

NO. 49565-1-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

EOR, Inc.,

Appellant/Cross-Respondent,

v.

ROGER BELLERIVE AND LINDSAY BELLERIVE,

Respondents/Cross-Appellants

RESPONDENTS/CROSS-APPELLANTS BRIEF

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I. INTRODUCTION

The instant appeal requests this Court to address the overall fee award following the conclusion of a one-week trial. The Bellerives¹ brought the underlying action against Rusdal² to either complete the purchase and sale via specific performance, or in the alternative, to recover damages against Rusdal for monies it wrongfully retained. To protect their substantial investment in the Home (as defined below), the Bellerives recorded a lis pendens. In return, Rusdal counterclaimed for slander of title alleging the Bellerives' lis pendens improperly clouded the title to its real property.

The parties proceeded to a bench trial. Upon conclusion of trial, the trial court awarded the Bellerives damages in the amount of \$13,160.00. The trial court ultimately found Rusdal to be unjustly enriched by the Bellerives' performance and investment pursuant to the parties' purchase agreement. The trial court dismissed Rusdal's slander of title claim.

The purchase agreement contains a standard attorneys' fees and costs provision in favor of the prevailing party. Pursuant to the purchase

¹ Used herein, "Bellerives" refers to Roger and Lindsay Bellerive, the underlying plaintiffs.

² Used herein, "Rusdal" refers to EOR, Inc. d/b/a Rusdal Construction the defendant below.

agreement's fee provision, the trial court awarded the Bellerives \$75,000.00 in attorneys' fees. The trial court also implicitly awarded Rusdal \$25,000.00 in fees and costs in the form of an offset to the Bellerives' fee award. Thus, in total, the trial court awarded the Bellerives \$13,160.00 in damages plus \$50,000.00 net attorneys' fees.

Rusdal now appeals alleging the trial court improperly granted attorneys' fees to the Bellerives. The Bellerives cross-appeal alleging the trial court improperly granted attorneys' fees to Rusdal because Rusdal did not prevail. To the contrary, only the Bellerives received an affirmative judgment and the Bellerives defeated Rusdal's counterclaim.

This Court should affirm the trial court's award of fees to the Bellerives. This Court should further reverse the fee award applied as an offset in favor of Rusdal.

II. CROSS ASSIGNMENTS OF ERROR

1. Conclusion of Law 3: The trial erred by concluding the Bellerives "failed to sustain their burden of proof on their claims for damages under... breach of contract."
2. Conclusion of Law 6: The trial court erred by concluding the case below involved three major issues – (1) The Bellerives' claim for specific performance, (2) the Bellerives' claim for damages, and (3) Rusdal's claim for slander of title.

3. Finding of Fact 25: The trial court erred by applying a “proportional offset” in the amount of \$25,000.00 to Rusdal for fees incurred by Rusdal in defense of claims which the Bellerives did not prevail.
4. Conclusion of Law 13: The trial court erred by awarding any fees to Rusdal without any findings of fact concerning the reasonableness of Rusdal’s fees.

III. ISSUES PERTAINING TO CROSS ASSIGNMENTS OF ERROR

1. Did the trial court err by concluding the Bellerives failed to sustain their burden of proof on contract damages but finding the sale of the real property to a third party damaged the Bellerives in the amount of \$13,160.00, which derives from the Bellerives investment in the home pursuant to the parties’ contract? *Answer: Yes*
2. Did the trial court err by applying a proportional offset in favor of Rusdal where only the Bellerives received affirmative relief and successfully defeated Rusdal’s counterclaim? *Answer: Yes*
3. Did the trial court err by granting fees to Rusdal without any findings of fact in support of Rusdal’s offsetting fee award? *Answer: Yes*

4. Did the trial court err by awarding Rusdal \$25,000.00 in fees for defeating the Bellerives prayer for specific performance, despite Rusdal's counsel's fee affidavit which showed Rusdal incurred only \$14,283.00 in fees and \$1,339.00 in costs through the date the trial court denied the Bellerives' claim for specific performance on summary judgment? *Answer: Yes*

IV. STATEMENT OF THE CASE

This case arises from the Bellerives' dream to build their first-ever custom constructed home. CP 232. In August 2013, the Bellerives found a five-acre parcel located on the old 30-acre Mitchell tree farm in Gig Harbor, WA (the "Mitchell Property"). CP 232-233. Prior to the Bellerives' discovery of the Mitchell Property in August 2013, the then existing property owners, the Mitchells, and Rusdal reached an agreement to develop the property. CP 233. Under the terms of the Rusdal-Mitchell agreement, the Mitchells agreed to carry the land on a promissory note made by Rusdal. *Id.* In exchange, the Mitchells would receive payment when Rusdal constructed and sold a home on the property. In early September 2013, the Bellerives hired their own architect and interior designer to design a single-family home with a detached garage to construct on the Mitchell

property (hereinafter “the Home”).¹ CP at 212 and 233. Pursuant to the pre-existing Rusdal-Mitchell agreement, the Bellerives were required to hire Rusdal to build the Home. CP 212. On November 5, 2013, the Bellerives provided the plans they had prepared for the Home to Rusdal. *Id.*

Thereafter, on or about December 2, 2013, the Bellerives and Rusdal executed a Northwest Multiple Listing Service (NWMLS) Real estate Purchase and Sale Agreement, including numerous NWMLS addendums (hereinafter the “Purchase Agreement”) with Rusdal.² Ex. 359.

a. *The Purchase Price*

The Bellerives and Rusdal agreed to a fixed price for the Home in the amount of \$575,000.00, a fact reflected by the Purchase Agreement. Ex. 359, Form 21, pg. 1. The purchase price included the cost of the real property. *Id.* By later addendum, the parties increased the purchase price to \$585,000.00 with a \$10,000.00 credit to the Bellerives at closing (which operated to keep the effective fixed price at \$575,000.00). *Id.* at “Form 36.”

¹ Whenever the Bellerives make reference to the “Home” herein, they refer to the Mitchell Property located at the common address of 5314 69th St. NW, Gig Harbor, Washington 98335, together with the improvements constructed thereon primarily consisting of a single-family residence and detached garage.

² The Purchase Agreement was executed by the Bellerives and the then owners of the real property, Albert and Andrea Mitchell (hereinafter “the Mitchells”). The Mitchells assigned the Purchase Agreement to Rusdal by addendum in February 2014.

The Purchase Agreement allowed the Bellerives to make changes to the Home during the course of construction. *See id.* at Form 25, pg. 2. To make changes during the construction, the Purchase Agreement required the parties execute change orders in writing:

Unless otherwise provided herein, *any changes, upgrades and/or additions* to plans and specifications, decorator selections, site plan, landscaping or any other aspect of the Property *made after mutual acceptance of this Agreement...* (collectively called “Changes”) shall be subject to the mutual agreement of Buyer and Seller. All Changes shall be agreed to in writing and shall be based on an agreed price.

(Emphasis Added.) *Id.*

So long as they were agreed in accordance with the above contract provision, the Bellerives pay Rusdal for any Changes upfront and out-of-pocket and, further, they became nonrefundable:

Any Change requested by Buyer, including but not limited to any Changes in decorator selections, which exceeds the allowances specified, or otherwise increases construction costs, must be paid by Buyer directly to Seller in cash, in advance, and will be nonrefundable.

Id.

Thus, in order for the benefit of labor or increase cost in appliances to be retained by Rusdal, by contract, Rusdal was required to document in writing in accordance with the provision concerning Changes.

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b. Construction Schedule, Progress, and Changes

Prior to entering the transaction at issue with Rusdal, the Bellerives had never built a home before. CP 235. Likewise, with the exception of purchasing their prior residence, the Bellerives never owned real estate. *Id.* The Bellerives were not relatively sophisticated in real estate or construction. As such, the Bellerives wholly relied on Rusdal to manage and coordinate construction of the Home. *Id.*

After execution of the Purchase Agreement, Rusdal delayed for months. *Id.* Though the Bellerives provided plans for the Home to Rusdal in November 5, 2013 and executing the Purchase Agreement on December 2, 2014, Rusdal did seek or obtain building permits until March 31, 2014 – approximately 6 months after receiving plans. *Id.* Further, Rusdal did not commence construction until late May 2014. *Id.*

Rusdal secured a “hard money” loan (with a 10% interest rate and \$12,000.00 origination fee) to finance construction of the Home. *See* Ex. 97; Ex. 216-17. Rusdal never disclosed the need, or intent, to obtain the loan with the Bellerives. The Purchase Agreement required Rusdal, as both the general contractor and Seller, to keep the Bellerives advised of the progress of construction and to promptly advise any delays which Rusdal reasonably expected would delay closing. CP 236. Despite its contractual obligation to do so, Rusdal failed to keep the Bellerives updated on

construction progress and costs. *Id.* Despite repeated requests for cost updates from the Bellerives, Rusdal only provided construction cost updates on five occasions. *Id.*

Without cost updates, the Bellerives could not determine the cost of the Home's construction. *Id.* However, through much of the construction process, the Bellerives understood they would pay a fixed price - \$575,000. CP 234. On February 24, 2015, Rusdal provided a construction cost update to the Bellerives. CP 236-237. Under the last update, Rusdal alleged the new price for the home was \$681,880.50. *Id.* However, per the Purchase Agreement, the Bellerives previously sought a loan in the amount of \$585,000.00. CP 237.

The Bellerives believed the price of the Home (as indicated by the final plans) was fixed under the Purchase Agreement. The Bellerives understood they would pay for "upgrades" out of pocket at the time of the upgrade or change order. To this end, Rusdal and the Bellerives only executed two written change orders – Change Order No. 1 dated July 1, 2014 and Change Order No. 2 dated September 1, 2014. *Id.* at 214. These change orders total \$33,684.94. *Id.* However, \$26,870.97 of those change orders concerns the three car garage reflected in the Bellerives' final plans and the Purchase Agreement. *Id.* The remainder, \$6,307.66, of concerned an upgrade to the HVAC system. *Id.*

The parties did not execute any other written change orders. *See id.* Though the parties did not execute additional change orders, the Bellerives continued to invest in the Home, without written confirmation by Rusdal, during the course of construction. *See id.* The Bellerives purchased and installed appliances in the Home. *Id.* at 213-14. Mr. Bellerive also performed landscaping for the Home. *Id.* at 214.

The lack of construction budget updates, the lack of specifications, and Rusdal's inconsistent practices culminated in a dispute between the parties regarding purchase price. *Id.* at 214-15.

c. Settlement Agreement with Agreed Purchase Price

Ultimately, the parties entered into a "Settlement Agreement" on June 4, 2015. *Id.* at 214-15. The Settlement Agreement incorporated the parties' Purchase Agreement by reference. *Id.* By the Settlement Agreement and written addendum to the Purchase Agreement, the parties agreed to a purchase price of \$648,750.00 and a closing date of on or before June 19, 2015. *Id.*; Ex. 170, pg. 1.

d. Financing Contingency and Appraisal Issue

As required by the terms of the Purchase Agreement, the Bellerives applied for financing and, shortly thereafter, received a pre-approval letter on December 3, 2013. Ex. 57. The Bellerives remained in close contact with their loan advisor who repeatedly communicated that they only needed

10 days to finalize their loan for closing. CP 239. However, shortly after signing the Settlement Agreement and submitting the June 8th addendum, they learned that their financing appraisal would expire on June 14th and, as a result, the lender required a new appraisal. CP at 215. The Bellerives' loan advisor indicated that a new appraisal would require additional time beyond the June 19th extended closing date. CP 239. The Bellerives sought an extension of the closing date from Rusdal to accommodate the new financing appraisal, but Rusdal refused. CP at 215.

e. The Bellerives initiate litigation and only the Bellerives receive affirmative relief.

Thereafter, the Bellerives filed the underlying Complaint on June 26, 2015. *See id.* at 1-9. On June 26, 2015, the Bellerives also filed a lis pendens against the Home. *Id.* at 215. The Bellerives' Complaint prayed for specific performance in order for Rusdal to sell the Home to them, or in the alternative, damages. *Id.* at 8-9. Rusdal counterclaimed and alleged a cause of action for slander of title caused by the lis pendens. *Id.* at 19-20.

In August 2015, Rusdal placed the Home under contract with a third-party buyer, the Wessals. *See Ex. 267.* During discovery, the Bellerives learned Rusdal began negotiating the sale of the Home with the Wessals in early 2015 while still under contract with the Bellerives. The

Wessals offered to purchase the Home for substantially more than the Bellerives. *See* Ex. 267.

On October 23, 2015, the trial court granted Rusdal's motion for partial summary judgment. *See* CP at 21-26. As a result, the trial court dismissed the Bellerives' specific performance claim along with a number of the underlying causes of action for damages. *Id.* at 25. After the trial court dismissed the Bellerives claim for specific performance, the Bellerives released their lis pendens. CP 224-229. Based upon Rusdal's fee affidavit on record, through October 23, 2015, Rusdal incurred approximately \$14,283 in fees in conjunction with the litigation. CP at 169-173.

On or about November 19, 2015 Rusdal sold the Home to the Wessals. Ex. 330. Rusdal received over \$100,000.00 in cash at closing. *Id.* At the time of sale, Rusdal did not return any of the Bellerives' investment – cash or otherwise – in the Home. In addition to conveying the Home, Rusdal also conveyed the appliances, which the Bellerives purchased and installed, to the Wessals. CP at 216.

The Bellerives amended their Complaint and named the Wessals as defendants. *Id.* at 2. The Bellerives' Amended Complaint set forth additional causes of action for conversion (for money and chattel) and a constructive trust. *Id.* at 9-10. The additional claims sought to recover the

Bellerives' investment, including appliances, in the Home, now in the possession of the Wessals. *See, id.* The Bellerives and the Wessals reached settlement and, accordingly, the Wessals were dismissed from the suit prior to trial.

The Bellerives and Rusdal proceeded to a five-day bench trial. *Id.* at 211. The parties tried the Bellerives claims for damages under the causes of (1) breach of contract, (2) unjust enrichment, (3) quantum meruit, (4) conversion, and (5) constructive trust. *Id.* at 216-17. Each of the Bellerives' claims sought the same relief – to recover the Bellerives' financial investment in the Home, albeit on alternative theories. *Id.* at 9-10. The parties also tried Rusdal's slander of title claim. CP at 217.

The trial court awarded \$13,160.00 to the Bellerives. *Id.* The trial court concluded the Bellerives "failed to sustain their burden of proof on their claims for damages under for [sic] breach of contract." *Id.* However, the trial court also concluded the Bellerives "demonstrated damages, in equity, in the total gross sum of \$13,160.00." *Id.* These damages arose from the Bellerives' investment and installation of the appliances and Mr. Bellerives' labor at the Home. *Id.* at 216. The trial court found Rusdal received an unjust benefit by selling the Home at a substantial profit to the Wessals where the profit largely derived from the Bellerives' undocumented investments. *Id.*

Importantly, the trial court found the Purchase Agreement required the parties to document change orders in writing. *Id.* at 214. The trial court also found the parties only executed two change orders – one for a garage and the other for an HVAC system. *Id.* The trial court further found “Rusdal was negotiating outside of the parties’ agreement (for the sale to the Bellerives) for the sale of the home to a third party, who ultimately purchased the realty and improvements, together with those improvements constructed by the Bellerives’ labor and appliances purchased by the Bellerives.” *Id.* at 216. The trial court also found in favor of the Bellerives on Rusdal’s slander of title claim. *Id.* at 217.

f. The trial court awards the Bellerives and Rusdal attorneys’ fees.

Only the Bellerives moved for an award of attorneys’ fees pursuant. *Id.* at 107-20. Rusdal argued no basis existed for an award of attorneys’ fees; however, Rusdal’s counsel nonetheless submitted a fee affidavit. *Id.* at 159-66; 167-79.

The trial court engaged in a proportionality analysis to determine its fee award. *Id.* at 219. The trial court found the parties tried three “Major Issues” – (1) the Bellerives claim for specific performance, (2) the Bellerives claim for damages and (3) Rusdal’s slander of title claim. *Id.* at 217. Because the Bellerives received a net affirmative award of damages,

and defeated Rusdal's counterclaim, the trial court determined the Bellerives were the prevailing party. *Id.*

The Bellerives sought an award of attorneys' fees in the amount of \$121,142.19. *Id.* at 124; *but see id.* at 218-19. However, the trial court only awarded the Bellerives \$75,000.00 in attorneys' fees. *Id.* at 219. The trial court summarily offset the Bellerives' fee award by awarding \$25,000.00 in attorneys' fees to Rusdal. *Id.* Unlike the fee award in favor of the Bellerives, the trial court made no findings to support Rusdal's fee award. *See generally, id.* at 211-20. Rusdal did not request, or raise, the trial court's lack of findings to support the fee award below. *Id.* at 206-07.

The parties now cross-appeal the respective awards of attorneys' fees.

V. ARGUMENT

This Court should affirm the Bellerives' award of attorneys' fees and reverse the trial court's award of fees in favor of Rusdal in the form of an offset. The Bellerives' prevailed on contract based claims. As an initial matter, the trial court's findings implicitly support a judgment in favor of the Bellerives for Rusdal's breach of the Purchase Agreement. In particular, the parties purchase agreement required that "Changes" be documented in a writing acknowledged by both parties. This breach of contract independently supports an award of fees to the Bellerives. Nonetheless, the

Bellerives' claim, for which they recovered, arose from the Purchase Agreement, which supports an award of fees. Moreover, the Bellerives prevailed on Rusdal's slander of title claim, which also arose out of the Purchase Agreement and, therefore, supports an award of fees to the Bellerives. Finally, the trial court erred by awarding Rusdal an offsetting fee award. Russo was on the prevailing party as the trial court found against it on two of the three claims (or Major Issues) in the case- finding in favor of the Bellerive's on both their claims for damages and on Rusdal's slander of title claim

A. Standards of review.

An appellate court reviews a "trial court's conclusions of law de novo." *Scott's Excavating Vancouver, LLC v. Winlock Properties, LLC*, 176 Wn. App. 335, 342, 308 P.3d 791 (2013). By contrast, an appellate court reviews challenged findings of fact under a substantial evidence standard. *Scott's Excavating Vancouver, LLC*, 176 Wn. App. at 342. "Substantial evidence is defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *Scott's Excavating Vancouver, LLC*, 176 Wn. App. at 341-42 (quotes omitted). The substantial evidence standard "views reasonable inferences in the light most favorable to the prevailing party." *Scott's Excavating Vancouver, LLC*, 176 Wn. App. at 342. An appellate court "may affirm on any ground

supported by the record.” *Hoover v. Warner*, 189 Wn. App. 509, 526, 358 P.3d 1174 (2015), *review denied*, 185 Wn.2d 1004, 366 P.3d 1243 (2016).

Further, “[a]n appellate court will uphold an attorney fee award unless it finds the trial court manifestly abused its discretion.” *Berryman v. Metcalf*, 177 Wn. App. 644, 656–57, 312 P.3d 745 (2013). “Discretion is abused when the trial court exercises it on untenable grounds or for untenable reasons.” *Berryman*, 177 Wn. App. at 657.

B. The trial court erred by finding Rusdal did not breach the parties agreement

Rusdal argues the trial court erred by awarding fees to the Bellerives on a theory of unjust enrichment. However, this Court need not reach the merits of Rusdal’s argument because the trial court implicitly found Rusdal breached the Purchase Agreement damaging the Bellerives. The trial court found the Purchase Agreement required Rusdal execute written change orders for “changes” or upgrades to the Home during the construction process. However, the trial court also found Rusdal failed to execute change orders for the Bellerives’ investment in the form of appliances and sweat equity. As a result, the trial court found Rusdal’s failure to refund the Bellerives’ their investment at the time of sale to the Wessals, damaged the Bellerives in the amount of \$13,160.00.

When interpreting a contract, the primary objective of the court is to discern the parties' intent. *Wm. Dickson Co. v. Pierce Cnty.*, 128 Wn. App. 488, 493, 116 P.3d 409 (2005). Courts construe contracts as a whole, "interpreting language in the context of other contract provisions." *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 713, 334 P.3d 116 (2014). "An interpretation which gives effect to all of the words in a contract provision is favored over one which renders some of the language meaningless or ineffective." *GMAC v. Everett Chevrolet, Inc.*, 179 Wn. App. 126, 135, 317 P.3d 1074, *review denied*, 181 Wn.2d 1008, 335 P.3d 941 (2014).

A breach of contract "is simply a broken promise." *Ford v. Trendwest Resorts, Inc.*, 146 Wn.2d 146, 155, 43 P.3d 1223 (2002).

The trial court found the Purchase Agreement required change orders occur in writing. Finding of Fact No. 11 states, "The [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 the construction of the Home resulting in an increase in price." CP at 214. Consistent with this finding, Paragraph 4(a) of the Presale Addendum requires, "All Changes shall be agreed to in writing and shall be based on an agreed price." Ex. 359, Form 25. The Presale Addendum broadly defines "changes" as, in part, "any changes, upgrades

and/or additions to plans... made after mutual acceptance of this Agreement...” *Id.* In consideration for the change order, Paragraph 4(d) of the Presale Addendum required the Bellerives pay for any “Change” “directly to [Rusdal] in cash, in advance and will be non-refundable.” *Id.*

During construction, the trial court found the Bellerives purchased, and installed, appliances worth \$10,000.¹ CP at 213. However, the trial court also found, contrary to the language of the Purchase Agreement, Rusdal did not execute a corresponding change order for the appliances. *Id.* at 214. The trial court found Rusdal and the Bellerives only executed change orders to include a garage and an HVAC system. *Id.* Thus, when Rusdal sold the Home to the Wessals, along with the Bellerives’ upgrades, Rusdal received a windfall claiming the Bellerives’ investment was nonrefundable. Read holistically, the trial court’s Findings of Fact found Rusdal breached the Purchase Agreement.

Notably, the trial court denied the Bellerives’ breach of contract claim because the trial court found the Bellerives failed to prove damages resulting from the breach. Yet, the trial court ascribed a value to the breach,

¹ To be precise, the trial court found that the appliances were worth \$10,000.00 to the Bellerives as an “overage they paid toward appliances”. VRP 5:1-4. In other words, the Bellerives paid \$10,000.00 more than what was scheduled for appliances, and, thus, it constituted a change or an upgrade that Rusdal would have been required to document with a written change order for the monies to be considered non-refundable.

or the value of the unexecuted change order. The trial court explicitly found the Bellerives' investment in the form of appliances cost \$10,000.00 and labor cost an additional \$3,160.00. Stated otherwise, the trial court's "unjust enrichment" damages actually reflect breach of contract damages.

"Restitution is an alternative remedy to damages for breach of contract." *Bailie Commc'ns, Ltd. v. Trend Bus. Sys.*, 53 Wn. App. 77, 81, 765 P.2d 339 (1988). "The purpose of restitution is to remedy unjust enrichment." *Ehsani v. McCullough Family P'ship*, 160 Wn.2d 586, 594, 159 P.3d 407 (2007). "The only limitation is that the injured party have remaining duties to perform under the contract." *Bailie Commc'ns, Ltd.*, 53 Wn. App. at 81-82.

In *Dravo Corp. v. L.W. Moses Co.*, 6 Wn. App. 74, 91, 492 P.2d 1058 (1971), the court explained restitution differs from quantum meruit "in that there is no contract implied and no full performance on the contract." In dicta, the *Dravo* Court observed Washington courts applied two measure of damages in restitution claims. *Dravo Corp.*, 6 Wn. App. at 91. The court elaborated one measure of damages considers the underlying contract itself:

In Washington the proper damages for a recovery in restitution upon a wrongfully terminated contract is the reasonable value of services. Past cases have held that the contract itself furnishes the measure of damages to the extent of the evidence thereby afforded. *Noyes v. Pugin*, 2 Wash. 653, 27 P. 548 (1891); *Dyer Bros. Golden West Iron Works v. Pederson*, 112 Wash. 390, 193 P. 1002, 192 P. 622 (1920);

Bailey v. Furleigh, 121 Wash. 207, 208 P. 1091 (1922);
Ahrens v. Ladley, 53 Wash.2d 507, 334 P.2d 778 (1959).

Contrary to these older Washington cases, the decided balance of judicial opinion does not limit recovery under restitution to the contract price. C. McCormick, *Law of Damages* 166 (1935), since the value of services performed to the point of termination may not be related to the comparable portion of the contract price.

Dravo Corp., 6 Wn. App. at 91. (emphasis added). *The Dravo Court* ultimately concluded on the facts at bar, “the correct measure of recovery is the reasonable value of performance measured as of the time it was received as part performance of the contract less the amount of benefits received as part performance on the contract.” *Dravo Corp.*, 6 Wn. App. at 92.

In *Kofmehl v. Baseline Lake, LLC*, 177 Wn.2d 584, 597, 305 P.3d 230 (2013) the Court addressed a claim for restitution, and cross claim for breach of the agreement, in an aborted real estate transaction. On appeal, the Court affirmed reversal of summary judgment on the buyer’s right to restitution finding material issues of fact. *Kofmehl*, 177 Wn.2d at 601. Finding neither party yet prevailed; the Court declined to award attorney’s fees based upon the real estate purchase and sale agreement and attorney fee provision. *Kofmehl*, 177 Wn.2d at 602-03.

Here, the trial court effectively granted the contractual remedy of restitution. The trial court returned to the Bellerives their investment into the Home from the aborted Purchase Agreement. The trial court’s oral

ruling makes clear it awarded, or derived the applicable damages in consideration of the Purchase Agreement. Explained above, restitution, in this context, contemplates and derives from the underlying contract. Moreover, illustrated in *Kofmehl, supra*, a claim for restitution may support an award of attorneys' fees to the prevailing party, in this case, the Bellerives.

C. Rusdal's failure to execute change orders also breached the implied duty of good faith and fair dealing found in every contract.

"There is in every contract an implied duty of good faith and fair dealing." *Badgett v. Security State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). "This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance." *Badgett*, 116 Wn.2d at 569. "[T]he duty of good faith and fair dealing arises only in connection with terms agreed to by the parties." *Rekhter v. State, Dep't of Soc. & Health Servs.*, 180 Wn.2d 102, 113, 323 P.3d 1036 (2014) (alteration added; subsequent alteration removed; quotes removed). The "duty of good faith and fair dealing arises when the contract gives one party discretionary authority to determine a contract term." *Rekhter*, 180 Wn.2d at 113. Often, "The duty of good faith and fair dealing applies when one party has discretionary authority to determine certain terms of the contract, such as

quantity, price, or time.” *Rekhter*, 180 Wn.2d at 113 (quoting *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Colo.1995)).

Rusdal’s failure to execute written change orders breached the implied duty of good faith and fair dealing. The Purchase Agreement required Rusdal to execute a change order in order to retain, without repayment, any investment by the Bellerives in the Home. Yet, the trial court’s findings confirm Rusdal (1) did not execute a change order concerning the appliances, (2) negotiated the sale of the Home “[w]hile the Purchase Agreement was pending” and (3) subsequently sold the Home to a third party “with those improvements constructed by the Bellerives’ labor and appliances.” CP at 216. Rusdal breached the duty of good faith and fair dealing by refusing to subsequently document the Bellerives’ investment. Rusdal argued the parties’ failure to execute change orders rendered the Bellerives’ investment non-refundable. As a result of Rusdal’s failure to abide by the Purchase Agreement, Rusdal sold the Home to the Wessals at an increased value which reflected the net gain derived from the Bellerives’ investment in cash to Rusdal.

D. The Trial Court properly awarded fees to the Bellerives because all of the claims in the underlying action arose from the Purchase Agreement which contains an attorneys’ fees provision.

Ultimately, the trial court found the “[t]he Bellerives and Rusdal’s entire business relationship stems from the [contract-] Settlement Agreement and Purchase Agreement.” CP at 215. Rusdal does not assign error to this finding. *See* Appellant’s Brief at 1-2. Thus, even if this Court determines Rusdal did not breach the contract, all of the claims below nonetheless arose from the parties’ written contracts. Therefore, the trial court properly awarded fees to the Bellerives who received the only net affirmative relief.

1. *The trial court properly awarded fees to the Bellerives as the prevailing party under RCW 4.84.330 because the Bellerives prevailed on a cause of action which arose from the parties’ contract.*

Under RCW 4.84.330, courts may award costs and attorneys fees to the prevailing party in an action on a contract.¹ A “court may award attorney fees for claims other than breach of contract when the contract is

¹ In relevant part, RCW 4.84.330 reads:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys’ fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys’ fees in addition to costs and necessary disbursements.

central to the existence of the claims, i.e., when the dispute actually arose from the agreements.” *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229, 278, 215 P.3d 990 (2009); *see also Seattle First Nat. Bank v. Washington Ins. Guar. Ass’n*, 116 Wn.2d 398, 413, 804 P.2d 1263 (1991) (“an action is on a contract if the action arose out of the contract and 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) (“An action is on a contract for purposes of a contractual attorney fees provision if the action arose out of the contract and if the contract is central to the dispute.”); *Douglas v. Visser*, 173 Wn. App. 823, 835, 295 P.3d 800 (2013) (“When an action in tort is based on a contract containing an attorney fee provision, the prevailing party is entitled to attorney fees.”).

In *Hill v. Cox*, 110 Wn. App. 394, 412, 41 P.3d 495 (2002), the Court of Appeals held a plaintiff in a timber trespass claim, a statutory tort, could recover attorneys’ fees based on the underlying contract. There, the plaintiff purchased property from the defendant and the defendant later cut timber on the purchased property. *Hill*, 110 Wn. App. at 400. Affirming the award of fees to the plaintiff, the *Hill* Court explained:

[T]here would not have been a timber trespass if the parties had not contracted that the trees within 100 feet of the cabin were not to be cut. Hence, [the plaintiff’s] action arose out of the contract and the contract was central to the dispute.

(Emphasis Added.) *Hill*, 110 Wn. App. at 412.

Here, the Purchase Agreement, with its attorneys' fees provision, gave rise to the Bellerives' action and formed the basis for the Bellerives' damages. The Bellerives' relationship with Rusdal arose because of the Purchase Agreement. CP at 215. At the outset, the Bellerives pled a cause of action for breach of contract. CP at 5. The Bellerives pled unjust enrichment in the alternative to recover the investment made into the Home pursuant to the Purchase Agreement, a contract. To this end, in calculating Rusdal's "enrichment" the trial court analyzed the benefit based off of the Bellerives' investment into the property pursuant to the Purchase Agreement. Stated otherwise, the trial court calculated damages for unjust enrichment by relying upon the Purchase Agreement. The Bellerives' unjust enrichment damages effectively reflect breach of contract damages or were otherwise calculated by relying on the contract.

2. *Additionally, the trial court properly awarded fees to Bellerives because the Bellerives prevailed on Rusdal's slander of title claim which arose from the parties' contract.*

The Trial Court properly awarded the Bellerives fees for prevailing on Rusdal's slander of title claim. Under RCW 4.84.330, "tort claims are based on a contract when they arise from the contract and the contract is central to the dispute." *Borish v. Russell*, 155 Wn. App. 892, 907, 230 P.3d 646, 654 (2010), *as amended on denial of reconsideration* (June 29, 2010).

In *Borish v. Russell*, a seller of real estate defeated the buyer's negligent misrepresentation claim under the economic loss rule. *Borish*, 155 Wn. App. at 902. Because the underlying tort claim arose out of a real estate purchase and sale agreement, the Court of Appeals granted fees to the prevailing defendants. *Borish*, 155 Wn. App. at 907. Specifically, the *Borish* Court, in granting fees on appeal under RAP 18.1, pursuant to RCW 4.84.330, explained:

Here, the [plaintiffs'] claim against the [defendants] is defeated by application of the economic loss rule to the parties' RESPA, **and the [plaintiffs'] lawsuit arises out of the contractual relationship they had with the [defendants]**. The RESPA provides for reasonable attorney fees and expenses to a prevailing party on suits "concerning this Agreement."

(Emphasis Added.) *Borish*, 155 Wn. App. at 907.

In this instance, Rusdal's slander of title arose from the contractual relationship between Rusdal and the Bellerives. Explained above, the Bellerives Complaint sought to enforce the underlying Purchase Agreement for their right to purchase the Home, or, in the alternative, for their damages. In its Answer, Rusdal alleges its cause of action for slander of title, arose from the lis pendens filed to enforce the terms of the Purchase Agreement during the pendency of litigation. CP at 18-19.

Moreover, like in *Borish, supra*, the parties' contracts here contain expansive attorneys' fees language. Specifically, the Settlement Agreement

awards fees to the prevailing party in any claim to “enforce [the] Settlement Agreement because of an *alleged* dispute, breach, default or misrepresentation...” Ex. 170, pg. 2 (emphasis added). And further, the Purchase Agreement here contains identical language present in *Borish*, 155 Wn. App. at 907: “[I]f Buyer or Seller institutes suit against the other *concerning this Agreement* the prevailing party is entitled to reasonable attorneys’ fees and expenses.” Ex. 359, Form 21, pg. 4 (Emphasis added). Like in *Borish*, this Court should affirm the Bellerives’ award for defeating Rusdal’s contract based tort claim.

In defense, Rusdal argues “the Bellerives did not prevail on any of the tort claims they asserted.” Brief at 11. However, the law does not require the Bellerives to prevail on a claim they asserted to receive an award. Noted above, the *Borish* Court explained a party may receive attorneys’ for defending a tort which arose from an underlying contract. *Borish*, 155 Wn. App. at 907.

Second, Rusdal defends by arguing the slander of title claim did not arise out of the parties’ contract. Appellant’s Brief at 12. Rusdal’s argument asserts the trial court denied Rusdal’s slander of title claim because the claim “turned on whether [Rusdal] could prove that it sustained financial loss as a direct result of the Bellerives’ *lis pendens* filing.” Appellant’s Brief at 12.

However, Rusdal's argument ignores the trial court's ruling. The trial court dismissed Rusdal's slander of title claim because the Bellerives' filed the lis pendens to enforce the parties' contract and, further, it was "not done with malice". CP 198. The Bellerives filed the lis pendens to prevent the sale of the Home to a third party pending their prayer for relief for specific performance. And a party may only seek the remedy of specific performance where a contract exists. *Crafts v. Pitts*, 161 Wn.2d 16, 24, 162 P.3d 382, 386 (2007) ("because specific performance is uniquely a contract remedy, a trial court may order specific performance only if there is a valid binding contract") (emphasis added). The trial court found the Bellerives filed the underlying lis pendens, which gave rise to the slander of title claim, for the purpose of enforcing the Purchase Agreement. Therefore, the Bellerives defeated Rusdal's tort claim which arose from the underlying Purchase Agreement. The trial court properly awarded the Bellerives' fees for defeating Rusdal's slander of title claim.

3. *The Trial Court erred in awarding Rusdal its Fees in the form of an Offset.*

"As a general rule, a prevailing party is one that receives an affirmative judgment in its favor." *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc.*, 168 Wn. App. 86, 98, 285 P.3d 70 (2012); see also *Mortzky v. Heberlein*, 40 Wn. App. 181, 183, 697 P.2d 1023 (1985)

(remanding for determination of attorneys' fees for defendant/counterclaimant that received net affirmative judgment); *see also Emerick v. Cardiac Study Center, Inc.*, 189 Wn. App. 711, 707, 357 P.3d 696 (2015) (“In general, a prevailing party is one who receives an affirmative judgment in his or her favor.”). “If neither party wholly prevails, then the party that substantially prevails on its claims is the prevailing party.” *Hawkins v. Diel*, 166 Wn. App. 1, 10, 269 P.3d 1049 (2011); *see also Newport Yacht Basin Ass'n of Condo. Owners*, 168 Wn. App. at 98 (“A prevailing party need not succeed on its entire claim to qualify for attorney fees, but it must substantially prevail in order to be entitled to such an award.”).

In *Mortzky*, the Court of Appeals held the counterclaimant, who received a “net affirmative judgment” was the prevailing party and entitled to fees. *Mortzky*, 40 Wn. App. at 183-84. There, the plaintiff filed foreclosed on a lien in the amount of \$2,092.93; the defendant counterclaimed for defective construction work and received a judgment of \$4,937.00. *Mortzky*, 40 Wn. App. at 182. The trial court offset the awards, which “provided[ed] for a net affirmative judgment to [the counterclaimant].” *Mortzky*, 40 Wn. App. at 182. Because the counterclaimant received the net affirmative judgment, the court of appeals held the trial court erred in awarding fees to the plaintiff and “remanded to

determine attorney fees” to the counterclaimant. *Mortzky*, 40 Wn. App. at 183-84.

Likewise, in *Hawkins v. Diel*, 166 Wn. App. 1, 12, 269 P.3d 1049 (2011), this Court affirmed an award of attorneys’ fees to the prevailing plaintiff. There, the Plaintiffs prevailed on their breach of contract claim, one of four claims asserted, and obtained the only judgment in the action. *Hawkins*, 166 Wn. App. at 11. However, the defendants in *Hawkins* successfully defended the plaintiff’s general damages claim. *Hawkins*, 166 Wn. App. at 11. On appeal, the defendants argued courts “must look at the outcome of all the claims in a lawsuit” to assess the prevailing party for fee purposes. *Hawkins*, 166 Wn. App. at 11. The *Hawkins* Court rejected this argument, opining “successfully defending a portion of the [plaintiffs’] suit does not make [the defendants] a prevailing party.” *Hawkins*, 166 Wn. App. at 12. In so holding, the court elaborated: “In the whole of the litigation, the court awarded affirmative relief only to the [plaintiffs]. Thus, the [plaintiffs] are the only prevailing party...” *Hawkins*, 166 Wn. App. at 12.

In this case, the trial court awarded one affirmative judgment which favored only the Bellerives. The record confirms, of all the claims asserted below, only the Bellerives received any affirmative relief. The trial court dismissed Rusdal’s single slander of title claim. Stated otherwise, “In the whole of the litigation, the court awarded affirmative relief only to the

[Bellerives]. Thus, the [Bellerives] are the only prevailing party.” *Hawkins*, 166 Wn. App. at 12. Therefore, this Court should affirm the Bellerives’ award of fees and costs.

Moreover, Rusdal’s argument to deny fees merely asserts the same “holistic” argument rejected by this Court in *Hawkins, supra*. See Brief at 16 (arguing Bellerives received only “16.65% of the \$79,032.49 they sought at trial”). This Court should not now depart from the logic of *Hawkins, supra*.

The Bellerives prevailed at trial; therefore, this Court should award only the Bellerives fees and costs.

4. *The Trial Court did not award the Belleirves excessive fees or costs, but instead only awarded the Bellerives sixty-two (62%) percent of the fees requested.*

Rusdal next argues the trial court awarded an excessive fee. Appellant’s Brief at pg. 18. “An appellate court will uphold an attorney fee award unless it finds the trial court manifestly abused its discretion.” *Berryman*, 177 Wn. App. at 656–57. “Discretion is abused when the trial court exercises it on untenable grounds or for untenable reasons.” *Berryman*, 177 Wn. App. at 657.

“In general, trial courts should use the lodestar method when determining the award of attorney fees as costs.” *In re Guardianship of Decker*, 188 Wn. App. 429, 446, 353 P.3d 669 (2015), *review denied*, 184

Wn.2d 1015, 360 P.3d 818 (2015). The lodestar calculation consists of two primary factors. *Target Nat. Bank v. Higgins*, 180 Wn. App. 165, 184, 321 P.3d 1215 (2014) First, “the court must first exclude from the requested hours any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims.” *Target Nat. Bank*, 180 Wn. App. at 184 (quotes omitted). However, “Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee.” *Bright v. Frank Russell Investments*, 191 Wn. App. 73, 80, 361 P.3d 245 (2015) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 435, 103 S. Ct. 1933, 1940, 76 L. Ed. 2d 40 (1983)).

Second, “the trial court may adjust or apply a multiplier to the award either upward or downward to reflect factors not already taken into consideration—specifically, the contingent nature of success and the quality of work performed.” *Target Nat. Bank*, 180 Wn. App. at 184 (quotes omitted).

Once calculated, “The lodestar amount may be adjusted to account for subjective factors such as the level of skill required by the litigation, the amount of potential recovery, time limitations imposed by the litigation, the attorney's reputation, and the undesirability of the case.” *Target Nat. Bank*, 180 Wn. App. at 184.

In *Bright*, Division I of this Court affirmed the entirety of the trial court's award of fees and costs even though the jury only found in the plaintiff's favor on one of two pled claims. *Bright*, 191 Wn. App. at 82. There, the plaintiff brought two claims: a claim for failure to accommodate and a claim for retaliation. *Bright*, 191 Wn. App. at 75. The *Bright* Court reasoned the trial court did not need to reduce the resulting fee award because the plaintiff did not prevail on both claims. *Bright*, 191 Wn. App. at 82. Instead, the court explained the plaintiff's claims "shared a factual core" thereby justifying a single, unreduced, award of fees. *Bright*, 191 Wn. App. at 82.

Rusdal's argument on appeal improperly seeks to disgorge the Bellerives for asserting multiple, related claims. However, litigants may raise multiple alternative claims for relief and "the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee." *Bright*, 191 Wn. App. at 80. On this basis alone, Rusdal's argument fails.

Nonetheless, all of Bellerives' claims prosecuted through the time of trial arise from the same common core of facts. The Bellerives' tried the following claims for damages before the trial court: (1) breach of contract, (2) unjust enrichment, (3) constructive trust and (4) conversion. The aforementioned causes of action all sought to recover the Bellerives' investment into the Home in the form money damages. The Bellerives

made each and every investment into the Home pursuant to the Purchase Agreement and in expectation Rusdal would, in turn, convey the Home at closing. Each cause presented by the Bellerives to the trial court considered whether Rusdal could lawfully retain the entirety of the Bellerives' investment. Similar to *Bright, supra*, each of the causes tried by the Bellerives' at trial consisted of the same "factual core."

Moreover, contrary to Rusdal's argument, the trial court reduced the Bellerives' fee award, ostensibly for duplicative work and unsuccessful claims. The Bellerives moved for a fee award in the amount of \$121,142.19. CP at 124. Prior to Rusdal's "offset" the trial court only awarded the Bellerives \$75,000.00 net in fees – or approximately sixty-two (62%) percent of the Bellerives' entire request.

E. The Trial Court erred by awarding fees to Rusdal through an offset through the Court dismissed the only claim brought by Rusdal and Rusdal did not move for fees.

This Court should reverse the fee award in favor of Rusdal for four clear reasons. First, Rusdal never moved for, or requested, fees. Second, case law establishing proportionality reflects proportionality will not apply in a case where a defendant loses his counterclaim. Third, the trial court failed to make any finding of reasonableness concerning Rusdal's fees. Fourth, the trial court awarded Rusdal \$25,000.00 for defeating the

Bellerives' claim for specific performance yet Rusdal's fee affidavit reflects it did not incur \$25,000.00 in fees at the time of summary judgment.

1. *The trial court erred by award Fees to Rusdal sua sponte.*

As an initial matter, the trial court erred by awarding fees to Rusdal because Rusdal did not move for a fee award in its favor. CR 54(d)(2) requires a party bring an affirmative motion to request fees:

Claims for attorneys' fees and expenses, other than costs and disbursements, *shall be made by motion* unless the substantive law governing the action provides for the recovery of such fees and expenses as an element of damages to be proved at trial. *Unless otherwise provided by statute or order of the court, the motion must be filed no later than 10 days after entry of judgment.*

(Emphasis added).

Below, Rusdal never moved for an award of attorneys' fees. Rusdal never sought fees or submitted a motion pursuant to CR 54(d)(2). Therefore, the trial court erred by awarding any fees to Rusdal.

2. *The Trial Court Erred by Applying the Rule of Proportionality.*

Even if the trial court could award relief Rusdal did not seek, the trial court erred by applying the rule of proportionality. Washington subscribes to a proportionality approach to awards of attorneys' fees in select contract based actions. *Transpac Dev., Inc. v. Oh*, 132 Wn. App. 212, 218, 130 P.3d 892 (2006). Courts will apply the proportionality approach "where multiple distinct and severable contract claims are at issue."

Transpac Dev., Inc., 132 Wn. App. at 218. Under the proportionality approach a court “determine[s] the amount of attorney fees each party would be entitled to for prevailing against the other's claim, as if there were two separate lawsuits, and then to offset one award against the other.” *Transpac Dev., Inc.*, 132 Wn. App. at 220.

The trial court erred by treating the Bellerives' prayer for specific performance as a separate claim. Specific performance and legal damages reflect alternative remedies available to an aggrieved plaintiff in a breach of contract cause of action. *Crafts*, 161 Wn.2d at 24 (“specific performance is uniquely a contract remedy”) (emphasis added); *see also Paradiso v. Drake*, 135 Wn. App. 329, 335, 143 P.3d 859 (2006) (“Specific performance is an appropriate remedy for a seller's breach only when...damages are not an adequate remedy for the buyer.”) (Emphasis added). The remedies do not reflect separate claims subject to proportionality. Furthermore, Rusdal failed to raise the issue or otherwise articulate a basis for which the Bellerives' claims could be segregated for purposes of an award of fees. Rusdal cannot now raise the issue for the first time on appeal. *See* RAP 2.5(a).

To this end, the Bellerives asserted a breach of contract claim and prayed for specific performance or damages. The Bellerives pled unjust enrichment in the alternative to recover damages for investments pursuant

to the Purchase Agreement. Thus, one claim to recover the Bellerives' investment under the Purchase Agreement, for purposes of proportionality, exists. The trial court awarded the Bellerives affirmative relief; the Bellerives prevailed.

Furthermore, *Marassi v. Lau*, which established the proportionality rule, confirms the rule of proportionality cannot apply here. *Marassi v. Lau*, 71 Wn. App. 912, 916, 859 P.2d 605 (1993), *abrogated on other grounds by Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 200 P.3d 683 (2009). The *Marassi* Court adopted the rule of proportionality because the "general principals" failed to "address situations in which a defendant has *not* made a counterclaim for affirmative relief, but merely defends against the plaintiff's claims." *Marassi*, 71 Wn. App. at 916 (emphasis added); *but see Cornish Coll. of the Arts v. 1000 Virginia Ltd. P'ship*, 158 Wn. App. 203, 231, 242 P.3d 1 (2010) ("a defendant need not have made a counterclaim for affirmative relief, as the defendant can recover as a prevailing party for successfully defending against the plaintiff's claims") (citing *Marassi*, 71 Wn. App. at 916).

Here, Rusdal pursued a counterclaim – slander of title. Rusdal sought affirmative relief and lost. Therefore, under *Marassi, supra*, this Court need not depart from the "general principals" concerning the prevailing party. Explained above, the "general principals" deem the

Bellerieves the prevailing party as the only party which received affirmative relief.

3. The trial court did not enter the requisite Findings of Fact or Conclusions of Law to support an award of fees in favor of Rusdal.

The trial court did not, nor did Rusdal request, findings concerning the reasonableness of Rusdal's counsel's fees. Without such findings, the trial court erred by awarding fees to Rusdal.

To support a fee award, a trial court "must supply findings of fact and conclusions of law sufficient to permit a reviewing court to determine why the trial court awarded the amount in question." *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 144, 331 P.3d 40 (2014). The record must explain whether the rates billed, in support of the award, were reasonable. *SentinelC3, Inc.*, 181 Wn.2d at 144.

Below, the trial court made no findings concerning the reasonableness of Rusdal's fee award. To the contrary, the only findings and conclusions in the record relate to the Bellerives' fee award. CP at 216; 218-20 (finding the hourly rates for the Bellerives' award reasonable).

Where the record lacks sufficient findings to support an award, an appellate court will remand to augment the record. *SentinelC3, Inc.*, 181 Wn.2d at 145. However, this Court should not remand here because Rusdal failed to allege the defect below. See RAP 2.5(a). Below, Rusdal's only objection

to the proposed Findings of Fact and Conclusions of Law concerned the Bellerives' right to obtain additional fees or costs incurred to enforce the judgment.

4. Even if proportionality treated the Bellerives' request for specific performance, as a claim, Rusdal would only be entitled to recover those fees incurred through October 23, 2015.

Assuming, *arguendo*, the Bellerives' request for specific performance is treated as a claim for purposes of applying proportionality, the trial court dismissed the same on summary judgment. Therefore, Rusdal may only recover those fees incurred through October 23, 2015. According to Rusdal's counsel's fee affidavit, through October 23, 2015, Rusdal incurred only \$15,622.40 in fees and costs. Thus, the trial court erred by awarding approximately \$25,000.00.

F. This Court should award the Bellerives fees and costs on appeal.

RAP 18.1 permits this Court to award costs on appeal where a basis for a fee award exists. Under RCW 4.84.330 a court may award attorneys' fees and costs incurred to enforce the provisions of a contract which contains an attorneys' fees provision. The parties underlying Settlement Agreement provides the "prevailing party shall be entitled to recover reasonable attorney's' fees and other costs incurred in [an] action or proceeding (including those incurred on appeal)." Ex. 170, pg.

3. Moreover, the underlying Purchase Agreement provides for an award of fees to the prevailing party in an action between Buyer and Seller, Bellerive and Rusdal. Ex. 359, Form 21, at pg. 4. Explained herein, the Bellerives prevailed in an action upon the underlying contracts. The Bellerives received the only affirmative relief below and this Court should affirm, in part, the Bellerives' award for the reasons stated herein. Therefore, this Court should award the Bellerives fees and costs on appeal.

VI. CONCLUSION

This Court should reverse the trial court's award of fees in favor of Rusdal for the reasons stated herein. In all other respects, this Court should affirm the trial court.

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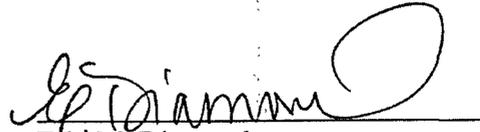
CERTIFICATE OF SERVICE

I certify that on the 10th day of March, 2017,

I caused a true and correct copy of the foregoing document to be served on the following via email and first-class mail as indicated below:

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Erin M. Diamond