

64402-5

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**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

NO. 64402-5-I

ROBERT S. PETERSON,

Appellant,

vs.

**JOSEPH D. WOODMANSEE and
KIMBERLY A. WOODMANSEE,**

Respondents.

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STATE OF WASHINGTON
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REPLY BRIEF OF RESPONDENTS / CROSS-APPELLANTS

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I. SUMMARY OF REPLY.

Distinguishing between “broad” and “narrow” attorney’s fees provisions is neither “irrelevant” nor “academic” as Peterson claims. Contract interpretation begins with the contract language, and Washington courts have repeatedly made this distinction in determining whether fees are awardable. Peterson’s Reply Brief quotes selectively from “narrow” cases and claims that they control “broad” contract provisions as well, although the cases specifically state that they do not.

The broad language of the fee provision in the PSA awards fees in actions “concerning this Agreement”. This language has been interpreted to extend to circumstances surrounding the contract. Under similar broad provisions, Washington cases have awarded fees for tort claims of fraud in negotiation of a contract, wrongful interference with contract, and breach of fiduciary duty, the same claims as the present case. Because Peterson’s fraud and interference were directly focused on the PSA and were committed in the negotiation of the PSA, this action was “concerning” the PSA, the PSA was “central” to the claims, and the claims are “on the contract”.

Peterson’s Reply Brief did not attempt to defend the trial court’s rationale for denying prejudgment interest on part of the judgment, which the court denied because Peterson did not personally receive the money representing that part of the damages. There is no authority for Peterson’s

theory that the court's denial of Peterson's affirmative defense of unreasonable failure to mitigate damages transformed the liquidated damage amount into a discretionary award. The damages were calculated precisely from the exhibits without any use of discretion, so the amount of damages was liquidated, and prejudgment interest was appropriate.

II. ARGUMENT

1. Woodmansees Are Entitled To Attorney Fees At Trial.

A. The Court Should Adhere to the Distinction between "Broad" and "Narrow" Fee Provisions.

The difference between broad and narrow fee provisions is hardly "academic" or "irrelevant", as Peterson claims (App. Reply Br., p. 7, 12). To the contrary, fees may be awarded under contract, and the contract language is where contract analysis starts. The goal of contract interpretation is to determine the parties' intent as manifested by the contract language. State Dept. of Corrections v. Fluor Daniel, Inc., 160 Wn.2d 786, 795, 161 P.3d 372 (2007). The PSA (Ex. 5, p. 3, ¶ p) contained a "broad" fee provision awarding fees in any action "concerning this Agreement", i.e., in any action related to the PSA:

p. If Buyer or Seller institutes suit against the other concerning this Agreement, the prevailing party is entitled to reasonable attorneys' fees and expenses.

Woodmansees' opening brief cited many cases from Washington (further

discussed below) and other jurisdictions holding that the words “concerning” and “relating to” in fees provisions are intentionally broad, and award fees in more circumstances than merely contract enforcement actions.

In contrast to the broad provision in the present PSA, a “narrow” fees provision only awards fees in actions brought to enforce specific contract terms. The trial court’s citation of Burns v. McClinton, 135 Wn.App. 285, 143 P.3d 680 (2006) as its rationale and authority for denying fees was error. The court denied a fee award on the basis that Woodmansees’ claims “were not brought to enforce the...agreement” (§ 1.8, CP 2834-35), but that is the narrow rule applicable to a narrow fee provision, not to the broad language in the PSA provision. Peterson would have this Court interpret the contract language “concerning this Agreement” to mean “enforcing this Agreement”. The category of actions “concerning” or “relating to” a contract is substantially broader than actions brought to “enforce” specific contract terms. The essential ruling of Burns (135 Wn.App. at 309) was:

Following the trial, Burns repeatedly requested an award of attorney fees for work done on issues related to D&D Properties. The basis for his request was a provision in the partnership agreement: “Should any party *enforce this Agreement* by appropriate legal action, the prevailing party shall be entitled to reasonable attorneys’ fees . . .

Burns has not identified any specific clause or provision of the partnership agreement that either party *attempted to enforce*.

The trial court erred by conflating the two types of provisions and

overlooking the actual language of the PSA fees provision.

Peterson claims that the distinction between “broad” and “narrow” provisions is “academic”, or indeed, nonexistent, but the very cases Peterson relies upon make that distinction explicit and determinative. Peterson’s Reply Brief (p. 12) (mis)quotes from Burns v. McClinton: “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”. But Burns is not a universal rule; Burns restricted the fees award to contract enforcement claims because that was the language of the contract fee provision in Burns. Peterson argues that the narrow rule applies regardless of the actual contract language. But Burns, 135 Wn.App. at 309, expressly recognized the distinction between broad and narrow provisions, and their differing results:

The court allowed attorney fees in *Hudson* under a broad provision of a partnership agreement creating an entitlement to prevailing party attorney fees in any litigation “related to” the partnership. The provision in the D&D Properties agreement, however, is narrower. Attorney fees are not available except in an action enforcing the agreement.

Peterson would have this Court adopt the last sentence of the above quotation as if it were the entire rule, regardless of the language of the fees provision at issue. Such a result would overturn Burns by ignoring the distinction between fee provisions that Burns expressly recognizes.

In “narrow rule” cases the Washington appellate courts have repeatedly taken pains to indicate that the fee provision language matters, and that broad fee provisions yield a different result. In Hemenway v. Miller, 116 Wn.2d 725, 742, 807 P.2d 863 (1991), also relied upon by Peterson, the Supreme Court expressly approved the award of fees for a tort claim in Western Stud Welding v. Omark, 43 Wn.App. 293, 299, 716 P.2d 959 (1986), but stated that it reached a different result in Hemenway precisely because the Hemenway provision was narrower: “We agree with the principle of Omark, but note that the attorney fees provision there was broader than that provision here.” Peterson’s Reply Brief (p. 12) claims that Woodmansees have “cited no case where . . . the application of the “broad” or “narrow” label has made a difference”, when both Hemenway and Burns explicitly so state.

Peterson’s Reply Brief claims that the Hemenway and Burns narrow rule “swallows up” (p. 12) or “outdates” (p. 7) the broad provision rule, but those cases expressly say the opposite. These cases were determined based on the fee provision language in the contracts, which is what this Court should do in the present case. Woodmansees’ action satisfies the terms of the fee provision in the PSA in this case, which is distinctly broader than the one in Burns.

Peterson does the same selective editing with Boguch v. The

Landover Corp., 153 Wn.App. 595, 224 P.3d 795 (2009). Peterson’s Reply Brief (p. 3-4) includes a long quotation from Boguch, but *omits the immediately preceding sentence* in Boguch which discloses that Boguch was based on a narrow fees provision:

Boguch next contends that the trial court erred in awarding attorney fees and costs to Landover under the attorney fee provision in the listing agreement, *which provided for an award of fees in any action brought to enforce the terms of the agreement*. We agree.

Peterson’s Reply Brief (p. 4) implies that Boguch allows fees “only if a party seeks to recover under a specific contractual provision”, regardless of the actual contract language. Boguch in fact is simply another “narrow” rule case. Peterson’s Reply Brief (p. 10) repeats this assertion: “none of Peterson’s purported duties as an agent or a fiduciary are set forth in any contract.” But even the abridged quotation from Boguch in Peterson’s Reply Brief (p. 3) states that the ruling was specific to the contract fee provision language: “under a contractual fee-shifting provision *such as the one at issue herein*”. Peterson de-emphasizes that precise phrase, making even typographical efforts to imply that the fee provision language makes no difference.

The quotation from Boguch in Peterson’s Reply Brief (p. 4) further reveals why Boguch only makes sense in the context of its narrow fee

provision. The determinative part of the quotation includes the conclusion that the claim “is not properly characterized as breach of contract.” That was determinative in Boguch because the fee provision only awarded fees in breach of contract actions. Boguch is not a general rule applicable to all cases. Courts in Boguch, Hemenway and Burns were careful to make the very distinction which Peterson now wants this Court to ignore.

B. Woodmansees’ claims for fraud and interference with the formation of the PSA are claims “concerning” the PSA.

Perhaps this proposition is not in contention, since Peterson does not address it in his Reply Brief. Peterson’s Reply Brief (p. 9, 12) strangely claims that Woodmansees are “parsing a distinction between ‘relating’ and ‘concerning’”, but Woodmansees argue the opposite: something “related to” a contract “concerns” the contract. According to the numerous authorities cited in Woodmansees’ opening brief, the words “concerning” and “relating to” are interchangeable, and the only difference in the cases cited is whether they award fees for claims “concerning” a contract, or “relating to” it.

Determining whether fees are allowed under the contract starts with analysis of the actual PSA language: whether Woodmansees’ claims “concern” the PSA. The simple answer is yes: because Peterson’s torts intentionally and directly affected the negotiation and execution of the PSA, this action was “concerning” the PSA. Woodmansees’ claims for fraud in the

negotiation of the PSA and tortious interference with the execution of the PSA are claims “concerning” the PSA. Fraud in the negotiation of a contract, the same claim made in this case, was specifically held to be “contract-related” in Western Stud Welding v. Omark Industries, 43 Wn.App. 293, 299, 716 P.2d 959 (1986). The respondent in Western Stud Welding made the same argument as Peterson: that tort claims (for breach of fiduciary duty and tortious interference) were not related to the contract. But Western Stud Welding held not only that fraud during the negotiation of the contract was “contract-related”, but also that the contract was central to that dispute, that the lawsuit arose out of the contract, and so attorney fees were awardable. Western Stud Welding, 43 Wn.App. at 297. That should be the ruling in the present case as well.

Western Stud Welding was not an isolated case. In Hudson v. Condon, 101 Wn.App. 866, 877, 6 P.3d 61 (2000), the Court awarded fees for claims of fraud and breach of fiduciary duty, under a fees provision awarding fees in litigation between the parties “related to” the contract. In Failes v. Lichten, 109 Wn.App. 550, 554, 37 P.3d 310 (2001), the Court of Appeals held that tort claims for fraudulent concealment and misrepresentation in a house sale were “related to” the transaction, under a similar provision awarding fees in “any dispute relating to this transaction”. In Brown v. Johnson, 109 Wn.App. 56, 59, 34 P.3d 1233 (2001), the Court

awarded fees for a common law claim of misrepresentation during the negotiation of a PSA, under a fees provision awarding fees in actions “concerning” the PSA, identical to the present PSA provision. In Stieneke v. Russi, 145 Wn.App. 544, 571, 190 P.3d 60 (2008), Division Two ruled that the plaintiff’s claim for fraud involving oral misrepresentation (145 Wn.App. at 563) leading to a purchase and sale agreement was “on the contract”, in the absence of any claim for breach of contract. In Deep Water Brewing v. Fairway Resources, 152 Wn.App. 229, 278-279 (2009), the Court awarded fees on a claim for tortious interference under a “related to” fee provision, ruling against the defendant’s argument that the tort did not arise from the contract. In McClure v. Davis Wright Tremaine, 77 Wn.App 312, 315, 890 P.2d 466 (1995) the Court held: “The term ‘relating to’ is sufficiently broad to include a claim for breach of fiduciary duty.” The Court should reach the same conclusion in this case as in the cases listed above: the PSA authorizes fees for Woodmansees’ claims of fraud and interference in the negotiation of the PSA because these claims “concern” the PSA.

C. Woodmansees’ Action was “On the Contract”.

The test for whether an action is “on a contract” is: “if it arose out of the contract and if the contract is central to the dispute.” Tradewell Group, Inc. v. Mavis, 71 Wn.App. 120, 130, 857 P.2d 1053 (1993). As shown in the cases discussed above, this definition encompasses tort claims when there is a

broad fee provision in the contract. The trial court ruled that Woodmansees' action was not "on the contract", ¶1.6, CP 2834; ¶1.9, CP 2835, citing Burns v. McClinton as authority and observing that Burns "held that the claims in question were not brought to enforce the agreement." ¶1.8, CP 2834-35. Reliance on Burns in this case was error, as tort claims in the cases listed above were held to be "on the contract" because they were "concerning" or "related to" the contracts, under their respective fee provisions. If only actions to enforce a contract can be "on the contract", which is the narrow provision rule, then the difference between broad and narrow contract language would be rendered meaningless. Courts interpret contracts to give meaning to all the contract language, and do not adopt an interpretation that renders a contract term meaningless. MacLean Townhomes, LLC v. American 1st Roofing and Builders, Inc., 133 Wn.App. 828, 831, 138 P.3d 155 (2006).

1. Woodmansees' Claims for Fraud and Interference in the Negotiation of the PSA "Arose From" the PSA.

Many Washington cases have held that torts can "arise from" contracts, the first element of the test for whether a claim is "on a contract". In Brown v. Johnson, 109 Wn.App. 56, 59, 34 P.3d 1233 (2001), the PSA fees provision was identical to the present provision, awarding fees in actions "concerning this Agreement". Brown's claim also was identical:

misrepresentation in the negotiation of a PSA. The Court of Appeals held that Brown's claim for fraud in the negotiation of the PSA was "on the contract", that is, it "arose" from the contract:

Brown's action for misrepresentation arises out of the parties' agreement to transfer ownership of Johnson's home to Brown.⁵ Moreover, the purchase and sale agreement was central to her claims.

Brown's claim was not for breach of contract or breach of duties under the PSA. The Court emphasized (n. 5, 109 Wn.App. at 59) that the action was not for misrepresentation in the disclosure statement, which might be considered a breach of contract: "In fact, the action is a *common law action* for misrepresentation of which Johnson's failure to disclose on the disclosure statement was but one act among several acts and omissions by Johnson culminating in the jury's verdict for Brown." The same is true in the present case: Woodmansees' claim for misrepresentation arose from the PSA.

Similarly, in Stieneke v. Russi, 145 Wn.App. 544, 571, 190 P.3d 60 (2008), Division Two of the Court of Appeals held that claims for fraud and fraudulent concealment in a purchase and sale were "on the contract":

If a tort action is based on a contract central to the dispute that includes an attorney fee provision, the prevailing party may receive attorney fees. *Hill v. Cox*, 110 Wn.App 394, 412, 41 P.3d 495 (2002). An action is "on the contract" if the action arose out of the contract and if the contract is central to the dispute. *Hill*, 110 Wn.App. at 412. The Stienekes' fraud claims are "on the contract". *Hill*, 110 Wn.App. at 411-12.

Stieneke's claims "arose from the contract", not from a breach of the contract or of a duty under the contract. The sellers misrepresented the house on their disclosure statement, but the disclosure statement was held not part of the PSA. 145 Wn.App. at 568. The claims were "based on the contract", but were not for *breach* of contract, but breach of a common law duty to speak: "the seller's duty to speak arises" when there is a concealed defect known to the seller that would not be disclosed by a careful inspection. Stieneke, 145 Wn.App. at 560. In Brown v. Johnson and Stieneke, the fraud claims "arose from the contract", because the seller's misrepresentations were about the subject of the contract, made in the course of negotiating the contract. In order to be "arise from the contract" and be "on the contract", the claims do not need to be for breach of contract or of a duty imposed by the contract; they need to be about the subject of the contract.

In Boules v. Gull Industries, Inc. 133 Wn.App. 85, 134 P.3d 1195 (2006), the contract provided for fees in any litigation "arising out of this transaction". The trial court denied fees, reasoning that the fraud claim was not "on the contract" because it occurred before the contract was entered. Boules, at 88. The Court of Appeals reversed, holding that the claim for fraud in the negotiation of the PSA was "on the contract" and arose from the transaction, "namely the purchase and sale agreement." Boules, at 89.

Under the plain language of the agreement, the Bouleses

engaged the Kims in litigation “arising out of this transaction”, namely, the purchase and sale agreement for the Bouleses to sell their gas station to the Kims. The Bouleses sued the Kims, alleging that the Kims fraudulently forced them to sell their gas station at an unfair price. Because these allegations directly relate to conditions of the purchase and sale agreement, the litigation arose out of this purchase and sale transaction.

The word “conditions” in the foregoing quotation refers to the circumstances leading up to the PSA, not to “conditions precedent” in a contract. Boules treats the fee provision’s use of the word “transaction” and the PSA as synonymous, and held that the fraud claims arose from the PSA.

In Ethridge v. Hwang, 105 Wn.App. 447, 460-61, 20 P.3d 958 (2001), Etheridge prevailed on claims for tortious interference, and MHLTA and CPA violations. The Court held that “Ethridge’s claims arose out of her inability to assign her lease under the lease agreement, so her claims arose under the lease.” In Deep Water Brewing v. Fairway Res., 152 Wn.App. 229, 278-279 (2009), the Court of Appeals awarded fees on a claim of tortious interference after dismissal of all contract claims, holding that the tort claim “actually arose from the agreements.” Woodmansees’ claims against Peterson arise from the PSA exactly as tort claims arose from contracts in the foregoing cases: misrepresentations about the subject of the PSA and interference during the negotiation of the PSA, “arise from” the PSA.

2. The PSA was “Central” to the Tort Claims.

The second element in determining whether a claim is “on a contract”

is whether the contract is “central” to the dispute. Tradewell Group, Inc. v. Mavis, 71 Wn.App. at 130. Peterson’s Reply Brief (p. 3) inverts the question here, arguing: “Peterson’s Alleged Torts Were Not Central to the Purported Contract.” That is not the question; the question is whether the PSA was central to Woodmansees’ claims.

The PSA was central because Peterson’s wrongful acts were focused on the PSA; the PSA itself was the subject of the fraud. The facts in this case are the opposite of Burns v. McClinton, and the trial court’s reliance on Burns was therefore misplaced. In Burns the fees provision was contained in a partnership agreement on real property that the parties jointly owned. But the claims were confined to professional negligence by the defendant handling Burns’ tax returns as his accountant. Their property partnership had nothing to do with those claims, so the property partnership agreement was not “central” to those claims. Here the material facts are the opposite: Peterson’s fraud and interference directly concerned the PSA itself. The dispute about Peterson’s conduct cannot be “resolved without referring to” the PSA, as “centrality” is defined in Burns, 135 Wn.App. at 310, because the PSA itself was the object and focus of the wrongful acts. Preventing the PSA was Peterson’s whole purpose; it was not “mere background” (App. Reply Br., p. 7). The PSA could not be more “central” to Woodmansees’ claims.

Hypothetically changing Burns shows that Woodmansees’ argument

does not overreach. If the fees provision in Burns had been broad instead of narrow, the plaintiff still would not have been entitled to fees, because the property partnership agreement containing the fees provision still would not be “central” to the complaint about the defendant’s performance as an accountant.

Peterson’s Reply Brief (p. 7) makes another curious argument about a hypothetical “stranger to the PSA”, without citing any authority or discussing how that might be a helpful inquiry. That another person could have done the same things does nothing to diminish the centrality of the PSA to this action against Peterson for having done so. And if a “stranger” had taken the actions Peterson took, he would not have been a stranger to the PSA, since Peterson signed it.

D. Fees are Awardable Under the PSA Although the PSA Itself was Not Enforceable.

All the claims relating to the PSA were necessarily brought in this action. Peterson cites no authority (App. Reply Br., p. 3) for his claim that because this Court held the PSA was unenforceable under the breach of contract theory, fees cannot be awarded under it when Woodmansees prevailed on other legal theories related to it. Peterson does not discuss or attempt to distinguish any of the numerous Washington cases holding to the contrary of his claim. “Attorneys fees and costs are awarded to the prevailing

party even when the contract containing the attorneys fee provision is invalidated.” LaBriola v. Pollard Group, Inc., 152 Wn.2d 828, 100 P.3d 791 (2004). LaBriola cites a number of cases for this principle, including Herzog Aluminum, Inc. v. General American Window Corp., 39 Wn.App. 188, 197, 692 P.2d 867 (1984). Herzog held that the prevailing party was entitled to attorney fees, although there had been no meeting of the minds and therefore no contract had been formed. *See*, Yuan v. Chow, 96 Wn.App. 909, 916, 982 P.2d 647 (1999). The Herzog rule applies equally to the present case, where this Court ruled on the first appeal that the contract failed for lack of meeting of minds. Peterson ignores the fact that this Court awarded both parties fees in the first appeal under the same PSA provision, when the PSA was invalidated.

2. Woodmansees Are Entitled To Prejudgment Interest.

A. Peterson Did Not Defend the Trial Court’s Rationale for Its Ruling.

The trial court denied prejudgment interest on the part of the damages consisting of money Woodmansees paid to Sherons and Hillman, “because Robert Peterson never had use of the funds paid by Woodmansees to Sherons and Hillman”. ¶ 3.5, CP 2837. The court erred by focusing on the defendant’s, rather than the plaintiffs’, loss of the use value of the money. Woodmansees lost the use value of the additional money they paid to

Hillman and Sherons, regardless whether Peterson personally received it. Peterson did not attempt to defend the trial court's rationale. Peterson's only response (App. Reply Br., p. 21) is a claim that "whether Peterson retained Woodmanees' money is irrelevant", because the damage amount was not liquidated. Peterson is mistaken on that point.

B. Woodmanees' Damages Were Liquidated.

The court found that the amount of damages could be precisely calculated from the purchase prices in the closing documents for the original PSA and for the two halves of Parcel 3. FF 63, CP 2623. These numbers were fixed and documented in the evidence (Ex. 24, p. 6; Ex. 25, p. 1; Ex. 36, p. 4), so the calculation of damages was mere arithmetic. Therefore the amount was liquidated, and prejudgment interest is proper.

A claim is liquidated if "the evidence furnishes data which, if believed, makes it possible to compute the amount [owed] with exactness, without reliance on opinion or discretion." *Prier*, at 32. An unliquidated claim is one "where the exact amount of the sum to be allowed cannot be definitely fixed from the facts proved, disputed or undisputed, but must in the last analysis depend upon the opinion or discretion of the judge or jury as to whether a larger or a smaller amount should be allowed." *Hansen v. Rothaus*, 107 Wn.2d 468, 473, 730 P.2d 662 (1986) (quoting *Prier*, at 33).

Kiewit-Grice v. State, 77 Wn.App 867, 872, 895 P.2d 6 (1995).

Peterson's Reply Brief (p. 21), repeats the argument from his opening brief that the court "could not have properly assessed" the damages without

an “exercise of discretion in determining what was reasonable and necessary” because the trial court ruled on Peterson’s affirmative defense of unreasonable failure to mitigate damages. Peterson’s theory is wrong on several counts.

First, the court held that Peterson was not entitled to even raise that affirmative defense because his torts were intentional, CL 20, CP 2627, and Peterson did not assign error to that conclusion. Peterson cannot argue on appeal that a defense which was not even allowed at trial nonetheless affected the court’s verdict. It is crystal clear that this disallowed defense did not play any part in the court’s calculation of the amount of damages.

Second, it is the character of the plaintiff’s claim, not of the defense, that determines whether an amount sued for is a liquidated sum. Hadley v. Maxwell, 120 Wn.App. 137, 144, 84 P.3d 286 (2004). The amount of damages was liquidated based on the trial exhibits.

Third, there is no substance to Peterson’s argument even if he had been entitled to raise this affirmative defense. Deciding whether there was reasonable effort at mitigation does not make the calculation of damages one of reasonableness; these are two separate questions. Determining an affirmative defense of unreasonable failure to mitigate damages requires the court to decide whether plaintiffs could reasonably have avoided the damages. Labriola v. Pollard Group, Inc., 152 Wn.2d 828, 840, 100 P.3d 791

(2004). That decision does not change the nature of the claim, the method of calculating the damages, the precision by which the calculation can be made from the evidence, or the amount of damages. *See, e.g., Pederson's v. Transamerica Ins.*, 83 Wn.App. 432, 922 P.2d 126 (1996), where the alleged failure to control cleanup costs (83 Wn.App. at 443) did not affect the liquidated “*character of the underlying claim*”. (83 Wn.App. at 452) (italics in original). Determining whether Woodmansees’ purchase of Parcel 3 was a reasonable course of conduct did not affect how the court calculated the damages.

Peterson’s citation to Maryhill Museum of Fine Arts v. Emil’s Concrete Const. Co., 50 Wn.App. 895, 751 P.2d 866 (1988) is off point, as shown in the quotation in Peterson’s Reply Brief (p. 17): “In the present case, the costs and extent of the repairs were disputed. The court used its discretion in determining the reasonable cost of repairs . . .”, which was the measure of damages. In comparison, the prices of Parcel 3 on the original PSA and the secondary PSAs were fixed in the exhibits. Peterson’s own proposed findings of fact included the same exact amounts and calculations. ¶1.58, CP 2586; ¶1.62, CP 2587. They were not in dispute. Calculating the difference between these prices was not a question of reasonableness, and did not involve an exercise of discretion.

When damages are liquidated, the injured party is entitled to be

compensated from the date of loss to the date of judgment. State Dept. of Corrections v. Fluor Daniel, Inc., 160 Wn.2d at 790, citing Hansen v. Rothaus, 107 Wn.2d 468, 473, 730 P.2d 662 (1986). Woodmansees were entitled to prejudgment interest on the damages amount paid to Hillman and Sherons, as well as on the amount paid to Peterson.

III. REQUEST FOR ATTORNEY FEES ON APPEAL.

Woodmansees request an award of attorney fees and costs on appeal pursuant to RAP 18.1 and RAP 14.2. The PSA provided for attorney fees in any action “concerning this agreement”, and this action “concerns” the PSA. Woodmansees also request attorney fees on appeal under the authorities cited above in support of Woodmansees’ appeal for an award of fees at trial. These same authorities would support an award on appeal. CHD, Inc. v. Boyles, 138 Wn.App.131, 141, 157 P.3d 415 (2007).

IV. CONCLUSION.

This Court should adhere to the long line of case law carefully distinguishing “broad” from “narrow” contractual fee provisions, and recognizing the differing results. Woodmansees’ tort claims are covered under the broad fees provision of the present PSA because these claims “concerned” the PSA. Peterson’s claim that only actions to enforce the contract can be awarded fees under contract fee provisions, regardless of what the provisions say, is contrary to all Washington authorities. Burns v.

McClinton, relied upon by the trial court and Peterson, is off point on both of the critical points for analysis here: the Burns contract had a narrow fee provision; and Burns' complaint and defendant's wrongful actions had nothing to do with the contract containing the fee provision. Burns and Hemenway specifically state that broader fee provisions produce different results.

This action was "on the contract": the claims for fraud in the negotiation of the PSA and wrongful interference with the execution of the PSA "arose from" the PSA, and the PSA was "central" to the claims. Many cases hold that claims for fraud in the negotiation of a contract and interference arise from the contract. And the PSA was central to this case, because the PSA was the subject of Peterson's tortious conduct. As Burns defines "centrality", Woodmansees' claims could not be determined without referring to the PSA.

Woodmansees were entitled to prejudgment interest on the entire amount of their damages because the amount was liquidated. Peterson did not defend the trial court's rationale for denying prejudgment interest on one portion of the judgment, but not another, based on whether Peterson had received the funds representing the damages. Instead, Peterson argues that the court ruling on an affirmative defense of unreasonable failure to mitigate damages (a defense which the trial court ruled Peterson was not even entitled

to make) somehow transforms the calculation of damages into a discretionary decision. There is no authority or logic behind Peterson's theory. Deciding whether a plaintiff's mitigation efforts are reasonable does not convert the simple arithmetic of calculating the amount of plaintiff's damages based on fixed numbers into a discretionary calculation of damages.

Woodmansees request that the Court of Appeals affirm the trial court's Judgment on the principal balance of the award, and reverse that portion of the Judgment denying Woodmansees' request for attorney fees and prejudgment interest. This matter should be remanded to the trial court to determine the amount of fees and prejudgment interest to be awarded to Woodmansees at trial and on appeal.

RESPECTFULLY PRESENTED this 22nd day of July, 2010.

BROIHIER & WOTIPKA

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