

FILED
Court of Appeals
Division II
State of Washington
2/20/2020 4:55 PM
NO. 53256-5-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

JUBITZ CORPORATION, an Oregon corporation,

Appellant/Cross-Respondent,

v.

VANCOUVER HOSPITALITY PARTNERS, LLC, a Washington limited

liability company, Respondent; and

ROBERT HOLMSTROM and ELIZABETH HOLMSTROM, individuals,

Respondents/Cross-Appellants.

**APPELLANT'S REPLY AND RESPONSE BRIEF TO
RESPONDENTS/CROSS-APPELLANTS ROBERT AND
ELIZABETH HOLMSTROM'S COMBINED RESPONSIVE AND
OPENING BRIEF**

Katie Jo Johnson, WSBA No. 46143
McEwen Gisvold, LLP
1100 SW Sixth Avenue, Suite 1600
Portland, OR 97204
(503) 226-7321

Attorneys for Appellant/Cross-Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. JUBITZ'S REPLY TO HOLMSTROMS' RESPONSE BRIEF 1

 A. SUMMARY OF REPLY 1

 B. STANDARD OF REVIEW 1

 C. ARGUMENT..... 2

II. JUBITZ'S RESPONSE TO HOLMSTROMS' OPENING BRIEF ON
CROSS-APPEAL 12

 A. First Assignment of Error: Trial Court Conclusion of Law No. 4 of
February 2019 Findings and Conclusions (Quiet Enjoyment)..... 12

 1. Counterstatement of Issues..... 12

 2. Argument..... 12

 B. Second Assignment of Error: Trial Court Conclusion of Law No. 5
of February 2019 Findings and Conclusions (Breach of Warranty of
Clear Title) 14

 1. Counterstatement of Issues..... 14

 2. Argument..... 14

 C. Monetary Damages..... 15

 D. Third Assignment of Error: Award of Attorney Fees, Expenses and
Costs to Jubitz 16

 1. Counterstatement of Issues..... 16

 2. Argument..... 16

 E. RAP 18.1 FEE REQUEST..... 17

F. CONCLUSION..... 17

III. Unpublished Opinion: *Votiv, Inc. v. Bay Vista Owner LLC*,
Washington Court of Appeals No. 78289-4-I (2019)Appendix 2

TABLE OF AUTHORITIES

Cases

| | |
|--|---|
| <i>Am. Nursery Prods., Inc. v. Indian Wells Orchards</i> , 115 Wn.2d 217, 797 P.2d 477 (1990)..... | 1 |
| <i>Barstad v. Stewart Title Guar. Co.</i> , 145 Wn.2d 528, 39 P.3d 984 (2002).. | 8 |
| <i>Dumas v. Gagner</i> , 137 Wn.2d 268, 971 P.2d 17 (1999)..... | 1 |
| <i>Maxwell v. Maxwell</i> , 12 Wn.2d 589, 123 P.2d 335 (1942)..... | 2 |
| <i>Ruse v. Dep't of Labor & Indus.</i> , 138 Wn.2d 1, 977 P.2d 570 (1999)..... | 1 |

I. JUBITZ'S REPLY TO HOLMSTROMS' RESPONSE BRIEF

A. SUMMARY OF REPLY

Respondents/Cross-Appellants Robert Holmstrom and Elizabeth Holmstrom (collectively, the "Holmstroms") misconstrue both the facts and the law of this case throughout their Response Brief. But, in doing so, the Holmstroms succeed only in highlighting the reasons why Appellant/Cross-Respondent Jubitz Corporation ("Jubitz") can and should prevail in this appeal.

This Court should find that the parking easement at issue does not bind Jubitz and does not burden the property leased and under agreement to purchase by Jubitz.

B. STANDARD OF REVIEW

As both Respondent Vancouver Hospitality Partners, LLC ("VHP") and Jubitz set forth in their respective briefs, the correct standard of review is that questions of law and conclusions of law are reviewed *de novo*. *Dumas v. Gagner*, 137 Wn.2d 268, 280, 971 P.2d 17 (1999).

Conclusions of law must flow from, and be supported by, the findings of fact. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999); *Am. Nursery Prods., Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 222, 797 P.2d 477 (1990). The Holmstroms' attempts to apply an

abuse of discretion standard or substantial evidence standard to conclusions of law are incorrect and should be disregarded.¹

C. ARGUMENT

The Holmstroms do not add any additional legal arguments in response to Jubitz's Assignments of Error beyond those already made in VHP's Response Brief. Therefore, in the interest of efficiency, Jubitz hereby incorporates by reference the arguments made in its Reply to VHP's Response Brief.

Rather than add any meaningful legal analysis to the issues at hand, the Holmstroms spend the majority of their Response Brief making blatant misrepresentations regarding the evidence and findings made by the trial court.

For example, the Holmstroms represent that "Scott Hogan, a licensed attorney and manager of a title company with many years of

¹ The Holmstroms also misconstrue the burdens of a party seeking to reform an instrument. *See, e.g., Maxwell v. Maxwell*, 12 Wn.2d 589, 593, 123 P.2d 335 (1942) ("the party seeking reformation of a writing for mutual mistake must establish facts which will warrant the allowance of the remedy by clear and convincing evidence and not by a mere preponderance. * * * Reformation is a proper remedy where the parties have reached a definite and explicit agreement, understood in the same sense by both, but by their mutual or common mistake, the written contract fails to express that agreement * * *.") (internal citations omitted).

experience examining real property titles, provided expert testimony about how he searched the Clark County real property indices and found that 1999 RPA to be in the chain of title for the Vancouver Oil property," and that "[a]nother title company employee, Ariel Marinetti, testified about how she found the 1999 RPA to affect the Vancouver Oil parcel." [Holmstroms Response Brief, p. 14]. But, neither Ms. Marinetti nor Mr. Hogan testified regarding the validity of the RPAs. In fact, Mr. Hogan actually testified that he makes no determination regarding the validity of items found in indices when he conducts searches:

Q. When you do a search based on the index, do you make any determination as to the validity of the deeds?

A. No.

RP (Trial), at 262:19-21. Mr. Hogan further testified that he did not make any determination about the actual effect of the RPAs:

Q. And you—and you came to a conclusion about the legal effect of that—of the reciprocal parking easement?

A. I came to a conclusion as to whether the reciprocal parking easement affected the title, not specifically what that effect is.

RP (Trial), at 277:11-16. In fact, Mr. Hogan confirmed that the RPAs did not contain sufficient information within their four corners:

Q. Okay. Thank you. And let's assume, for the sake of argument, that that's incorrect, those legal descriptions are incorrect. Okay?

A. Yeah.

Q. Assuming that, can you determine from this document what the correct legal descriptions should have been, according to the intent of the parties?

A. I suppose I could have searched outside the four corners of the document, looking for properties owned by Holmstrom or Bodging [sic].

Q. Fair enough. But putting aside what you could have searched or found outside of this document, is there any information, within the four corners of this document, that would indicate what the parties intended as the correct legal descriptions, assuming that the ones attached are incorrect?

A. No, other than an inference by the names of the parties.

RP (Trial), at 289:12-290:4.²

The Holmstroms also represent that Jerry Olson testified that he was "able to locate documentation reflecting that the Vancouver Oil property was approved for 13 parking spaces by searching the County's planning documents in the course of an on-line search of publicly

² Mr. Hogan also clarified that his experience is in researching his own company's internal title plants, not the county indices: "A. There are two different indexes that be—could be considered the grantor/grantee index. One would be the auditor's grantor/grantee index. The other would be our title plant grantor/grantee index. With the auditor's grantor/grantee index, I do not frequently search that. With our title plant—internal plant records database, I frequently do search that." RP (Trial), at 280:21-281:2.

available documents." [Holmstroms Response Brief, p. 7]. But, the County was not actually requiring off-site parking on the Jubitz Property:

Q. Right. And you mentioned an expectation on the part of the county to require off-site parking.

A. There—the site on its own was short some 10 spaces. And they—they needed parking off site to satisfy the parking part of it.

Q. And they weren't requiring off-site parking on the Jubitz—or on the VOC property; is that right? They were just requiring off-site parking somewhere?

A. Somewhere.

RP (Trial), at 131:2-10. Mr. Olson further testified that the County had actually been considering off-site parking on property owned by the Krenzler Corporation.

Q. Okay. If you could turn in that book to tab 32. And this is Trial Exhibit 23. This is that decision we were talking about, the county decision—

A. Uh-huh.

Q. —earlier. And in the bottom right corner of each page there's a number. If you could go to VHP000264. I'll ask you about that. There's a finding 80 right there. And it refers to the shared parking; is that right?

A. Uh-huh.

Q. And it talks about the 12 additional spaces located on the abutting property to the west. Do you see that?

A. Yes.

Q. And so the Vancouver Oil property is to the north, not to the west; isn't that fair to say?

A. Right. That's not the Vancouver Oil property.

RP (Trial), at 146:1-15. In addition, Mr. Olson confirmed that the RPAs were not sufficiently described:

Q. Okay. So a surveyor at Olson Engineering could read this document and put the easement on the ground?

A. They could illustrate the property covered by the easement.

Q. Okay.

A. There isn't a specific easement—

Q. Right.

A. —in here. It's a—

Q. But just review—

A. It's a blanket easement over the following property, that happens to include the property being purchased.

RP (Trial), at 145:16-25. The insufficiency of the RPAs was confirmed by the deposition testimony of another Olson Engineering representative,

Howard Richardson:

Q. And we'll look at it, but just from memory, what's not complete about it?

A. There's no way to describe where the easement's at.

Q. In what respect?

A. As a surveyor, we have to be able to put it on the ground, there's no way for me to put that on the ground.

* * *

Q. You just read the reciprocal parking easements it says 11 spaces, but as a surveyor you have no idea where those go.

A. Correct.

Q. Is that important or not important?

A. It is to determining who is going to benefit or be servient to them or maybe they both will be. I don't know based on the recorded document. There's obviously an intent to have 11 spaces somewhere.

Q. And you used the word incomplete before, that's what you're talking about?

A. Incomplete?

Q. I thought you testified earlier the reciprocal parking easements are incomplete in your mind.

A. They're not incomplete, I can't locate them. Obviously, there's 11 spaces somewhere. The intent is there. Where are the 11 spaces, that's what I'm trying to clear up here.

Q. Is it fair to say there's actually 22 spaces, 11 on one parcel and 11 on another?

A. I don't know that. I need more clarification.

Q. You can't determine that by reading the reciprocal parking easements?

A. To me it's a question. There could be 11 on both sides, I don't know, you know. It has enough of a gray area that it's almost black, you know. It's not clear whether maybe there

is 22, maybe if Krenzler was involved there's 33. I don't know for sure.

I'm trying to get it straight so that a layperson can read that and it will make sense to them, not a document for attorneys and surveyors to understand.

CP 2069; 2075 (Richardson Deposition, at 13:17-24; 40:14-41-20).³

The Holmstroms attempt to distract from these facts by insisting that the RPAs were reflected on some title commitments, but that position is both misinformed and concerning. First, a title commitment is not meant to, and does not, reflect a chain of title. *See, e.g., Barstad v. Stewart Title Guar. Co.*, 145 Wn.2d 528, 540, 39 P.3d 984 (2002) (recognizing that a preliminary title commitment and title policy are not intended to "disclose the same title information generally included in an abstract of title"). Second, the fact that the Holmstroms apparently had a title commitment during their negotiations with Jubitz that reflected the RPAs, and yet the Holmstroms failed to disclose that information to Jubitz or anyone else, highlights the Holmstroms' misconduct. Bruce Holmstrom testified at trial:

Q. And Trial Exhibit 3. Are you—are you on Clark County Title?

A. Yes, Clark County Title.

³ The RPAs likewise contain no time restriction, which Mr. Olson testified was a concern for the County. RP (Trial), at 146:16-147:12.

Q. Okay.

A. Distribution list.

Q. Did you order this from Clark County Title?

A. It appears I did, yes.

Q. And was it on approximately November 20, 2012 when you ordered it?

A. Yes.

Q. Do you recall why you ordered it at that point?

A. I can only assume that I believed it was my responsibility to put together title reports on all properties.

Q. Do you have a memory of receiving this from Clark County Title?

A. I have some memory. I know that I cancelled it through Kelly McDonald, who was the manager of Clark County Title at the time, as soon as I found out that we weren't going to be using them.⁴

Q. Do you remember how you found out that you weren't going to use this?

A. I would assume, through Milner.

Q. Do you recall sending this on to anyone else?

A. No.

⁴ This is not true, as Mr. Holmstrom's testimony reflects that the Clark County title report was not cancelled until January 10, 2013, after closing. RP (Trial), at 355:14-357:7.

Q. And this document does reflect the RPE, does it not? If you look at exceptions 14 and 15.

A. Yes.

* * *

Q. As of January 10, 2013, you now know that Jubitz doesn't think you—didn't think you have any of your own title insurance information or title report. That's as of January 10. Is that correct?

A. That's what it says.

Q. Okay. After you received this message from Mr. McDonald, did you reach out to anybody, to Jubitz, to say, oh, by the way, I thought you knew about this November 20 report?

A. No, I was enjoying Carlsbad, California, and I wasn't involved in it after that.

RP (Trial), at 334:12-335:14; 356:22-357:7.

The Holmstroms attempt to create notice where none existed. For example, the Holmstroms represent that Jubitz had attorneys "review the County's site plan file" prior to closing of the Jubitz Property.

[Holmstroms Response Brief, p. 8]. But, the evidence at trial was that attorneys had reviewed information as part of this litigation:

Q. And have you—as part of this suit, have you reviewed the county file for the site plan for the hotel?

A. Personally, no. We certainly had Miller Nash do that early on. And then we received all the documents, I think, in—

RP (Trial), at 201:15-19.⁵

In addition, the Holmstroms represent that Jubitz employees had "historical knowledge" of the RPAs. [Holmstroms Response Brief, pp. 8-9]. But that is not what those employees testified, and the trial court found directly to the contrary:

"Even employees of Jubitz who had formerly worked for the Holmstroms and their oil company were unaware of the existence of any written reciprocal agreement concerning parking."

CP 2122, Opening Brief, App. A.

The Holmstroms would like the Court to believe that Clark County required the RPAs as a "condition of the development of the hotel property." [Holmstroms Response Brief, p. 11]. But, that is not true, as set forth above.

The Holmstroms would also like the Court to believe that "several parties acted pursuant to and in reliance on the RPA for 17 years, without incident." [Holmstroms Response Brief, p. 11]. But, if that were the case, why did the Holmstroms not disclose the RPAs to Jubitz at the time of the lease and purchase sale agreement? And why did VHP not immediately

⁵ Mark Gram testified that, as of the time of closing: "Q. Had anyone on Jubitz's behalf done any search of the permitting file or county records? A. No." RP (Trial), at 188:20-22.

provide a copy of the RPAs to Jubitz, when Jubitz inquired about parking issues in 2016? *See* Reply Brief to VHP's Response Brief, pp.6-7.

II. JUBITZ'S RESPONSE TO HOLMSTROMS' OPENING BRIEF ON CROSS-APPEAL

A. First Assignment of Error: Trial Court Conclusion of Law No. 4 of February 2019 Findings and Conclusions (Quiet Enjoyment)

1. Counterstatement of Issues

Whether the trial court properly issued its conclusion of law given its findings of fact.

2. Argument

Trial Court Conclusion of Law No. 4 of the February 2019 Findings and Conclusions correctly holds that:

"The failure of the Holmstroms to remove the encumbrance imposed on the northern parcel by the existence of the RPAs breached the warranty for quiet enjoyment and possession in the lease. Jubitz has not waived its right to seek monetary damages resulting from this breach."

CP 2184, Opening Brief, App. B.

Holmstroms' argument that Jubitz's right to quiet enjoyment of the Jubitz Property is limited to mere possession is contrary to both the facts and law of the case. Section 10(1) of the Lease warrants that:

"Quiet Enjoyment. Landlord represents and warrants that Tenant, on paying the rents and observing and keeping all covenants, agreements, and conditions of this Lease on Tenant's part to be kept, shall quietly have and enjoy the Premises during the Term without hindrance or molestation by anyone, subject, however, to the exceptions, reservations, and conditions of this Lease."

[Ex. 6, Opening Brief, App. D]. There is no real dispute that the right to quiet enjoyment of a lease includes protection from undisclosed encumbrances. *See, e.g., Votiv, Inc. v. Bay Vista Owner LLC*, 2019 Wash. App. LEXIS 2422, **12-13 (Wa. App. September 16, 2019, Case No. 78289-4-I) ("Generally, a covenant of quiet enjoyment 'secures the tenant from any wrongful act by the lessor which impairs the character and value of the leased premises or otherwise interferes with the tenant's quiet and peaceable use and enjoyment thereof.' Washington cases have recognized a tenant's right to quiet enjoyment in varied factual settings. Those include situations when the landlord's construction work interfered with the tenant's use of the leased premises.") (internal citations omitted).

[App. 2].

There is also no real dispute that Jubitz did not waive its right to seek monetary damages pursuant to the lease. Jubitz has all remedies available to it in equity or under the law:

"(c) Rights and Remedies Cumulative. Each right and remedy provided for in this Lease is cumulative and is in addition to every other right or remedy provided for in this

Lease or now or hereafter existing at law or in equity or by statute or otherwise, and the exercise or beginning of the exercise by Landlord or Tenant of any one or more of the rights or remedies provided for in this Lease or now or hereafter existing at law or in equity or by statute or otherwise shall not preclude the simultaneous or later exercise by the party in question of any or all other rights or remedies provided for in this Lease or now or hereafter existing at law or in equity or by statute or otherwise."

[Ex. 6, Opening Brief, App. D, Section 8(c)]. The trial court's Conclusion of Law No. 4 of the February 2019 Findings and Conclusions is correct and should be upheld.

B. Second Assignment of Error: Trial Court Conclusion of Law No. 5 of February 2019 Findings and Conclusions (Breach of Warranty of Clear Title)

1. Counterstatement of Issues

Whether the trial court properly issued its conclusion of law given its findings of fact.

2. Argument

Trial Court Conclusion of Law No. 5 of the February 2019 Findings and Conclusions correctly holds that:

"The failure of the Holmstroms to remove the encumbrance imposed on the northern parcel by the existence of the RPAs breached the warranty to provide Jubitz with clear title at the time of sale, free of any encumbrance not approved by Jubitz, as provided in the PSA. Jubitz has not waived its right to seek monetary damages resulting from this breach."

CP 2185, Opening Brief, App. B.

Holmstroms' argument that Jubitz's right to clear title is somehow limited to protection from only "financial" encumbrances is again contrary to both the facts and law of the case. The Holmstroms offer no authority whatsoever for the proposition that an easement is not an encumbrance that materially affects title.

There is also no real dispute that Jubitz did not waive its right to seek monetary damages pursuant to the purchase and sale agreement. The Holmstroms' attempt to rely on a "Notice of Developments" section regarding post-Effective Date developments is without merit. In this case, the RPAs which the Holmstroms have attempted to uphold were in place prior to the Effective Date, but were not disclosed as required. Jubitz has the right to damages for that non-disclosure, and is not limited to the remedy of cancelling the closing. The trial court's Conclusion of Law No. 5 of the February 2019 Findings and Conclusions is correct and should be upheld.

C. Monetary Damages

With respect to monetary damages, the Holmstroms do not assign error to Trial Court Conclusion of Law No. 6 of the February 2019 Findings or to any findings of fact. Therefore, those should not be

reviewed on appeal. To the extent the Court does reach that conclusion of law, it is amply supported by the evidence. In fact, the evidence at trial is that Jubitz is entitled to damages in the amount of \$520,000.00. CP 2147-56.

D. Third Assignment of Error: Award of Attorney Fees, Expenses and Costs to Jubitz

1. Counterstatement of Issues

Whether the trial court properly issued an award of attorney fees, expenses and costs to Jubitz.

2. Argument

The trial court correctly issued an award of attorney fees, expenses and costs to Jubitz given the Holmstroms' breach of warranties under the Lease and Purchase Agreement.

For Holmstroms to contend that they "prevailed" by successfully contending that the RPAs were "valid, enforceable, and binding upon [Jubitz]" demonstrates the blatant audacity with which the Holmstroms have continued to disregard their duties to Jubitz. The Holmstroms have never explained why they chose to attempt to enforce the RPAs against Jubitz, rather than to honor their obligations to Jubitz, but that choice means they are responsible for the fees and costs incurred by Jubitz in being forced to litigate the validity of the RPAs.

E. RAP 18.1 FEE REQUEST

Jubitz requests an award of its fees and costs incurred in this appeal pursuant to the terms of the RPAs, Lease and Purchase Agreement at issue in this litigation and RAP 18.1.

F. CONCLUSION

This Court should reverse the erroneous conclusions of law of the trial court and hold that the RPAs are void and unenforceable as to Jubitz and the Jubitz Property. This Court should also award Jubitz the fees and costs it incurred in this appeal. To the extent the Court reaches Holmstrom's Assignments of Error on Cross-Appeal, the Court should uphold the Trial Court's Conclusions of Law regarding breach of the Lease, breach of the Purchase Agreement and award of fees and costs in the trial court.

RESPECTFULLY SUBMITTED this 20th day of February, 2020.

MCEWEN GISVOLD LLP

By: _____



Katie Jo Johnson, WSBA No. 46143
Of Attorneys for Appellant/Cross-
Respondent Jubitz Corporation

APPENDIX 2

Votiv, Inc. v. Bay Vista Owner LLC

Court of Appeals of Washington, Division One

July 12, 2019, Oral Argument; September 16, 2019, Filed

No. 78289-4-I

Reporter

2019 Wash. App. LEXIS 2422 *; 2019 WL 4419446

VOTIV, INC., *Appellant*, v. BAY VISTA OWNER LLC ET AL.,
Respondents.

Notice: RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

Subsequent History: Reported at *Votiv, Inc. v. Bay Vista Owner LLC*, 2019 Wash. App. LEXIS 2479 (Wash. Ct. App., Sept. 16, 2019)

Prior History: [*1] Judgment or order under review. Judge signing: Honorable Veronica Alicea Galvan. Date filed: 04/19/2018.

Votiv, Inc. v. Bay Vista Owner LLC, 2018 Wash. Super. LEXIS 3282 (Feb. 2, 2018)

Counsel: For Appellant: Jesse Owen Iv Franklin, Allen Roger Benson, Schlemlein Fick & Scruggs, PLLC, Seattle, WA.

For Respondent: Dean Gordon Von Kallenbach, Williams Kastner, Seattle, WA.

For Respondent/Cross-Appellant: Joshua Mark Rosen, Law Office of Joshua Rosen, Santa Ana, CA.

Judges: Authored by James Verellen. Concurring: Stephen Dwyer, John Chun.

Opinion by: James Verellen

Opinion

¶1 VERELLEN, J. — A commercial landlord must fulfill its contractual duties of repair and maintenance in a reasonable manner. When a landlord fulfills its duties unreasonably and interferes with its tenant's use and enjoyment of its leasehold, then it can be liable for the tort of nuisance. If that unreasonable conduct also substantially deprives the tenant of the peaceable use and enjoyment of its leasehold, the landlord can be liable for breaching the covenant of quiet enjoyment as well. *Votiv, Inc.*'s, lease does not prevent it from suing landlord Bay Vista Owner LLC (BVO) for nuisance or breach of the covenant of quiet enjoyment. *Votiv* presented sufficient evidence to defeat summary judgment on its nuisance and covenant of quiet enjoyment [*2] claims against BVO.

¶2 But *Votiv*'s claim of constructive eviction does not survive summary judgment because *Votiv* never abandoned its leasehold.

¶3 Neither party is entitled to contractual attorney fees under the lease because, at this stage of the proceedings, neither is a "successful party," as required in the lease. And no other party can seek fees under the lease because the lease limits fee requests to the landlord and tenant.

¶4 Therefore, we affirm in part, reverse in part, and

remand.

FACTS

¶5 Motiv is a music/media company that leases office space in the top floor of the five-story Bay Vista Tower office building.¹ BVO is Motiv's landlord.² The 18-story Bay Vista residential tower sits atop one-half of the roof of the office building and uses the other one-half of the office building's roof as a common area recreational space for residential tenants only.³ The recreational space is open to the sky and contains large plantings, a walking track, a pool, and a tennis court.⁴ A waterproofing membrane sits beneath the recreational space and above the office building's roof to protect the offices from moisture and leaks.⁵ The membrane had deteriorated, allowing leaks into the fifth floor.⁶ Replacement [*3] work began in June of 2017.⁷

¶6 Motiv soon complained about disruptions to its work from construction noise and vibrations.⁸ Construction occurred primarily during business hours on weekdays. In an attempt to minimize disruptions, some of the noisiest work was scheduled only for weekends.⁹ In July, three days after BVO responded to Motiv's complaints, Motiv sued to stop construction.¹⁰ The defendants included BVO; The CWD Group, Inc., which managed the construction project; the Bay Vista Building Association, which is the management organization for decisions affecting both the residential and office portions of the building; the Bay Vista Residential Tower Association, which is the homeowners association for the residential tower; construction company Tatley-Grund, and other parties.¹¹ The court denied Motiv's request for an

injunction.¹²

¶7 Motiv also sought damages from BVO for breach of the lease and damages from all defendants for nuisance.¹³ BVO moved for summary judgment on all claims.¹⁴ The court relied exclusively on section 32 of the lease, which allows the landlord to enter the premises to maintain, restore, or improve the premises or the building when the landlord has the right or obligation to maintain, [*4] restore or improve. Because section 32 also limits claims against the landlord arising out of the landlord's entry on the premises for those purposes, the trial court granted summary judgment on all claims against all defendants and awarded attorney fees to BVO.¹⁵ The court denied a motion by all other defendants (collectively CWD) for an award of attorney fees under the lease.¹⁶

¶8 Motiv moved for reconsideration. The court denied the motion and awarded BVO attorney fees for responding to the motion to reconsider.¹⁷

¶9 Motiv appeals the grant of summary judgment, denial of its motion for reconsideration, and the awards of attorney fees. CWD cross appeals denial of its request for attorney fees.

ANALYSIS

¶10 We review a grant of summary judgment de novo, performing the same inquiry as the trial court and affirming an order of summary judgment where "there is no genuine issue of material fact and the movant is entitled to summary judgment as a matter of law."¹⁸ "We review the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences

¹ Clerk's Papers (CP) at 493.

² CP at 233.

³ CP at 231.

⁴ CP at 231, 232, 238.

⁵ CP at 232-33.

⁶ CP at 31, 625, 1255.

⁷ CP at 69-70.

⁸ CP at 69-70, 350-51.

⁹ CP at 142-44.

¹⁰ CP at 3, 106-18, 350-51.

¹¹ CP at 3-4, 231. Tatley-Grund has since been dismissed as a

defendant.

¹² CP at 28-29, 145-46.

¹³ CP at 9-11.

¹⁴ CP at 217-28.

¹⁵ Report of Proceedings (RP) (Feb. 2, 2018) at 31-32; CP at 653-54.

¹⁶ CP at 1462-64.

¹⁷ CP at 1515-18.

¹⁸ *Lahey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922, 296 P.3d 860 (2013) (quoting *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 358, 166 P.3d 667 (2007)).

in that party's favor."¹⁹

¶11 If the court grants summary judgment in a contract dispute and there are no disputed material facts and no extrinsic evidence [*5] presented on the contract issue, we determine the meaning of the contract as a matter of law.²⁰ We interpret the contract to give effect to all provisions and not disregard contract terms used by the parties.²¹ We give contract terms their ordinary meaning unless the entirety of the contract clearly demonstrates a contrary intent.²²

Section 32 Limitations on Liability

¶12 When analyzing the lease, the trial court applied "the ordinary definition of premises" to section 32 and reasoned that "just like the roof of a house would be part of the building or part of the premises, any space directly above the space that is for lease is also part of [the premises]."²³ Because section 32 limited BVO's liability, the court concluded it barred Votiv's claims. But this section is inapplicable.

¶13 Section 32 of the lease addresses BVO's right of entry into Votiv's office:

Landlord and its authorized representatives *shall have the right to enter the Premises ... for any of the following purposes:* ... (ii) to do any maintenance; to make any restoration to the Premises or the Building that Landlord has the right or the obligation to perform, and to make any improvements to the Premises or the Building that Landlord deems necessary

. . . .

Landlord [*6] shall not be liable in any manner for any inconvenience, annoyance, disturbance, loss of business, nuisance, or other damage *arising*

*out of Landlord's entry on the Premises as provided in this Section, except damage resulting from the grossly negligent or willful acts of Landlord or its authorized representatives. Tenant shall not be entitled to an abatement or reduction of Rent if Landlord exercises any right reserved in this Section. Landlord shall conduct its activities on the Premises as allowed in this section in a reasonable manner so as to cause minimal inconvenience, annoyance or disturbance to Tenant.*²⁴

¶14 Votiv argues, "Section 32 of the lease does not apply to the present case because Votiv's damages are not the result of BVO's entry on the Premises."²⁵ And section 32 expressly limits BVO's liability only for "damage arising out of Landlord's entry on the Premises."²⁶ Thus, the issue is whether the structural roof is, as the court concluded, part of the "Premises" defined in the lease.

¶15 The lease defines "Premises" as "that certain space ... located on the fifth (5th) floor of the Building and designated as suite 510."²⁷ The "Building" is the "Bay Vista Office Building, together with (i) its Allocated [*7] Interest in the Common Elements ... as set forth in the Condominium Declaration."²⁸ The declaration states improvements to the fifth floor roof are common elements.²⁹ Those improvements include the waterproof membrane, the concrete topping slab, the roof drainage system, the sun deck, and other structures comprising the roof.³⁰ The lease's definition of "Premises" is narrow in scope and does not include the structural roof, which is part of the building but not the premises leased to Votiv.

¶16 It is BVO's contractual duty to repair the roof. Section (12)(a) defines BVO's maintenance duties: "Landlord shall maintain in good condition and repair the following: (i) the *structural parts of the building*, which structural parts include ... *subflooring and roof*, (ii) the building standard lighting fixtures, window coverings and

¹⁹ *Id.* (citing Qwest Corp., 161 Wn.2d at 358).

²⁰ Snohomish County Pub. Transp. Benefit Area Corp. v. FirstGroup Am., Inc., 173 Wn.2d 829, 834, 271 P.3d 850 (2012).

²¹ *Id.* at 840.

²² Riley v. Iron Gate Self Storage, 198 Wn. App. 692, 700, 395 P.3d 1059 (2017).

²³ RP (Feb. 2, 2018) at 32.

²⁴ CP at 496 (emphasis added).

²⁵ Appellant's Reply Br. at 2 (emphasis omitted).

²⁶ CP at 496.

²⁷ CP at 493.

²⁸ *Id.*

²⁹ CP at 15.

³⁰ *Id.*

ceiling tiles³¹ But section 12 does not limit BVO's liability when carrying out these repairs. In addition, the recreational facilities on the rooftop are for the exclusive use of residential tenants and are off limits to Votiv.

¶17 The contract does not use an everyday definition for "premises" that included the building's roof, and we will not write one in.³² Section 32 applies only [*8] when BVO or its agents enter Votiv's premises. Because no entry occurred, the section is inapplicable and does not limit BVO's liability.

Lack of Control

¶18 As alternative grounds to affirm, BVO argues that "it is not liable to Votiv because it lacked ownership of the Roof Deck and control over the Work."³³ But for purposes of summary judgment, BVO conceded that it "accepts Votiv's allegation that it 'directly or indirectly' controlled the Work."³⁴ Because we perform the same inquiry as the trial court,³⁵ this concession continues to bind BVO on appeal.

¶19 Even without this concession, the undisputed record shows BVO participated in controlling the building project through the Bay Vista Building Association. The Bay Vista building, which is the office tower and residential tower together, has different owners for its different parts. Each part has a different association to manage that part of the building: the Bay Vista Residential Building Association manages the residential part of the building, and the Association of Office Unit Owners manages the office building.³⁶ Decisions affecting the entire building are made by the Bay Vista Building Association.³⁷ The Building Association has only two [*9] members: the Office Association and the Residential Association.³⁸ BVO is

³¹ CP at 307.

³² See *Riley*, 198 Wn. App. at 700 (contract terms should not be given ordinary definitions where the contract demonstrates a contrary intent).

³³ BVO Resp't's Br. at 22.

³⁴ CP at 223 n.18.

³⁵ *Lahey*, 176 Wn.2d at 922.

³⁶ CP at 231.

³⁷ CP at 232.

³⁸ *Id.*

the sole member of the Office Association.³⁹ Each member has equal power over the Building Association. If the Building Association needs to make a decision but its members deadlock, they must submit to binding arbitration.⁴⁰ Because the arbitrator's decision binds the members of the Building Association and BVO is the sole member of the Office Association, it is bound by the arbitrator's decisions.

¶20 In 2012, the Building Association began exploring ways to repair the roof membrane.⁴¹ The Residential Association and the Office Association deadlocked on the scope and cost of repairs.⁴² The Residential Association proposed a more extensive and expensive replacement of the entire roof membrane, and the Office Association disagreed.⁴³ They entered arbitration in 2016, and the arbitrator adopted the Residential Association's plan for the Building Association.⁴⁴ The Building Association, acting on the behalf of its members, began work on the replacement project in June of 2017.⁴⁵ Because the arbitrator's decision bound the Office Association as one of only two members of the Building Association, the Building Association oversaw [*10] repairs on its members' behalf. And as BVO is now the sole member of the Office Association, BVO participated in the control of the replacement project.

¶21 Because BVO can be liable to Votiv for harm from the roof membrane replacement project and nothing in the lease limits that liability, we consider whether the court properly dismissed Votiv's claims for nuisance, breach of the covenant of quiet enjoyment, and constructive eviction.

Nuisance

¶22 In Washington, the tort of nuisance is "an unreasonable interference with another's use and

³⁹ CP at 231.

⁴⁰ CP at 232.

⁴¹ CP at 31.

⁴² CP at 233, 288.

⁴³ CP at 233.

⁴⁴ CP at 286, 293-95.

⁴⁵ CP at 162-63, 234.

enjoyment of property."⁴⁶ Where, as here, the plaintiff alleges private nuisance, "an intentional interference with the plaintiff's use or enjoyment is not itself a tort, and unreasonableness of the interference is necessary for liability."⁴⁷ A landlord can be liable for nuisance when carrying out repairs required by a lease if it does so in a manner that interferes unreasonably with its tenant's leasehold.⁴⁸ Reasonableness is typically a question of fact, but a court may resolve the issue as a matter of law where reasonable minds could reach only one conclusion by balancing the rights and interests of the parties.⁴⁹

¶23 BVO contends its efforts were reasonable [*11] as a matter of law because section 12 of the lease required that it repair the roof or risk breach.⁵⁰ It is true BVO had an obligation to "adequately maintain [its] retained portions of a building so as to allow the tenant to enjoy the beneficial use of the [leased] portion of the building."⁵¹ And it is also true that concrete removal is inherently noisy work. The question on summary judgment is whether we can reach only the conclusion that BVO's noise mitigation efforts were reasonable.

¶24 Here, we have neither absolute interference nor absolute reasonableness. Specific evidence from June

⁴⁶ *Boyle v. Leech*, 7 Wn. App. 2d 535, 538, 436 P.3d 393 (2019) (quoting *Wallace v. Lewis County*, 134 Wn. App. 1, 18, 137 P.3d 101 (2006)); see *RCW 7.48.010* (actionable nuisance is "an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the ... property.").

⁴⁷ *Bradley v. Am. Smelting & Ref. Co.*, 104 Wn.2d 677, 689, 709 P.2d 782 (1985) (quoting *Restatement (Second) of Torts § 821D*, at 102 cmt. d (1979)).

⁴⁸ See *Tiegs v. Watts*, 135 Wn.2d 1, 14-15, 954 P.2d 877 (1998) (an ordinary, reasonable business operation "may constitute a nuisance if it is conducted in a manner which unreasonably interferes with the use and enjoyment of another's property").

⁴⁹ *Boyle*, 7 Wn. App. 2d at 539. Contrary to BVO's argument that Votiv presented no evidence of unreasonable conduct because it never filed a noise complaint with the City of Seattle, a plaintiff can prove nuisance without showing a nuisance *per se*. See *Moore v. Steve's Outboard Serv.*, 182 Wn.2d 151, 155, 339 P.3d 169 (2014) (distinguishing nuisance and nuisance *per se*).

⁵⁰ BVO Resp't's Br. at 29 (citing *Cherberg v. Peoples Nat'l Bank of Wash.*, 88 Wn.2d 595, 600, 564 P.2d 1137 (1977)).

2017 through January 2018 reveals 13 incidents where noise levels reached over 80 decibels in Votiv's office.⁵² Construction noise was so loud one day that Tatley-Grund's safety director recommended that Votiv's employees wear earplugs.⁵³ Even on quieter days, Votiv's chief executive officer stated noise interfered with his ability to hold meetings, have conferences, and generally conduct business.⁵⁴ Other employees complained about noise-induced migraine headaches, about noise preventing them from doing their work evaluating music and media, and about working from home because construction noise made the office unusable. [*12]⁵⁵

¶25 On the other hand, BVO presented evidence that restricting noisy work only to weekends and evenings would delay completion by years and compromise safety.⁵⁶ Tatley-Grund and CWD took steps to mitigate construction noise, such as working with Votiv to schedule noisy work for weekends and around important work events, providing alternative office space for meetings, and monitoring noise levels.⁵⁷ But Votiv counters that the alternative meeting space was inadequate for its needs, and that Tatley-Grund did not always follow its own schedule.⁵⁸ Considering the evidence in a light most favorable to Votiv, as we must, we cannot conclude BVO and CWD's mitigation efforts were reasonable as a matter of law. Summary judgment is not appropriate on the nuisance claim.

Quiet Enjoyment

¶26 Votiv claims BVO breached the lease by not

⁵¹ *Cherberg*, 88 Wn.2d at 601.

⁵² CP at 388-93, 522. We note that the Department of Labor & Industries requires that employees wear hearing protection when noise levels equal or exceed an average of 85 decibels over eight hours, according to measurements by noise dosimetry. *Washington Administrative Code 296-817-20015*; CP at 522.

⁵³ CP at 522 (stating "earplugs recommended" where decibels reached 83.9 dBA in Votiv's office).

⁵⁴ CP at 379, 388-96.

⁵⁵ CP at 581-82, 589-94.

⁵⁶ CP at 648.

⁵⁷ CP at 33-34, 135-37, 142, 394, 396.

⁵⁸ CP at 385, 582.

honoring the express covenant of quiet enjoyment in the lease. Section 44(n) states, "Tenant may peaceably and quietly enjoy the Premises subject, nevertheless, to the terms and conditions of this Lease."⁵⁹ Generally, a covenant of quiet enjoyment "secures the tenant from any wrongful act by the lessor which impairs the character and value of the leased premises or otherwise interferes with the tenant's [*13] quiet and peaceable use and enjoyment thereof."⁶⁰ Washington cases have recognized a tenant's right to quiet enjoyment in varied factual settings.⁶¹ Those include situations when the landlord's construction work interfered with the tenant's use of the leased premises.

¶27 For example, in *Bancroft v. Godwin*, the court held a landlord was liable for breaching the covenant of quiet enjoyment when a tenant's goods were damaged during a remodel of the building.⁶² The landlord in *Bancroft* decided to remodel the building in which the tenant leased storage space.⁶³ By deciding to remodel the building, "it was incumbent upon [the landlord] to see that said modification was accomplished in such a manner as not to ... in any way seriously interfere with the beneficial enjoyment of the tenancy created by [the] lease."⁶⁴ Because the landlord improperly supervised

⁵⁹ CP at 504.

⁶⁰ *Cherberg v. Peoples Nat'l Bank of Wash.*, 15 Wn. App. 336, 343, 549 P.2d 46 (1976) (landlord breached the covenant of quiet enjoyment by electing to demolish the building, threatening to terminate the tenant's lease, and "effectively forc[ing] its tenant to close down its business and temporarily vacate the leased premises"), *aff'd in part and rev'd on other grounds*, 88 Wn.2d 595, 564 P.2d 1137 (1977); see *Ennis v. Ring*, 56 Wn.2d 465, 470, 353 P.2d 950 (1959) (landlord's "wrongful interference" with tenant's leasehold can breach the covenant of quiet enjoyment); see also 41 A.L.R.2d 1414 § 10 (originally published in 1955) (covenant of quiet enjoyment protects tenants against acts of a landlord or its agents that constitute a substantial interruption of the quiet enjoyment of the premises, including a substantial interference with possession of the tenant.)

⁶¹ A Washington tenant can bring an action for breach of the covenant of quiet enjoyment and continue to possess their leasehold. See *Ennis*, 56 Wn.2d at 470 ("If the landlord's conduct has been such as to amount to a breach of the covenant of quiet enjoyment, the lessee, although remaining in possession, may treat the wrongful interference with his possession of the demised premises as a breach of covenant for which an action *ex contractu* will lie.").

⁶² 41 Wash. 253, 253-54, 83 P. 189 (1905).

the remodel and allowed a water leak that damaged the tenant's goods, the landlord was liable.⁶⁵

¶28 Similarly, in *Alexis v. Pittinger*, our Supreme Court held a landlord's "negligent or wanton" conduct in managing its separate property both breached the covenant of quiet enjoyment and [*14] constructively evicted the tenant.⁶⁶ The landlord in *Alexis* leased a parcel of land to a chicken farmer and retained the surrounding property for himself.⁶⁷ The landlord expressly reserved the right to clear trees on the surrounding property.⁶⁸ The landlord began clearing trees by attaching 15 or 16 sticks of blasting powder to each tree and blowing them up, sending debris into the leased parcel and seriously damaging the tenant's chicken house.⁶⁹ Although blasting was the customary way of clearing trees, the court explained that doing so within 150 feet of the tenant's property was unreasonable where it "unnecessarily injure[d], damage[d], and deprive[d] a lawful tenant of peaceable possession of the premises."⁷⁰ The court affirmed separate damage awards for violating the covenant of quiet enjoyment and for constructive eviction.⁷¹

¶29 And in *Matzger v. Arcade Building & Realty Company*, our Supreme Court concluded that a landlord breached the covenant of quiet enjoyment by making its leasehold unusable for its intended purpose by modifying part of the building it controlled and depriving the leasehold of natural light required for the tenant's business.⁷²

¶30 Here, consistent with *Votiv's* nuisance claim, [*15]

⁶³ *Id.* at 253.

⁶⁴ *Id.* at 255.

⁶⁵ *Id.*

⁶⁶ 119 Wash. 626, 627, 206 P. 370 (1922).

⁶⁷ *Id.* at 628-29.

⁶⁸ *Id.* at 628.

⁶⁹ *Id.* at 629-30.

⁷⁰ *Id.* at 630.

⁷¹ *Id.* at 627, 630.

⁷² 102 Wash. 423, 424-26, 428, 173 P.47 (1918).

if there is a genuine issue of material fact whether the landlord engaged in unreasonable conduct that deprived Votiv of the peaceable use and enjoyment of its office, then Votiv's claim for breach of the covenant of quiet enjoyment withstands summary judgment.

¶31 BVO argues, however, the lease's covenant of quiet enjoyment is limited by and "subordinate to the other terms and conditions of the lease."⁷³ It contends section 12 in the lease requires that BVO maintain and repair the roof, so it could not have acted wrongfully by repairing the membrane and the roof.⁷⁴ But this interpretation makes the express covenant of quiet enjoyment meaningless where, as here, there are genuine issues of material fact about whether BVO acted unreasonably when fulfilling this duty and deprived Votiv of the use and enjoyment of its office.

¶32 Therefore, consistent with its claim of nuisance, Votiv's claim for breach of the covenant of quiet enjoyment is sufficient to overcome summary judgment.

Constructive Eviction

¶33 BVO argues we should affirm summary judgment on Votiv's claim for constructive eviction because Votiv never abandoned its office.⁷⁵ Constructive eviction involves an intentional or injurious interference with a leased [*16] premises by a landlord or its agents that materially impairs the tenant's power to enjoy the premises.⁷⁶ In the context of a commercial lease, landlords have constructively evicted tenants by "seriously interfer[ing] with the tenant's conduct of business on the premises."⁷⁷ Proof of interference is not enough, however, because a tenant claiming constructive eviction must abandon the premises within a reasonable time.⁷⁸ Abandonment is necessary to

show the connection between constructive eviction and actual eviction.⁷⁹ Nothing in the record or the briefing suggests Votiv abandoned its office.

¶34 Votiv relies exclusively on *Aro Glass & Upholstery Company v. Munson-Smith Motors, Inc.* to support its argument that constructive eviction "does not require a tenant to abandon the leasehold and physically move out of the leased premises."⁸⁰ But *Aro Glass* actually states the opposite: "When the premises subject to a lease are no longer fit for the purposes intended, the resultant constructive eviction releases the tenant from any further liability to pay rent, *provided he abandons the premises to the lessor.*"⁸¹ Because [*17] Votiv fails to show it abandoned its office, Votiv's constructive eviction claim fails.

Attorney Fees

¶35 The remaining issues all involve awards or denials of attorney fees. Under section 36 of the lease:

⁷⁸ *Cline v. Altose*, 158 Wash. 119, 126-27, 290 P. 809 (1930) ("As a general rule, the acts of the landlord, in order to amount to a constructive eviction of his tenant, must be such a physical interference with the possession of the tenant, under color of right, as to deprive him of the beneficial enjoyment of the demised premises, in consequence of which he abandons the same.") (quoting *Ralph v. Lomer*, 3 Wash. 401, 409, 28 P. 760 (1891)); *Tennes v. Am. Bldg. Co.*, 72 Wash. 644, 647, 131 P. 201 (1913) (holding that a party's decision to remain in possession of its leased premises waived its ability to claim constructive eviction, despite being able to show wrongful conduct by its landlord amounting to constructive eviction); *Brine v. Berastrom*, 4 Wn. App. 288, 289, 480 P.2d 783 (1971) ("A necessary element of constructive eviction is vacation of the premises by the tenant."); see *Buerkli v. Alderwood Farms*, 168 Wash. 330, 334-35, 11 P.2d 958 (1932) ("In order to claim and assert a constructive eviction as a defense to an action for rent, the tenant must in fact vacate the premises. Where the tenant continues to occupy the premises, he is liable for rent."); *Old City Hall*, 181 Wn. App. at 8 ("A constructive eviction prospectively releases the tenant from the obligation to pay rent, so long as the tenant abandons the leasehold in response to the constructive eviction."); 20 A.L.R. 1369 (originally published in 1922) ("The great weight of authority is to the effect that, in order for the lessee to rely upon constructive eviction as a ground for avoiding payment of the rent contracted for, he must surrender or abandon the leased premises.").

⁷³ BVO Resp't's Br. at 28.

⁷⁴ *Id.* at 30.

⁷⁵ *Id.* at 22.

⁷⁶ *Old City Hall LLC v. Pierce County AIDS Found.*, 181 Wn. App. 1, 8, 329 P.3d 83 (2014) (quoting *Aro Glass & Upholstery Co. v. Munson-Smith Motors, Inc.*, 12 Wn. App. 6, 8, 528 P.2d 502 (1974)).

⁷⁷ *Id.* at 8-9 (quoting 17 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW § 6.32, at 352 (2d ed.2004)).

⁷⁹ STOEBUCK & WEAVER, *supra*, at 353. A plaintiff can bring a claim for constructive eviction before abandoning its leasehold

If either party shall bring any action for relief against the other party, declaratory or otherwise, arising out of this Lease, including any action by Landlord for the recovery of Rent or possession of the Premises, the losing party shall pay the successful party a reasonable sum for attorneys' fees which shall be deemed to have accrued on the commencement of such action and shall be paid whether or not such action is prosecuted to judgment.⁸²

We review de novo whether a contract provides a legal basis to award fees.⁸³

¶36 First, *Votiv* contends the court erred by awarding attorney fees to BVO under section 36 of the lease because it erroneously granted summary judgment and denied reconsideration.⁸⁴ Despite assigning error to the findings of fact and conclusions of law in awarding fees in both instances, *Votiv* does not argue which findings are erroneous, nor does it argue the amounts awarded were an abuse of discretion.⁸⁵ Thus, the only issue is whether BVO is a "successful party" under section 36.⁸⁶

¶37 The lease does not define "successful [*18] party," so we can ascertain the term's ordinary meaning by turning to the dictionary.⁸⁷ "Successful party" is synonymous with "prevailing party," and a "prevailing party" is a "party in whose favor a judgment is rendered."⁸⁸ BVO prevails on the issue of constructive eviction, and *Votiv* prevails on breach of the covenant of

but must eventually abandon the premises. *Aro Glass, 12 Wn. App. at 11.*

⁸⁰ Appellant's Br. at 30.

⁸¹ *Aro Glass, 12 Wn. App. at 11* (emphasis added).

⁸² CP at 323.

⁸³ *Hall v. Feigenbaum, 178 Wn. App. 811, 827, 319 P.3d 61 (2014).*

⁸⁴ Appellant's Br. at 43.

⁸⁵ *Id.* at 6-8, 43-44; Appellant's Reply Br. at 23-24.

⁸⁶ See *Long v. Snoqualmie Gaming Comm'n, 7 Wn. App. 2d 672, 690, 435 P.3d 339 (2019)* ("We need not address an issue that a party does not argue in its brief."); **RAP 10.3(g)** (appellant must specifically designate each allegedly erroneous finding of fact).

⁸⁷ *Queen City Farms, Inc. v. The Central Nat'l Ins. Co. of Omaha, 126 Wn.2d 50, 77, 882 P.2d 703 (1994).*

⁸⁸ BLACK'S LAW DICTIONARY 1298, 1659 (10th ed. 2014).

quiet enjoyment.⁸⁹ "[B]ecause both parties have prevailed on major issues, neither qualifies as the prevailing party under the contract."⁹⁰ And neither party argues for a proportional approach to attorney fees.⁹¹ Even if BVO was the prevailing party on summary judgment, it no longer is the prevailing party at this stage of the proceedings. The ultimate prevailing party on the underlying litigation will await the outcome on remand.⁹² BVO was not entitled to attorney fees either for summary judgment or for contesting *Votiv's* motion to reconsider. And in this setting, neither party qualifies for an award of attorney fees on appeal under section 36.

¶38 The sole issue in CWD's cross appeal is whether the court erred by denying its request for fees under section 36 of the lease.⁹³ The court concluded CWD was not party to the lease and not entitled [*19] to fees.⁹⁴ CWD argues it is an intended third-party beneficiary and may request attorney fees under the lease.⁹⁵

¶39 "The creation of a third party beneficiary agreement requires that the parties intend, at the time they enter into the agreement, that the promisor assume a direct obligation to the beneficiary."⁹⁶ Here, the lease explicitly

⁸⁹ *Votiv* also prevails on the issue of nuisance. But because nuisance is an independent tort not arising out of this lease, neither party is entitled to contractual attorney fees on that issue.

⁹⁰ *Am. Nursery Products, Inc. v. Indian Wells Orchards, 115 Wn.2d 217, 234-35, 797 P.2d 477 (1990)*; see *Mellon v. Reg'l Tr. Servs. Corp., 182 Wn. App. 476, 499, 334 P.3d 1120 (2014)* ("But considering our analysis, each party prevails on a major issue and loses on others. Thus, no party stands as the clear victor meriting such an award [under the contract].") (citing *id.* at 234; *Tallman v. Durussel, 44 Wn. App. 181, 189, 721 P.2d 985 (1986)*; *Oneal v. Colton Consol. Sch. Dist. No. 306, 16 Wn. App. 488, 493, 557 P.2d 11 (1976)*).

⁹¹ See *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)*.

⁹² Even if *Votiv* is the substantially prevailing party on appeal, it still may not be entitled to attorney fees because this court's decision does not determine the prevailing party for the underlying litigation. *Satomi Owners Ass'n v. Satomi, LLC, 167 Wn.2d 781, 817-18, 225 P.3d 213 (2009)*.

⁹³ CWD Resp't's Br. at 5.

⁹⁴ CP at 1463.

⁹⁵ CWD Resp't's Br. at 24-28.

excludes all parties except Motiv and BVO from recovering attorney fees under section 36. Lease section 42(z), which CWD fails to discuss, expressly defines “party” as “Landlord or Tenant.”⁹⁷ Because section 36 only allows a “party” to seek attorney fees, BVO and Motiv did not intend for CWD or anyone else to recover attorney fees under the lease.⁹⁸

¶40 Motiv argues that it is entitled to costs on appeal under *RAP 14.2*.⁹⁹ In order to determine which party substantially prevailed on review for purposes of an award of costs on appeal, the court has discretion to look beyond the bottom line of reversal or affirmance.¹⁰⁰ And, as provided in the comment to *RAP 14.2*, “the award of costs is based on who wins the review proceeding—not on who ultimately prevails on the merits.” Although Motiv is not the “successful party” for purposes of contractual attorney fees, it is the substantially prevailing party on appeal for purposes [*20] of *RAP 14.2*. Motiv may be awarded costs on appeal by a commissioner or clerk upon compliance with *RAP 14.4*.

¶41 Therefore, we affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

DWYER and CHUN, JJ., concur.

End of Document

⁹⁶ *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229, 255, 215 P.3d 990 (2009).

⁹⁷ CP at 500.

⁹⁸ CP at 323.

⁹⁹ Appellant's Reply Br. at 23-24.

¹⁰⁰ See *Family Med. Bldg., Inc. v. Dep't of Social & Health Servs.*, 38 Wn. App. 738, 739, 689 P.2d 413 (1984), *aff'd in part & rev'd in part*, 104 Wn.2d 105, 702 P.2d 459 (1985).

MCEWEN GISVOLD LLP

February 20, 2020 - 4:55 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53256-5
Appellate Court Case Title: Jubitz Corp., App/Cross-Resp v. Vancouver Hospitality Partners, et al.,
Resp/Cross-App
Superior Court Case Number: 17-2-05075-3

The following documents have been uploaded:

- 532565_Briefs_20200220165450D2913876_8120.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was Reply and Response.pdf

A copy of the uploaded files will be sent to:

- ann@hpl-law.com
- dlukins@lukinslaw.com
- kurtk@mcewengisvold.com
- sgl@hpl-law.com
- zachs@landerholm.com

Comments:

Sender Name: Nancy Nolan - Email: nancyn@mcewengisvold.com

Filing on Behalf of: Katie Jo Esq Johnson - Email: katiejoj@mcewengisvold.com (Alternate Email:)

Address:
1100 SW 6th Avenue #1600
Portland, OR, 97204
Phone: (503) 226-7321

Note: The Filing Id is 20200220165450D2913876