

No. 64402-5

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JOSEPH D. WOODMANSEE and
KIMBERLY A. WOODMANSEE, husband and wife,

Respondents/Cross Appellants,

vs.

ROBERT S. PETERSON,

Appellant/Cross Respondent,

APPELLANT/CROSS RESPONDENT'S REPLY BRIEF

BADGLEY~MULLINS LAW GROUP PLLC
Duncan C. Turner, WSBA #20597
701 Fifth Avenue, Suite 4750
Seattle, WA 98104
Telephone: (206) 621-6566
Fax: (206) 621-9686
Attorney for Appellant

FILED
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
2010 JUN 25 PM 4:43

ORIGINAL

TABLE OF CONTENTS

I. ARGUMENT IN OPPOSITION TO WOODMANSEES’ CROSS APPEAL ISSUES..... 1

 A. The Trial Court Properly Denied an Attorneys’ Fee Award as to Parcel 3. 1

 1. Standard on Review. 1

 2. There Was No Enforceable Contract Between Peterson and Woodmansee Upon Which to Base a Fee Award for Parcel 3..... 1

 3. Petersons’ Alleged Torts Were Not Central to the Purported Contract..... 3

 4. The “Broad” versus “Narrow” Argument Is Irrelevant and the Cases Cited by Woodmansee Are Not Applicable to the Issues in this Case. 7

 B. The Trial Court Should Have Denied All Prejudgment Interest. 13

 1. Standard on Review. 13

 2. Where the Court Exercises Discretion in Determining the Reasonableness of the Defendant’s Expenditures that are the Basis of Damages, the Damages Are Not Liquidated. 13

 3. This Court May Affirm the Denial of Prejudgment Interest on Any Valid Basis. 18

4. The Trial Court Necessarily Exercised Discretion in Determining the Reasonableness of Woodmansee’s Mitigation Efforts.....	19
5. Whether Peterson Retained Woodmansee’s Money is Irrelevant to the Issue of Prejudgment Interest.	21
II. ARGUMENT IN REBUTTAL ON PETERSON’S APPEAL.	21
A. Overview.....	21
B. As a Party to an Arms’ Length Transaction, Peterson Did Not Become the Opposing Party’s Agent or Fiduciary.	22
C. Peterson’s Actions Were Not the Efficient Cause of Damages Relating to His Own Share of Parcel 3.	25
III. CONCLUSION.....	27

TABLE OF AUTHORITIES

Cases

<i>Aker Verdal A/S v. Neil F. Lampson, Inc.</i> , 65 Wn. App. 177, 828 P.2d 610 (1992).....	17
<i>Alejandre v. Bull</i> , 159 Wn.2d 674, 153 P.3d 864 (2007).....	10
<i>Anderson’s Lakeside Leisure Co. v. Anderson</i> , 314 Wis.2d 560, 757 N.W.2d 803 (2008)	10, 11
<i>Bay Cities Paving & Grading, Inc. v. Lawyers’ Mutual Ins. Co.</i> , 5 Cal.4 th 854, 844 P.2d 1263, 21 Cal.Reptr.2d 691 (1993)	8
<i>Boguch v. The Landover Corp.</i> , 153 Wn. App. 595, 615-16, 224 P.3d 795, 805-06 (2009).....	3, 4, 7
<i>Bostain v. Food Exp., Inc.</i> , 159 Wn.2d 700, 723, 153 P.3d 846 (2007) ...	15
<i>Burns v. McClinton</i> , 135 Wn. App. 285, 310-11, 143 P.3d 630 (2006), <i>review denied</i> , 161 Wn.2d 1005, 166 P.3d 718 (2007).....	passim
<i>Campagna v. Smallwood</i> , 428 So.2d 1343, 1347 (La. App.1983)	16
<i>Cook v. Seidenverg</i> , 36 Wn.2d 256, 264, 217 P.2d 799, 803 (1950).....	26
<i>Coulter v. Asten Group, Inc.</i> , 155 Wn. App.1, 230 P.3d 169 (2010).....	13
<i>Culinary Workers & Bartenders Union, Local No. 596 v. Gateway Café, Inc.</i> , 91 Wn.2d 353, 372, 588 P.2d 1334 (1979).....	1
<i>Dautel v. Heritage Home Ctr., Inc.</i> , 89 Wn. App. 148, 154, 948 P.2d 397 (1997).....	16
<i>Egerer v. CSR W., L.L.C.</i> , 116 Wn. App. 645, 653-56, 67 P.3d 1128 (2003).....	15
<i>Failes v. Lichten</i> , 109 Wn. App. 550, 37 P.2d 310 (2001)	7, 9, 10

<i>Farm Crop Energy, Inc. v. Old Nat. Bank of Washington</i> , 38 Wn. App. 50, 685 P.2d 1097 (1984) rev'd on other grounds 109 Wn.2d 923, 750 P.2d 231.....	3
<i>Fluke Capital & Mgmt. Servs. v. Richmond</i> , 106 Wn.2d 614, 625, 724 P.2d 356 (1986).....	1
<i>G.W. Constr. Corp. v. Profl Serv. Indus., Inc.</i> , 70 Wn. App. 360, 366, 853 P.2d 484 (1993) (citing <i>Yeager v. Dunnavan</i> , 26 Wn.2d 559, 562, 174 P.2d 755 (1946))	4
<i>Gall v. McDonald Indus.</i> , 84 Wn. App. 194, 207, 926 P.2d 934 (1996) ..	25
<i>Guarino v. Interactive Objects, Inc.</i> , 122 Wn. App. 95, 129, 86 P.3d 1175 (2004).....	23
<i>Hadley v. Maxwell</i> , 120 Wn. App. 137, 141, 84 P.3d 286 (2004).....	13
<i>Hansen v. Rothaus</i> , 107 Wn.2d 468, 473, 730 P.2d 662 (1986)..	15, 16, 17, 18
<i>Hellbaum v. Burwell & Morford</i> , 1 Wn. App. 694, 703-05, 463 P.2d 225 (1969).....	17
<i>Hemenway v. Miller</i> , 116 Wn.2d 725, 743, 807 P.2d 863 (1991)	4, 5, 6, 12
<i>Hudson v. Condon</i> , 101 Wn. App. 866, 877, 6 P.3d 615 (2000)	2, 7, 9
<i>King v. City of Seattle</i> , 84 Wn.2d 239, 250, 525 P.2d 228 (1974).....	25
<i>Lakes v. von der Mehden</i> , 117 Wn. App. 212, 70 P.3d 154 (2003)...	13, 16, 17
<i>Liebergessell v. Evans</i> , 93 Wn.2d 881, 889, 613 P.2d 1170 (1980)	23
<i>Little v. King</i> , 147 Wn. App. 883, 890, 198 P.3d 525 (2008).....	3
<i>Mall Tool Co. v. Far W. Equip. Co.</i> , 45 Wn.2d 158, 176, 273 P.2d 652 (1954).....	14

<i>Maltman v. Sauer</i> , 84 Wn.2d 975, 982, 530 P.2d 254 (1975).	26
<i>Maryhill Museum of Fine Arts v. Emil's Concrete Const. Co.</i> , 50 Wn. App. 895, 901, 751 P.2d 866 (1988).....	15, 17
<i>Mehrer v. Easterling</i> , 71 Wn.2d 104, 109, 426 P.2d 843 (1967)	26
<i>Miller v. U.S. Bank of Washington</i> , 72 Wn. App. 416, 427, 865 P.2d 536 (1994).....	24
<i>Niven v. E.J. Bartells Co.</i> , 97 Wn. App. 507, 983 P.2d 1193 (1999)	18
<i>Noble v. Safe Harbor Family Preservation Trust</i> , 167 Wn.2d 11, 17, 216 P.3d 1007 (2009).....	13
<i>Owens v. Harrison</i> , 120 Wn. App. 909, 915, 86 P.3d 1266 (2004).....	4
<i>Pearson Constr. Corp. v. Intertherm, Inc.</i> , 18 Wn. App. 17, 20, 566 P.2d 575 (1977).....	16
<i>Porter v. Sadri</i> , 38 Wn. App. 174, 177, 685 P.2d 612 (1984)	26
<i>Prier v. Refrigeration Engineering Co.</i> , 74 Wn.2d at 35, 442 P.2d 621 (1968).....	17
<i>Puget Sound National Bank v. McMahon</i> , 53 Wn.2d 51, 330 P.2d 559 (1958).....	23
<i>Qualls v. Golden Arrow Farms, Inc.</i> , 47 Wn.2d 599, 602, 288 P.2d 1090, 1092 (1955).....	26
<i>Safeco Ins. Co. v. Woodley</i> , 150 Wn.2d 765, 773, 82 P.3d 660 (2004)....	15
<i>Schooley v. Pinch's Deli Market, Inc.</i> , 134 Wn.2d 468, 478, 951 P.2d 749 (1998).....	25
<i>Seattle-First Nat'l Bank v. Wash. Ins. Guar. Ass'n</i> , 116 Wn.2d 398, 413, 804 P.2d 1263 (1991).....	4

<i>North Pac. Plywood, Inc. v. Access Rd. Builders, Inc.</i> , 29 Wn. App. 228, 235, 628 P.2d 482, review denied, 96 Wn.2d 1002 (1981).....	17
<i>Skinner v. Holgate</i> , 141 Wn. App. 840, 877, 173 P.3d 300 (2007)	1
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 26, 482 P.2d 775 (1971)	1
<i>State of Washington Dept. of Corrections v. Fluor Daniels, Inc.</i> , 160 Wn.2d 786, 161 P.3d 372 (2007).....	14, 15
<i>State v. Inzitari</i> , 6 Conn.Cir. 170, 269 A.2d 35 (1969).....	8
<i>Tokarz v. Frontier Federal Savings and Loan</i> , 33 Wn. App. 456, 465-65, 656 P.2d 1089 (1983).....	24
<i>Tradewell Group, Inc. v. Mavis</i> , 71 Wn. App. 120, 126, 857 P.2d 1053 (1993)), affirmed, 160 Wn.2d 696, 161 P.3d 345 (2007).	3, 4
<i>Travis v. Bohannon</i> , 128 Wn. App. 231, 243, 115 P.3d 342 (2005).....	26
<i>Trompeter v. United Ins. Co.</i> , 51 Wn.2d 133, 316 P.2d 455 (1957).....	14
<i>Tropiano v. City of Tacoma</i> , 105 Wn.2d 873, 876-877, 718 P.2d 801 (1986).....	18
<i>Western Stud Welding v. Omark Industries</i> , 43 Wn. App. 293, 716 P.2d 959 (1986).....	4, 5, 6, 7, 8
<i>Weyerhaeuser Co. v. Commercial Union Ins. Co.</i> , 142 Wn.2d 654, 687, 15 P.3d 115 (2000).....	15
<i>Williams v. Joslin</i> , 65 Wn.2d 696, 399 P.2d 308 (1965)	23
<i>Woodmansee v. Peterson</i> , 132 Wash.App. 1050, 2006 WL 1195512 (2006)	2
<i>Wright v. City of Tacoma</i> , 87 Wash. 334, 353, 151 P. 837 (1915).....	14

Yield Dynamics, Inc. v. TEA Systems Corp., 154 Cal. App.4th 547, 66
Cal.Rptr.3d 1 (2007) 11

Other Authorities

14A KARL B. TEGLAND, WASHINGTON PRACTICE: CIVIL
PROCEDURE § 35.13, at 434 (2003) 14

Treatises

22 Am.Jur.2d *Damages* § 203 (1965)..... 16
23 Am.Jur. 948..... 22, 23

I. ARGUMENT IN OPPOSITION TO WOODMANSEES' CROSS APPEAL ISSUES.

A. The Trial Court Properly Denied an Attorneys' Fee Award as to Parcel 3.

1. Standard on Review.

The applicable standard of review for an award or a denial of attorneys' fees in this instance is as follows:

Awarding attorney fees under a statute or contract is a matter of discretion with the trial court that we will not disturb absent a clear showing of an abuse of that discretion. *Fluke Capital & Mgmt. Servs. v. Richmond*, 106 Wn.2d 614, 625, 724 P.2d 356 (1986); *Culinary Workers & Bartenders Union, Local No. 596 v. Gateway Café, Inc.*, 91 Wn.2d 353, 372, 588 P.2d 1334 (1979). Abuse of discretion occurs when the trial court's decision rests on untenable grounds or untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Skinner v. Holgate, 141 Wn. App. 840, 877, 173 P.3d 300 (2007).

In this case, the trial judge properly applied the most recent and persuasive case law on the subject, and had sound legal and factual bases for his determination. There was no abuse of discretion in denying the fee award.

2. There Was No Enforceable Contract Between Peterson and Woodmansee Upon Which to Base a Fee Award for Parcel 3.

“Generally attorney fees are not recoverable by the prevailing party as costs of litigation unless the fees are permitted by contract, statute

or recognized ground in equity.” *Hudson v. Condon*, 101 Wn. App. 866, 877, 6 P.3d 615 (2000). Woodmansee has based his claim for attorneys’ fees on the PSA for Parcel 3, but this Court has already determined that no such contract was formed.

In the earlier appeal, Woodmansee sought specific performance of the PSA for Parcel 3. This Court succinctly described the state of the inchoate transaction between the parties as follows:

Here, Woodmansee asked the trial court to use the PSA dated April 15, 2004, which Peterson and Woodmansee alone signed, as the basis for specific performance for the sale of Peterson’s undivided interest in Parcel 3. It appears the trial court ordered the sale based on this request.

The problem is that neither that document nor any other signed by Peterson in this record provides for the sale the court ordered—the sale of his undivided one-half interest.

Woodmansee v. Peterson, 132 Wn. App. 1050, 2006 WL 1195512 (2006).

The Court further held

Because we hold that there *was no agreement for the sale of Peterson’s undivided one-half interest* in Parcel 3 for the trial court to specifically enforce, we reverse the summary judgment order and decree of specific performance with respect to that parcel.

Id. It follows that since there was no contract between Woodmansee and Peterson, there can be no award of attorneys fees based upon the non-contract.¹

3. Petersons' Alleged Torts Were Not Central to the Purported Contract.

Even if the PSA were germane to the issue of attorneys' fees, Woodmansee's analysis is flawed and should be rejected.

Less than one year ago, in *Boguch v. The Landover Corp.*, 153 Wn. App. 595, 615-16, 224 P.3d 795, 805-06 (2009), this Court examined and restated at length the controlling principles that pertain to Woodmansee's claim for attorneys fees.

“Whether a party is entitled to attorney fees is an issue of law that we review de novo.” *Little v. King*, 147 Wn. App. 883, 890, 198 P.3d 525 (2008) (citing *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 126, 857 P.2d 1053 (1993)), *affirmed*, 160 Wn.2d 696, 161 P.3d 345 (2007). ***A prevailing party may recover attorney fees*** under a contractual fee-shifting provision such as the one at issue herein ***only if a party***

¹ The trial court concluded that Peterson's conduct “created a contract by promissory estoppel.” Conclusions of Law (“CL”) 7 (CP 2624). This conclusion reinforces the point that there is no contractual basis for an attorneys' fee award. “Promissory estoppel is used to avoid injury when parties have failed to properly form a contract but one party has acted in reliance on the promise of another.” *Farm Crop Energy, Inc. v. Old Nat. Bank of Washington*, 38 Wn. App. 50, 685 P.2d 1097 (1984) rev'd on other grounds 109 Wn.2d 923, 750 P.2d 231. “[A] promissory estoppel claim does not arise out of [a contract] either since estoppel, by its very nature, is an alternative theory of liability based on the *absence of an express agreement*.” *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 130, 857 P.2d 1053 (1993)(emphasis in original) (trial court did not err in denying party's request for attorney fees incurred in defending against non-contract claims).

brings a “claim on the contract,” that is, only if a party seeks to recover under a specific contractual provision. If a party alleges breach of a duty imposed by an external source, such as a statute or the common law, the party does not bring an action on the contract, even if the duty would not exist in the absence of a contractual relationship. *Hemenway v. Miller*, 116 Wn.2d 725, 743, 807 P.2d 863 (1991); *Burns v. McClinton*, 135 Wn. App. 285, 310-11, 143 P.3d 630 (2006), review denied, 161 Wn.2d 1005, 166 P.3d 718 (2007); *G.W. Constr. Corp. v. Prof'l Serv. Indus., Inc.*, 70 Wn. App. 360, 366, 853 P.2d 484 (1993).

“[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.*” *Tradewell Group*, 71 Wn. App. at 130, 857 P.2d 1053 (citing *Seattle-First Nat'l Bank v. Wash. Ins. Guar. Ass'n*, 116 Wn.2d 398, 413, 804 P.2d 1263 (1991); *W. Stud Welding, Inc. v. Omark Indus., Inc.*, 43 Wn. App. 293, 299, 716 P.2d 959 (1986)). Stated differently, *an action “sounds in contract when the act complained of is a breach of a specific term of the contract, without reference to the legal duties imposed by law on that relationship.”* *G.W. Constr.*, 70 Wn. App. at 364, 853 P.2d 484 (citing *Yeager v. Dunnavan*, 26 Wn.2d 559, 562, 174 P.2d 755 (1946)). “*If the tortious breach of a duty, rather than a breach of a contract, gives rise to the cause of action, the claim is not properly characterized as breach of contract.*” *Owens v. Harrison*, 120 Wn. App. 909, 915, 86 P.3d 1266 (2004) (emphasis added)(citing *G.W. Constr.*, 70 Wn. App. at 364, 853 P.2d 484).

Boguch, 153 Wn. App. at 615-16 (emphasis added).

The claims and findings against Peterson relating to his conduct can be summarized as follows:

- that Peterson offered to obtain Hillman and Sheron’s signatures on the PSA, and thereby became Woodmansee’s

agent for that purpose. Findings of Fact (“FF”) 9, 11. CL 4, 5, 6. (CP 2609, 2624)

- that Peterson misled and misrepresented to Woodmansee the status of his efforts toward obtaining Hillman and Sheron’s signatures. FF 15, 27, 28, 29. (CP 2610, 2614)
- that Peterson failed to transmit the original offer to Hillman and Sheron and then misrepresented the offer to them. FF 10. (CP 2609)
- that Peterson interfered with Woodmansee’s offers to the other owners. FF 19, 21, 22, 55. CL 8. (CP 2611, 2612, 2621, 2624)

Not a single one of these actions relates to any duty or conduct arising under the PSA.

Woodmansee principally relies upon *Western Stud Welding v. Omark Industries*, 43 Wn. App. 293, 716 P.2d 959 (1986) in his attempt to frame the issue as being one of narrow versus broad construction of the attorneys’ fee provision that was contained in the PSA. Without overruling *Western Stud*, Washington Supreme Court in *Hemenway v. Miller*, 116 Wn.2d 725, 742-43, 807 P.2d 863 (1991) brought the focus

properly back on the causal element, *i.e.*, on whether the claims are sufficiently tied to the duties inherent in the contract.

When the underlying documents merely provide the background out of which the surety allegedly acquires new rights and duties by operation of law and by their voluntary actions in obtaining the assignee, it is apparent that the action is not “on the contract.” The surety's argument, and the holding of the Court of Appeals, is analogous to a but-for argument in a proximate cause question. Rejecting that approach, we conclude that the voluntary actions of the original makers of the note created the central issue of the legal effect of their actions in creating a possible suretyship relationship. Therefore, if the sureties prevail on retrial, they are not entitled to attorney fees.

116 Wn.2d at 743.

The analysis under *Western Stud* 43 Wn.App at 293 was that

Without the stock purchase and sale agreement, Simonseth would not be in the position of bearing the resulting financial loss from the discontinuation of the KSM distributorship. The contract cannot be overlooked in the analysis of these circumstances.

This Court quoted that same paragraph in *Burns* and explained that *Hemenway* signaled a departure from *Western Stud* analysis. *See Burns* 135 Wn. App. at 310 (“Since *Western Stud*, however, the Supreme Court has explained that mere but-for causation is insufficient to render a dispute ‘on a contract.’” ... “When the underlying documents merely provide the background out of which the [actor] allegedly acquires new rights and

duties by operation of law and by their voluntary actions ... it is apparent that the action is not ‘on the contract.’”)

One way to illustrate the point is to ask, hypothetically, whether a stranger to the PSA who had engaged in the conduct attributed to Peterson could have been held legally responsible under the same analysis that the trial court applied to Peterson. One quickly notes that a stranger could have volunteered to transmit Woodmansee’s offer, but not done so; he could have misled both Woodmansee and the owners of Parcel 3 as to the state of the offers; he could have attempted to extract a \$100,000 fee from the owners for handling the transaction. A stranger could have agreed to be an agent or a fiduciary or any other relationship to Woodmansee that has been ascribed to Peterson. Just as in *Burns*, the underlying PSA merely provided a background to Peterson’s allegedly wrongful acts.

4. The “Broad” versus “Narrow” Argument Is Irrelevant and the Cases Cited by Woodmansee Are Not Applicable to the Issues in this Case.

As noted above, Woodmansee relies on a series of outdated cases as a springboard for discussion whether “concerning this Agreement” might also mean “related” to this Agreement. *Western Stud* dates back to 1986; *Hudson v. Condon* to 2000; and *Failes v. Lichten* to 2001. These all predate *Burns* (2006) or *Boguch* (2009) and none of them offers any

insight into the meanings of “related” or “concerning” to the extent that a definition would override the later and more persuasive cases.

Woodmansee cites a Connecticut case, *State v. Inzitari*, 6 Conn.Cir. 170, 269 A.2d 35 (1969) for the principal that “concerned” means “related to.” Respondents’ Brief at 33. *Inzitari* was a criminal case, however, and the term had already been defined by the Connecticut Supreme Court for specific application to the states “pool betting” statutes. 269 A.2d 36-37. No contracts or attorneys’ fee issues were involved in the case.

Woodmansee similarly refers to *Bay Cities Paving & Grading, Inc. v. Lawyers’ Mutual Ins. Co.*, 5 Cal.4th 854, 844 P.2d 1263, 21 Cal.Reptr.2d 691 (1993). Here the issue was whether two acts of attorney malpractice were so related as to be one claim under an errors and omissions policy. The definition played no part in the court’s decision, because it noted that this case involved one client, one lawyer, and one attempt to collect a single debt. 855 P.2d at 1266.

Woodmansee’s reliance on *Western Stud* (which the Supreme Court refers to as *Omark*) is discussed above in context with the later cases.

Woodmansee cites *Hudson v. Condon* to advance the “related to” definitional argument. But a closer look at *Hudson* shows that, under the more modern *Burns* analysis, the same result would have been reached. The court’s reasoning in granting attorneys’ fees to *Hudson* related back to the association of the wrongful acts to the duties under a valid contract.

All of the Hudsons' causes of action are related to the partnership agreement and the duties that arise from it. Most claims also involve the lease, which clearly entitles the prevailing party to costs and fees incurred in legal action occasioned by default or breach of the lease. ***No issues separate from the agreement or the lease were addressed in this lawsuit. Consequently the trial court did not err in awarding reasonable fees and costs to the Condons.***

101 Wn.App at 877-78 (emphasis added).

Another of Woodmansee’s references is equally inapplicable to parsing a distinction between “relating” and “concerning.” In *Failes v. Lichten*, 109 Wn. App. 550, 37 P.2d 310 (2001), the parties entered into a residential real estate transaction that actually closed. After closing, Failes sued, alleging “fraudulent concealment, misrepresentation, and/or mutual mistake of fact” and claiming “that the home was subject to various problems, including ‘very high levels of health endangering molds and yeasts (microbial growth)’.” Furthermore, *Failes* sought both contractual and tort remedies, including “rescission of the sale, either because of misrepresentation or mutual mistake of fact; for damages suffered by

Plaintiff as a result of Defendants' misrepresentation; [and] for reasonable attorney's fees and legal costs as authorized by the Purchase and Sale Agreement.”” 109 Wn. App. at 553.² Since the claims so clearly arose from the duties expressed or implied in the real state contact, the court properly concluded that attorneys’ fees were awardable. Because the conclusion is so extremely obvious, the decision offers no instruction on making a close call where an attorney fee provision is of debatable meaning. By contrast, as noted above, none of Peterson’s purported duties as an agent or a fiduciary are set forth in any contract.

Anderson’s Lakeside Leisure Co. v. Anderson, 314 Wis.2d 560, 757 N.W.2d 803 (2008) is similarly unpersuasive and unhelpful. The dispute in this case involved a non-compete agreement and a related transfer of a tradename that had been granted by a written contract. The court easily determined that the claims of breach and infringement fell within the attorneys’ fees provision.

Anderson argues that attorney fees must be limited because the

² Under the “economic loss rule,” *Failes* should have only been permitted to assert a contract claim and not a parallel and related tort claim. *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007) (purpose of the economic loss rule is to bar recovery for alleged breach of tort duties where a contractual relationship exists and the losses are economic losses; plaintiff limited contract remedies, regardless of how claims are characterized). *Alejandre* stands for the principle that if one has a contract and suffers economic loss, he may not bring a tort claim for these damages. By analogy, since Woodmansee has only a tort claim, he cannot assert a claim for attorneys’ fees under a contract that never was formed.

Agreement's language concerning entitlement to attorney fees applies in “any action concerning this Agreement,” a limitation that excludes non-contract claims such as the tradename infringement claim. We are not persuaded.

...

[T]he tradename infringement claim is clearly in the category of “any action concerning this Agreement” because the Agreement was the instrument by which ownership of the tradename in question was transferred.

757 N.W.2d at 823.

Woodmansee cites to *Yield Dynamics, Inc. v. TEA Systems Corp.*, 154 Cal. App.4th 547, 66 Cal.Rptr.3d 1 (2007), again to illustrate what “concerning” might mean. The appellate court noted that “parties argue at length about the meaning and application of the fee clause, and specifically whether claims were ‘concerning this Agreement’ so as to fall within the clause,” but concluded that the debate was “academic.” 66 Cal.Rptr.3d at 30. This case is not particularly helpful because even the California appellate court was uncertain as to the determinations that had been made at the trial court level.

Yield contends that most of the causes of action here did not fall within the fee clause of the asset purchase agreement. ... The trial court allowed about 60 percent of the requested award. This figure may reflect the denial of recovery for the causes of action *Yield* insists fell outside the agreement.

Id.

Woodmansee has cited to cases from many states and jurisdictions, but not one of them supports a claim where a party has been held liable for *contractual* attorneys' fees where there was in fact *no contract*. He has cited no case where the distinction between "related" and "concerning" or the application of the "broad" or "narrow" label has made a difference and where none of the alleged torts are related to duties described or even implied in the writing that contains the attorneys' fee provision.

In closing out his argument, *see* Respondents' Brief at 36-37, Woodmansee again refers to *Hemenway* and *Burns*, but not for their *fundamental holdings*. *Hemenway* clearly states that the written contract containing the fee provision must be "central to the controversy." 116 Wn.2d at 742. *Burns* requires a claimant to identify the "specific clause or provision in the purchase and sale agreement that either party attempted to enforce" as a predicate for an award of attorneys' fees. 135 Wn. App. 311. These fundamental holdings swallow up the academic debate about "related" and "concerning" and render them irrelevant.

For the same reason that it was proper to deny attorneys' fees at the trial court level, his application for fees on appeal should be denied.

B. The Trial Court Should Have Denied All Prejudgment Interest.

1. Standard on Review.

A trial court's decision regarding prejudgment interest is review on an abuse of discretion standard. *Hadley v. Maxwell*, 120 Wn. App. 137, 141, 84 P.3d 286 (2004); *Coulter v. Asten Group, Inc.*, 155 Wn. App.1, 230 P.3d 169 (2010).

A prevailing party is generally entitled to prejudgment interest, provided the damages are liquidated. *Lakes v. von der Mehden*, 117 Wn. App. 212, 214, 70 P.3d 154 (2003). The interest is awardable “when the amount claimed is liquidated,” or “when the amount claimed is unliquidated but is determinable by computation with reference to a fixed standard in a contract.” *Id.* at 217, 70 P.3d 154. A claim is liquidated if “data in the evidence makes it possible to compute the amount with exactness, without reliance on opinion or discretion.” *Id.*

Coulter, 155 Wn.App at 12-13. “A trial court abuses its discretion when its decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons. Untenable reasons include errors of law.” *Noble v. Safe Harbor Family Preservation Trust*, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009).

2. Where the Court Exercises Discretion in Determining the Reasonableness of the Defendant’s Expenditures that are the Basis of Damages, the Damages Are Not Liquidated.

The test for determining whether damages are liquidated or unliquidated is merely this: Is judgment by the finder of fact required to determine the amount of damages?

The trial court should have denied all prejudgment interest, and Woodmansee on appeal has mistakenly concluded that because his damages can be determined mathematically, they are therefore liquidated. This ignores the significant issue as to whether the trier-of-fact has been required to exercise judgment or discretion in establishing the inputs to the mathematical equation.

In *State of Washington Dept. of Corrections v. Fluor Daniels, Inc.*, 160 Wn.2d 786, 161 P.3d 372 (2007), the Washington Supreme Court examined at length the test for damage liquidity, determining its application in both contract and tort cases.

Historically, contract damages were considered "liquidated" if they could be determined by "reference to a fixed standard contained in the contract, ***without reliance upon opinion or discretion,***" and interest has long been available from the moment of breach. *Mall Tool Co. v. Far W. Equip. Co.*, 45 Wn.2d 158, 176, 273 P.2d 652 (1954) (emphasis omitted); *see also Wright v. City of Tacoma*, 87 Wash. 334, 353, 151 P. 837 (1915) (same); 14A KARL B. TEGLAND, WASHINGTON PRACTICE: CIVIL PROCEDURE § 35.13, at 434 (2003). It is comparatively easy to determine whether damages are liquidated when the parties' own contract so provides. *E.g.*, *Trompeter v. United Ins. Co.*, 51 Wn.2d 133, 316 P.2d 455 (1957) (claim was liquidated where the amount due was specifically provided for in the insurance policy). Sometimes

statutory law will provide fixed standards that will allow damages to be liquidated. *E.g.*, *Egerer v. CSR W., L.L.C.*, 116 Wn. App. 645, 653-56, 67 P.3d 1128 (2003) (claim was liquidated where measure of damages to be used was fixed by statute as the difference between the contract price and the prevailing market price at the time of the breach). This court has recently found a claim for overtime was liquidated when we could determine the amount precisely. *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 723, 153 P.3d 846 (2007) (claim for overtime was liquidated where objective evidence indicated the overtime due with exactness). ***These principles have been applied even occasionally in the tort context.*** *E.g.* *Hansen v. Rothaus*, 107 Wn.2d 468, 473-75, 730 P.2d 662 (1986). ***However, damages that cannot be calculated without the use of discretion are not liquidated.*** *E.g.*, *Safeco Ins. Co. v. Woodley*, 150 Wn.2d 765, 773, 82 P.3d 660 (2004) (claim for legal fees could not be considered liquidated where the amount of expenses lied within the discretion of the trial judge); *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 687, 15 P.3d 115 (2000) (claim for damages from an environmental clean-up project was unliquidated where determining the amount required testimony allocating certain clean-up bills between areas covered and not covered by insurance); *Maryhill Museum of Fine Arts v. Emil's Concrete Constr. Co.*, 50 Wn. App. 895, 903, 751 P.2d 866 (1988) (museum's claim for damages resulting from water leaks was unliquidated where the museum was unique and thus lacked a market value and the measure of damages was consequently left to the trial court's discretion).

160 Wn.2d at 789-90.

By way of further example, in an injury tort case, the medical bills of the injured party may be calculated to the penny, but the damages are yet unliquidated because mathematics is only a starting point in determining recoverable damages.

By their nature, medical expenses are not liquidated until the judge or jury determines that the expenses were reasonable and necessarily incurred. ...It is not enough that the medical bills be paid, the amounts must be reasonable.

Lakes v. von der Mehden, 117 Wn. App. 212, 70 P.3d 154 (2003) (internal citations and quotation marks omitted). This is true even where the defendant stipulates to the reasonableness and necessity of the damages. *Id.*, 117 Wn.2d at 218 (“Unliquidated claims are not rendered liquidated by the fact that the defendant stipulates to the damages or agrees to the reasonableness of a settlement. *Hansen*, 107 Wn.2d at 477-78, 730 P.2d 662 (citing *Pearson Constr. Corp. v. Intertherm, Inc.*, 18 Wn. App. 17, 20, 566 P.2d 575 (1977)); *Dautel v. Heritage Home Ctr., Inc.*, 89 Wn. App. 148, 154, 948 P.2d 397 (1997).”)

Whether and the extent to which a party has reasonably mitigated its damages raise issues for the trier-of-fact’s judgment and discretion that preclude the damages being liquidated. Thus, in a construction defect case, the court held that

Courts measure damages within a reasonable time after defects are discovered under the theory the nonbreaching party has a duty to mitigate losses by repairing the defects as soon as possible. *Campagna v. Smallwood*, 428 So.2d 1343, 1347 (La. App.1983); 22 Am.Jur.2d *Damages* § 203 (1965). Although the nonbreaching party must use reasonable means to minimize its damages, the breaching party has the burden of showing that reasonable alternative courses of action were open to the nonbreaching party.

Maryhill Museum of Fine Arts v. Emil's Concrete Const. Co., 50 Wn. App. 895, 901, 751 P.2d 866 (1988). In the *Maryhill Museum* case, the plaintiff urged the court to adopt the same argument that Woodmansee does here. The trial court was affirmed in rejecting the claim as unliquidated.

The museum contends the amount owed was liquidated because the judge calculated it by taking the actual contract costs of the project plus the architects' fees and the add ons, and subtracting the amount of deductions. The museum cites *Prier* in support of its position. There, the court awarded prejudgment interest as of the date the repairs were completed because the cost of repairs was not disputed. *Prier v. Refrigeration Engineering Co.*, 74 Wn.2d at 35, 442 P.2d 621 (1968). In the present case, the costs and extent of the repairs were disputed. The court used its discretion in determining the reasonable cost of the repairs would be the original contract cost of the project. Until that decision was made, the amount was not liquidated. See *North Pac. Plywood, Inc. v. Access Rd. Builders, Inc.*, 29 Wn. App. 228, 235, 628 P.2d 482, review denied, 96 Wn.2d 1002 (1981); *Hellbaum v. Burwell & Morford*, 1 Wn. App. 694, 703-05, 463 P.2d 225 (1969). Therefore, the court correctly refused to award prejudgment interest.

Maryhill Museum, 50 Wn. App. at 902.³

See also, *Aker Verdal A/S v. Neil F. Lampson, Inc.*, 65 Wn. App. 177, 828 P.2d 610 (1992) (\$283,618.03 cost of repairs remained unliquidated due to application of discretion in determining reasonable labor rate).

³ Note that if *Prier* or *Hansen* were before the court today, the damages in those case should be deemed unliquidated under the holding in *Lakes v. von der Mehden*.

3. This Court May Affirm the Denial of Prejudgment Interest on Any Valid Basis.

The gravamen of Woodmansee's argument on appeal is that the trial court improperly relied upon *Hansen v. Rothaus*, 107 Wn.2d 468, 473, 730 P.2d 662 (1986), pursuant to which, after initially awarding prejudgment interest, the court subsequently withdrew the award in part because it had not been shown that Peterson had retained the funds expended by Woodmansee.

Whether or not the Court properly withheld part of the award of prejudgment interest under this analysis, as shown above, the correct outcome was still not reached because Woodmansee's damages were wholly unliquidated.

"A trial court judgment may be affirmed on any grounds supported by the pleadings and the proof, even if the trial court's specific reason for granting the judgment was in error." *Niven v. E.J. Bartells Co.*, 97 Wn. App. 507, 983 P.2d 1193 (1999) citing (*Tropiano v. City of Tacoma*, 105 Wn.2d 873, 876-877, 718 P.2d 801 (1986).

So even if the Court agrees with Woodmansee's criticism of the trial court's reasoning as expressed in the Judgment and Order, etc., it should hold that no prejudgment interest is due because the damages are unliquidated.

4. The Trial Court Necessarily Exercised Discretion in Determining the Reasonableness of Woodmansee's Mitigation Efforts.

The Findings of Fact show without room for dispute that the trial court exercised discretion in determining the reasonableness of Woodmansee's damages.

Finding 42 (CP 2617) holds that "Woodmansees did not unreasonably fail to attempt to mitigate their damages....The \$100,000 per acre price Woodmansees paid for Hillman and Sherons' half of Parcel 3, and the \$135,000 per acre price Woodmansees paid for the Peterson half of Parcel 3, were reasonable and within the range of values being paid for development property in the area."

Similarly, Finding 48 (CP 2619) holds that "Foote [People's Bank's appraiser] appraised the Parcels by three methods: "as-is" or market value, subdivision value, and preliminary plat approval value. In June of 2006, Mr. Foot valued Parcels 1-3 "as-is" at \$171,000 per acre. Woodmansees' purchase of Hillman and Sherons' half interest in Parcel 3 in December, 2004 for \$100,000 per acre was reasonable. In January, 2008 Foote valued Peterson's half of parcel 3 at \$161,000 per acre. Woodmansees' purchase of Mr. Peterson's half of Parcel 3 in March, 2008 for \$135,000 per acre was reasonable."

Generally, Findings 56 through 59 (CP 2621-2622) recount the financial pressures on Woodmansee that necessitated his continuing efforts to mitigate his damages by purchase of the shares of Parcel 3.

Finally, Finding 60 (CP 2622) summarizes the trial court's evaluation of Woodmansee's conduct by holding that "Woodmansees chose to purchase Parcel 3 as one of several reasonable alternatives, in a good faith attempt to mitigate their damages caused by the defendant."⁴

⁴ These findings reflect the considerable amount of time spent at trial and in deposition testimony relating to the issue of the reasonableness of Woodmansee's damage claims. *See, e.g.* the following summaries of: **VRP Vol. 1, p. 64:2-17** (Woodmansee had done a lot of research in the area and had been in negotiations on other parcels. Parcels 2 and 3 were slightly under what he had been able to negotiate with some other parcels just across the street); **VRP Vol. 1, pgs. 78:17-79:3** (Woodmansee had considered backing out of the parcel 3 transaction but he was in negotiations with several different builder for the possibility of putting together contracts to sell lots to them. He thought it was an important factor to be able to keep the lot going with all the activity he was getting from potential purchasers); **VRP Vol. 1, pgs. 101:25-103:3** (Woodmansee did not consider giving up on parcel 3 because he felt like he was already in contract with the sellers. He was also in serious conversations with a lot of different major builders. He was in the process of making a decision on whether he would sell 3 or 4 projects to different builders or ultimately end up in the contract with Johnson. It was important to Woodmansee to be able to maintain the purchase because he felt like it was some of the better property in Mount Vernon. There is not a lot of property to develop in Mt. Vernon); **VRP Vol. 1, p. 126: 5-15** (Prior to executing the first contract, Woodmansee was already looking to execute a second contract with Johnson because a lot of people were trying to buy lots in the area. Woodmansee and Johnson discussed the option that if they control a lot of the area, it would be in their favor to do so. There would be less competition.); **VRP Vol 1, p. 128: 6-22** (Woodmansee did not have enough land to build 800 lots for Johnson. He was concerned that Johnson was going to hold him to the letter of 800 lots. Johnson was unwilling to change the terms of the contract so Woodmansee continued to watch for one more piece of land that he could purchase.); **VRP Vol. 1, pgs. 133:16-134:12** (Woodmansee would purchased 9 acres from Peterson at \$1,215,000. The primary reason Woodmansee purchased this land was to fulfill the contract he had with DB Johnson.); **VRP Vol. 2, p. 13: 8-12** (As of Nov. 2007 Woodmansee had acquired several parcels of land to provide the balance of some 748 lots to Johnson.); **VRP Vol. 2, pgs. 23:15-24:4** (Woodmansee went ahead with the purchase of the

The trial court could not have properly assessed Woodmansee's damages without making a determination that the amounts of money he spent over and above the original \$65,000 per acre offer was reasonable and necessary. Just as in the case of medical costs or labor wage rates or many other components of loss, the trial court's exercise of discretion in determining what was reasonable and necessary renders the damages unliquidated and precludes an award of prejudgment interest.

5. Whether Peterson Retained Woodmansee's Money is Irrelevant to the Issue of Prejudgment Interest.

As noted in the Brief of the Appellant and above, the trial court should have awarded no prejudgment interest to Woodmansee because the damages were unliquidated. The retention of funds issue is therefore irrelevant.

II. ARGUMENT IN REBUTTAL ON PETERSON'S APPEAL.

A. Overview.

Peterson's arguments on appeal are, for the most part, fully stated in his opening brief. The assignments of error, both as to findings of fact

partitioned Peterson parcel in order to cover himself with lots to sell to Johnson. Woodmansee had several conversations with Johnson to try to get him to restructure the contract to where he wasn't obligated to provide 800 lots but Johnson was unwilling to reduce the number of lots. He was afraid that he would have 750 lots and Johnson would tell him to provide him 50 more lots that would cost him more money per lot.); **VRP Vol. 2, pgs. 65:20-67:3** (Johnson's slowdown notice says that he retains his option to extend the purchase. Woodmansee testifies that he was buying the property from Peterson with regard to the option to extend.)

and conclusions of law have clearly stated Peterson's position that he does not dispute the pure factual issues, i.e., what was said to whom, who took what action and why, which agreements were consummated and which were not. Peterson has made abundantly clear that he disputes each and every conclusion of law (e.g., existence of duties owed to Woodmansee) and findings as to "ultimate" facts (e.g. reasonableness of Woodmansee's actions, right to rely, Peterson "volunteering" to be an agent, Woodmansee's expectancies, etc.) by which the court determined his liability to Woodmansee as an agent, fiduciary or otherwise.

Accordingly, Peterson's rebuttal will be limited to highlighting a few key points upon which the Court's attention is particularly desired.

B. As a Party to an Arms' Length Transaction, Peterson Did Not Become the Opposing Party's Agent or Fiduciary.

Woodmansee's opening brief devotes considerable effort in addressing both Peterson's latitude (or lack thereof) in making representations to Woodmansee, *see* Respondents' Brief ¶¶ V(1)-(2), and Peterson's purported duties owed to Woodmansee, *see Id.* ¶V(4). Under the facts of this case, the two issues are intertwined and cannot be fully addressed individually. "The right to rely on representations is inseparably connected with the correlative problem of the duty of a representee to use diligence in respect of representations made to him." 23 Am.Jur. 948

quoted in *Puget Sound National Bank v. McMahon*, 53 Wn.2d 51, 330 P.2d 559 (1958). See also *Williams v. Joslin*, 65 Wn.2d 696, 399 P.2d 308 (1965) (duty and right to rely limited in arms' length transactions; cites to *McMahon* and 23 Am.Jur. 948).

“Generally, participants in a business transaction deal at arm's length; it has been said that an individual has no particular duty to disclose facts nor any particular right to rely on the statements of the party with whom he contracts at arm's length.” *Liebergessell v. Evans*, 93 Wn.2d 881, 889, 613 P.2d 1170 (1980). The existence of the adversarial relationship precludes any closer or more confidential relationship from developing. This was recognized in *Guarino v. Interactive Objects, Inc.*, 122 Wn. App. 95, 129, 86 P.3d 1175 (2004). The court concluded that, notwithstanding that the defendants had duties under the Washington State Securities Act, they nevertheless owed no fiduciary duties under the common law.

The parties' relationship in this case cannot be characterized as one built on a foundation of trust. The record illustrates that even prior to their resignations, the appellants were cognizant that the respondents did not have their best interests in mind.

The relative positions of the parties significantly affects whether such a duty can arise at all.

“Ordinarily, the duty to disclose a material fact exists only where there is a fiduciary relationship and not where the parties

are dealing at arm's length. ... A party cannot be permitted to say he was taken advantage of, if he had means of acquiring the information, or if, because of his business experience or his prior dealings with the other party, he should have acquired further information before he acted.”

Tokarz v. Frontier Federal Savings and Loan, 33 Wn. App. 456, 465-65, 656 P.2d 1089 (1983).

Furthermore, it seems axiomatic that the confidential relationship must already exist prior to the statements by which the alleged duty is breached. Otherwise, speech that is permitted of a non-fiduciary would itself trigger the existence of the duty, a nonsensical result. Case law supports this view. “The general rule in Washington is that a lender is not a fiduciary of its borrower; a special relationship must develop between a lender and a borrower *before* a fiduciary duty exists.” *Miller v. U.S. Bank of Washington*, 72 Wn. App. 416, 427, 865 P.2d 536 (1994) (emphasis added).

Accordingly, for Woodmansee to prevail, he must have shown that the fiduciary duty or agency or other special relationship had arisen previously and was in existence when Peterson allegedly undertook to act for him. The facts show otherwise – they had no relationship outside of the arms’ length transaction.

C. Peterson's Actions Were Not the Efficient Cause of Damages Relating to His Own Share of Parcel 3.

Woodmansee does not address Peterson's argument that no damages should flow from Woodmansee's decisions to purchase Parcel 3 at a date long after this court had determined that Peterson had no contractual duty to sell. The parties mutual and voluntary decision to effect a sale of Peterson's interest cannot be an efficient proximate cause of damages relating to that interest.

Proximate cause encompasses both cause in fact and legal cause. *Gall v. McDonald Indus.*, 84 Wn. App. 194, 207, 926 P.2d 934 (1996). Factual cause rests on "a physical connection between an act and an injury." *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 478, 951 P.2d 749 (1998). Legal causation involves a policy determination as to how far the consequences of a defendant's acts should extend. *Schooley*, 134 Wn.2d at 478. The determination of legal causation depends on "mixed considerations of logic, common sense, justice, policy, and precedent." *Schooley*, 134 Wn.2d at 479 (quoting *King v. City of Seattle*, 84 Wn.2d 239, 250, 525 P.2d 228 (1974)). When the facts are not in dispute, the court decides legal causation as a matter of law. *Schooley*, 134 Wn.2d at 478.

Even if a defendant's earlier wrongful conduct is established, "[i]f a new, independent act breaks the chain of causation, the original negligence is no longer a proximate cause of the injury and the defendant is not liable for the injury. [citation omitted] A superseding cause is an occurrence that intervenes so as to relieve the actor from liability for harm to another for which his antecedent negligence is a substantial cause." *Travis v. Bohannon*, 128 Wn. App. 231, 243, 115 P.3d 342 (2005). See also *Porter v. Sadri*, 38 Wn. App. 174, 177, 685 P.2d 612 (1984) (wrongful act which simply provided the condition or occasion that produced the injury, although a cause in fact, was too remote and not in itself a proximate or efficient legal cause).

If the act itself is not foreseeable—in other words, if the act is an intervening, efficient cause—it will break the causal connection between the defendant's negligence and the plaintiff's injury. *Qualls v. Golden Arrow Farms, Inc.*, 47 Wn.2d 599, 602, 288 P.2d 1090, 1092 (1955). 'Where such intervening act or force is not reasonably foreseeable, it must be regarded as a superseding cause negating the claim of proximate or legal cause.' *Cook v. Seidenverg*, 36 Wn.2d 256, 264, 217 P.2d 799, 803 (1950); and *Mehrer v. Easterling*, 71 Wn.2d 104, 109, 426 P.2d 843 (1967).

Maltman v. Sauer, 84 Wn.2d 975, 982, 530 P.2d 254 (1975).

Here, the parties' mutual decision to enter into the 2008 buy-sell agreement was just such an intervening cause, and no damages can flow from Woodmansee's acquisition of Peterson's interest in Parcel 3.

III. CONCLUSION

For the reasons stated here, and in Appellant's Opening Brief, Peterson prays that the judgment of the trial court be reversed and all claims against him arising out of the Parcel 3 transactions be dismissed.

RESPECTFULLY SUBMITTED this 25th day of June, 2010.

BADGLEY MULLINS LAW GROUP PLLC



Duncan C. Turner WSBA # 20597

2. Proof of service

upon the attorneys of record herein, as follows, to wit:

Jeffrey Brohier
720 Third Avenue, Suite 1600
Seattle, WA 98104-1813

DATED this 25th day of June, 2010 in Seattle, WA.



Christina Limon, Paralegal