

NO. 46823-9-II

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COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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COLLEGE MARKETPLACE LLP, a Washington Limited Liability  
Company,,

Appellant,

v.

OLHAVA ASSOCIATES, LP, a Washington Limited Partnership, HD  
DEVELOPMENT OF MARYLAND, INC., a Maryland Corporation,  
and WAL-MART REAL ESTATE BUSINESS TRUST, a Delaware  
Statutory Trust,

Respondents.

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**RESPONDENT OLHAVA ASSOCIATES LP BRIEF**

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Mark A. Rowley, WSBA #7555  
GARVEY SCHUBERT BARER  
Attorneys for Olhava Associates, LP  
Eighteenth Floor  
1191 Second Avenue  
Seattle, Washington 98101-2939  
(206) 464-3939 Phone  
(206) 464-0125

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## I. INTRODUCTION

Respondent Olhava Associates, LP (“Olhava”) joins in the arguments in the brief submitted by Respondent HD Development of Maryland (“Home Depot”). In the event however that the judgment by the trial court in favor of Olhava in the amount of \$257,792.96 for Olhava’s attorneys’ fees and costs is reversed, Olhava, as the seller of Lot 7A to College Marketplace, is still entitled to an award for a portion of those fees and costs because of Olhava’s successful defense of two tort claims against Olhava that “concerned” the parties’ purchase and sale agreement.

## II. STATEMENT OF CASE

In February 2007, College Marketplace closed the purchase of Lot 7A from Olhava pursuant to the terms of a certain Commercial & Investment Real Estate Purchase & Sale Agreement (the “PSA”), dated September 18, 2006. Clerk’s Papers (“CP”) 523 (October 3, 2014 Findings of Fact (“FF”) 22; CP 609-623 (Ex. 23; PSA). Paragraph 21 of the PSA states:

If Buyer or Seller institutes **a suit against the other concerning this Agreement**, the prevailing party is entitled to reasonable attorneys’ fees and expenses. In the event of trial, the amount of the attorneys’ fees shall be fixed by the court.

CP 616 (emphasis added)

In addition to College Marketplace's counts of declaratory judgment and quiet title that sought to invalidate the First Amended and Restated Easements with Covenants and Restrictions Affecting Land ("2008 ECRs"), College Marketplace's Third Amended Complaint (CP 162-180) asserted two tort claims against Olhava for fraudulent concealment and negligent misrepresentation. CP 172, 174

College Marketplace's claims were each based on the alleged failure of Olhava to disclose to College Marketplace the negotiations of the 2008 ECRs among Olhava, Home Depot, and Wal-Mart, notwithstanding the disclosure obligations in the PSA. See, paragraphs 21 and 22 of Third Amended Complaint. CP 165-166

By order dated August 29, 2014, the two tort claims against Olhava were voluntarily dismissed with prejudice. CP 518-519

In its motion for attorneys' fees and costs, Olhava moved for an award of all its attorneys' fees and costs incurred in connection with College Marketplace's lawsuit pursuant to the attorneys' fee clause in the 2008 ECRs and also asserted an independent ground for an award of the allocable fees and costs incurred for the defense of College Marketplace's claims of fraudulent concealment and negligent misrepresentation pursuant to paragraph 21 of the PSA. CP 1265-1268. Olhava's fees and costs allocable to the defense of those two claims is the sum of \$26,979.63. CP 883.

The trial court held that Olhava was entitled to its reasonable fees and costs under paragraph 21 of the PSA because the tort claims of fraudulent concealment and negligent misrepresentation were claims “concerning the [PSA]”. CP 1516 (Att Fee CL 22, 23, 24) Because the trial court granted judgment for substantially all of Olhava’s attorneys fees and costs in the amount of \$257,792.96 (CP 1527-1529), the trial court did not decide what portion of Olhava’s fees and costs were allocable to the defense of the two tort claims.

### III. ARGUMENT

A. In The Event The Judgment For Attorneys’ Fees and Costs in Favor of Olhava Is Reversed, Olhava Is Entitled to Recover A Portion of its Fees Under the PSA.

College Marketplace does **not** assign error to the trial court’s Conclusions of Law 22, 23, and 24 on Olhava’s entitlement to attorneys’ fees and cost as the prevailing party under the PSA. College Marketplace however in a cryptic footnote argues that although the PSA “might support an award to fees for the tort claims . . . for the reasons discussed above, Olhava should not be considered a ‘prevailing party’ in this litigation.” College Marketplace Brief, p. 41, fn. 11.

There are however no reasons discussed by College Marketplace in its brief on why Olhava is not the prevailing party under the PSA. The only arguments advanced by College Marketplace are why the defendants are not the prevailing parties under the 2008 ECRs.

The failure of College Marketplace to assign error to the trial court's Conclusions of Law 22, 23, and 24 precludes consideration by this Court of Olhava's entitlement to an award of attorneys' fees and costs under the PSA. *Halvorsen v. Ferguson*, 46 Wn. App. 708, 722-23, 735 P.2d 675, 684 (1986). Although appellate courts have occasionally reviewed legal issues notwithstanding an appellant's failure to assign error to a specific conclusion of law, the appellant's brief in those cases has clearly articulated the challenge. *Johnson v. Cnty. of Kittitas*, 103 Wn. App. 212, 216, 11 P.3d 862, 863-64 (2000), *as amended on reconsideration* (Jan. 11, 2001). See, RAP 10.3(g) ("The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.")

Although College Marketplace claims that the PSA "might" support Olhava's claim for attorney fees, there should be no dispute on point. In *Brown v. Johnson*, 109 Wn.App. 56, 34 P.3d 1233 (2001), a buyer successfully sued a seller of a house for misrepresentation. As in the instant case, the purchase and sale agreement provided attorneys' fees to the prevailing party in any lawsuit "concerning this Agreement." The Court held that the misrepresentation claim arose from the parties' purchase agreement and that the buyer was therefore entitled to recover her attorneys' fees.

As for whether Olhava is the prevailing party under the PSA,

College Marketplace argued in its opposition pleadings in the trial court that the two tort claims were voluntarily dismissed by College Marketplace. CP 1455 That fact however does not alter the definition of a prevailing party. *Hawk v. Branjes*, 97 Wn.App. 776, 780, 986 P.2d 841, 843 (1999)(“At the time of a voluntary dismissal, the defendant has ‘prevailed’ in the commonsense meaning of the word.”).

B. Olhava Requests Attorneys’ Fees And Costs On Appeal.

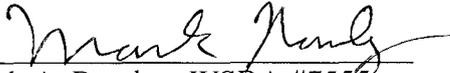
Olhava requests that its attorneys fees and costs on appeal be awarded to Olhava.

**IV. CONCLUSION**

Olhava requests that this Court affirm the trial court’s judgments in its favor. In the event, however, Olhava’s judgment for attorneys’ fees and costs in the amount of \$257,792.96 is reversed, this Court should remand to the trial court for an award of attorneys’ fees and costs allocable to Olhava’s defense of the two tort claims that concerned the PSA.

DATED this 8<sup>th</sup> day of June, 2015.

GARVEY SCHUBERT BARER

By   
Mark A. Rowley, WSBA #7585  
E-mail: mrowley@gsblaw.com

**CERTIFICATE OF SERVICE**

I, Vickie L. Owen, hereby certify under penalty of perjury under the laws of the State of Washington that, on June 8, 2015 I caused a copy of the foregoing document to be served on the person(s) identified below in the manner indicated below:

Michael E. Kipling, WSBA #7677 Timothy Michael Moran, WSBA #24925 Kipling Law Group PLLC 4464 Fremont Avenue N., Suite 300 Seattle, WA 98103 206-545-0345 206-545-0350 (fax) <a href="mailto:kipling@kiplinglawgroup.com">kipling@kiplinglawgroup.com</a> <a href="mailto:moran@kiplinglawgroup.com">moran@kiplinglawgroup.com</a>	<b>Via E-Mail and Legal Messenger</b>
Charles E. Maduell Davis Wright Tremaine LLP 1201 Third Avenue, Suite 2200 Seattle, WA 98101-3045 206-622-3150 206-757-7700 (fax) <a href="mailto:billrasmussen@dwt.com">billrasmussen@dwt.com</a>	<b>Via E-Mail and Legal Messenger</b>
Eliot M. Harris, WSBA #36590 Sedgwick LLP 520 Pike Street, Suite 2200 Seattle, WA 98101-4093 206-462-7560 <a href="mailto:eliot.harris@sedgwicklaw.com">eliot.harris@sedgwicklaw.com</a>	<b>Via E-Mail and Legal Messenger</b>

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Dated this 8th day of June, 2015.

  
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 Vickie L. Owen