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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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NO. 49565-1-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

EOR, INC,

Appellant,

v.

ROGER BELERIVE AND LINDSAY BELLERIVE,

Respondents.

APPELLANT'S REPLY BRIEF

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ORIGINAL

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Appellant EOR, Inc. (“EOR”) appealed the Trial Court’s decision to award to the Respondents Roger and Lindsay Bellerive (hereinafter referred to collectively as the “Bellerives”) attorney’s fees in the amount of \$50,000.00 and costs in the amount of \$306.00 against EOR because the Trial Court expressly found that the Bellerives had failed to sustain their burden of proof on their breach of contract claims and dismissed their claims (Conclusions of Law 2, 3 and 7, CP 211-220), and the parties’ contracts were the only basis for an award of fees to the Bellerives.

In their response and despite the Trial Court’s express findings, the Bellerives argue that “the trial court implicitly found [EOR] breached the Purchase Agreement damaging the Bellerives”. Respondents’ Brief at 16 (emphasis added). The Bellerives’ argument lacks any merit as they failed to assign error to the relevant findings of fact and they fail to provide any citation to the record to contradict the Trial Court’s findings.

The Bellerives have also cross-appealed, asserting the Trial Court erred in offsetting the Bellerives’ attorney’s fees award by the fees incurred by EOR. Since the Bellerives specifically argued to the Trial Court that it could offset the fees awarded to them by the fees

incurred by EOR using a proportionality approach¹, the Bellerives are barred by the invited error doctrine from making that argument now.

Lastly, the Bellerives' Statement of the Case is replete with factual assertions that are inaccurate or not supported by accurate citations to the record. Since much of these inaccuracies are not relevant to the issues on appeal, EOR believes a response to each will be an unnecessary distraction. Nevertheless, the existence of the inaccuracies should not go unnoticed.

I.
ARGUMENT

1. The Trial Court Properly Concluded That EOR Did Not Breach The Parties Contract.

The Bellerives recognize that the only basis for the Trial Court to award them attorney's fees is if they prevailed on a claim under the contract. Consequently, the Bellerives argue that they either did, or should have, prevailed on their contract claims, contrary to the Trial Court's Order on Summary Judgment and express findings of fact and conclusions of law.

The only basis the Bellerives provide for their argument is that the Trial Court's factual findings "implicitly support a judgment in favor of the Bellerives for [EOR's] breach of the Purchase

¹ CP 184-185.

Agreement”² and that “[r]ead holistically, the trial court’s Findings of Fact found [EOR] breached the Purchase Agreement.”³ The Bellerives provide no factual or legal basis for these assertions.

First, the Trial Court’s November 3, 2015 Order on EOR’s Motion for Summary Judgment expressly concluded that “[a]s of June 19, 2015⁴, Rusdal had performed its contractual obligations under the parties’ Agreement, as amended by the June 4, 2015 Addendum” and then dismissed the Bellerives’ claim for specific performance under the contract. CP 21-26. That Order was certified as a final judgment pursuant to CR 54(b) and the Bellerives did not appeal that Order. Id.

At trial the Bellerives nonetheless asserted that EOR breached the parties’ contracts by refusing in bad faith to grant them an extension of the closing date, even though the Bellerives failed to obtain financing within the time allowed under the parties’ Settlement Agreement. CP 31. After trial, the Court expressly found that EOR did not act in bad faith and EOR did not prevent the Bellerives from procuring the financing needed to close the transaction. See

² Respondents’ Brief at 14.

³ Respondents’ Brief at 18.

⁴ June 19, 2015 was the new closing date under the parties Settlement Agreement.

Findings of Fact 17 and 18; CP 215. Since the Bellerives failed to assign error to these findings, they are verities on appeal. Robel v. Roundup Corp., 148 Wash.2d 35, 42, 59 P.3d 611 (2012). Moreover, even if the Bellerives had assigned error, they provide no reference to the record as a basis for contradicting those findings.

The Bellerives also asserted at trial that they were entitled to damages under the contract in excess of \$30,000.00 for two change orders that the parties had executed and for which the Bellerives had paid. See Bellerive Exhibit 360. The Trial Court rejected this argument as well. CP 214, 217.

At Finding of Fact 11, the Trial Court found that “[t]he Purchase Agreement contained provisions governing the procedure for the parties to memorialize by written change order their agreement for an upgrade or other change in construction of the home resulting in an increase in price.” CP 214. At Finding of Fact 12, the Trial Court discussed the two change orders and found that the “parties intended the change order work to be agreed upon and executed outside of the Purchase Agreement.” CP 214. The Bellerives failed to assign error to these findings of fact, which are also verities on appeal. Moreover, the Bellerives provide no citation

to the record to contradict these findings. Instead, the Bellerives mischaracterize the Trial Court's findings to support their arguments.

The Bellerives state the Trial Court "found the Purchase Agreement required Rusdal to execute written change orders for 'changes' or upgrades to the home...." and that the Trial Court "also found that Rusdal failed to execute change orders for the Bellerives' investment in the form of appliances and sweat equity." Respondents' Brief at 16. The Bellerives go on to assert that "[a]s a result, the trial court found Rusdal's failure to refund the Bellerives' their investment...damaged the Bellerives in the amount of \$13,160.00." Respondents' Brief at 16. The Bellerives further devote an entire section of their Brief to their assertion that EOR breached the implied covenant of good faith and fair dealing by failing to execute written change orders (as they allege the Trial Court found).

But the Trial Court made no finding regarding change orders beyond noting that the parties' contract contained provisions for the parties to memorialize upgrades or other changes in the construction of the home resulting in a price increase. Finding of Fact 11 at CP 214. The Trial Court most certainly did not find that EOR had some responsibility for executing written change orders when applicable,

as opposed to the Bellerives. Moreover, the Trial Court never found that EOR breached its contractual obligations by failing to execute a required change order.

On the contrary, in its summary judgment order dismissing the Bellerives' specific performance claims, the Trial Court expressly found that EOR had performed all of its contractual obligations under the parties' Agreement. CP 23. Moreover, the Bellerives have failed to cite to any evidence in the record, much less any finding by the Trial Court, that the \$13,160 sought by the Bellerives for appliances they purchased and labor performed by Mr. Bellerive arose out of an "upgrade or other change in construction of the home resulting in an increase in price" that could have even been the subject of a written change order, much less that EOR and not the Bellerives themselves would have been the party responsible for documenting the Bellerives' claimed costs in such a change order.

Despite the Bellerives' complete misrepresentation of the record in their Brief, the Trial Court expressly found that EOR performed all of its obligations under the parties' contracts (CP 23) and that EOR did not act in bad faith or interfere with the Bellerives' financing. CP 215. The Bellerives acknowledge this by challenging Conclusion of Law 3, which states that the Bellerives' failed to sustain

their burden of proof for damages on their contract claims. But as the Bellerives failed to challenge any of the Trial Court's findings of fact on which its conclusions of law were based, and as the arguments advanced in the Bellerives' Brief regarding EOR's supposed contractual breaches rely entirely on manufactured findings of fact for which the Bellerives provide no evidence to support and which the Trial Court never made, the Bellerives' challenge to Conclusion of Law 3 must fail.

2. Because The Trial Court Awarded The Bellerives Damages In Equity and Not Under The Parties' Contracts, It Erred In Awarding The Bellerives' Attorney's Fees.

The Bellerives make every effort to evade the Trial Court's repeated and explicit findings that EOR did not breach the parties' contracts and that their damages in the amount of \$13,160 were awarded based on the theory of unjust enrichment. Findings of Fact 24 and 25, Conclusions of Law 3 and 4, CP 211-220. Consequently, they also ignore EOR's citation to the Court of Appeals, Division II, case holding that where an action is brought on a contract, but the case is resolved on equitable grounds, as it was here, no attorney's fees may be awarded based on the contract. In that regard, this Court stated as follows:

“Although this suit began as a contract enforcement action, when the Johnsons sued for return of the insurance policies as corporate property under the written employment agreement, the trial court (and this court) resolved the case on equitable grounds. Accordingly, because the case is not resolved on the basis of enforcing a written contract provision, RCW 4.84.330, with its provision for reasonable attorney fees, has no application here. Thus, for the reasons discussed below, we hold that while Johnson has substantially prevailed, he may recover only statutory fees and costs.”

Dave Johnson Ins., Inc. v. Wright, 67 Wn.App. 758, 782, 275 P.3d 339 (2012).

The Bellerives in their Response Brief do not even reference, much less dispute, this dispositive holding that resolves the central issue in this appeal. Instead, they cite at pages 24 and 25 of their Brief to Douglas v. Visser, 173 Wn.App. 823, 295 P.3d 800 (2013) and Hill v. Cox, 110 Wn.App. 394, 41 P.3d 495 (2002) for the proposition that in a *tort* action based on a contract containing an attorney fee provision, the prevailing party is entitled to attorney’s fees. Yet in the very next paragraph they note that they pled, and the Trial Court awarded them damages based on, an unjust enrichment claim. The Bellerives still apparently are unable to appreciate that unjust enrichment is an equitable claim, not a tort based claim. Thus the case law they cite to has absolutely no

relevance to the issue in this case, which again is dispositively resolved by the Court of Appeals' holding in Wright, supra.

Just as in Wright, although this suit began as a contract enforcement action when the Bellerives sued EOR for breach of the parties' written agreements, the Trial Court dismissed all of the Bellerives' contracts claims - first the specific performance claims on summary judgment, then the damage claims following trial. The Trial Court awarded damages to the Bellerives only on equitable grounds. Accordingly, because the case was not resolved on the basis of enforcing the parties' written contract provision, RCW 4.84.330, with its provision for reasonable attorney fees, has no application here. Thus, even if the Bellerives are deemed to have substantially prevailed, they may recover only statutory fees and costs and the Trial Court erred in awarding them what it determined to be their reasonable attorney's fees.

3. The Bellerives Were Not Entitled To An Award Of Fees For Prevailing On EOR's Slander Of Title Claim.

The Bellerives claim in their Brief that they were entitled to an award of attorney's fees under the parties' contracts for successfully defending against EOR's slander of title claim, as they assert that claim arose out of the parties' contract. But a tort claim is only "based

on a contract” if (1) the tort arose out of the contract; and (2) if the contract is central to the dispute. Edmonds v. John L. Scott Real Estate, Inc., 87 Wn.App. 834, 855, 942 P.2d 1072 (1997).

Nothing in the parties’ contract compelled the Bellerives to file a lis pendens against EOR’s property, and EOR’s resulting slander of title claim was not based in any way on the parties’ contract. The Trial Court ordered the Bellerives to release the lis pendens on summary judgment precisely because it determined that there was no basis for the Bellerives’ specific performance claims under the parties’ contract. Thus, to the extent that the parties’ contract was in any way relevant to EOR’s slander of title claim, the parties’ contract was the basis for EOR’s successful summary judgment motion to obtain the release of the wrongfully filed lis pendens clouding EOR’s title.

The only issue EOR presented for trial was whether it sustained financial loss as a result of the filing of the lis pendens – an issue which had nothing at all to do with the parties’ contract. The Trial Court found that EOR had not proved it sustained a financial loss as a result of the lis pendens and dismissed the claim. (CP 215, 217) The Bellerives could not be entitled to an award of attorney’s fees based on the dismissal of that claim.

Moreover, even if EOR's slander of title claim had "arisen" out of the parties' written contracts, the Bellerives would only have been entitled to the reasonable fees incurred defending that claim. When attorney fees are available on some claims but not others, or for some but not all of the work performed by the attorney, the trial court must take care to segregate the attorney's compensable hours from the non-compensable hours. Smith v. Behr Process Corp., 113 Wn.App. 306, 54 P.3d 665 (2002). In a case involving multiple claims, the court should award attorney fees only on the claims for which attorney fees are authorized. If a party recovers on some claims for which attorney fees are authorized and on some claims for which attorney fees are not authorized, the court should limit the award accordingly. King County v. Squire Inv. Co., 59 Wn.App. 888, 897, 801 P.2d 1022 (1990).

But the Bellerives made no attempt to segregate out the time spent on their successful claims from the numerous additional claims they asserted, but lost. Instead, the Bellerives asked for an award based on all the time spent by their attorneys in the case, totaling \$116,664.69. (CP 107 – 121, 122-155) The trial court awarded them \$75,000.00 of this amount without any explanation for the basis of that amount or how any of that amount might have related to the

slander of title claim. In the absence of that analysis, the Trial Court's decision was arbitrary and capricious and must be reversed.

4. The Trial Court Did Not Err In Offsetting A Portion of EOR's Attorney's Fees Against Its Award To The Bellerives.

On their cross-appeal, the Bellerives assert that the Trial Court erroneously "awarded" EOR attorney's fees absent a motion for fees filed by EOR. (Respondents' Brief at 34-45) But the Trial Court did no such thing.

Instead, the Bellerives filed a motion for an award of attorney's fees prior to the entry of the Judgment (CP 107-121), even though CR 54(d)(2) only requires such motions to be filed within 10 days after entry of judgment. As part of its response to the Bellerives' motion, EOR provided the Trial Court with the declaration of its counsel setting forth its own attorney's fees incurred in the litigation. (CP 167-179). EOR had not yet filed its own motion for fees as no judgment had yet been entered.

In considering the Bellerives motion for fees, the Trial Court thus had before it specific information as to the amounts of fees and costs incurred by both the Bellerives and EOR. Not only did the Bellerives not assert any objection to the Trial Court's consideration of all of that information, they specifically argued to the Trial Court

that as it had EOR's attorney's fee information before it could apply an appropriate offset to any fees awarded to the Bellerives. (CP 184-185).

Nor, other than noting that EOR had not filed its own motion for fees prior to entry of the Judgment, have the Bellerives provided any basis whatsoever in their Brief as to why it was inappropriate for the Court to consider all of that information in determining the amount of attorney's fees to award to the Bellerives. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

The Bellerives further assert that the Trial Court erred in applying a proportionality approach in its award of fees. But as noted above, the Bellerives specifically argued to the Trial Court that it could apply an appropriate offset to any fees awarded to the Bellerives, which would require a proportionality approach. (CP 184-185). The Bellerives' challenge on appeal the Trial Court's use of that approach is thus barred by the invited error doctrine, which prohibits a party from setting up an error in the trial court then

complaining of it on appeal. Humbert/Birch Creek Const. v. Walla Walla County, 145 Wn.App. 185, 192, 185 P.3d 660 (2008).

Even if the Bellerives' challenge was not precluded under the invited error doctrine, they have failed to show that use of the proportionality approach was error. The Bellerives properly note that courts generally apply such an approach "where multiple distinct and severable contract claims are at issue." Transpac Dev., Inc. v. Oh, 132 Wn.App. 212, 218, 130 P.3d 892 (2006). But they go on to argue that the Trial Court should not have applied the proportionality approach because it "erred by treating the Bellerives' prayer for specific performance as a separate claim." (Response Brief at 36)

The Bellerives fail to provide any rational explanation as to how the Bellerives' specific performance claim was not a contract claim distinct and severable from their contract claim for damages. Each claim sought a separate remedy, and indeed were handled separately and distinctly by the Trial Court. The specific performance claim was dismissed on summary judgment, while the damage claim was dismissed at trial.

More importantly, the Bellerives' arguments serve not to show that the Trial Court erred in using the proportionality approach, but rather to underscore the Trial Court's error in awarding the Bellerives

any attorney's fees at all. Regardless of whether the Bellerives' contractual specific performance claim was separate from their contractual damage claim, they lost on both claims and both claims were dismissed in their entirety. No matter how one parses out the Bellerives' contract claims, EOR prevailed on them entirely on both summary judgment and at trial.

The Trial Court thus clearly erred in awarding the Bellerives any fees at all under the parties' contracts.

5. EOR's Request For Attorney's Fees And Costs.

Pursuant to RAP 18.1, EOR requests that it be awarded its attorney's fees and costs incurred in responding to the Bellerives' cross-appeal.

The Bellerives seek an award of additional attorney's fees based on the parties' contract. Contractual authority as a basis for an award of attorney's fees at trial also supports such an award on appeal. West Coast Stationary Eng'rs Welfare Fund v. Kennewick, 39 Wn. App. 466, 477, 694 P.2d 1101 (1985). See also Granite Equip. Leasing Corp. v. Hutton, 84 Wn.2d 320, 327, 525 P.2d 223 (1974).

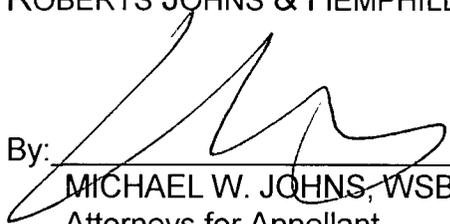
As there is no merit to the Bellerives' cross-appeal, EOR respectfully requests that it be awarded the attorney's fees and costs that it has incurred responding to that appeal.

II.
CONCLUSION

The Trial Court abused its discretion in awarding any fees to the Bellerives and therefore this Court should reverse the Trial Court's award of attorney's fees to the Bellerives. This Court should further award EOR its attorney's fees and costs incurred on its appeal, and in responding to the Bellerives' appeal.

Respectfully submitted this 20th day April, 2017.

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CERTIFICATE OF SERVICE
STATE OF WASHINGTON

BY _____

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing APPELLANT'S REPLY BRIEF on the following individuals in the manner indicated:

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SIGNED this 20th day of April, 2017, at Gig Harbor,
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KRISTINE R. PYLE