

FILED

COA No. 30014-5-III

APR 11 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

---

JAMES R. DAVEY and DANA DAVEY, husband and wife,

Appellants/Cross-Respondents,

v.

WINDERMERE SERVICES CO., et al.

Respondents/Cross-Appellants

---

REPLY BRIEF OF RESPONDENTS/CROSS-APPELLANTS

---

WILLIAM D. SYMMES, WSBA # 683  
MATTHEW W. DALEY, WSBA # 36711  
MICHAEL J. KAPAUN, WSBA # 36864  
WITHERSPOON · KELLEY, P.S.  
422 West Riverside Avenue, Suite 1100  
Spokane, Washington 99201-0300  
Phone: (509) 624-5265

Counsel for Respondents/Cross-Appellants.

TABLE OF CONTENTS

	<u>Page</u>
I. SUMMARY OF ARGUMENT & RELIEF REQUESTED .....	1
A. The Sypolt Court Erred By Denying Windermere's Request for Attorneys' Fees and Costs Under the Purchase Agreement .....	3
B. The Sypolt Court Erred by Denying Windermere's Request for Attorneys' Fees and Costs Under the Listing Agreement .....	4
II. ARGUMENT .....	5
A. Standard of Review.....	5
B. RCW 4.84.330 Required the Sypolt Court to Award Windermere Its Fees and Costs.....	6
C. Windermere Was, and Is, Entitled to Fees and Costs Under the Purchase Agreement .....	8
1. The Fact that the Daveys Plead a Tort Claim Does Not Alleviate Their Obligation to Pay Windermere's Fees and Costs as the Prevailing Party Under the Purchase Agreement .....	9
2. The Daveys' Reliance Upon <i>Boguch v. Landover</i> <i>Corp.</i> Is Misplaced.....	10
D. Windermere is Entitled to Fees and Costs Under the Listing Agreement .....	12
E. Windermere Is Also Entitled to Recover its Fees and Costs on Appeal .....	13
III. CONCLUSION.....	14
CERTIFICATE OF SERVICE .....	15

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Boguch v. Landover Corp.</i> , 153 Wn. App. 595 (2009).....	10, 11
<i>Brown v. Johnson</i> , 109 Wn. App. 56 (2001) .....	6, 7, 9
<i>Burns v. McClinton</i> , 135 Wn. App. 285, 309 (2006).....	11
<i>Edmonds v. John L. Scott Real Estate, Inc.</i> 87 Wn. App. 834 (1997) .....	7, 9, 12
<i>Hudson v. Condon</i> , 101 Wn. App. 866 (2000) .....	11
<i>Pratt v. Davey</i> , No. 26620-6-III, slip op. (Div. III 2008) .....	1
<i>Pratt v. Davey</i> , 166 Wn.2d 1023 (2009).....	9
<i>Quality Food Centers v. Mary Jewell T, LLC</i> , 134 Wn. App. 814 (2006) .....	14
<i>Sanders v. State</i> , 169 Wn.2d 827 (2010) .....	5
<i>Seattle-First Nat'l Bank v. Wash. Ins. Guar. Ass'n.</i> , 116 Wn.2d 398 (1991) .....	6
<i>Singleton v. Frost</i> , 108 Wn.2d 723 (1987).....	6
 <u>STATUTES AND COURT RULES</u>	
RCW 4.84.330 .....	6
RAP 18.9.....	14

## I. SUMMARY OF ARGUMENT & RELIEF REQUESTED

For the better part of the past five years, James and Dana Davey have refused to accept an unavoidable fact – a fact that was decided at trial and confirmed on appeal<sup>1</sup> – namely, that a valid and binding Real Estate Purchase and Sale Agreement with Earnest Money Provision (“Purchase Agreement”) was formed when Robert and Sharon Pratt timely accepted the Daveys' counteroffer for the sale of their Spokane house. The Davey's appeal should be rejected based upon that same unavoidable fact. However, Windermere<sup>2</sup> should prevail on its cross-appeal. The Trial Court erred in denying Windermere's request for attorneys' fees and costs, where both the Purchase Agreement and the listing agreement mandated that the prevailing party shall recover its fees and costs.

The Daveys' suit against Windermere arises out of two written contracts – the Purchase Agreement and the Exclusive Right to Sell Listing Agreement (“Listing Agreement”), which the Daveys executed with Windermere in July 2007.

While the Daveys continue to litigate and re-litigate issues arising under these contracts, Windermere continues to incur substantial attorneys'

---

<sup>1</sup> *Pratt v. Davey*, No. 26620-6-III, slip op. (Div. III 2008).

<sup>2</sup> Respondents/Cross-Appellants Windermere Service Co., Windermere Manito, LLC, Joseph Nichols, Sr., Yvonne DeBill, and Kathi Pate are collectively referred to herein as "Windermere."

fees and costs in defending against, and defeating, the Daveys' claims.

Both the Purchase Agreement and Listing Agreement contain broad attorneys' fees provisions. (CP 63, 361). Under either agreement, Windermere is the prevailing party and, therefore, entitled to recover its attorneys' fees and costs.

Although the Sypolt Court<sup>3</sup> properly entered summary judgment in Windermere's favor with respect to each of the Daveys' claims, the Court erred in denying Windermere's prayer for attorneys' fees and costs. RCW 4.84.330 requires Washington Courts to award fees and costs to a prevailing party, where that party enjoys a contractual right to fees and costs. As the prevailing party, Windermere was absolutely entitled to recover its attorneys' fees and costs pursuant to the Purchase Agreement and pursuant to the Listing Agreement, both of which mandate that the prevailing party "shall" be entitled to recover fees and costs. Each basis, standing alone, justified and required Windermere to be awarded its fees, and taken together the two agreements mandate reversal on the limited issue of attorneys' fees and costs. Windermere, therefore, respectfully asks the Court to remand this matter with instructions to compute and award Windermere's fees and costs – including fees on appeal.

---

<sup>3</sup> In order to avoid confusion, the Trial Court in this matter will be referred to as "the Sypolt Court" and the Trial Court in the prior litigation (*Pratt v. Davey*) will be referred to as "the Austin Court."

**A. THE SYPOLT COURT ERRED BY DENYING WINDERMERE'S REQUEST FOR ATTORNEYS' FEES AND COSTS UNDER THE PURCHASE AGREEMENT.**

The Daveys' causes of action against Windermere were all fundamentally based upon, and arose out of, the Purchase Agreement. The core factual issue underlying each of the Daveys' claims was whether the Pratts had timely and properly accepted the Daveys' counteroffer in accordance with the terms of the Purchase Agreement. The Daveys contend that the Pratts did not do so and that Windermere lied and falsified information in the Purchase Agreement to make it appear as though the Pratts had timely and properly accepted.

Windermere moved for summary judgment alleging collateral estoppel – that is, Windermere contended that the Austin Court's prior determination that the Pratts had timely and properly accepted the Daveys' counteroffer made it impossible for the Daveys' claims against Windermere to proceed. In granting that motion, the Sypolt Court recognized that resolution of each of the Daveys' claims against Windermere required the Court to determine whether the Pratts had timely accepted the Daveys' counteroffer.

The Sypolt Court, however, failed to carry that recognition over to Windermere's request for attorneys' fees. In doing so, the Sypolt Court erred. None of the Daveys' claims against Windermere could be resolved

without interpreting the Purchase Agreement. Specifically, the Daveys' claims would have required the Court to interpret the Purchase Agreement's provisions with respect to acceptance – that is, whether the Pratts' acceptance complied with the terms of the Purchase Agreement. Thus, the Purchase Agreement was central to this dispute. The Daveys' claims rose (and fell) on the terms and conditions of the contract.

Therefore, although the Daveys did not sue Windermere for breach of contract, the Daveys' claims against Windermere were based upon and arose from the Purchase Agreement. The Purchase Agreement's fees provision is very broad, covers all claims based upon or arising out of the agreement, and mandates that the prevailing party “shall” recover their fees and costs. As the prevailing party, Windermere was entitled to attorneys' fees and costs, and Windermere is entitled to fees and costs on appeal.

**B. THE SYPOLT COURT ERRED BY DENYING WINDERMERE'S REQUEST FOR ATTORNEYS' FEES AND COSTS UNDER THE LISTING AGREEMENT.**

Windermere is also entitled to an award of fees and costs under the Listing Agreement. The Daveys have not even attempted to respond to Windermere's arguments under the Listing Agreement. Regardless, no argument or response from the Daveys could change the Listing Agreement's clear and unambiguous language. Nor could any argument

change the fact that Windermere is entitled to fees and costs under the Listing Agreement.

The Listing Agreement specifically allocated certain risks, as between the Daveys and Windermere, and one of those risks was the costs of litigation. Where, as here, the prevailing party has a contractual right to fees, the Court has no discretion but to award fees – the Court must honor the parties’ bargained for allocation of risk.

The Sypolt Court erred in denying Windermere's request for attorneys’ fees and costs, mandated by the Listing Agreement. The Court of Appeals should, therefore, remand this matter to the Sypolt Court with instructions to calculate and award Windermere's fees and costs.

## II. ARGUMENT

### A. STANDARD OF REVIEW.

Where a prevailing party’s right to attorneys’ fees and costs arises from a contract and is conferred by statute, the Court of Appeals reviews the Trial Court’s decision on whether to award attorneys’ fees *de novo*. *Sanders v. State*, 169 Wn. 2d 827, 866 (2010). Whether the amount of fees awarded was reasonable is reviewed under an abuse of discretion standard. *Id.*

The Sypolt Court denied Windermere's request for fees and costs – none were awarded. As a matter of law, the Sypolt Court's decision is reviewed *de novo*.

**B. RCW 4.84.330 REQUIRED THE SYPOLT COURT TO AWARD WINDERMERE ITS FEES AND COSTS.**

RCW 4.84.330 requires Washington Courts to award reasonable attorneys' fees and costs to the prevailing party “on a contract,” where the contract provides for the prevailing party to recover such fees and costs. *Singleton v. Frost*, 108 Wn.2d 723, 727-8 (1987). An action is “on a contract” where: (i) the action arose out of the contract; and (ii) the contract is central to the dispute. *Seattle-First Nat’l Bank v. Wash. Ins. Guar. Ass’n*, 116 Wn. 2d 398, 413 (1991).

A plaintiff cannot avoid the obligation to pay fees and costs by bringing an action in tort rather than suing on the contract directly. *See Brown v. Johnson*, 109 Wn. App. 56, 58 (2001). Even where a party elects to bring an action in tort, the prevailing party is entitled to recover fees and costs if the action is based on a contract (and the contract has a fees provision). *Id.*

The claims in *Brown v. Johnson* are functionally identical to the claims in this matter, and the *Brown* Court held that the purchase and sale agreement's attorneys' fees provision applied even though the Plaintiff

fashioned the claim as one for misrepresentation. 109 Wn. App. 56, 59-60 (2001). In *Brown*, Plaintiff alleged misrepresentation arising out of a real estate purchase and sale agreement, pursuant to which Brown was to purchase Johnson's house. *See generally, Id.* Though Brown's claim was for misrepresentation, the Court of Appeals held that attorneys' fees and costs were owing under the contract because the "the purchase and sale agreement was central to [the] claims." *Id* at 59.60.

Similarly, in *Edmonds v. John L. Scott Real Estate, Inc.*, the Court of Appeals upheld an award of attorney fees to a prevailing plaintiff who sued her real estate broker for breach of fiduciary duty and other tort claims when the broker failed to return the Plaintiff's earnest money following a failed real estate transaction. 87 Wn. App. 834, 855-856 (1997). In that case, the broker, instead, disbursed the money to himself and to the seller. *Id.* Although the plaintiff's causes of action sounded in tort, the Court of Appeals held that the plaintiff's actions for negligence and breach of fiduciary duty were "on a contract," and the Court awarded fees to the prevailing plaintiff. *Id.*

As was the case in both *Edmonds* and *Brown*, the Daveys' claims were "on a contract" and arose out of contract. Regardless of how the Daveys describe their claims against Windermere, none can be resolved

without the Purchase Agreement and/or Listing Agreement. Both agreements were central to the dispute.

The Sypolt Court, thus, erred in denying Windermere's request for fees and costs. Windermere was, and remains, entitled to both attorneys' fees and costs, and Windermere respectfully asks the Court of Appeals to award those costs and fees.

**C. WINDERMERE WAS, AND IS, ENTITLED TO FEES AND COSTS UNDER THE PURCHASE AGREEMENT.**

It is undisputed that the Purchase Agreement was executed by the Daveys and prepared by Windermere agents Kathi Pate and Yvonne DeBill. (CP 5, 13-23, 77-78, 81). That agreement includes a broad attorneys' fee provision that provides:

Attorney's Fees. If Buyer, Seller, or any real estate licensee or broker involved in this transaction is involved in **any dispute relating to any aspect of this transaction** or this Agreement, each prevailing party **shall** recover their reasonable attorneys' fees. This provision shall survive Closing."

(CP 63) (emphasis added). That contract language does not limit Windermere's right to recover attorneys' fees and costs. There is nothing in the Purchase Agreement that limits recovery to cases alleging breach of

contract. Instead, the Purchase Agreement broadly mandates fees and costs in “any dispute relating to any aspect of this transaction.” (*Id.*)<sup>4</sup>

**1. *The Fact That the Daveys Plead a Tort Claim Does Not Alleviate Their Obligation to Pay Windermere's Fees and Costs as the Prevailing Party Under the Purchase Agreement.***

In response to Windermere’s cross-appeal for attorneys’ fees, the Daveys argue that their claims are not based on a contract because “this action involves Windermere’s wrongful acts as a fiduciary and for fraud against the Daveys.” (Appellant’s Reply Brief, pg. 2). However, as discussed above (*Edmonds* and *Brown*), Washington Courts have already recognized that claims for breach of fiduciary duty and misrepresentation may arise “on a contract.” *Edmonds*, 87 Wn. App. at 855-856; *Brown*, 109 Wn. App. at 59-60. Moreover, the Purchase Agreement's provision is far broader – it mandates recovery whenever there is a dispute "relating to any aspect of" the transaction pursuant to which the Daveys were to sell and the Pratts were to purchase the house. (CP 63). Each of the “wrongful acts” alleged by the Daveys directly arose from the Purchase

---

<sup>4</sup> In *Pratt v. Davey*, 166 Wn.2d 1023 (2009), the Pratts were awarded attorneys’ fees and costs under this provision in their action for specific performance. As detailed in Windermere’s Response Brief on the issue of collateral estoppel, the issues raised by the Daveys in this lawsuit are identical to the issues adjudicated in the *Pratt v. Davey* case and involve the same documents, acts, and alleged omissions with regard to the sale of the Daveys’ house.

Agreement, including Windermere's participation in the drafting of that agreement. (CP 3-12). Each of those allegedly wrongful acts also directly related to the Davey/Pratt purchase and sale transaction. *Id.*

The Sypolt Court correctly recognized that the timeliness of the Pratts' acceptance was the "material," "core," and "central" issue" from which everything emanate[d] and revolve[d] around for purposes of determination of this case." (RP 48-49). However, the Sypolt Court erred in failing to acknowledge that Windermere was entitled to fees and costs precisely because "everything emanate[d] and revolve[d] around" the Purchase Agreement. (*See Id.*). Windermere was, and is, entitled to fees and costs under the Purchase Agreement. Windermere, therefore, respectfully asks the Court of Appeals to right that error and to remand this matter for a calculation and award of attorneys' fees and costs.

**2. *The Daveys' Reliance Upon Boguch v. Landover Corp. Is Misplaced.***

The Daveys' responsive brief relies upon a single case in an effort to avoid the obligation to pay Windermere's fees and costs; that case is *Boguch v. Landover Corp.*, 153 Wn. App. 595 (2009). Despite the Daveys' reliance, the *Boguch* decision has no bearing on this matter.

The attorney fees provision in *Boguch* was far more limited than the Purchase Agreement's. The *Boguch* provision allowed for fees only

"in an action brought to enforce the terms of the agreement." (*Id.* at 615) (emphasis added). The Purchase Agreement's provision, on the other hand, applies broadly to "any dispute relating to any aspect of this transaction." (CP 63) (emphasis added).

Washington Courts have recognized the importance of analyzing the specific provision at issue in deciding whether to award fees. In *Burns v. McClinton*, the Court of Appeals denied the prevailing party's request for fees where the claim was for breach of fiduciary duty and the contract allowed for fees to be recovered only in an action to "enforce th[e] Agreement." 135 Wn. App. 285, 309 (2006). In so holding, the *Burns* Court distinguished *Hudson v. Condon*, 101 Wn. App. 866 (2000), on the grounds that *Hudson* involved a far broader contractual provision – namely, one that allowed for fees in any action "related to" the contractual partnership. *Burns*, 135 Wn. App. at 309.

Thus, the *Boguch* holding that fees are awardable only where a party "seek[s] to recover under a specific contractual provision" has no bearing on this matter. *Boguch*, 153 Wn. App. at 615. The Purchase Agreement allows for fees in "any dispute relating to any aspect of this transaction." (CP 63). The provisions are simply too different for any meaningful parallel to be drawn.

**D. WINDERMERE IS ENTITLED TO FEES AND COSTS UNDER THE LISTING AGREEMENT.**

The Listing Agreement between the Daveys and Windermere, their broker, contained an attorneys' fee provision, which states:

If it becomes necessary for either of the parties to obtain the services of an attorney to enforce the provisions hereof, the defaulting party shall pay the substantially prevailing party all damages and expenses resulting from the default, including all reasonable attorney's fees and all court costs and other expenses incurred by the substantially prevailing party.

(CP 361). Windermere is entitled to fees under the Listing Agreement, and the Daveys do not even offer any argument to the contrary.

In response to this cross-appeal, the Daveys provide no response to Windermere's entitlement to fees under the Listing Agreement. Indeed, the Daveys do not even mention the Listing Agreement in their response brief.

The Daveys have no response because their claims against Windermere undoubtedly arose out of the Listing Agreement. By its own terms, the Listing Agreement expressly "creates an agency relationship between [the Daveys] and [Windermere] and [Yvonne DeBill]." (CP 361). As was the case in *Edmonds*, the Daveys' Complaint alleges that Windermere and its agents breached certain fiduciary duties when preparing the Purchase Agreement. *Compare, Edmonds*, 87 Wn. App.

834, 855-856 (1997), *with* (CP 3-12). The Listing Agreement is the sole source of whatever duties Windermere owed the Daveys. Thus, the Davey's claim that Windermere breached those duties undoubtedly arose from, and related to the enforcement of, the Listing Agreement.

The Listing Agreement obligated the Daveys to execute all documents necessary to close on the sale of the House. (CP 361). The Daveys now admit that they had a valid contract to sell the House, but refused to close on the sale. (Appellant's Brief, pp. 7-8; CP 80). The Daveys' failure to close on the sale was, therefore, a breach of the Listing Agreement. (CP 80-81, 360-361). That breach gave rise to this lawsuit, and that breach entitles Windermere to its fees and costs.

The Daveys and Windermere specifically chose to allocate the risk of litigation expenses in the Listing Agreement. The Court should honor that allocation of risk. Windermere, therefore, respectfully asks the Court to reverse the Sypolt Court's denial of Windermere's fee request.

Windermere also asks the Court to remand this matter for a calculation of and award of attorneys' fees and costs.

**E. WINDERMERE IS ALSO ENTITLED TO RECOVER ITS FEES AND COSTS ON APPEAL.**

When a contract or agreement provides for payment of fees, the prevailing party is also entitled to its reasonable fees and costs incurred on

appeal. RAP 18.1; *Quality Food Centers v. Mary Jewell T, LLC*, 134 Wn. App. 814 (2006). Windermere is entitled to fees on appeal for the same reasons that it was entitled to an award of fees from the Sypolt Court.<sup>5</sup>

### III. CONCLUSION

The Sypolt Court erred in denying Windermere's request for attorneys' fees and costs under both the Purchase Agreement and the Listing Agreement. The Daveys' claims against Windermere arose under those contracts. And each of those contracts was central to this dispute. The Court of Appeals should, therefore, reverse the Sypolt Court's denial of Windermere's fees and costs and remand this matter for a computation of the amount of fees that Windermere is entitled to receive – including fees on appeal.

RESPECTFULLY SUBMITTED, this 11th day of April, 2012.

**WITHERSPOON· KELLEY, P.S.**



WILLIAM D. SYMMES, WSBA # 683

MATTHEW W. DALEY, WSBA # 36711

MICHAEL J. KAPAUN, WSBA # 36864

Counsel for Respondents/Cross-Appellants

---

<sup>5</sup> With respect to the Daveys' appeal of the Sypolt Court's order dismissing the claims against Windermere on the basis of collateral estoppel and *Celotex*, the Court of Appeals may also award Windermere its fees on appeal pursuant to RAP 18.9.

**CERTIFICATE OF SERVICE**

On the 11th day of April, 2012, I caused to be served a true and correct copy of the within document described as REPLY BRIEF OF RESPONDENTS/CROSS-APPELLANTS on all interested parties to this action as follows:

Kenneth H. Kato 1020 N. Washington St. Spokane, WA 99201  Phone: (509) 220-2237  Counsel for Appellants/Cross- Respondents	Via United States Mail [ ] Via Federal Express [ ] Via Hand Delivery [x] Via Facsimile [ ] Via Electronic Mail [ ]
---	--

  
\_\_\_\_\_  
JANET L. FERRELL  
Legal Assistant