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Court of Appeals  
Division II  
State of Washington  
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No. 54501-2-II

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

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ACORN OLYMPIA, LLC,

Appellant,

v.

ROBERT L. HELSTROM and YVONNE E. HELSTROM,

Respondent.

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BRIEF OF APPELLANT ACORN OLYMPIA, LLC

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## **I. INTRODUCTION**

Acorn Olympia, LLC (“Acorn”) asserted several claims against Robert and Yvonne Helstrom (the “Helstroms”) relating to a commercial real estate transaction. Upon discovery of previously unknown evidence relating to its breach of contract claim, Acorn and the Helstroms agreed to a Stipulated Motion and Order of Voluntary Nonsuit, dismissing Plaintiff’s claims against the Helstroms without prejudice. Upon dismissal, the Helstroms sought an award of attorney’s fees, arguing that they were the “prevailing party” in accordance with parties’ purchase and sale agreement, as a result of Acorn’s dismissal of claims.

The trial court erred in holding the Helstroms were the “prevailing party” under Paragraph 21 of the purchase and sale agreement when it seemingly applied the “mistaken ‘general rule’” that if a plaintiff voluntarily dismisses the entire action under CR 41, the defendant is considered the prevailing party.

In the alternative, the trial court abused its discretion in the amount of attorney’s fees granted to the Helstroms. The trial court did not require the Helstroms to segregate those legal fees incurred only in the narrower issue of breach of contract.

## **II. ASSIGNMENTS OF ERROR ON APPEAL**

1. The trial court erred in finding that the Helstroms are the prevailing party pursuant to Paragraph 21 of the parties' purchase and sale agreement as articulated in Finding of Fact No. 5.
2. The trial court erred in finding that the Helstroms' attorney's fees in the amount of \$51,996.00 and costs in the amount of \$776.00 are reasonable as articulated in Finding of Fact No. 6.
3. The trial court erred in concluding that the Helstroms are entitled to judgment against Acorn for attorney's fees in the amount of \$51,996.00 and costs in the amount of \$776.00 based on the prevailing party attorney's fees clause in the parties' purchase and sale agreement.

## **III. STATEMENT OF ISSUES PRESENTED FOR REVIEW**

- A. Did the trial court err in granting the Helstroms' Motion for an Award of attorney's fees because the Helstrom Defendants are not the "prevailing party" pursuant to Paragraph 21 of the purchase and sale agreement or RCW 4.84.330? **Yes.**
- B. Did the trial court abuse its discretion in granting the Helstroms an unreasonable award of attorney's fees because the trial court failed to require the Helstroms to segregate their claim for attorney's fees to the specific breach of contract claim? **Yes.**

#### IV. STATEMENT OF FACTS

Acorn Corporation and Respondents Robert and Yvonne Helstrom (the “Helstroms”) executed a Commercial & Investment Real Estate Purchase and Sale Agreement (the “Agreement”) for the purchase and sale of the commercial property commonly known as 4550 3<sup>rd</sup> Avenue SE, Lacey, Washington 98503 (the “Property”) on May 15, 2017 for the agreed upon purchase price of \$2,250,000.00.<sup>1</sup> Paragraph 7 of the Agreement required a closing date of August 31, 2017.<sup>2</sup> The Agreement also contained the following attorney’s fees provision:<sup>3</sup>

Neither Buyer nor Seller may recover consequential damages such as lost profits. If Buyer or Seller institutes suit against the other concerning this Agreement, the prevailing party is entitled to reasonable attorneys’ fees and expenses. In the event of trial, the amount of the attorney’s fee shall be fixed by the court. The venue of any suit shall be the county in which the Property is located, and this Agreement shall be governed by the laws of the state where the Property is located.

Acorn Corporation later assigned its interest in the Agreement to Appellant Acorn Olympia, LLC.<sup>4</sup> Defendants Joni Baker (“Ms. Baker”) and Prime Locations, Inc. (“Prime Locations”) represented both parties as a dual agent.<sup>5</sup> On August 18, 2017, as part of the Agreement, the Helstroms signed a Second Addendum/Agreement to Purchase and Sale Agreement (“Second Addendum”) agreeing to reduce the purchase price of the Property to \$2,175,000.00, in addition to other agreed items, including an earlier

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<sup>1</sup> Clerk’s Papers (“CP”) 129-30, ¶¶ 1 -2.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> CP 130, ¶ 3.

closing date of August 23, 2017.<sup>6</sup> Appellant agreed to all terms in the Second Addendum, and signed the Second Addendum on August 19, 2017, despite believing that closing so quickly would likely be impossible.<sup>7</sup> Shortly after signing the Second Addendum, Appellant delivered the Second Addendum to Ms. Baker.<sup>8</sup>

After months of extensions and numerous additional addenda, the parties finally closed November 17, 2017.<sup>9</sup> However, First American Title closed at the original purchase price of \$2,250,000.00 instead of the reduced purchase price of \$2,175,000.00.<sup>10</sup> Despite previously assuring the Appellant after closing that “the price reduction was agreed to...” it was later revealed through discovery that Ms. Baker believed that the price reduction in the Second Addendum was contingent on the closing occurring on August 23, 2017.<sup>11</sup> As such, the Second Addendum was never sent to First American Title.<sup>12</sup> This action arose as a result of the parties’ disagreement over the purchase price.<sup>13</sup>

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<sup>6</sup> CP 130, ¶ 4.

<sup>7</sup> CP 130, ¶ 5.

<sup>8</sup> CP 131, ¶ 6.

<sup>9</sup> CP 132, ¶¶ 11-12.

<sup>10</sup> CP 132, ¶ 12.

<sup>11</sup> CP 214-54.

<sup>12</sup> *Id.*

<sup>13</sup> CP 1-7.

## V. PROCEDURAL HISTORY

On September 19, 2018, Acorn filed a complaint against the Helstroms for breach of contract, promissory estoppel, and unjust enrichment, and brought claims against the Prime Location Defendants for negligence and disgorgement of profits.<sup>14</sup> The Helstroms and the Prime Locations Defendants subsequently asserted crossclaims against the other.<sup>15</sup>

The Helstroms filed a motion for summary judgment on April 1, 2019 which was denied by the trial court on May 10, 2019 based upon an unresolved factual circumstances relating to Ms. Baker's knowledge and physical possession of the Second Addendum and her role as a dual agent.<sup>16</sup> The parties deposed Ms. Baker on August 13, 2019. Ms. Baker revealed that she believed that the price reduction in the Second Addendum was contingent on the closing date occurring on August 23, 2017, despite the fact that in emails at the time the price discrepancy was discovered, Ms. Baker assured Acorn that the price had been reduced.<sup>17</sup>

As a result of Ms. Baker's deposition, Plaintiff settled with and dismissed the Prime Locations Defendants.<sup>18</sup> Plaintiff and the Helstroms filed a Stipulated Motion and Order of Voluntary Nonsuit, dismissing

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<sup>14</sup> CP 1-7.

<sup>15</sup> CP 8-23.

<sup>16</sup> CP 198-200.

<sup>17</sup> CP 214-54.

<sup>18</sup> CP 255-57.

Plaintiff's claims against the Helstrom Defendants without prejudice but with both parties reserving all rights and defenses as to the determination of prevailing party for purposes of an award of attorney's fees.<sup>19</sup>

The Helstroms filed a motion for an award of attorney's fees on November 8, 2019, which was subsequently granted.<sup>20</sup> The Helstroms then filed a Motion for Entry of Findings of Facts and Conclusions of Law and Judgment, which were entered by the court on January 3, 2020.<sup>21</sup> Acorn subsequently appealed the trial court's findings of fact, conclusions of law, and judgment against Acorn.<sup>22</sup> The issues on appeal are related to the trial court's finding that the Helstroms are the prevailing party pursuant to the Agreement and the excessive award for attorney's fees and costs.

## **VI. STANDARD OF REVIEW**

The appellate court applies a dual standard of review to a trial court's award of attorney's fees.<sup>23</sup> The court reviews a trial court's initial determination of the legal basis for an award of attorney's fees de novo.<sup>24</sup> On de novo review, the appellate court engages in the same analysis as the trial court.<sup>25</sup> The appellate court reviews a discretionary

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<sup>19</sup> CP 258-60.

<sup>20</sup> CP 261-70.

<sup>21</sup> CP 406-07; 437-39; 440-43.

<sup>22</sup> CP 258-60.

<sup>23</sup> *Cook v. Brateng*, 180 Wn. App. 368, 375, 321 P.3d 1255 (2014).

<sup>24</sup> *Id.*

<sup>25</sup> *Margola Assocs. V. City of Seattle*, 121 Wn.2d 625, 634, 854 P.2d 23 (1993).

decision to award or deny attorney's fees and the reasonableness of any attorney's fee award for an abuse of discretion.<sup>26</sup> A trial court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons.<sup>27</sup>

## VII. ARGUMENT

### A. **The trial court erred in finding that the Helstroms are the “prevailing party” for an award of attorney’s fees.**

The trial court erred in granting the Helstrom Defendants' motion for attorney's fees on the basis that they were the “prevailing party” pursuant to *Andersen v. Gold Seal Vineyards, Inc.*, 81 Wn.2d 863, 868, 505 P.2d 790 (1973), that allegedly sets forth the standard of voluntary non-suits and an award of attorney's fees. The trial court misinterpreted both this seminal case and subsequent Washington law. Rather, the trial court should have applied the definition of “prevailing party” contained in RCW 4.84.330 to the parties' Agreement.

RCW 4.84.330 provides that “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...shall be entitled to reasonable attorneys' fees.” RCW 4.84.330 defines prevailing part as “the party in whose favor

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<sup>26</sup> *Cook*, 180 Wn. App. at 375.

<sup>27</sup> *Id.*

final judgment in rendered.” The term “final judgment” is facially unambiguous—it refers to any court order having preclusive effect.<sup>28</sup> Thus, a voluntary dismissal without prejudice is not a final judgment because it is not “a formal decision or determination” “leaving nothing further to be determined by the court.”<sup>29</sup> In applying RCW 4.84.330, courts consider the prevailing party as the one who receives affirmative relief or judgment in its favor.<sup>30</sup>

However, the trial court erred in failing to consider or apply any of the above-discussed principles. Rather, the trial court seemingly relied on *Andersen* as the standard for voluntary non-suits and attorney’s fees. But the trial court failed to acknowledge that the Court’s language in *Andersen* was specific only to RCW 4.28.185(5). “We think the general rule pertaining to voluntary nonsuits, that the defendant is regarded as having prevailed, should be applied to cases in which service upon the defendant was obtained under RCW 4.28.185(5).”<sup>31</sup> The rule articulated in *Andersen* does not control in the present case, nor is it the broad, default rule that the Helstroms claim it to be.

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<sup>28</sup>*Wachovia SBA Lending v. Kraft*, 138 Wn. App. 854, 860, 158 P.3d 1271 (2007).

<sup>29</sup> *Id.*

<sup>30</sup> *McLelland v. Paxton*, 11 Wn. App. 2d 181, 222, 453 P.3d 1 (2019); *Mike’s Painting, Inc. v. Carter Welsh, Inc.*, 95 Wn. App. 64, 68, 975 P.2d 532 (1999).

<sup>31</sup>*Andersen v. Gold Seal Vineyards, Inc.*, 81 Wn.2d 863, 868, 505 P.2d 790 (1973) (emphasis added).

Indeed, the Washington Supreme Court more recently noted in *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 490, 200 P.3d 683, 688 (2009), that the Court of Appeals’ decisions that have explored this question of voluntary dismissal without prejudice as a final judgment “rest on the mistaken ‘general rule’ that ‘if a plaintiff voluntarily dismisses its entire action under CR 41, the defendant is considered to be the prevailing party for purposes of attorney fees under RCW 4.84.330’” (emphasis added). The Supreme Court again reiterated that the *Wachovia* Court “clarified that there is no default rule that permits the award of attorney fees following voluntary dismissal of a claim under CR 41(a)(1)(B).”<sup>32</sup> Rather, the decision as to whether a particular voluntary nonsuit should trigger attorney’s fees should be left to the discretion of the trial judge in light of the circumstances of the particular case.<sup>33</sup>

Since there is no default rule in regard to attorney’s fees in voluntary dismissals, both trial courts and the Court of Appeals have been left to their own devices in determining when to apply the statutory definition contained in RCW 4.84.330 to a contractual attorney’s fees provision. Such discretion and has left the courts with a myriad of results and inconsistent rules.

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<sup>32</sup> *AllianceOne Receivables Mgmt., Inc. v. Lewis*, 180 Wn.2d 389, 398, 325 P.3d 904 (2014) (emphasis added).

<sup>33</sup> *Hawk v. Branjes*, 97 Wn. App. 776, 783, 986 P.2d 841 (1999).

1. *The statutory definition of “prevailing party” has been applied inconsistently to bilateral attorney’s fees agreements in the different Court of Appeals Divisions.*

The Supreme Court in *Wachovia* seems to suggest that the application of RCW 4.84.330 should be limited to unilateral attorney’s fees provisions in a contract, though the Court did not say as much directly.<sup>34</sup> However, it is apparent that courts have been applying the statutory “prevailing party” definition to both bilateral and unilateral attorney’s fees agreements. Indeed, Division I has previously held that “where a dispute between parties to a lease arises based on a lease agreement that does not contain an attorneys’ fee provision, RCW 4.84.330 does not provide a separate, independent right of action. And where... the agreement already contains a bilateral attorneys’ fee provision; RCW 4.84.330 is generally inapplicable.”<sup>35</sup>

However, Division I went on to instinctively apply the provisions of RCW 4.84.330 to a bilateral lease provision entitling the prevailing party to reasonable attorney’s fees stating that “[t]he lease here provides that in any litigation, the prevailing party is entitled to reasonable attorney fees. Such a provision makes an award of attorney fees to the prevailing party mandatory under RCW 4.84.330. As provided by that statute, a prevailing party is the

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<sup>34</sup> See *Wachovia SBA Lending*, 165 Wn.2d at 490.

<sup>35</sup> *Hawk v. Branjes*, 97 Wn. App. at 780 (emphasis added); see also *Kaintz v. PLG, Inc.*, 147 Wn. App. 782, 786–87, 197 P.3d 710 (2008).

party in whose favor final judgment is rendered.”<sup>36</sup> Division I has also permitted the application of the statute to bilateral attorney’s fees provisions when the contract is found to be void or unenforceable.<sup>37</sup>

Similarly, Division III has applied the RCW 4.84.330 definition of “prevailing party” to an earnest money agreement with a bilateral attorney’s fees provision that provided for attorney’s fees to the prevailing party in an action based on the agreement.<sup>38</sup> Division III also applied RCW 4.84.330 to several other cases involving bilateral attorney’s fees provisions.<sup>39</sup> Though the courts in *Transpac Dev., Inc. v. Oh*, 132 Wn. App. 212, 130 P.3d 892 (2006) and *Hertz v. Riebe*, 86 Wn. App. 102, 936 P.2d 24 (1997) did not address attorney’s fees in a voluntary non-suit, the cases make no distinction on the basis of voluntary non-suits, but rather the distinction is supposedly on bilateral attorney’s fees provisions versus unilateral provisions. However, as this Court can see, such distinction has been applied inconsistently.

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<sup>36</sup> *Transpac Dev., Inc. v. Oh*, 132 Wn. App. 212, 217, 130 P.3d 892 (2006) (emphasis added).

<sup>37</sup> See *Park v. Ross Edwards, Inc.*, 41 Wn. App. 833, 706 P.2d 1097 (1985); see also *Herzog Aluminum, Inc. v. Gen. Am. Window Corp.*, 39 Wn. App. 188, 692 P.2d 867 (1984).

<sup>38</sup> See *Hertz v. Riebe*, 86 Wn. App. 102, 104–05, 936 P.2d 24 (1997).

<sup>39</sup> See *McLelland*, 11 Wn. App. 2d at 222; *Mike’s Painting, Inc.*, 95 Wn. App. at 68.

2. *This Court's precedent does not support a finding that Helstrom is the prevailing party.*

Contrarily, this Court has been consistent in its definition of “prevailing party.” Though this Court has not explicitly addressed the application of voluntary non-suits to a prevailing party attorney’s fees provision, this Court has definitively and consistently stated that, “[a]s a rule, the prevailing party is the one that receives an affirmative judgment in its favor.”<sup>40</sup> Though this Court once acknowledged the distinction between bilateral and unilateral attorney’s fees provisions, it was not in the context of a voluntary non-suit.<sup>41</sup> Moreover, this Court has also applied RCW 4.84.330 to bilateral attorney’s fees provisions, though, again, not in the context of a voluntary non-suit.<sup>42</sup> More recently, however, this Court has reiterated the sentiment that “the prevailing party is the one that receives an affirmative judgment in its favor” seemingly without regard to the bilateral, unilateral distinction discussed in Division I and Division III.<sup>43</sup>

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<sup>40</sup> *Dave Johnson Ins., Inc. v. Wright*, 167 Wn. App. 758, 782–83, 275 P.3d 339 (2012); see also *Olivas v. Mekalsen*, 51877-5-II, 2019 WL 4849375, at \*7 (Wn. Ct. App. Oct. 1, 2019) (unpublished). See GR 41.

<sup>41</sup> *Mountjoy v. Bayfield Res. Co.*, No. 38783–2–II, 2010 WL 3057252, at \*8 (Wn. Ct. App. Aug. 5, 2010) (unpublished). See GR 41.

<sup>42</sup> *Phillips Bldg. Co., Inc. v. An*, 81 Wn. App. 686, 700-01, 915 P.2d 1146 (1996).

<sup>43</sup> See *Dave Johnson Ins., Inc.*, 167 Wn. App. at 782–83 (did not apply the definition of RCW 4.84.330 because the action was not resolved on contractual grounds); *Bellerive v. EOR Inc.*, 49565-1-II, 2018 WL 1729776, at \*4 (Wn. Ct. App. Apr. 10, 2018) (unpublished) (“The prevailing party is the one that receives an affirmative judgment in its favor”). See GR 41.

In *Bellerive v. EOR Inc.*, 49565-1-II, 2018 WL 1729776, at \*1 (Wn. Ct. App. Apr. 10, 2018) (*see* GR 41), the parties entered into a residential purchase and sale agreement that contained an attorney’s fee provision similar to the one at issue in this appeal.<sup>44</sup> The bilateral attorney’s fees provision provided for attorney’s fees to the prevailing party if either party “institute[d] suit against the other concerning [the] Agreement.”<sup>45</sup> The parties both asserted claims against the other.<sup>46</sup> Bellerive ultimately prevailed on only one of its 14 claims against EOR.<sup>47</sup> Although EOR successfully defended against 13 claims, the court determined that “because the Bellerives were the only party that prevailed on an issue and received an affirmative judgment” they were the prevailing party.<sup>48</sup>

In sum, Divisions I and III have been inconsistent in their application of the RCW 4.84.330 statutory definition to both unilateral and bilateral attorney’s fees provisions in a written agreement. This Court has the opportunity to clarify the inconsistencies by applying its firmly held principle that “the prevailing party is the one that receives an affirmative judgment in its favor” regardless of the bilateral attorney’s fee provision in

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<sup>44</sup> Pursuant to GR 14.1, this unpublished case is being cited for illustrative persuasive purposes only.

<sup>45</sup> *Bellerive*, 2018 WL 1729776, at \*1.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at \*1.

<sup>48</sup> *Id.*

the parties' Agreement. The Helstroms did not receive a final or affirmative judgment, thus, they are not the prevailing party. Any other holding would lead to further confusion and inconsistency among the courts. Moreover, applying the statutory definition to some, but not all bilateral attorney's fees provisions, would lead to the absurd result in which the statutory definition is not applicable seemingly only in those cases involving bilateral attorney's fees provisions and a voluntary non-suit, which certainly was not the intent of the statute.<sup>49</sup> Consequently, Acorn asks this Court to reverse the trial court's finding that the Helstroms are the prevailing party.

**B. In the alternative, the trial court erred in failing to engage in contract interpretation to determine if the parties intended to adopt the statutory definition of prevailing party.**

In the alternative, the trial court erred in failing to consider whether the parties' intended to adopt the statutory definition of prevailing party contained in RCW 4.84.330. If this Court determines that the statutory definition of RCW 4.84.330 *generally* is not applicable to bilateral attorney's fees provisions, this Court should hold that the trial court erred in failing to consider the intent of the parties' in regard to the attorney's fees provision.

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<sup>49</sup> "We note the purpose behind RCW 4.84.330 is remedial—unilateral attorney fee provisions are to be applied bilaterally." *Wachovia SBA Lending*, 138 Wn. App. at 862.

1. *The trial court erred in failing to interpret the specific language of the parties' Agreement.*

Prior precedent has never set forth a general rule that equated voluntary dismissal to a final judgment for the purposes of determining a prevailing party under RCW 4.84.330. Rather, when the parties have executed a bilateral attorney's fees provision, the court considers whether the parties intended to adopt the statutory definition of prevailing party contained in RCW 4.84.330.<sup>50</sup> The trial court erred in failing to consider the specific language of the parties' Agreement in determining whether to apply the definition of RCW 4.84.330 to the present case. Had the trial court properly considered the intent of the parties, the Helstroms would not be the prevailing party. Indeed, the evidence indicates that the parties did intend to adopt the statutory definition of "prevailing party."

When interpreting a contract, the court discerns the parties' intent from the contract as a whole and declines to read ambiguity into an otherwise clear and unambiguous contract.<sup>51</sup> The court gives words their ordinary, usual, and popular meaning unless the entirety of the agreement evidences a contrary intent.<sup>52</sup>

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<sup>50</sup> See *Hawk*, 97 Wn. App. at 780.

<sup>51</sup> *Mayer v. Pierce County Med. Bureau, Inc.*, 80 Wn. App. 416, 420, 909 P.2d 1323 (1995).

<sup>52</sup> *Dave Johnson Ins.*, 167 Wn. App. at 769.

In *Hawk*, the court found no evidence that the parties intended to adopt the statutory definition of prevailing party in RCW 4.84.330.<sup>53</sup> The court specifically noted that the parties used the term “successful party” as opposed to prevailing party.<sup>54</sup> By contrast, those courts that have applied the statutory definition of prevailing party in RCW 4.84.330 to bilateral attorney’s fees provisions, have done so when the parties use the specific “prevailing party” language.<sup>55</sup>

Similarly, here, Paragraph 21 of the Agreement states that “[i]f Buyer or Seller institutes suit against the other concerning this Agreement, the prevailing party is entitled to reasonable attorney’s fees and expenses to be fixed by the Court.”<sup>56</sup> The Agreement does not define the term “prevailing party”. Based on prior court’s application of the statutory definition in RCW 4.84.330, the parties understood that the use of “prevailing party” as opposed to “successful” or other such term, elicited the application of RCW 4.84.330. Had the trial court engaged in interpretation of the parties’ attorney’s fee provision, as required, the trial court should have found that the parties intended to incorporate the statutory

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<sup>53</sup> See *Hawk*, 97 Wn. App. at 781.

<sup>54</sup> *Id.*

<sup>55</sup> See *Hertz*, 86 Wn. App. at 104–05 (applying the RCW 4.84.330 definition of “prevailing party” to an earnest money agreement that provided for attorney’s fees to the prevailing party in an action based on the agreement; see also *Transpac Dev., Inc.*, 132 Wn. App. at 217 (2006) (same).

<sup>56</sup> CP. 129-30, ¶2.

definition of prevailing party found in RCW 4.84.330, requiring the Helstroms to obtain an affirmative or final judgment to be considered the prevailing party.

2. *In interpreting the parties' Agreement, the trial court erred in failing to evaluate the circumstances of the case.*

Moreover, the decision as to whether a particular voluntary nonsuit should trigger attorney's fees should be left to the discretion of the trial judge in light of the circumstances of the particular case, whether interpreting a contract clause or statute.<sup>57</sup> The trial court in this case engaged in no such analysis of the circumstances of the case. Here, in interpreting the parties' intent in the Agreement and the application of RCW 4.84.330, the trial court should have considered the circumstances of this particular case and, in doing so, should not have awarded attorney's fees.

As this court can see, Acorn properly and promptly dismissed this matter against the Helstroms once evidence was discovered that weakened its claims against the Helstroms. However, at the time of filing the lawsuit, the facts of this case sufficiently supported Acorn's claims. Throughout the transaction, the parties continued to treat the Second Addendum as if it had been properly executed.<sup>58</sup> Ms. Baker, too, assured Acorn that an error had

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<sup>57</sup> *Hawk*, 97 Wn. App. at 783 (emphasis added).

<sup>58</sup> See CP 132, ¶ 10.

been made but “the price reduction was agreed to...”<sup>59</sup> Indeed, the trial court even denied Helstroms’ first motion for summary judgment.<sup>60</sup>

In considering these circumstances of the case, the trial court should not have awarded Helstroms’ attorney’s fees regardless of the application of the RCW 4.84.330 to the parties’ attorney’s fees provision. The circumstances of this particular voluntary dismissal, coupled with the parties’ explicit use of the term “prevailing party” do not support a finding that Helstroms are the “prevailing party” either pursuant to RCW 4.84.330 or the parties’ Agreement.

**C. The trial court abused its discretion when it failed to require the Helstroms to properly segregate attorney’s fees for non-breach of contract claims.**

Next, the trial court abused its discretion in failing to require the Helstroms to segregate the fees incurred on those claims unrelated to breach of contract. In its order, the trial court only required the Helstroms to segregate those fees incurred in asserting and defending crossclaims. Such failure to require further segregation constitutes abuse of discretion.

“If attorney fees are recoverable for only some of a party's claims, the award must properly reflect a segregation of the time spent on issues for

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<sup>59</sup> CP 132-33, ¶ 13.

<sup>60</sup> CP 198-200.

which fees are authorized from time spent on other issues.”<sup>61</sup> This is true even if the claims overlap or are interrelated.<sup>62</sup> The court must separate the time spent on those theories essential to the cause of action for which attorney’s fees are properly awarded and the time spent on legal theories relating to the other causes of action.<sup>63</sup> This must include, *on the record*, a segregation of the time allowed for the separate legal theories.<sup>64</sup>

Here, the trial court did no such segregation. Indeed, the trial court seemingly acknowledged that the claims were segregable, requiring the Helstroms to segregate those costs and fees incurred in asserting and defending crossclaims against Prime Locations, but the trial court did not require the Helstroms to segregate those fees unrelated to the breach of contract claim.<sup>65</sup>

Here, the parties’ attorney’s fees provision permits recovery of reasonable attorney fees only if a party institutes suit against the other “concerning th[e] Agreement...”<sup>66</sup> “A prevailing party may recover attorney fees under a contractual fee-shifting provision...only if a party brings a “claim on the contract,” that is, only if a party seeks to recover

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<sup>61</sup> *Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now (C.L.E.A.N.)*, 119 Wn. App. 665, 690, 82 P.3d 1199 (2004).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* (emphasis original).

<sup>65</sup> See CP 437-39; 440-43.

<sup>66</sup> CP 129-30, ¶2 (emphasis added).

under a specific contractual provision.<sup>67</sup> Yet the trial court impermissibly awarded the Helstroms their attorney’s fees in connection with Acorn’s unjust enrichment and promissory estoppel claims. Such claims are not “concerning the Agreement” nor are they “claims on the contract.” Indeed, this Court has rejected attorney’s fees requested for similar equitable claims.<sup>68</sup>

In *Bellerive*, the plaintiffs and defendant entered into a residential construction and purchase and sale agreement that permitted recovery of attorney’s fees to the prevailing party.<sup>69</sup> The Bellerives ultimately succeeded on their claims of breach of contract and unjust enrichment.<sup>70</sup> The Bellerives sought recovery of attorney’s fees expended on both claims, arguing that their entire relationship with the defendant arose from the parties agreement, and thus “the agreements gave rise to their action for unjust enrichment.”<sup>71</sup> However, this Court rejected plaintiffs’ “but for” argument, holding that “[a]lthough the Bellerives’ relationship with EOR stems from the agreements, it does not mean the claim on which they succeeded actually arose from the agreements and gave rise to the claim for

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<sup>67</sup> *Boguch v. Landover Corp.*, 153 Wn. App. 595, 615, 224 P.3d 795 (2009).’

<sup>68</sup> See *Bellerive*, 2018 WL 1729776, at \*1. Pursuant to GR 14.1, this unpublished case is being cited for illustrative persuasive purposes only.

<sup>69</sup>*Id.*, at \*1.

<sup>70</sup>*Id.*, at \*2.

<sup>71</sup>*Id.*, at \*5.

unjust enrichment.”<sup>72</sup> Rather, this Court determined that since the unjust enrichment claim arose *in equity* and outside of the parties’ agreement.<sup>73</sup>

Similarly, here, the trial court abused its discretion in permitting the Helstroms to recover attorney’s fees expended in defending against Acorn’s equitable claims of unjust enrichment and promissory estoppel. Like in *Bellerive*, though the parties’ contractual relationship may have stemmed from the Agreement, the claims of unjust enrichment and promissory estoppel arose in equity and were independent of the parties’ Agreement. As such, even if the Helstroms are the “prevailing party” on the unjust enrichment and promissory estoppel claims, the Helstroms are not entitled to recover attorney’s fees pursuant to the parties’ Agreement because such equitable claims do not constitute a “claim on the contract.” Therefore, the trial court erred in not requiring segregation of the time spent on these claims.

### **CONCLUSION**

The application of the definition of “prevailing party” contained in RCW 4.84.330 is inconsistent through the courts. Yet, the definition is frequently applied to contractual bilateral attorney’s fees provisions, especially when, as here, the attorney’s fee provision contains the term

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<sup>72</sup>*Id.*

<sup>73</sup>*Id.* (emphasis added).

“prevailing party”. Pursuant to RCW 4.84.330 and this Court’s precedent, the Helstrom Defendants are not a prevailing party because a final judgment has not been rendered and they did not receive an affirmative judgment. As a result, the Helstrom Defendants are not entitled to an award of attorney’s fees.

In the alternative, the trial court erred in failing to determine if the parties’ intended to incorporate the statutory definition of prevailing party in the Agreement. The trial court further erred by failing to require the Helstroms to segregate those attorney’s fees expended in defending against Acorn’s equitable claims. Such claims did not arise from the parties’ Agreement and the Helstroms are not entitled to recover attorney’s fees.

For the foregoing reasons, Acorn respectfully requests that this Court reverse the trial court’s holding that the Helstroms are the prevailing party pursuant to the parties’ Agreement. In the alternative, Acorn respectfully requests that this Court reverse and remand the trial court’s judgment for further fact finding in regard to the parties’ contractual intent and segregation of fees expended on the equitable claims.

Dated this 1<sup>st</sup> day of June, 2020.

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*/s/ Skyler Gunderson*

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## DECLARATION OF SERVICE

I, Rachel Eades, state: On this day I caused the foregoing Brief of Appellant Acorn Olympia, LLC to be filed with the Court of Appeals Division II via the Washington State Appellate Courts' Portal and served on the following via the same and by email:

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Declarant is a resident of the State of Washington and over the age of eighteen (18) years. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this Day of June 1, 2020 at Seattle Washington.

*Rachel Eades*

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Rachel Eades, Paralegal

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