

No. 68253-9-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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RYAN & WAGES, LLC, a Washington limited liability company,  
through its members, JULIA MCCORD, and THE  
CONJUNCTIONAL PATRIOTIC SOVEREIGN PATHWAY,  
Appellants/Cross-Respondents,

v.

TOM WAGES, an individual, and REDDING LAKE STEVENS, LLC,  
an Oregon limited liability company,  
Respondents and  
Cross-Appellant (TOM WAGES).

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**RESPONDENT'S BRIEF OF REDDING LAKE STEVENS, LLC**

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## TABLE OF CONTENTS

	Page
<b>A. Introduction .....</b>	<b>6</b>
<b>B. Assignment of Error .....</b>	<b>7</b>
<b>C. Statement of the Issues.....</b>	<b>7</b>
<b>D. Statement of the Case.....</b>	<b>8</b>
1. Background.....	8
2. Ryan & Wages Waived the Right to Challenge the Award of Fees and Costs.....	9
<b>E. Argument Why Appeal Should Be Denied.....</b>	<b>10</b>
1. Standard of Review.....	10
2. Redding Was Properly Awarded its Costs and Fees Under the Doctrine of Mutuality of Remedies.....	10
a. Mutuality of Remedy Doctrine is the Basis for Awarding Attorney Fees.....	11
b. The Issue Before The Court Was Previously Decided in Kaintz.....	15
c. The Kaintz Case is On Point.....	17
3. Ryan & Wages Waived Their Objection.....	19
4. Redding Should Be Awarded its Attorney Fees and Costs on Appeal.....	20
<b>F. Conclusion.....</b>	<b>21</b>

## TABLE OF AUTHORITIES

	Page
<b>Cases</b>	
<i>Kaintz v. PLG, Inc.</i> , 147 Wn. App. 782, 788-89, 197 P.3d 710 (2008).....	6,7,10,11,13,15,16,17,18,20
<i>Tradewell Group, Inc. v. Mavis</i> , 71 Wn. App. 120, 126, 857 P.2d 1053 (1993).....	10
<i>Fisher Props., Inc. v. Arden-Mayfair, Inc.</i> , 106 Wn.2d 826, 849-50, 726 P.2d 8 (1986).....	11
<i>Herzog Aluminum, Inc. v. Gen. Am. Window Corp.</i> , 39 Wn. App. 188, 196, 692 P.2d 867 (1984).....	11,14,20
<i>Reynolds Metals Co. v. Alperson</i> , 25 Cal.3d 124, 128, 599 P.2d 83 (1979).....	11
<i>Park v. Ross Edwards, Inc.</i> , 41 Wn. App. 833, 706 P.2d 1097 (1985).....	12,13
<i>Yuan v. Chow</i> , 96 Wn. App. 909, 918, 982 P.2d 647 (1999).....	13
<i>Mt. Hood Bev. Co. v. Constellation Brands, Inc.</i> , 149 Wn.2d 98, 63 P.3d 779 (2003).....	13
<i>Labriola v. Pollard Group, Inc.</i> , 152 Wn.2d 828, 100 P.3d 791 (2004).....	14,18,20
<i>Erwin v. Cotter Health Centers, Inc.</i> , 133 Wn. App. 143, 155,135 P.3d 547 (2006).....	18,20
<i>Almanza v. Bowen</i> , 155 Wn. App. 16, 23-24, 230 P.3d 177 (2010).....	19,20
<i>Klass v. Haueter</i> , 49 Wn. App. 697, 745 P.2d 870 (1987).....	19,20

**TABLE OF AUTHORITIES (Continued)**

	Page
<b>Cases</b>	
<i>T.J. Meenach v. Triple "E" Meats, Inc.</i> , 39 Wn. App. 635, 694 P.2d 1125 (1985).....	19
<i>State ex rel. LaMon v. Town of Westport</i> , 73 Wn. 2d 255, 438 P.2d 200 (1968).....	19
<i>Cole v. Webster</i> , 103 Wn. 2d 280, 692 P.2d 799 (1984).....	19
<i>Haywood v. Aranda</i> , 143 Wn. 2nd. 231, 239-40, 19 P.3d 406 (2001).....	19

**TABLE OF STATUTES, CODES, AND CIVIL RULES**

	Page
<b>Statutes:</b>	
RCW 4.84.330.....	11,12,13,23
RCW 19.126.....	13
<b>Civil Rules:</b>	
RAP 18.1.....	20,24

## **A. Introduction**

The trial court properly awarded attorney fees and costs to Respondent, Redding Lake Stevens, LLC (“Redding”), based on the well-recognized doctrine of mutuality of remedy. Appellants, Ryan & Wages, and two of its members, Julia McCord and The Conjunctional Patriotic Sovereign Pathway LLC (collectively Ryan & Wages),<sup>1</sup> filed breach of contract claims against Redding based on the Redding Lake Stevens, LLC Operating Agreement (“Redding OA”). As part of its allegations, Ryan & Wages prayed for an award of attorney fees and costs under the Redding OA. Redding successfully defeated the contract claims on summary judgment based in part on the fact that Redding was not a party to the Redding OA. The trial Court awarded Redding its costs and attorney fees as the prevailing party on its dispositive motion.

Ryan & Wages’ appeal does not contest the trial court’s dismissal of the breach of contract claim; it is instead limited solely to the award of attorney fees. The award of attorney fees was

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<sup>1</sup> Although Mr. Wages is a named Respondent in this appeal, he is not involved in the attorney fee dispute between Ryan & Wages, and Redding. Mr. Wages is appealing portions of the trial verdict, and Redding having been dismissed with prejudice on summary judgment, did not participate in the December 2011, trial, and is not involved in the Wages’ appeal. (CP at 627-39). This court consolidated the Ryan & Wages’ appeal, and Mr. Wages’ appeal into this action. (CP at 490-92).

proper under the equitable principal of mutuality of remedy. **Kaintz v. PLG, Inc.**, 147 Wn. App. 782, 788-89, 197 P.3d 710 (2008). Ryan & Wages' appeal should be denied, and the Court should award Redding its costs and attorney fees incurred in defending this appeal.

**B. Assignment of Error**

The trial court made no error in awarding attorney fees and costs to Redding because, under the legal doctrine of mutuality of remedy, Redding is entitled to the same benefit that Ryan & Wages would have received if it had succeeded in its breach of contract claim against Redding when it sought to recover attorney fees and costs under the bilateral prevailing party attorney fee provision in the contract.

**C. Statement of the Issues**

Should the Court follow **Kaintz** and this Court's long history of mutuality of remedy precedent and hold that a party is entitled to an award of attorney fees when it successfully defeats breach of contract claims where the contract contained a bilateral attorney fee clause – regardless of whether they were actually a party to the contract.

**D. Statement of the Case**

**1. Background**

Redding is an Oregon limited liability company, and a real estate investment entity formed to acquire and potentially develop two assisted-living facilities. (CP at 138 ¶ 7). The two members of Redding are CMDG Investments, LLC (“CMDG”), and Ryan & Wages. (CP at 138 ¶ 8). Ryan & Wages was originally formed by Tom Wages and Doris Ryan as a real estate investment venture. (CP at 324 ¶ 1; 428:12-21). After Ms. Ryan’s death in 2005, two of her heirs, Appellants Julia McCord (Mrs. Ryan’s daughter) and The Conjunctional Patriotic Sovereign Pathway (owned by Floyd Ryan, Mrs. Ryan’s son), became members of Ryan & Wages. (CP at 324 ¶ 1). Ms. Ryan heirs have been engaged in contentious litigation against Mr. Wages for years. (CP at 234-44; 381-86).

CMDG provided the capital and expertise to Redding, while retaining management authority. Ryan & Wages contributed land in Lake Stevens, Washington, and the rights to buy land in Redding, California. (CP at 138 ¶ 10)

In Ryan & Wages’ Amended Complaint, they alleged a single cause of action against Redding for breach of contract for

Redding's alleged failure to comply with the Redding OA.<sup>2</sup> (CP at 234-44). Among other things, Ryan & Wages asked in its prayer for relief for attorney fees and costs. (CP at 244 ¶ 10). Redding successfully defeated Ryan & Wages' claim on a Motion for Summary Judgment because Redding was not a party to the Redding OA and it owed no contractual duties to Ryan & Wages. (CP at 72-73). As part of the ruling, Redding was awarded its costs and fees. (CP at 73 ¶ 2).

**2. Ryan & Wages Waived its Right to Challenge the Award of Fees and Costs**

Ryan & Wages never raised any legal objection to the trial court awarding fees and costs to Redding. Plaintiffs' only statement regarding an award of attorney fees to Redding is Ryan & Wages' assertion that an award of attorney fees to Redding is premature.

[I]t is premature for Redding Lake Stevens, LLC to be awarded any attorney fees, as Plaintiffs do not believe Summary Judgment should be granted at this time. Assuming Summary Judgment is not granted, the appropriate time for an award of attorney fees is at the end of the trial, set for December 5, 2011.<sup>3</sup>

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<sup>2</sup> Ryan & Wages filed their second of three lawsuits in Snohomish County Superior Court in December 2009 concerning disputes over the Redding OA, and their deceased mother's real estate investment. (CP at 388-04). Initially, they named Redding as party, but asserted no affirmative claims against Redding until they filed their Amended Complaint. (CP at 388-04; 234-44).

<sup>3</sup> Ryan & Wages contested in the trial court only the amount Redding claimed for fees and costs, but it did not challenge Redding's legal right to recovery those fees. (CP at 127 ¶ D).

(CP at 127 ¶ D).

**E. Argument Why Appeal Should Be Denied**

**1. Standard of Review**

Redding concurs with Ryan & Wages that the standard of review for the issue presented on appeal is de novo. **Tradewell Group, Inc. v. Mavis**, 71 Wn. App. 120, 126, 857 P.2d 1053 (1993).

Redding also agrees that its motion for summary judgment was based on the fact that it was not a party to the contract under which plaintiffs brought their breach of contract claims, the Redding OA, and that the attorney fees provision in the Redding OA is a bilateral attorney fees clause. (CP at 231 ¶ 4; 232:2-4).

**2. *Redding Was Properly Awarded its Costs and Fees under the Doctrine of Mutuality of Remedies***

Ryan & Wages' sole objection to the award of attorney fees and costs to Redding is that Redding was not a party to the Redding OA under which the trial court awarded attorney fees.<sup>4</sup> Under the well-established legal doctrine of mutuality or remedy, as outlined in **Kaintz v. PLG, Inc.**, 147 Wn. App. 782, 788-89, 197 P.3d 710 (2008), this Court expressly rejected the posture taken by Ryan & Wages in this appeal. Ryan & Wages cites to **Kaintz** in its

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<sup>4</sup> Appellant's Br. 1, 5.

motion, however, it failed to explain why the **Kaintz** holding on mutuality of remedy does not provide direct precedent to decide the issue on appeal in Redding's favor.<sup>5</sup>

**a. Mutuality of Remedy Doctrine is the Basis For Awarding Attorney Fees.**

Attorney fees are awarded when authorized by a contract, statute, or a recognized ground in equity. **Fisher Props., Inc. v. Arden-Mayfair, Inc.** 106 Wn.2d 826, 849-50, 726 P.2d 8 (1986). Since at least 1984, this Court has applied the equitable doctrine of mutuality of remedy to award attorney fees to a party who successfully defeats a contract action by establishing the invalidity or unenforceability of the contract. **Kaintz**, 174 Wn. App., at 789. In fact, this Court has stated that the mutuality of remedy doctrine mandates this conclusion. *Id.*

The phrase "mutuality of remedy" as applied to an award of attorney fees was first used by this Court in 1984 in **Herzog Aluminum, Inc. v. Gen. Am. Window Corp.**, 39 Wn. App. 188, 196, 692 P.2d 867 (1984). In **Herzog**, the Court, relying on rulings by the California Supreme Court, stated that RCW 4.84.330 was "enacted to establish mutuality of remedy." *Id.* (quoting **Reynolds Metals Co. v. Alperson**, 25 Cal.3d 124, 128, 599 P.2d 83 (1979)).

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<sup>5</sup> Appellant's Br. 13.

The principal was subsequently applied in **Park v. Ross Edwards, Inc.**, 41 Wn. App. 833, 706 P.2d 1097 (1985).

In **Park**, this Court upheld the trial court's ruling that the contract at issue was unenforceable because there was no meeting of the minds. *Id.* at 836-37. The Court noted that because the contract was determined to be ineffective under traditional approaches to contract interpretation, the attorney fees provision would also be ineffective. *Id.* Nonetheless, this Court upheld the award of attorney fees to the party that successfully argued the invalidity of the contract. The Court reasoned that had there been a unilateral attorney fee clause rather than a bilateral clause in the agreement, RCW 4.84.330 would have allowed the party establishing the invalidity of the contract to recover its attorney fees. *Id.* at 838-39. The Court rejected the inequitable result that simply because the contract contained a bilateral attorney fees clause rather than a unilateral attorney fees clause, no fees could be awarded:

Certainly it makes little sense to allow a [party] who successfully defends a suit for specific performance by proving the absence of a contract to collect attorney fees only if the purported contract included a unilateral attorney fee provision but not if it included bilateral provision.

**Id.**, at 839. As a result, this Court upheld the award of attorney fees to the party establishing the invalidity of the contract.

While the Court in **Park** did not expressly state that it was applying the mutuality of remedy principal, subsequently this Court confirmed that the **Park** decision was applying the mutuality of remedy doctrine . **Kaintz**, 147 Wn. App. at 788. In **Yuan v. Chow**, 96 Wn. App. 909, 918, 982 P.2d 647 (1999), the Court openly identified the equitable principle underlying this Court's decision in **Park**, and the applicable legislative enactments when it stated, "the purpose of the bilateral fee provision of RCW 4.84.330 is to provide mutuality of remedy."

The Supreme Court confirmed and expanded the mutuality of remedy doctrine in 2003 when it awarded attorney fees to a party that prevailed in having a statute declared void. **Mt. Hood Bev. Co. v. Constellation Brands, Inc.**, 149 Wn.2d 98, 63 P.3d 779 (2003). In **Mt. Hood**, in-state wine distributors brought claims against out-of-state wine suppliers alleging violations of RCW 19.126. **Id.** at 107-08. The trial court struck down the statute as a violation of the Commerce Clause and awarded attorney fees to the successful out-of-state wine suppliers. **Id.** at 121-22. The trial court based its award on RCW 19.16.060, which provided for an award of attorney

fees to the prevailing party in an action brought under the statute.

*Id.* The in-state distributors appealed, asserting among other things, that the trial court could not award attorney fees under a statute it declared void. *Id.* The Supreme Court disagreed. Relying on **Herzog**, the Supreme Court ruled that the award of attorney fees was proper under the mutuality of remedies doctrine even though the prevailing party won by establishing that the statute was void. *Id.* at 121-22.

The next year in **Labriola v. Pollard Group, Inc.** 152 Wn.2d 828, 100 P.3d 791 (2004), the Supreme Court expanded the rule to apply to cases where contracts were declared void. At issue in **Labriola** was whether a noncompete agreement was binding when there was no consideration provided to the employee, and thus no contract. *Id.* at 830-31. Even though the Court found no enforceable contract, it upheld the attorney fees award to the employee under the terms of the bilateral attorney fees clause within the noncompete agreement. *Id.* at 839. The Supreme Court summarily resolved the issue by stating: “[A]ttorney fees and costs are awarded to the prevailing party even when the contract containing the attorney fee provision is invalidated.” *Id.*

**b. The Issue Before The Court Was Previously Decided in Kaintz.**

The **Kaintz** Court stated that mutuality of remedy requires an award of attorney fees to a party that defeats contract claims by establishing that there was no contract between the parties, when the contract contains a bilateral attorney fees clause. **Kaintz**, 147 Wn. App. at 789. In fact in **Kaintz**, this Court held that mutuality of remedy principals “mandate” that attorney fees be awarded in such cases. *Id.*

The **Kaintz** case involved a commercial lease dispute. Kaintz leased commercial space to Draper Enterprise, Inc. *Id.* at 784. The lease contained a bilateral attorney fees clause. *Id.* Draper subsequently assigned the lease to PLG, Inc., without obtaining Kaintz’s consent to the assignment despite an express lease requirement that no assignment was valid without Kaintz’ approval. *Id.* Kaintz filed an unlawful detainer action against PLG. *Id.* PLG filed counterclaims asserting breach of contract. *Id.* at 784-85. PLG specifically prayed for an award of attorney fees under the prevailing party attorney fee provision of the lease. *Id.* at 785.

The trial court dismissed PLG's claims on summary judgment agreeing with Kaintz that there was no contract between PLG and Kaintz. *Id.* In addition, the trial court awarded Kaintz attorney fees and costs under the prevailing party attorney fee clause in the lease. *Id.* PLG objected to the award of attorney fees because Kaintz had prevailed on the basis that there was no contract between Kaintz and PLG. *Id.*, at 786. PLG asserted that since there was no contract between the parties, there was no basis for an award of attorney fees. *Id.* After the trial court denied its motion for reconsideration, PLG appealed the award of attorney fees. *Id.* at 785-86.

This Court in **Kaintz** held that mutuality of remedy supports an award of attorney fees even in circumstances in which the party that prevailed did so by establishing that the contract at issue was unenforceable or inapplicable because they were not a party to the contract:

Today we explicitly hold that [mutuality of remedy] can support such an award even in circumstances in which the party that prevailed did so by establishing that the contract at issue was unenforceable or inapplicable.

*Id.*, at 784.

**c. The Kaintz Case Is On Point.**

Ryan & Wages' sole objection to the award of attorney fees and costs to Redding is that Redding was not a party to the Redding OA under which the trial court awarded attorney fees.<sup>6</sup> This Court expressly rejected that argument in **Kaintz**. *Id.*, at 789.

The **Kaintz** case is directly on-point with the facts in this case. Ryan & Wages filed suit alleging breach of contract claims against Redding asserting that Redding had failed to satisfy its obligations under the Redding OA. (CP at 242-43). In **Kaintz**, PLG filed breach of contract claims against Kaintz claiming that Kaintz breached the lease. **Kaintz**, 147 Wn. App. at 785. Ryan & Wages prayed for an award of attorney fees under the bilateral attorney fees clause contained in the Redding OA. (CP at 244). In **Kaintz**, PLG prayed for an award of attorney fees based on a bilateral attorney fees clause in the lease. **Kaintz**, 147 Wn. App. at 785. The trial court properly dismissed Ryan & Wages' claim on summary judgment based on the fact Redding was not a party to the contract with Ryan & Wages. (CR at 72-73). In **Kaintz**, the trial court dismissed PLG's claims on summary judgment because there

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<sup>6</sup> Appellant's Br. 7.

was no contract between PLG and Kaintz. **Kaintz**, 147 Wn. App. at 785.

Ryan & Wages argues that Redding is not entitled to an award of attorney fees because Redding established that there was no contract between Redding and Ryan & Wages.<sup>7</sup> PLG argued that same thing in **Kaintz**: that an award of attorney fees was improper because Kaintz successfully argued there was no contract between the PLG and Kaintz. **Kaintz**, 147 Wn. App. at 785. This Court in **Kaintz** upheld an awarded attorney fees to Kaintz. *Id.* at 789. Similarly, the Court in this case should apply the mutuality of remedy doctrine and uphold the trial court's award of attorney fees and costs to Redding. Any other result would be inequitable and overturn **Kaintz** and substantial precedent applying the mutuality of remedies doctrine. **See also Labriola**, 152 Wn.2d at 828 (holding that an employee was entitled to attorney fees under the noncompete agreement even though the employee had successfully argued that the noncompete was unenforceable due to the lack of consideration); **Erwin v. Cotter Health Centers, Inc.**, 133 Wn. App. 143, 155, 135 P.3d 547 (2006) (upholding an award of attorney fees based on a contract the Court found

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<sup>7</sup> Appellant's Br. 7.

unenforceable); **Almanza v. Bowen**, 155 Wn. App. 16, 23-24, 230 P.3d 177 (2010) (prospective home purchasers entitled to an award of attorney fees after establishing that the agreement had been rescinded because if prevailing, the seller would have been entitled to an award of attorney fees); **Klass v. Haueter**, 49 Wn. App. 697, 745 P.2d 870 (1987) (attorney fees awarded to individual under attorney fee contract clause even though the individual prevailed by asserting they were not a party to the contract); **T.J. Meenach v. Triple "E" Meats, Inc.**, 39 Wn. App. 635, 694 P.2d 1125 (1985) (attorney fees properly awarded even though there was no contract between the parties).

### 3. **Ryan & Wages Waived Their Objection**

The failure to object at trial results in a waiver of the error for purposes of appeal. The doctrine of waiver of error is well established in the case law, generally resting upon acquiescence in a ruling or other act of the trial judge. **See e.g., State ex rel. LaMon v. Town of Westport**, 73 Wn. 2d 255, 261-62, 438 P.2d 200 (1968) (**overruled, on other grounds by, Cole v. Webster**, 103 Wn. 2d 280, 692 P.2d 799 (1984)); **Haywood v. Aranda**, 143 Wn. 2d. 231, 239-40, 19 P.3d 406 (2001).

Ryan & Wages waived its ability to object to Redding's request for attorney fees. When Redding requested attorney fees as part of its Motion for Summary Judgment, Ryan & Wages failed to offer any legal objection to Redding's request. With regard to attorney fees, Ryan & Wages only asserted that it was too early for the trial court to award attorney fees. (CP at 127 ¶ D). The record shows no objection by Ryan & Wages to the legality of an award of attorney fees and costs if Redding prevailed on its motion. Having failed to object to an award of attorney fees before the trial court, Ryan & Wages waived any right they had to appeal that issue.

#### **4. Redding Should Be Awarded its Attorney Fees and Costs On Appeal**

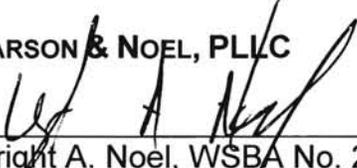
When an award of attorney fees is upheld on appeal based on the mutuality of remedy doctrine, the prevailing party on appeal is also entitled to an award of attorney fees and costs incurred in defending the appeal. **Kaintz**, 147 Wn. App. at 79-91. **See also Labriola**, 152 Wn.2d at 839; **Erwin**, 133 Wn. App. at 155; **Herzog**, 39 Wn. App. at 197; **Almanza**, 155 Wn. App. at 24; **Klass**, 49 Wn. App at 708; **Meenach**, 39 Wn. App. at 641. Pursuant to RAP 18.1, Redding requests that it be awarded its attorney fees and costs incurred in responding to Ryan & Wages' appeal.

**F. Conclusion**

Redding respectfully requests that this Court deny Ryan & Wages' appeal to overturn the trial court's award of attorney fees and costs to Redding. Granting Ryan & Wages appeal would overturn nearly 30 years of mutuality or remedy precedent. Under mutuality of remedy, a prevailing party is entitled to recover its attorney fees and costs under an attorney fees clause in a contract even when it successfully defeats the contract claims by showing that the contract was unenforceable or inapplicable. The trial court awarded attorney fees and costs to Redding under Section 13.4 of the Redding OA because Redding successful defeated Ryan & Wages' breach of contract claim by establishing that the contract at issue did not apply to Redding. Redding further requests the Court award Redding its attorney fees and costs on appeal.

RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of June, 2012.

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## APPENDIX

### Clerk's Papers

Defendant Tom Wages' Notice of Appeal	627-639
Perfection Schedule	490-492
Declaration of Willard L Forsyth	137-185
Declaration of Tom Wages	324-455
Ryan & Wages Amended Complaint	234-244
Order Granting Redding Lake Stevens, LLC's Motion for Summary Judgment	72-73
Ryan & Wages, LLC's Response to Redding Lake Stevens, LLC's Motion for Summary Judgment	121-131
Redding Lake Stevens, LLC's Motion for Summary Judgment	220-233

**RCW 4.84.330** Actions on contract or lease which provides that attorneys' fees and costs incurred to enforce provisions be awarded to one of parties — Prevailing party entitled to attorneys' fees — Waiver prohibited.

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.

Attorneys' fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorneys' fees is void.

As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

**RAP 18.1 ATTORNEY FEES AND EXPENSES** (a) Generally. If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

(b) Argument in Brief. The party must devote a section of its opening brief to the request for the fees or expenses. Requests made at the Court of Appeals will be considered as continuing requests at the Supreme Court, except as stated in section (j). The request should not be made in the cost bill. In a motion on the merits pursuant to rule 18.14, the request and supporting argument must be included in the motion or response if the requesting party has not yet filed a brief.

(c) Affidavit of Financial Need. In any action where applicable law mandates consideration of the financial resources of one or more parties regarding an award of attorney fees and expenses, each party must serve upon the other and file a financial affidavit no later than 10 days prior to the date the case is set for oral argument or consideration on the merits; however, in a motion on the merits pursuant to rule 18.14, each party must serve and file a financial affidavit along with its motion or response. Any answer to an affidavit of financial need must be filed and served within 7 days after service of the affidavit.

(d) Affidavit of Fees and Expenses. Within 10 days after the filing of a decision awarding a party the right to reasonable attorney fees and expenses, the party must serve and file in the appellate court an affidavit detailing the expenses incurred and the services performed by counsel.

(e) Objection to Affidavit of Fees and Expenses; Reply. A party may object to a request for fees and expenses filed pursuant to section (d) by serving and filing an answer with appropriate documentation containing specific objections to the requested fee. The answer must be served and filed within 10 days after service of the affidavit of fees and expenses upon the party. A party may reply to an answer by serving and filing the reply documents within 5 days after the service of the answer upon that party.

(f) Commissioner or Clerk Awards Fees and Expenses. A commissioner or clerk will determine the amount of the award, and will notify the parties. The determination will be made without a hearing, unless one is requested by the commissioner or clerk.

(g) Objection to Award. A party may object to the commissioner's or clerk's award only by motion to the appellate court in the same manner and within the same time as provided in rule 17.7 for objections to any other rulings of a commissioner or clerk.

(h) Transmitting Judgment on Award. The clerk will include the award of attorney fees and expenses in the mandate, or the certificate of finality, or in a supplemental judgment. The award of fees and expenses, including interest from the date of the award by the appellate court, may be enforced in the trial court.

(i) Fees and Expenses Determined After Remand. The appellate court may direct that the amount of fees and expenses be determined by the trial court after remand.

(j) Fees for Answering Petition for Review. If attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party's preparation and filing of the timely answer to the petition for review. A party seeking attorney fees and expenses should request them in the answer to the petition for review. The Supreme Court will decide whether fees are to be awarded at the time the Supreme Court denies the petition for review. If fees are awarded, the party to whom fees are awarded should submit an affidavit of fees and expenses within the time and in the manner provided in section (d). An answer to the request or a reply to an answer may be filed within the time and in the manner provided in section (e). The commissioner or clerk of the Supreme Court will determine the amount of fees without oral argument, unless oral argument is requested by the commissioner or clerk. Section (g) applies to objections to the award of fees and expenses by the commissioner or clerk.