

FILED  
Court of Appeals  
Division II  
State of Washington  
7/31/2020 4:48 PM  
No. 54501-2-II

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

---

ACORN OLYMPIA, LLC,

Appellant,

v.

ROBERT L. HELSTROM and YVONNE E. HELSTROM,

Respondent.

---

APPELLANT ACORN OLYMPIA, LLC'S REPLY BRIEF

---

5224 Wilson Ave. S., Suite 200  
Seattle, WA 98118  
(206)203-6000

DEMCO LAW FIRM, P.S.

Lars E. Neste, No. 28781  
Skyler B. Gunderson, No.  
54013

Attorneys for Respondent  
Acorn Olympia, LLC

**TABLE OF CONTENTS**

I. INTRODUCTION .....1

II. Statutory interpretation of RCW 4.84.330 does not support the distinction between unilateral and bilateral attorney's fees provisions applied only in cases of voluntary nonsuit.....2

III. The Helstroms did not adequately address the trial court’s error in failing to engage in fact finding to determine if the parties intended to incorporate the statutory definition of prevailing party. ....6

IV. Acorn’s equitable claims did not arise from the contract and were not so intertwined to the point of being inseparable in segregation.....7

V. This Court should deny the Helstroms’ attorney’s fees on appeal .....10

VI. CONCLUSION.....11

## TABLE OF AUTHORITIES

### Cases

|                                                                                                                                         |         |
|-----------------------------------------------------------------------------------------------------------------------------------------|---------|
| <i>AllianceOnce Receivables Mgmt., Inc. v. Lewis</i> , 180 Wn.2d 389, 325 P.3d 904 (2014) .....                                         | 2, 5    |
| <i>Andersen v. Gold Seal Vineyards, Inc.</i> , 81 Wn.2d 863, 505 P.2d 790 (1973).....                                                   | 2       |
| <i>Bellerive v. EOR, Inc.</i> , 49565-1-II, 2018 WL 1729776 (Wn. Ct. App. Apr. 10, 2018) .....                                          | 9       |
| <i>City of Spokane Valley v. Spokane Cty.</i> , 145 Wn. App. 825, 187 P.3d 340 (2008).....                                              | 5       |
| <i>Ethridge v. Hwang</i> , 105 Wn. App. 447, 20 P.3d 958 (2001) .....                                                                   | 7, 8    |
| <i>Hawk v. Branjes</i> , 97 Wn. App. 776, 986 P.2d 841 (1999) .....                                                                     | 2, 6, 7 |
| <i>Jametsky v. Olsen</i> , 179 Wn.2d 756, 317 P.3d 1006 (2014) .....                                                                    | 3, 5    |
| <i>Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now (C.L.E.A.N.)</i> , 119 Wn. App. 665, 82 P.3d 1199 (2004)..... | 7       |
| <i>Tradewell Group, Inc. v. Mavis</i> , 71 Wn. App. 120, 130, 857 P.2d 1053 (1993).....                                                 | 10      |
| <i>Transpac Dev., Inc. v. Oh</i> , 132 Wn. App. 212, 130 P.3d 892 (2006).....                                                           | 3, 4    |

**Statutes**

RCW 4.28.185 ..... 2  
RCW 4.84.250 - RCW 4.84.300..... 5  
RCW 4.84.330 ..... *passim*

**Other Authorities**

CR 41 ..... 2  
GR 14.1 ..... 9  
RAP 18.1..... 10, 11

## **I. INTRODUCTION**

The Helstroms' brief is rife with unsupported absolutes. They argue that the default rule is that a defendant is awarded attorney's fees in a case of voluntary nonsuit. They similarly argue that RCW 4.84.330 is only ever applied to cases in which the parties have agreed to a unilateral attorney's fees provision. Both of these premises upon which the Helstroms rely are unsupported by precedent. In fact, the Supreme Court has said just the opposite. There is no default rule permitting recovery of attorney's fees in a case of voluntary nonsuit. Indeed, both case law and statutory interpretation support a conclusion that a final judgment must be rendered for an award of attorney's fees. Moreover, the Court of Appeals has frequently and inconsistently applied RCW 4.84.330 to cases in which the parties have agreed to a bilateral attorney's fees provision. Contrary to the Helstroms' argument, the "default rule," if one exists, requires the trial court to decide whether a particular voluntary nonsuit should trigger attorney's fees. Since the trial court failed to consider the individual circumstances of this case, failed to engage in statutory interpretation to determine if RCW 4.84.330 applies, and failed to engage in contract interpretation to determine if the parties intended to incorporate RCW 4.84.330 into their Agreement, the trial court erred in granting the Helstroms an award of attorney's fees.

**II. Statutory interpretation of RCW 4.84.330 does not support the distinction between unilateral and bilateral attorney's fees provisions applied only in cases of voluntary nonsuit.**

The Helstroms' response brief rests on the erroneous premise of a default award of attorney's fees in the case of voluntary nonsuit.<sup>1</sup> However, the Helstroms fail to acknowledge that this "general rule" was made applicable only to RCW 4.28.185.<sup>2</sup> *Andersen v. Gold Seal Vineyards, Inc.*, 81 Wn.2d 863, 868, 505 P.2d 790 (1973) did not consider the relevant statute at issue and did not make any ruling or statement in regard to RCW 4.84.330's applicability in cases of voluntary nonsuit. Rather, the Supreme Court has confirmed just the opposite, stating 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>3</sup> Since there is no default rule in regard to attorney's fees and voluntary nonsuits, 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>4</sup>

---

<sup>1</sup>Brief of Respondent at 12. *See also Andersen v. Gold Seal Vineyards, Inc.*, 81 Wn.2d 863, 868, 505 P.2d 790 (1973) ("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>2</sup> *Id.*

<sup>3</sup> *AllianceOne Receivables Mgmt., Inc. v. Lewis*, 180 Wn.2d 389, 398, 325 P.3d 904 (2014) (emphasis added) (applying RCW 4.84.250).

<sup>4</sup> *Hawk v. Branjes*, 97 Wn. App. 776, 783, 986 P.2d 841 (1999).

The Helstroms argue that RCW 4.84.330 is not applicable to the case at hand because the plain language of the statute makes clear that it is only applicable to unilateral attorney’s fees provisions. The primary objective of any statutory construction inquiry is “to ascertain and carry out the intent of the Legislature.”<sup>5</sup> If possible, the Court must give effect to the plain meaning of a statute as an expression of legislative intent.<sup>6</sup> This plain meaning is *derived from the context of the entire act*.<sup>7</sup> When a statute is ambiguous, the court may resort to statutory construction, including relevant case law, for assistance in discerning legislative intent.<sup>8</sup>

As demonstrated in Acorn’s opening brief, a review of the cases that apply and/or cite RCW 4.84.330 in awarding attorney’s fees are inconsistent in their application. The Helstroms combat these inconsistencies by simply stating that the courts made “erroneous references” to the statute in discussing the award of attorney’s fees.<sup>9</sup> However, many of these cases are beyond simple “erroneous references.” Indeed, the court in *Transpac Dev., Inc. v. Oh*, 132 Wn. App. 212, 130 P.3d 892 (2006), went as far as instinctively applying the provisions of RCW 4.84.330 to a bilateral lease

---

<sup>5</sup> *Jametsky v. Olsen*, 179 Wn.2d 756, 762, 317 P.3d 1003 (2014).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* (emphasis added).

<sup>8</sup> *Id.*

<sup>9</sup> Brief of Respondent at 19.

provision entitling the prevailing party to reasonable attorney's fees stating that:

The 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 party in whose favor final judgment is rendered.<sup>10</sup>

These "erroneous references" are more than just that. The Helstroms cannot escape the fact that courts, throughout the various Divisions, have consistently failed to make the distinction between bilateral and unilateral attorney's fees provisions as the Helstroms claim the statute's plain language requires.

Moreover, the Helstroms argue that those cases that apply RCW 4.84.330 to bilateral attorney's fees provisions are factually distinct and thus, are not applicable to the issue of voluntary nonsuit. Acorn readily admits that many of the cases are not factually on point with the case at hand. However, this only further supports Acorn's argument of inconsistent and ambiguous interpretation of RCW 4.84.330. Given that the Courts have seemingly referenced and applied the statute in various other cases involving bilateral attorney's fees provisions, the Helstroms' interpretation of the statute would lead to the absurd result in which the distinction

---

<sup>10</sup> *Transpac Dev., Inc. v. Oh*, 132 Wn. App. 212, 217 130 P.3d 892 (2006).

between bilateral and unilateral attorney's fees provisions is only applied in cases of voluntary nonsuit. The statute cannot be interpreted in such a way. Statutes must be construed to avoid absurd results.<sup>11</sup>

Rather, the statute should be interpreted as requiring a final judgment, regardless of whether the attorney's fees provision is bilateral or unilateral. Not only has the distinction been frequently disregarded by the courts, additional provisions from RCW 4.84. et seq. support a similar interpretation. When determining the plain meaning of a statute, the court considers the statute within the entire scheme of other statutes, presuming the legislature enacts legislation in light of existing law.<sup>12</sup> Plain meaning is derived from the context of the entire act.<sup>13</sup> In reading the chapter as a whole, the legislative intent of requiring a final judgment to award attorney's fees and costs is supported.<sup>14</sup>

Given the inconsistent application of RCW 4.84.330, resulting in the absurd interpretation of applying the distinction between bilateral and unilateral attorney's fees provisions only in cases of voluntary nonsuit, the trial court erred in determining that RCW 4.84.330 did not apply to the

---

<sup>11</sup> *City of Spokane Valley v. Spokane Cty.*, 145 Wn. App. 825, 831, 187 P.3d 340 (2008).

<sup>12</sup> *AllianceOne Receivables Mgmt., Inc.*, 180 Wn.2d at 396.

<sup>13</sup> *Jametsky*, 179 Wn.2d at 762.

<sup>14</sup> *See, e.g.*, RCW 4.84.250 – RCW 4.84.300; *see also*, *AllianceOne Receivables Mgmt., Inc.*, 180 Wn.2d at 398 (Before an award of attorney's pursuant to RCW 4.84.250 can be triggered, the party must show that there was an entry of judgment).

parties' bilateral attorney's fee provision and further erred in finding that the Helstroms were the prevailing party.

**III. The Helstroms did not adequately address the trial court's error by failing to engage in fact finding to determine if the parties intended to incorporate the statutory definition of prevailing party.**

In the alternative, the trial court erred by failing to engage in fact finding to determine whether the parties intended to adopt the statutory definition of prevailing party contained in RCW 4.84.330. The Helstroms provide no relevant support for their statement that the trial court did not need to engage in such fact finding, arguing only that the parties' attorney's fees provision is "unambiguous."<sup>15</sup>

However, the case primarily relied upon by the Helstroms in their brief states just the opposite.<sup>16</sup> 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>17</sup> Indeed, the Court in *Hawk v. Branjes*, 97 Wn. App. 776, 986 P.2d 841 (1999), examined a similar bilateral attorney's fees provision to determine if the parties intended to incorporate the statutory definition,

---

<sup>15</sup> Brief of Respondent at 22.

<sup>16</sup> See *Hawk*, 97 Wn. App. 776.

<sup>17</sup> *Id.* at 780.

considering, among other factors, the fact the parties used the word “successful” as opposed to prevailing.”<sup>18</sup>

The Helstroms have not provided any reason for this Court to stray from precedent, that is, to require the trial court to engage in fact finding to determine if the parties intended to incorporate the statutory definition of “prevailing party” into their Agreement. The trial court erred in failing to make such determination.

**IV. Acorn’s equitable claims did not arise from the contract and were not so intertwined to the point of being inseparable in segregation.**

“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 which fees are authorized from time spent on other issues.”<sup>19</sup> This is true even if the claims overlap or are interrelated.<sup>20</sup> The Helstroms seemingly do not deny that they are only entitled to recover attorney’s fees for the breach of contract claim. Rather, they simply argue that the claims are so intertwined to be properly segregated.

The Helstroms reliance on *Ethridge v. Hwang*, 105 Wn. App. 447, 20 P.3d 958 (2001) is misplaced. The court in *Ethridge* held that each claim

---

<sup>18</sup> *Id.* at 781.

<sup>19</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>20</sup> *Id.*

involved the same core facts— “Hwang’s unreasonable rejection of prospective buyers at the park” and that *proof of all claims involved the same preparation* “—establishing that Hwang acted unreasonably.”<sup>21</sup> As such, the court held that “[b]ecause nearly every fact in this case related in some way to all three claims, segregation of the fee request was not necessary and the trial court did not abuse its discretion in awarding fees as it did.”<sup>22</sup>

Here, Acorn’s claims were not so intertwined. The disputed Second Addendum included eight different terms.<sup>23</sup> In exchange for the reduced purchase price, the parties agreed to numerous other items, including an agreement that Acorn would take the Property “as is” and an agreement to conduct a survey on the adjacent property and split the costs of said survey.<sup>24</sup> Despite the fact that the Second Addendum did not become part of the Agreement, the parties still carried out these contractual duties.<sup>25</sup> Indeed, Acorn paid for half of the costs of the survey and accepted the Property in “as is” condition without receiving the benefit of the reduced purchase price.<sup>26</sup> Such facts support Acorn’s claim for unjust enrichment.

---

<sup>21</sup> *Ethridge v. Hwang*, 105 Wn. App. 447, 461, 20 P.3d 958 (2001) (emphasis added).

<sup>22</sup> *Id.*

<sup>23</sup> CP 130-32, 149.

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

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

But discovery related to these facts are not related to the breach of contract claim or the issue of Ms. Baker's alleged delivery or non-delivery of the signed Second Addendum to escrow.<sup>27</sup> Thus, proof of all claims did not involve the same preparation, and segregation is possible.

The Helstroms argument that “all rights, duties and remedies between [the parties] arose out of their contract” and that Acorn's claims could have “no existence independent of the RESPA”<sup>28</sup> is precisely the “but for” argument this Court has rejected.<sup>29</sup> Indeed, this Court rejected this argument in *Bellerive v. EOR, Inc.*, 49565-1-II, 2018 WL 1729776, (Wn. Ct. App. Apr. 10, 2018), 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 unjust enrichment.”<sup>30</sup> Rather, this Court determined that the unjust enrichment claim arose in equity and outside of the parties' agreement.<sup>31</sup>

---

<sup>27</sup> Such issue of fact was discovered through Ms. Baker's deposition and ultimately led to Acorn's dismissal. *See* CP 255-57.

<sup>28</sup> Brief of Respondent at 26.

<sup>29</sup> *Bellerive v. EOR, Inc.*, 49565-1-II, 2018 WL 1729776 (Wn. Ct. App. Apr. 10, 2018) (unpublished) (pursuant to GR 14.1, this unpublished case is being cited for illustrative and persuasive purposes only).

<sup>30</sup>*Id.* at \*5.

<sup>31</sup>*Id.*

As discussed above, though Acorn’s claim for unjust enrichment may not have existed without the parties’ Agreement and preparation of the Second Addendum, such unjust enrichment claim arose in equity and as result of the actions taken by Acorn outside of the parties’ Agreement that unjustly enriched the Helstroms. As such, the Agreement was not central to the equitable dispute. Moreover, the Court in *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 130, 857 P.2d 1053 (1993), similarly rejected the proffered “but for” argument and held that promissory estoppel cannot arise out of a contract since “estoppel, by its very nature, is an alternative theory of liability based on the *absence of an express agreement*.”<sup>32</sup>

Consequently, Acorn’s equitable claims are not too intertwined to be segregated and do not constitute claims on the contract. Thus, the Helstroms are not entitled to recover attorney’s fees expended on the equitable claims pursuant to the parties’ Agreement. The trial court abused its discretion in failing to require segregation of the time spent on those equitable theories for which recovery of attorney’s fees is not authorized.

**V. This Court should deny the Helstroms attorney’s fees on appeal.**

As a result of the foregoing, the Helstroms are not the prevailing party in the trial court nor on appeal. Thus, the Helstroms should not be

---

<sup>32</sup>*Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 130, 857 P.2d 1053 (1993) (emphasis original).

awarded attorney's fees pursuant to RAP 18.1, which provides for an award of attorney's fees "[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court..."<sup>33</sup>

## VI. CONCLUSION

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 31st day of July, 2020.

DEMCO LAW FIRM, P.S.

*1st Skyler Gunderson*

---

Lars E. Neste, WSBA #28781  
Skyler B. Gunderson, WSBA #54013  
Attorneys for Appellant

DEMCO LAW FIRM, P.S.  
5224 Wilson Avenue S., Suite 200  
Seattle, WA 98118  
(206) 203-6000

---

<sup>33</sup> RAP 18.1.

**DEMCO LAW FIRM, P.S.**

**July 31, 2020 - 4:48 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 54501-2  
**Appellate Court Case Title:** Acorn Olympia, LLC, Appellant v. Robert & Yvonne Helstrom, et al.,  
Respondents  
**Superior Court Case Number:** 18-2-04599-9

**The following documents have been uploaded:**

- 545012\_Affidavit\_Declaration\_20200731164315D2878103\_1881.pdf  
This File Contains:  
Affidavit/Declaration - Service  
*The Original File Name was Declaration of Service 7.31.20.pdf*
- 545012\_Briefs\_20200731164315D2878103\_2788.pdf  
This File Contains:  
Briefs - Appellants Reply  
*The Original File Name was Appellants Reply Brief.pdf*

**A copy of the uploaded files will be sent to:**

- john@eoplaw.com
- lneste@demcolaw.com
- mike@jmmorganlaw.com
- reades@demcolaw.com

**Comments:**

---

Sender Name: Adria Gilliam - Email: agilliam@demcolaw.com

**Filing on Behalf of:** Skyler Brianne Gunderson - Email: sgunderson@demcolaw.com (Alternate Email: lfierro@demcolaw.com)

Address:  
5224 Wilson Ave S Ste 200  
Seattle, WA, 98118  
Phone: (206) 203-6000

**Note: The Filing Id is 20200731164315D2878103**

FILED  
Court of Appeals  
Division II  
State of Washington  
DECLARANT'S OATH  
7/31/2020 4:48 PM

I, Rachel Eades, state: On this day I caused the foregoing Reply 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:

Attorney for Helstrom Defendants

J. Michael Morgan, WSBA #18404  
Service Address: 1800 Cooper Point Dr. S.W. Bldg 12  
City, State, Zip: Olympia, WA 98502  
Telephone #: (360) 292-7501  
Email Address: [mike@jmmorganlaw.com](mailto:mike@jmmorganlaw.com)

Attorney for Prime Defendants

John Ostrander, WSBA #19645  
Service Address: 707 SW Washington Street, Suite 1500  
City, State, Zip: Portland, OR 97205  
Telephone #: (503) 224-7112  
Email Address: [john@eoplaw.com](mailto:john@eoplaw.com)

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 July 31, 2020 at Seattle Washington.

*s/ RACHEL EADES*

---

Rachel Eades, Paralegal

**DEMCO LAW FIRM, P.S.**

**July 31, 2020 - 4:48 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 54501-2  
**Appellate Court Case Title:** Acorn Olympia, LLC, Appellant v. Robert & Yvonne Helstrom, et al.,  
Respondents  
**Superior Court Case Number:** 18-2-04599-9

**The following documents have been uploaded:**

- 545012\_Affidavit\_Declaration\_20200731164315D2878103\_1881.pdf  
This File Contains:  
Affidavit/Declaration - Service  
*The Original File Name was Declaration of Service 7.31.20.pdf*
- 545012\_Briefs\_20200731164315D2878103\_2788.pdf  
This File Contains:  
Briefs - Appellants Reply  
*The Original File Name was Appellants Reply Brief.pdf*

**A copy of the uploaded files will be sent to:**

- john@eoplaw.com
- lneste@demcolaw.com
- mike@jmmorganlaw.com
- reades@demcolaw.com

**Comments:**

---

Sender Name: Adria Gilliam - Email: agilliam@demcolaw.com

**Filing on Behalf of:** Skyler Brianne Gunderson - Email: sgunderson@demcolaw.com (Alternate Email: lfierro@demcolaw.com)

Address:  
5224 Wilson Ave S Ste 200  
Seattle, WA, 98118  
Phone: (206) 203-6000

**Note: The Filing Id is 20200731164315D2878103**