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Division II  
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No. 54501-2-II

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

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ROBERT L. HELSTROM and YVONNE E. HELSTROM,

Respondents,

v.

ACORN OLYMPIA, LLC

Appellant,

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**RESPONDENTS' BRIEF**

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## I. INTRODUCTION

Appellant Acorn Olympia, LLC (“Acorn”), sued Robert and Yvonne Helstrom (“the Helstroms”) in Thurston County Superior Court, alleging that the Helstroms breached a May 15, 2017 commercial real estate purchase and sale agreement. Acorn’s complaint also made claims against the broker who acted as a dual agent in the transaction for negligence and “disgorgement of profits.” Acorn nonsuited its claims against all defendants shortly before a hearing was to be held on Helstroms’ second motion to dismiss the plaintiff’s claims on summary judgment. Acorn appeals from the trial court’s award of \$57,772 in attorney’s fees and costs in favor of Robert and Yvonne Helstrom (“Helstroms”) as the prevailing party under the bilateral prevailing party attorney’s fees clause contained in Paragraph 21 of the purchase and sale agreement.

The Helstroms submit herewith a more extensive statement of facts than the terse summary contained in Acorn’s opening brief. While the plaintiff’s voluntary dismissal of its case makes a full analysis of the summary judgment issues unnecessary, the Helstroms believe a somewhat detailed rendition of the facts is important for this Court’s review for two reasons. First, to demonstrate it was a logical and fair expectation of the

parties under the fee-shifting provisions in Paragraph 21 of the contract that the parties would not have to go through an entire trial for the bilateral prevailing party attorney fees clause to be operative. The second reason is to demonstrate that the chargeable time spent by the Helstroms' attorney defending the contract claims subsumed the defense of Acorn's equity claims of promissory estoppel and unjust enrichment. There was no discrete attorney work unique to the two subsidiary theories, which could not exist as independent causes of action outside of the contract claims. Therefore, the trial court correctly found that because all facts that had to be developed through the evidence were integral to all causes of action pled by Acorn. Thus, the Helstroms were entitled to recover the entire amount requested without artificially segregating among Acorn's contract and secondary equity claims.

## **II. RESTATEMENT OF THE ISSUES**

A. Whether the trial court correctly found that Acorn's voluntary dismissal of its claims against the Helstroms pursuant to CR 41(a)(1)(A) made the Helstroms the "prevailing party" per Paragraph 21 of purchase and sale contract?

B. Whether RCW 4.84.330 is inapplicable to the purchase and sale contract because that statute only applies to contracts containing unilateral prevailing party attorney fee clauses?

C. Whether the superior court was not required to artificially segregate the Helstroms' attorney's time spent only on the breach of contract claims when Acorn's equity claims arise out of the same facts and merely alleged alternative bases of recovery?

D. Whether this Court should award the Helstroms their attorney's fees and costs on appeal?

### **III. RESPONDENTS' STATEMENT OF THE CASE**

#### **A. Respondents' Statement of Facts.**

Respondent Robert L. Helstrom (Helstrom) and his wife Yvonne E. Helstrom signed a Commercial & Investment Real Estate Purchase and Sale Agreement (referred to below as the "REPSA") dated May 15, 2017,<sup>1</sup> to sell a commercial building to Appellant Acorn Olympia, LLC (Acorn).<sup>2</sup> Acorn's principal is John Skourtes (Skourtes). Joni Baker (Baker) of Prime Locations, Inc. (Prime Locations) was a dual agent, representing both buyer and seller.

The buyer and seller never communicated directly with one another.<sup>3</sup> Because Skourtes lived in Oregon, Baker typically communicated with him by phone, and all offers and counteroffers were

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<sup>1</sup> CP 48.

<sup>2</sup> The buyer under the REPSA was "Acorn Corporation et al/and or assigns," which later transferred its purchaser's interest to Acorn.

<sup>3</sup> CP 43.

transmitted to and from him by email.<sup>4</sup> Helstrom lived in Olympia and rarely used email. Therefore, Baker communicated by phone and in person with Helstrom. She delivered and received all documents to and from Helstrom by hand.<sup>5</sup>

Among the material terms of the REPSA are:

- Price: \$2,250,000.00 all cash, with \$50,000.00 earnest money.<sup>6</sup>
- Buyer's due diligence contingency to be satisfied or waived within 60 days.<sup>7</sup>
- Closing to occur no later than August 31, 2017.<sup>8</sup>

Baker opened escrow with First American Title Company (First American) on or about July 7, 2017.<sup>9</sup> Skourtes had an ongoing list of issues with the building and property that he wanted addressed at the seller's expense prior to closing. By mid-August 2017, Helstrom was concerned about Acorn's ability to meet an August 31<sup>st</sup> closing date. He expressed to Baker his reluctance to (1) agree to further extensions of closing and (2) spend money fixing up the property.<sup>10</sup> In an August 16, 2017 e-mail, Skourtes told Baker that he would offer a reduced price of

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<sup>4</sup> CP 216, p. 30.

<sup>5</sup> CP 216, p. 30-33.

<sup>6</sup> CP 48.

<sup>7</sup> CP 49, ¶5. By a First Addendum dated May 22, 2017 (CP 62) the parties agreed that the 60-day due diligence period would begin with the seller's delivery of a Phase One environmental report.

<sup>8</sup> CP 51, ¶7.

<sup>9</sup> CP 43.

<sup>10</sup> CP 43.

\$2,175,000.00 and waive the rest of his due diligence conditions provided the seller correct some issues with the exterior windows and roof, and agree to split the cost of a survey.<sup>11</sup>

Helstrom was willing to agree to the \$75,000.00 price reduction and accede to some of Skourtes' other conditions, but only if Acorn agreed to: (1) take the building "as-is;" (2) waive the other due diligence contingencies; and (3) close no later than Wednesday, August 23, 2017.<sup>12</sup>

<sup>13</sup> Baker prepared a Second Addendum<sup>14</sup> reflecting Helstrom's terms, which Helstrom signed on August 18, 2017.<sup>15</sup> Baker emailed the proposed first Second Addendum, signed by Helstrom, to Skourtes on August 18, 2017 at 4:45 p.m.<sup>16</sup> Baker made it clear to Skourtes in a telephone conversation that Helstrom was only going to agree to a price reduction if the sale would close the following week.<sup>17</sup>

Skourtes produced in discovery a copy of the proposed Second Addendum bearing his signature dated the following day, Saturday, August 19, 2017.<sup>18</sup> Helstrom did not recall ever seeing such document prior to litigation. No copy of the document bearing Skourtes' signature

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<sup>11</sup> CP 67.

<sup>12</sup> CP 44.

<sup>13</sup> CP 222, p. 65.

<sup>14</sup> Referred to throughout the record as the "first" Second Addendum.

<sup>15</sup> CP 69.

<sup>16</sup> CP 68-69.

<sup>17</sup> CP 223, p. 66-67.

<sup>18</sup> CP 73.

was produced in discovery by either Prime Locations or First American. Nor does the record contain any e-mail by which Skourtes transmitted this document to anyone.<sup>19</sup> Baker never saw this document until December 28, 2017, after closing.<sup>20</sup> Prime Locations has a standard procedure whereby every document physically delivered to its office is date stamped “received” and personally reviewed by Baker’s broker, Zach Kosturos.<sup>21</sup> Thus, had Skourtes hand delivered the signed addendum to Baker’s office, a copy would have been in Prime Location’s file. No such copy exists.<sup>22</sup>

Wednesday, August 23, 2017 passed, with Acorn neither depositing the earnest money nor waiving its contingencies. Thus, as of Monday, August 28, 2017, the parties were back to the original REPSA closing date of August 31, 2017. Acorn wired the \$50,000.00 earnest money on August 30, 2017.<sup>23</sup> However, Acorn was still unable to close on August 31<sup>st</sup>, so on August 30, 2017 the parties signed a replacement

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<sup>19</sup> CP 44-45. Skourtes’ e-mail sent on 4:40 p.m. Saturday, August 19, 2017 (CP 71-72) contained no attachment and in fact gave a litany of all of the reasons why Acorn could not close by the following Wednesday.

<sup>20</sup> CP 222, p. 63.

<sup>21</sup> CP 217, p. 37.

<sup>22</sup> It is the Helstroms’ position that Skourtes’ assertions that he returned the signed first Second Addendum are fraudulent. Skourtes told the Helstroms’ prior attorney in February 2018: “Look, I know I don’t have a valid claim. Just tell them to tender a claim to their insurance company and the insurer will pay me something.” See Declaration of Alan Wertjes, CP 272.

<sup>23</sup> CP 76.

Second Addendum extending the buyer's feasibility contingency to September 12, 2017 and extending closing to September 22, 2017.<sup>24</sup>

The parties signed several additional addenda, ultimately extending the closing date to November 17, 2017.<sup>25</sup> On November 14, 2017, Skourtes signed a Buyer's Estimated Settlement Statement, also verifying that total consideration for the sale was \$2,250,000.00.<sup>26</sup> On November 14, 2017, Helstrom also signed a Seller's Estimated Settlement Statement, verifying total consideration for the sale of \$2,250,000.00.<sup>27</sup>

The sale closed on November 17, 2017. Helstrom signed a Statutory Warranty Deed on November 14, 2017 which was recorded on November 17, 2017.<sup>28</sup> On November 17, 2017, First American sent Acorn a check for a net refund of excess funds in the amount of \$100,232.46, which Acorn negotiated and deposited on November 28, 2017.<sup>29</sup>

## **B. Procedural History.**

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<sup>24</sup> CP 45-46; 77-78; and 79. The August 30, 2017 replacement Second Addendum (CP 79) makes no reference to the earlier, superseded Second Addendum (CP 69) or the price reduction contained therein. In fact, all addenda refer back to the terms of the original REPSA, not to each other.

<sup>25</sup> CP 83, 85, 87 and 94.

<sup>26</sup> CP 96.

<sup>27</sup> CP 95.

<sup>28</sup> CP 97-98.

<sup>29</sup> CP 101.

On September 19, 2018 Acorn filed a Complaint for Damages.<sup>30</sup> Section I identifies the parties.<sup>31</sup> Section II sets facts supporting jurisdiction and venue.<sup>32</sup> Section III bears the heading “FACTS” and concisely sets forth the basic facts applicable to all causes of action.<sup>33</sup> Section IV, labelled “CAUSES OF ACTION,” incorporates the previous three sections, and then requests damages against Helstrom based upon theories of breach of contract, promissory estoppel and unjust enrichment.<sup>34</sup>

On April 1, 2019 Helstrom filed a motion for summary judgment dismissal of Acorn’s Complaint,<sup>35</sup> which the Court denied on May 10, 2019.<sup>36</sup> The court stated in Finding of Fact No. 2 that the basis of denial of summary judgment was “a paucity of evidence as to the subjective knowledge of the dual agent, Joni Baker (Baker) concerning the “first” Second Addendum to the REPSA.”<sup>37</sup> Counsel for the parties deposed Baker on August 13, 2019. Baker confirmed in her deposition that:

- Helstrom told her he would only agree to a price reduction if the sale closed no later than Wednesday, August 28, 2017;<sup>38</sup>

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<sup>30</sup> CP 1-7.

<sup>31</sup> CP 1-2

<sup>32</sup> CP 2

<sup>33</sup> CP 1-4

<sup>34</sup> CP 4-5

<sup>35</sup> CP 24.

<sup>36</sup> CP 198.

<sup>37</sup> CP 441

<sup>38</sup> CP 223, p. 66-67.

- She clearly communicated to Skourtes that the price reduction would only be available in exchange for the early closing;<sup>39</sup>
- Skourtes told her he would not and could not close by August 23, 2017;<sup>40</sup> and
- She did not see a copy of the first Second Addendum bearing Skourtes' initials until December 28, 2017, after the sale had closed.<sup>41 42</sup>

On September 27, 2019 Helstroms filed a Supplemental Motion to Dismiss Complaint and for Attorneys Fees and Costs,<sup>43</sup> which they noted for a November 15, 2019 hearing. On October 30, 2019 Acorn dismissed its claims against Baker and Prime Locations pursuant to a Stipulated Motion and Order of Dismissal.<sup>44</sup> Also on October 30, 2019, Acorn entered a Stipulated Motion and Order of Voluntary Nonsuit, dismissing its claims against Helstrom without prejudice pursuant to CR 41(a)(1)(A), and with all parties reserving “all rights and defenses as to the

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<sup>39</sup> *Id.* at 67.

<sup>40</sup> CP 222, p. 62; CP 223, p. 68.

<sup>41</sup> CP 222, p. 63.

<sup>42</sup> Helstrom rejects Acorn's characterization that Acorn and Helstroms stipulated to Acorn's nonsuit order “[u]pon discovery of previously unknown evidence.” (Brief of Appellant, p. 1) Acorn's reference is to evidence of conversations between John Skourtes and Joni Baker that she testified to in her deposition. (See CP 215-30) The only reason this evidence would be “unknown” to Acorn would be Skourtes' failure to disclose the evidence to his counsel. Acorn's decision to nonsuit its case at the last minute was a tactical move to try to avoid attorney fee liability based upon its misinterpretation of RCW 4.84.330.

<sup>43</sup> CP 201.

<sup>44</sup> CP 255-57.

determination as to who is the prevailing party and as to an award, if any, of attorney's fees or costs to any party.”<sup>45</sup>

On January 3, 2020, the court entered Findings of Fact and Conclusions of Law<sup>46</sup> and an Order and Judgment<sup>47</sup> awarding the Helstroms \$57,772 in attorney's fees and costs based upon Paragraph 21 of the REPSA. Findings of Fact 5 and 6, respectively, read:

5. Acorn's voluntary nonsuit of its claims against Helstrom makes Helstrom the prevailing party pursuant to Paragraph 21 of the Real Estate Purchase and Sale Agreement, which provides that if the buyer or seller institutes suit against the other concerning the agreement, the prevailing party is entitled to reasonable attorney's fees and expenses.

6. The attorney's fees incurred by Helstrom in the amount of \$51,996 and costs in the amount of \$776 are reasonable. Because all facts that had to be developed through the evidence were integral to all causes of action pled by Acorn, Helstrom may recover the entire amount requested without segregating among Acorn's various causes of action.

The court denied the Helstroms' request for fees and costs based on Civil Rule 11 and RCW 4.84.185.

#### **IV. ARGUMENT**

##### **A. Standard of review.**

This Court reviews de novo the legal issue of whether a statutory, contractual, or equitable basis exists for an attorney fees award. *Gander v.*

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<sup>45</sup> CP 259.

<sup>46</sup> CP 457.

<sup>47</sup> CP 437.

*Yeager*, 167 Wn. App. 638, 282 P.3d 1100 (2012). Whether the amount of fees awarded was reasonable is reviewed under an abuse of discretion standard. *Cook v. Brateng*, 180 Wn. App. 368, 375, 321 P.3d 1255 (2014). A trial judge is given broad discretion in determining the reasonableness of an award, and in order to reverse that award, it must be shown that the trial court manifestly abused its discretion. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 147, 859 P.2d 1210 (1993). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Discretion also is abused if it is exercised contrary to law. *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995).<sup>48</sup>

**B. The trial court correctly held that the Helstroms were the prevailing party under Paragraph 21 of the REPSA, entitling them to an award of fees and costs against Acorn.**

Washington follows the “American Rule,” under which attorney fees and expanded costs may only be awarded to a successful litigant where authorized by contract, statute or recognized ground of equity. *In re Impoundment of Chevrolet Truck*, 148 Wn.2d 145, 160, 60 P.3d 53 (2002). Otherwise, a prevailing party may be entitled to only statutory costs and attorney fees to the extent allowed by RCW 4.84.010.

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<sup>48</sup> *review denied*, 129 Wn.2d 1003, 914 P.2d 66 (1966).

The attorney fees award in the present case was based upon contract. Prevailing party attorney fee provisions in contracts may be unilateral – operating in favor of one party only – or bilateral, operating equally in favor of both parties. The attorney fees clause in Paragraph 21 of the REPSA is bilateral:

If 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>49</sup>

*Anderson v. Gold Seal Vineyards*, 81 Wn.2d 863, 505 P.2d 790 (1973) laid out the general rule in Washington that a plaintiff’s voluntary nonsuit makes the defendant the prevailing party because the plaintiff “failed to prove [the] claim.” *Id.* 81 Wn.2d at 865. In *Anderson*, the defendant/third-party plaintiff moved, several days into trial, to voluntarily dismiss an indemnity action against a third party defendant, a foreign corporation. The third-party defendant sought its attorney fees under RCW 4.28.185(5), the long-arm statute. The trial court awarded attorney fees, and the defendant appealed, arguing that because the voluntary nonsuit was without prejudice there was no prevailing party. The Supreme Court rejected that argument, holding that:

[T]he general rule pertaining to voluntary nonsuits, that the defendant is regarded as having prevailed, should be applied . . . [T]he legislature must naturally have had in mind that a defendant

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<sup>49</sup> CP 57

who "prevails" is ordinarily one against whom no affirmative judgment is entered.

*Id.* at 868. *Anderson* is controlling on this Court in the present instance.

Acorn misreads *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 200 P.3d 683 (2009), which involved a lender's suit on a promissory note and deed of trust in which the prevailing party attorney fees clauses were *unilateral* – working only in favor of the lender.<sup>50</sup> Because the *Wachovia* attorney's fees clauses were unilateral, the Court applied RCW 4.84.330, and held that "final judgment" for purposes of the statute is defined as "[a] court's last action that settles the rights of the parties and disposes of all issues in controversy." *Id.* The court held that a voluntary dismissal is therefore not a final judgment under RCW 4.84.330. *Id.*, 165 Wn.2d at 492. In summary, *Wachovia* is authority for Helstrom's position, which is that the operation of RCW 4.84.330 is limited to contracts with unilateral fee clauses.

In interpreting statutes, the court's goal is to give effect to the legislature's intent by applying the statute's plain meaning. *Dep't of*

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<sup>50</sup> See *Wachovia*, footnote 1. The Note stated: "The undersigned shall pay all expenses of any nature, whether incurred in or out of court ... including but not limited to reasonable attorney's fees and costs, which Holder may deem necessary or proper in connection with the satisfaction of the indebtedness ... ."

The Deed of Trust stated: "If Lender institutes any suit or action to enforce any of the terms of this Deed of Trust, Lender shall be entitled to recover such sum as the court may adjudge reasonable as attorneys' fees at trial and on any appeal."

*Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4

(2002). If the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. *Id.*

RCW 4.84.330 states in relevant part:

In any action on a contract . . . where such contract . . . specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract . . . **shall be awarded to one of the parties**, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements. . . . **As used in this section 'prevailing party' means the party in whose favor final judgment is rendered.**<sup>51</sup>

The definition of “prevailing party” in the second half of the statute is limited to contracts referred to “in this section,” *i.e.*, contracts with unilateral fee clauses, specified in the first half of the statute. No rational argument can be made that the Legislature intended to extend the definition of “prevailing party” as “the party in whose favor final judgment is rendered” to every contract case in the State of Washington.

The Supreme Court stated as much in *Wachovia*:

CR 41(a)(1)(B) does not contemplate the award of costs or attorney fees when there has been a voluntary dismissal. In the context of civil actions, the question of costs and attorney fees are dealt with in a series of provisions under chapter 4.84 RCW. These provisions generally award attorney fees to the prevailing party in an action. However, “prevailing party” is not defined in the same manner in every attorney fees statute. *See* RCW 4.84.250-.330.

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<sup>51</sup> RCW 4.84.330 (Emphasis added).

**Here, the attorney fees provisions at issue are unilateral. . . .  
Therefore, RCW 4.84.330 applies.** <sup>52</sup>

*Wachovia*, 165 Wn.2d at 488-489 <sup>53</sup> The obvious corollary of this statement by our Supreme Court is that if the attorney fee provisions at issue are *bilateral*, RCW 4.84.330 does not apply.

In *Walji v. Candyco, Inc.*, 57 Wn. App. 284, 787 P.2d 946 (1990), Division One of the Court of Appeals affirmed the trial court's award of attorney's fees in favor of the defendant, a commercial tenant, against the plaintiff landlord, who voluntarily dismissed its lease enforcement suit without prejudice pursuant to CR 41(a)(2) prior to trial. Plaintiff argued that there was no "prevailing party" because RCW 4.84.330 requires a final judgment on the merits. Division One rejected this argument, holding that preclusive effect must be given to the intent of the parties, which is the *common sense, not statutory* definition as expressed in their contract:

Since the case may never be renewed, it is essential to apply the attorney fee provision of the lease at the time of dismissal to effectuate the intent of the parties. If the litigation is renewed, the attorney fee provision might once more come into play and be applied to the plaintiff's benefit. There would be no inconsistency in such a result. This interpretation will inhibit frivolous or badly prepared lawsuits and will protect parties from the expense of defending claims which do not result in liability.

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<sup>52</sup> Emphasis added.

<sup>53</sup> Emphasis added.

The reason that an order of voluntary dismissal is not a final judgment is for the protection of plaintiffs by allowing the litigation to continue under certain circumstances. It is not for the purpose of precluding attorney fees to a defendant who has "prevailed" as things stand at that point.

*Walji*, 57 Wn. App. at 288-89.

In *Hawk v. Branjes*, 97 Wn. App. 776, 986 P.2d 841 (1999), Division One cited its earlier opinion in *Walji* with approval, explaining that RCW 4.84.330 does not apply to leases or contracts with bilateral attorney's fee clauses. Again, the court held that the intent of the parties as expressed in the written contract controls:

RCW 4.84.330 is relevant in any given case only to the extent that the statute overrides the parties' intent on matters covered by the statute. **In a dispute between parties to a lease, the statute, by its very terms, applies only if the lease agreement provides for fees and costs exclusively to *one* of the parties. The intent of the statute is to level the playing field by allowing *either* party to recover fees and costs if they prevail. In effect, the statute turns a unilateral attorneys' fee provision into a bilateral one.**

But 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, as here, the agreement already contains a bilateral attorneys' fee provision, RCW 4.84.330 is generally inapplicable.*<sup>54</sup>

*Hawk*, 97 Wn. App. at 779-80.<sup>55</sup>

Without any in-depth discussion, Acorn cites a number of cases to argue some general notion that Washington case law is in disarray when it

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<sup>54</sup> Emphasis added.

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comes to the definition of “prevailing party.” For example, Acorn cites *McLelland v. Paxton*, 11 Wn. App. 2d 181, 453 P.3d 1 (2019) and *Mike’s Painting, Inc. v. Carter Welsh, Inc.*, 95 Wn. App. 64, 975 P.2d 532 (1999) for the proposition that “In applying RCW 4.84.330, courts consider the prevailing party as the one who receives affirmative relief or judgment in its favor.”<sup>56</sup> Both cases are inapplicable to the instant appeal.

*McClelland* was a partnership dissolution action in which the partnership agreement contained a bilateral prevailing party fee provision. *McLellan*, 11 Wn. App. at 189. After the case was tried to the superior court, Division 3 of the Court of Appeals applied RCW 4.84.330 in upholding the trial court’s designation of one of the partners, McLelland, as the prevailing party. *Id.* at 222-23. Given the bilateral fee clause, Division 3’s reliance on RCW 4.84.330 appears to have been misplaced. However, had either party assigned error to the applicability of RCW 4.84.330 – which they did not - such error was harmless, because (1) the case had been tried to a final judgment and (2) the appellate court’s analysis was limited to whether substantial evidence supported the trial court’s determination as to which party substantially prevailed.

In *Mike’s Painting*, Division 3 again made what Helstrom believes was a misplaced reference to RCW 4.84.330 where the construction

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<sup>56</sup> Brief of Appellant, at 8.

contract at issue contained a bilateral prevailing party attorney fees clause. The case had been tried before a private arbitration panel. Both parties petitioned the superior court for modification and confirmation of the arbitration award, in which the panel had found that each party prevailed on distinct and severable issues and made fee awards to both parties, which the panel then offset. The superior court refused to modify the arbitration decision awarding fees to both parties, and Division III affirmed. *Mike's Painting*, 95 Wn. App. at 535. As in *McClelland*, the applicability of RCW 4.84.330 was not a contested issue, and was not material to the either court's decision, since the case had already been tried on the merits.

Acorn also cites *Marassi v. Lau*, 71 Wn. App. 912, 859 P.2d 605 (1993)<sup>57</sup> - another post-trial case involving a residential purchase and sale agreement containing a bilateral prevailing party attorney fees provision. In *Marassi*, the residential purchasers sued the seller/developer on a variety of theories for damages arising out of construction of a building site. *Id.* at 913-14. Prior to trial, the plaintiffs voluntarily dismissed some of their claims, the parties settled the developer's counterclaims, and the case proceeded to trial on the plaintiffs' remaining claims for damages. After trial, out of the \$88,450 sought by the plaintiffs, the trial court

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<sup>57</sup> *abrogated by* 165 Wn.2d 481 (2009).

awarded \$15,000 on a slope damage claim, less a \$153 offset for the settled claims. The court also awarded \$12,285 in attorney's fees and \$118 in costs to the plaintiffs. *Id.* at 914. The developer appealed, claiming that the plaintiffs could not be the prevailing party for purposes of an award of fees under RCW 4.84.330, even though they received an affirmative judgment.

Division 1 of the Court of Appeals reversed and remanded to the trial court for further proceedings, rejecting an "all or nothing" or even a "substantially prevailing" party approach on the facts of the case, where the plaintiffs had only prevailed on 2 out of their original 12 claims:

We hold that when the alleged contract breaches at issue consist of several distinct and severable claims, a proportionality approach is more appropriate. A proportionality approach awards the plaintiff attorney fees for the claims it prevails upon, and likewise awards fees to the defendant for the claims it has prevailed upon. The fee awards are then offset.

Again, it is Helstroms' position that Division One's offhand reference to RCW 4.84.330 was erroneous. However such ambiguity in the *Marassi* opinion has no bearing on the pretrial nonsuit issues in the instant appeal.<sup>58</sup>

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<sup>58</sup> It should be noted that Division 1 in *Marassi* reaffirmed its holding in *Walji*, rejecting the notion that *Anderson* should be limited to claims brought under the long-arm statute. *Id.*, 71 Wn. App. 918-919.

Again without any analysis or detailed discussion, Acorn cites a number of this Court’s prior decisions – including unpublished decisions – to make a vague, generalized argument that Division Two has consistently held, “[a]s a rule, the prevailing party is the one that receives an affirmative judgment in its favor.”<sup>59</sup> None of the cited cases involved nonsuits, and each is either inapplicable, or is authority for Helstrom’s position.

*Dave Johnson Ins., Inc. v. Wright*, 167 Wn. App. 758, 275 P.3d 339 (2012)<sup>60</sup> merely held that RCW 4.84.330 had no applicability in a contract case where plaintiff prevailed on grounds other than breach of the contract. *Id.* at 783-84. It has no bearing on the issues in the instant appeal.

In *Mountjoy v. Bayfield Res. Co.*, 2010 Wash. App. LEXIS 1682 (unpublished) this Court cited Division One’s opinions in *Hawk* and *Walji* with approval, holding “**RCW 4.84.330 applies only to contracts with unilateral fee provisions.**” *Id.* at ¶29.<sup>61</sup> Although *Mountjoy* has no precedential value because it is unpublished, to the extent it is persuasive it is squarely authority for Helstroms’ position.

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<sup>59</sup> Brief of Appellant at 12, citing *Dave Johnson Ins., Inc. v. Wright*, 167 Wn. App. 758, 782-83, 275 P.3d 339 (2012), *rev. den.* 175 Wn.2d 1027, 958 P.3d 313 (1998).

<sup>60</sup> *Review denied*, 134 Wn.2d 1027, 958 P.3d 313 (9998).

<sup>61</sup> Emphasis added.

*Olivas v. Mekalson*, 2019 Wash App. LEXIS 2549 (unpublished) was a post-trial case involving the question of which was the “prevailing party” under RCW 4.84.030, not RCW 4.84.330. *Id.* at ¶41. It is thus inapposite to the instant case.

*Phillips Bldg. Co. v. An*, 81 Wn. App. 696, 915 P.2d 1146 (1996) involved an unsuccessful petition by the plaintiffs requesting that the superior court modify an arbitration award which, on its face, did not specify which was the prevailing party. This Court upheld the superior court’s denial of modification of the award. *Id.*, 81 Wn. App. at 703-04. *Phillips* has no bearing on the issues in the instant appeal.

In *Bellerive v. EOR, Inc.*, 2018 Wash. App. LEXIS 775 (unpublished), this Court upheld the superior court’s determination of the prevailing party and post-trial award of attorney’s fees based on the fee-shifting provision in a residential real estate purchase and sale agreement. RCW 4.84.330 played no part in this Court’s decision. In fact, the only mention of RCW 4.84.330 was what Helstroms believe was an erroneous reference to that statute in the trial court’s conclusion of law 10, which was not an issue on appeal and not discussed in this Court’s unpublished opinion. Thus, besides having no precedential value, *Bellerive* has no bearing on the issues in the instant appeal.

**C. The trial court correctly interpreted the attorney’s fees clause in the contract, and was not required to engage in factfinding as to the parties’ circumstances as a precondition to finding that the Helstroms were the prevailing party.**

Acorn claims the trial court erred by not engaging in contract interpretation and/or factfinding into the circumstances of the parties before awarding attorney’s fees under the contract. Such was not required. Paragraph 19 of the REPSA is an unambiguous fee-shifting clause, that speaks for itself, and the trial court was not required to engage in factfinding before applying it. “A prevailing party may recover attorney fees pursuant to a contractual fee-shifting provision if the action involves claims on the contract.” *Boyd v. Sunflower Properties, LLC*, 197 Wn. App. 137, 150, 389 P.3d 626 (2016) (internal quotation marks omitted). “[A]n action is on a contract for purposes of a contractual attorney fees provision if the action arose out of the contract and if the contract is central to the dispute.” *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn. App. 834, 855, 942 P.2d 1072 (1997), *review denied*, 134 Wn.2d 1027 (1998) (emphasis added) (quoting *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 130, 857 P.2d 1053 (1993)). As pointed out by the *Marassi* court the award of fees to successful defendants is consistent with the underlying philosophy of fee shifting: to discourage weak cases, encourage settlements, and restore a wronged party to its original position.

*Marassi*, 71 Wn. App. at 918, citing Talmadge, *The Award of Attorneys' Fees in Civil Litigation in Washington*, 16 Gonz. L. Rev. 57, 69-70 (1980-1981). This is what Acorn and the Helstroms bargained for. The Helstroms did not breach the contract or engage in any improper behavior to invite Acorn's lawsuit. There are financial consequences to Acorn's delay in spotting the weakness in its case, and to its decision to wait over a year to finally pull the plug. It would be unfair and inequitable to make the Helstroms bear the financial cost of Acorn's poor litigation choices. Application of the prevailing party attorney's fees clause in their favor achieves a just and fair result, which is what the parties intended by the language in their contract.

**D. The trial court correctly exercised its discretion in not requiring the Helstroms to artificially segregate fees and costs related to the breach of contract claims where Acorn's three causes of action against Helstrom were dependent upon the same set of facts and were thus intertwined to the point of being inseparable.**

If attorney's fees are recoverable on some but not all of a party's claims, the attorney fee award "must properly reflect a segregation of the time spent on issues for which attorney fees are authorized from time spent on other issues." *Hume v. American Disposal Co.*, 124 Wn.2d 656, 672, 880 P.2d 988 (1994). The exception to this rule is that segregation of attorney fees is not required if "the trial court finds the claims to be so related that no reasonable segregation of successful and unsuccessful

claims can be made.” *Id.* at 673. In *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 693, 132 P.3d 115 (2006), the court adopted this language from *Hume*, holding that given the trial court's clear explanation that work related to the Consumer Protection Act could not be segregated from work related to the Washington Product Liability Act, the trial court's award of attorney fees under the Consumer Protection Act was not an abuse of discretion. *Id.* Similarly, a court is not required to artificially segregate time when the claims all relate to the same fact pattern but allege different bases of recovery. *Ethridge v. Hwang*, 105 Wn. App. 447, 461, 20 P.3d 958 (2001). There, the plaintiff prevailed on claims under the Manufactured/Mobile Home Landlord-Tenant Act, the Consumer Protection Act, and for tortious interference—all involving the same core of facts. There was a basis to award attorney fees for the first two claims but not for the tortious interference, which did, however, involve the same attorney preparation as the other claims. The court held that segregating the fee was not necessary when nearly every fact in the case related in some way to all three claims. *Id.*

Acorn's reliance on *Boguch v. Landover Corp.*, 153 Wn. App. 595, 224 P.3d 795 (2009) and *Loeffelholz v. C.L.E.A.N.*, 119 Wn. App. 665, 82 P.3d 1199 (2004) <sup>62</sup> is misplaced.

In *Boguch*, the plaintiff entered into an exclusive sale and listing agreement for the sale of his property. *Id.* at 601. The plaintiff then sued the listing agents for negligence, breach of professional duties under chapter 18.86 RCW, and breach of contract. *Id.* at 603. The trial court dismissed the claims on summary judgment and awarded the defendants attorney fees. *Id.* at 606-07. Partially reversing the award of attorney fees, Division One reasoned,

Although [the defendant's] duty to Boguch arose because the parties entered into a contractual relationship, the listing agreement itself does not specify the duty of care that the Realtor must provide. To the contrary, the common law and chapter 18.86 RCW imposed a duty to exercise reasonable care on the Realtors. Although the statute may be read as being incorporated into the listing agreement by reference, it does not follow that any act taken in fulfillment or derogation of that duty constitutes specific contractual performance or breach thereof.

*Id.* at 600, 617. Because the seller's negligence claims were non-contractual, the court held that the trial court erred to the extent it awarded fees to the realtor and the firm for prevailing on the negligence claims.

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<sup>62</sup> *Review denied*, 152 Wn.2d 1023, 101 P.3d 107 (2004).

In *Loeffelholz*, the plaintiff sued the individual defendants for two separate acts of defamation and for malicious prosecution. 119 Wn. App. at 677. The trial court awarded attorney fees to the defendants because they were immune from one of the defamation claims, but it also ordered fee segregation and ultimately awarded only \$50,000 of the original \$98,105.50 requested by the defendants' attorney. *Id.* at 689. The defendants argued that the trial court abused its discretion by requiring segregation, but this Court held that segregation was "clearly . . . possible". *Id.* at 692. "At the core of each claim or type of claim was a different time and different facts, even though the facts overlapped in the sense that facts relevant on one were sometimes relevant to others as well. The record does not show that the claims were so interrelated as to excuse segregation." *Id.* at 692.

The instant case is distinguishable from *Boguch* and *Loeffelholz* because the relationship between Acorn and the Helstroms and all rights, duties and remedies between them arose out of their contract. Acorn's alternative equitable theories of estoppel and unjust enrichment could have no existence independent of the REPSA. All facts that had to be developed were integral to all causes of action, and were thus intertwined to the point of being inseparable. The trial court therefore correctly held

that the Helstroms were entitled to recover the entire amount of their fees and costs to defend all claims.

**E. This Court should award the Helstroms their costs and attorneys' fees on appeal pursuant to RAP 18.1(a)**

This Court should award the Helstroms their costs and attorneys' fees pursuant to RAP 18.1(a), which provides in relevant part:

If applicable law grants to a party the right to recover reasonable attorneys' fees or expenses on review before the Court of Appeals or Supreme Court, the Party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the Trial court.

**V. CONCLUSION**

The trial court correctly held as a matter of law that the Helstroms were the prevailing party under Paragraph 21 of the REPSA, entitling them to recover the entire amount of their fees and costs to defend all claims. RCW 4.84.330 does not apply to the REPSA, because it contains a prevailing party attorney's fees clause that is bilateral. Because every one of Acorn's causes of action arose out the same facts and evidence, the Helstroms were not required to attempt segregation of legal expenses strictly related to the breach of contract cause of action. In conclusion, the trial court applied the proper legal standards in awarding the Helstroms their attorney's fees as the prevailing party below, and properly exercised its discretion in not requiring segregation of fees expended solely on the

breach of contract claims. This Court should affirm the judgment of the Superior Court in all respects, and should award the Helstroms their legal fees and costs on appeal.

DATED this 30<sup>th</sup> day of June, 2020.

**J. MICHAEL MORGAN, PLLC**

A handwritten signature in cursive script, appearing to read "J. Morgan", written in black ink.

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J. Michael Morgan, WSBA No. 18404  
Attorney for Respondents Robert  
and Yvonne Helstrom

**CERTIFICATE OF SERVICE**

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

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below.

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DATED this 30<sup>th</sup> day of June, 2020.

  
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J. Michael Morgan

**J. MICHAEL MORGAN, PLLC**

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