RESPONDENT'S STATEMENT OF THE CASE**

Appellants' Statement of the Case through the original April 2010 Judgment (*CP 996-1008*) is accurate as far as it goes. But, it is incomplete. As reflected in the Findings, by the time this matter went to trial, Appellants were asserting a right to affirmative relief in the form of reformation of the contracts at issue in the case on several grounds:

9. [Appellants] contend that the identification of P & U Capital Partners LLC rather than P & U Capital Partners I LLC as the purchaser of the Membership Units in the Membership Unit Purchase and Sale Agreement and Bill of Sale for the 176<sup>th</sup> Street LLC Membership Units was an error on the part of Mr. Kerruish as the scrivener of the

Membership Unit Purchase and Sale Agreement and Bill of Sale.

10. [Appellants] contend that the identification of the purchaser of the Membership Units as P & U Capital Partners LLC rather than P & U Capital Partners I LLC was a mutual mistake.

(CP 1003-1004). The relief was specifically denied in the Conclusions:

2. [Appellants] have failed to prove any basis for reformation of the Membership Unit Purchase and Sale Agreement, including a failure to demonstrate inequitable conduct by [Respondent] SBH or Sunridge. [Appellants] failed to meet their burden of proving by clear, cogent and convincing evidence that the description of P & U Capital Partners LLC was the result of a mutual mistake, or the error of [Respondent].

(CP 1006).

When this Court reversed and remanded, this Court's only direction was to award fees on appeal:

Price and Um request attorney fees and expenses pursuant to RAP 18.1, as provided for by both the Membership Agreement and REPSA. The Membership Agreement attorney fees and costs provision is limited to the parties of that contract only – Sunridge and P & U – and does not apply. The REPSA attorney fees provision, however, provides that the prevailing party in “any other action arising out of this Agreement or the transactions contemplated hereby ... shall be entitled to an award of reasonable attorneys fees and court costs incurred in such action or proceeding ... regardless of whether such action proceeds to final judgment.” CP at 27. ***Accordingly, we grant Price and Um reasonable attorney fees and costs on appeal pursuant to the REPSA and RAP 18.1. Except 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. RAP 18.1(i).***

*(App. 1 at p. 11; emphasis added).*

Appellants' first motion for fees was noted for hearing on July 12, 2013. Respondent objected on the grounds that, even after remand, Appellants were *not* the sole prevailing party, and that Appellants needed to document Bankruptcy Court approval for fees incurred after the Price and Um Bankruptcy filings. (*CP 1109-1107*). On July 12, 2013, the Trial Court entered a Memorandum of Journal Entry denying Appellants' motion "pending further hearing." (*CP 1399*).

Appellants re-noted the motion for hearing on December 19, 2013. Respondent objected on the same bases as before:

Furthermore, based on a review of Bankruptcy Court records, SBNW's counsel has been unable to locate any Order approving Mungia pursuant to 11 U.S.C. § 327. Likewise, SBNW's counsel has been unable to locate an Order approving any post-petition borrowing by Price and Um from Prium Companies LLC.

*(CP 1244-1245).*

This is the second hearing on the fee issue. Based on counsel's notes of the first hearing, the Moving Parties have simply failed to provide the information requested by this Court regarding who, if anyone, is entitled to reimbursement for fees here. Um submits a Declaration in which he identifies Prium Companies LLC as advancing funds for Mungia's litigation expenses. The issue of who would actually be entitled to seek to recover fees and be entitled to payment of any award remains a mystery. Nor does it appear that advances by Prium Companies LLC were ever authorized by either the Price or Um Bankruptcy Courts under 11 U.S.C. § 364.

*(CP 1245).*

This Court has no authority to award fees incurred after the bankruptcy filings by Price and Um because neither Price

and Um nor their appellate counsel Mungia have complied the applicable provisions of the Bankruptcy Code or rules governing compensation to professionals.

(CP 1249).

The Trial Court's Order on that motion states:

... [Appellants'] attorney's fees incurred on appeal in the amount of \$31,162.22 were incurred after the bankruptcy filings of the [Appellants] and will not be awarded by this Court absent an order by the bankruptcy court affirming the employment of [appellate counsel];

....in the absence of any reference to the [Appellants'] ability to recover attorney's fees incurred at the trial court level being contained in the Court of Appeal[s] decision of this matter, this Court lacks authority to grant such an award...

(CP 1384).

### III. APPLICABLE AUTHORITY AND DISCUSSION

The rule in Washington is that, in cases involving multiple claims, the determination of which party is the prevailing party requires an assessment of which party prevailed on which claim. *See, e.g., Marassi v. Lau*, 71 Wn. App. 912 (1993). There are two approaches to fee awards in this circumstance. The approach followed in Division II is applied in *Hertz v. Reibe*, 86 Wn. App. 102, 936 P.2d 37 (1997), in which neither party would be considered prevailing if both parties prevailed on major issues. In *Hertz*, both parties asserted claims for monetary damages and both were awarded monetary damages. The Court concluded:

RCW 4.84.330 defines a prevailing party as "the party in whose favor final judgment is rendered." That, in turn, has been interpreted to mean the party who substantially prevailed. Accordingly, if both parties prevail on a major issue, neither is a prevailing party. The statute does not

define the prevailing party as one who prevailed on a claim which authorized attorney fees. The statute focuses rather on the relief afforded to the parties for the entire suit whether or not the underlying claim provides for fees. After consolidation, both the Hertz's claim and the Riebes' claim were part and parcel of the same suit. Both parties prevailed on their respective claims and thus neither is a "prevailing party."

Hertz is a Division II case.

In this case, Respondent's claim was for monetary relief, while Appellants asserted a claim for equitable relief – for reformation – rather than money damages. However, this is a distinction without a difference and the entitlement of a prevailing party to fees on a reformation claim involving a contract with a fee provision is well established. Tomlinson v. Clarke, 60 Wn. App. 344, 803 P.2d 828 (1991) ("Because Tomlinson did not prevail on his action for reformation, the trial court ordered Tomlinson to pay the Clarkes' attorney fees at trial pursuant to the parties' contract and RCW 4.84.330." *Id.* at 352.) The litigation of the reformation issue was at the insistence of Appellants. But for that claim, the entire focus of the litigation would have been different, and the effort and expense expended by the parties would have been substantially smaller.

It can be presumed that Appellants will argue that both Respondent's claims and Appellants' claims arise from the same transaction and are not, therefore, separate and distinct. This same argument was rejected by the Court in Transpac Development, Inc. v. Oh, 132 Wn. App. 212, 130 P.2d 892 (2006):

Transpac argues that all claims arose out of Oh's signing a sublease to CityCom without the landlord's consent. Therefore, according to Transpac, this was not a case

involving “multiple distinct and severable contract claims” and it was not suitable for a proportional fee award under *Marassi*. We disagree. It is not infrequent that one misunderstanding in a business relationship will generate distinct and severable claims. Indeed, that is what happened in *Int’l Raceway, Inc. v. JDFJ Corp.* When the tenant harvested timber without obtaining the landlord’s written permission, the landlord refused to extend the lease. The tenant sued to obtain a lease extension, while the landlord sued for wrongful removal of timber. *Int’l Raceway, Inc.*, 97 Wn. App. at 4, 970 P.2d 343. Both parties prevailed in part. We found this situation suitable for an application of *Marassi*, even though both claims were sparked by the tenant’s harvesting of the timber. *Int’l Raceway, Inc.*, 97 Wn. App. at 7-9, 970 P.2d 343. The situation in the present case is analogous, and we reach the same result.

132 Wn. App. at 219.

Whether a party is a “prevailing party” is a mixed question of law and fact that is reviewed under an error of law standard. *Eagle Point Condo. Owners Ass’n v. Coy*, 102 Wash.App. 697, 706, 9 P.3d 898 (2000). Except that, following the Opinion in the prior appeal, there is no valid finding from the Trial Court as to who were prevailing parties in the litigation. That determination should be made by the Trial Court which heard the evidence and is in the best position to determine what was or was not a “major issue” in the case.

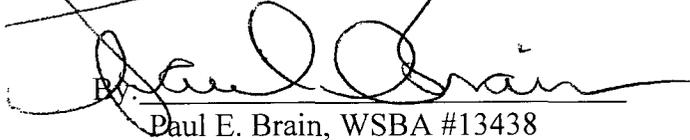
The amount of any award of attorney fees is discretionary with the Trial Court. It is within the discretion of the Trial Court to decline to award or reduce fees on the basis of Defendants’ serial failure to follow the direction of the Trial Court.

#### IV. CONCLUSION

For the reasons stated herein, this matter should be remanded to the Trial Court for further determination regarding Appellants' fees.

DATED this 20th day of June, 2014.

BRAIN LAW FIRM PLLC

A handwritten signature in black ink, appearing to read "Paul E. Brain", is written over a horizontal line. The signature is fluid and cursive.

Paul E. Brain, WSBA #13438

Counsel for Respondent

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 20th day of June, 2014, served a true and correct copy of the foregoing document upon counsel of record, via the methods noted below, properly addressed as follows:

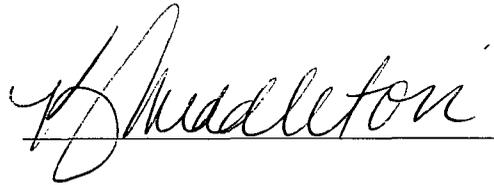
***Counsel for Appellants::***

Donald L. Anderson  
Eisenhower Carlson, PLLC  
1200 Wells Fargo Plaza  
1201 Pacific Avenue  
Tacoma, WA 98402

\_\_\_\_\_ Hand Delivery  
\_\_\_\_\_ U.S. Mail (first-class, postage prepaid)  
\_\_\_\_\_ Facsimile  
  X   Email  
\_\_\_\_\_

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

DATED this 20th day of June, 2014, at Tacoma, Washington.

  
\_\_\_\_\_

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2014 JUN 20 PM 4:59  
TACOMA  
CLERK