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FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2015 APR 24 PM 4:12

No. 72238-7-I

DIVISION I, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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PAULA G. ANDERSON AND JOHN DOE ANDERSON,  
husband and wife,

Appellants/Defendants,

v.

SIMON OROS and VIORICA OROS,  
husband and wife

Respondents/Plaintiffs.

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**BRIEF OF RESPONDENTS  
SIMON OROS AND VIORICA OROS**

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## II. INTRODUCTION

All of the errors that Defendant Paula Anderson (“Anderson”) assigns to the Trial Court are of her own making. Despite her own admission she personally entered into the written “Property Agreement” with Simon and Viorica Oros (“Oros”), and the documents demonstrating that fact, she persists in claiming her company, Anderson Real Estate Group, Inc. (“ARE”) was the proper party. The Trial Court properly precluded Anderson’s defense that Oros should have named ARE as the defendant.

Anderson failed to investigate and plead what appeared to be two counterclaims, one based on the broker agreement to which Anderson was not a party to (Anderson pled that Oros entered into the agreement with RE/Max Northwest). The other counterclaim alleged Oros made an oral agreement to provide labor and services to help improve the property for sale, but failed to provide any labor. However, Anderson failed to investigate her counterclaims. She pled, testified in deposition, and represented to the Court in limine the purported oral agreement was made by corporation, ARE. But, ARE was closed three months after Anderson failed to pay Oros in full.

So, Oros moved in limine to exclude claims and defenses that belonged to ARE, and that Anderson’s counterclaim of an alleged oral

agreement was barred by the statute of limitations in any event.

Recognizing her failures, Anderson suddenly claimed ARE was administratively dissolved, the consequence of which was that all of ARE's claims and liabilities immediately and automatically – without any action or winding up of ARE – transferred to Anderson as the shareholder. She made an eleventh hour plea to amend her Answer and Counterclaims to state she is the successor to ARE.

The Trial Court properly denied leave to amend, citing five bases for doing so, including late timing, confusion of the jury, and prejudice to Oros. But, despite Anderson representing the oral agreement for her counterclaim was made by ARE, the Trial Court nonetheless allowed that claim to go forward because the Court was unclear as to the facts of the claim and precisely who (ARE or Anderson) made the oral agreement.

To pursue her counterclaim on the alleged oral agreement, Anderson changed her testimony at trial to state that she, and not ARE, made an oral agreement with Oros. She had to have known that as an oral agreement, the three year statute of limitations barred the claim in any event, regardless of the parties.

So, when the Trial Court dismissed the counterclaim under CR 50 at the close of trial, citing expiration of the statute of limitations.

Anderson then suddenly sought to amend her Answer to switch the

affirmative counterclaim to a defense of set-off. Yet, Anderson knew of the issue when she was served with the Complaint, and Oros asked about it in discovery. Even further, the Trial Court raised *sua sponte* the possibility of the defense in addressing motions in limine. But, still, Anderson never sought to amend.

Moreover, any breach by Oros of the alleged oral agreement, whether as a defense of set-off or an affirmative counterclaim, failed in any event because Anderson failed to present any damages. Contrary to what Anderson states in the Appellants' Brief, the Trial Court did in fact allow Anderson to present damages; the Trial Court denied Oros' motion. Anderson failed, however. She failed to articulate a coherent theory or amount, and when asked how much she was seeking, Anderson did not know and tried to ask her counsel in front of the jury. Anderson has only herself to blame, not the Trial Court.

Even further, Anderson claims error in refusing to give a jury instruction for the defense of set-off (Assignment of Error ¶3). But, Anderson did not propose one, and did not object to absence of one. This is fatal to the assignment, and, again, Anderson has herself and not the Trial Court to blame.

Even still, Anderson received over \$125,000 to pay Oros. Instead of doing so, she paid to herself, personally, over \$37,000, and over

\$50,000 to ARE. But, Anderson complains the Trial Court should not have awarded pre-judgment interest, when it is specifically allowed and proper as a measure of damages because Anderson deprived Oros the lost “use value” of the funds.

Likewise, Anderson complains the Trial Court did not reduce the amount of fees the Trial Court awarded to Oros. But, the law does not require a reduction absolutely, and the Trial Court entered findings stating it weighed the factors in RPC 1.5 and considered the law, and noted the quality of work and difficulty of the issues, and concluded the fees were reasonable. The Trial Court did not abuse its discretion. Anderson omits that she drove up the cost of this action by asserting nine defenses to void her written agreement, failed to properly investigate and plead her claims, and took over twice as long as Oros to present her case. Thus, again, Anderson has only herself and not the Trial Court to blame.

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

#### **A. STATEMENT OF FACTS**

Simon and Viorica Oros emigrated from Romania. RP June 10, 21:11-19; 23: 5-10 and 27:8-21. When they emigrated, they could not speak English; Mr. Oros learned English from taking classes at Lake Washington Technical College. RP June 10, 21:17-19 and 22:4-6. To

start, they worked as nighttime janitors. RP June 10, 21:17-19. Mr. Oros was trained in Romania as an electrician, but went to school to become certified in this country. RP June 10, 22:18-24:13.

The Oroses saved some money and borrowed other money to buy property because they wanted to help give their three children a better opportunity than they had and to put their children through college. RP June 10, 28:7-21 and 26:2-19 (using equity line of credit).

Paula Anderson is a real estate broker. RP June 10, 136:14-15. She worked primarily with foreclosures. RP June 11, 125:8-11; RP, June 10, 142:4-18 (re Trial Ex. 1); *and see* Trial Ex. 1 (Anderson disclosure to clients, including Oros).

Anderson would obtain clients through a person Anderson employed to make cold calls, Shawn Cook. RP June 10, 24:14-25:18. Anderson would pay Mr. Cook to cold call potential “investor” clients; for each “investor” Mr. Cook brought to Anderson, Anderson would pay Mr. Cook a portion of her commission. RP June 12, 42:21-43:9; and RP June 10 137:5-138:5.

In May 2009, Mr. Cook cold called Oros, and Oros eventually met with Anderson. RP June 10, 24:14-25:18. Anderson encouraged Oros to buy properties at foreclosure, remodel them and then sell them for a profit. RP June 10, 25:25-27:22. When Mr. Oros explained that he was not

experienced with remodels and would be using an equity line of credit against his house he could not afford to lose, Anderson told Oros she would teach him. *Id.* Anderson explained she had “flipped” houses before, that her husband was a contractor, and she would show Oros how one “can use cheap labor.” Oros testified he “trust [*sic*] in her” and got “a little bit of courage” to invest. RP June 10, 27:17-22 and 28:22-25.

A month later, in June 2009, Anderson called Oros at 10:00pm the Thursday night before the foreclosure sale on Friday morning, and encouraged Oros to buy a property in Kenmore. RP June 10, 32:7-33:5. Anderson said it “was a good investment.” RP June 10, 33:6-12. Oros agreed, used his equity line of credit against his house for the down payment, and borrowed the remainder of the purchase price. RP June 10, 31:13-34:15.

The process is the lender to the buyer, a “hard money” lender as Anderson described it (RP June 10, 144:3-145:19), would go to the auction and bid the amount. The actual purchaser may or may not be present. RP June 10, 144:3-145:19; and RP June 11, 59:18-24. In this instance, Oros was not involved; in fact Mr. Oros and Anderson did not even discuss what amount to authorize the lender to offer. RP June 10, 33-6-12. After the actual auction, the borrower would pay a down

payment, and execute documents for the loan to finance the remainder (e.g. a promissory note and deed of trust). RP June 12, 63:1-64:7.

Anderson's role in the process is really as a "pass through" or conduit between the lender and client. RP June 11, 58:25-59:9. In fact, Anderson relied primarily on the raw data the lender provided; Anderson did not search for or cull her own information for potential properties she could present to clients. RP June 12, 7:1-17 and 9:2-22.

In mid-July, Anderson called Oros again and presented two or three new houses. Anderson advised Oros one in Renton "is better." RP June 10, 34:16-36:8. Anderson had done a "market analysis" of the Renton property, opining that it was worth over \$500,000, and stated it was being assessed for tax purposes for \$572,000. RP June 10, 75:10-23 and RP June 12, 33:7-34:9. Anderson told Oros it was "a good deal." *Id.* Upon that encouragement and advice, Oros initially agreed to buy the Renton property. *Id.*, and RP June 10, 77:1-13.

As with the first house in Kenmore, the process would be the same: the "hard money" lender would acquire the property at the foreclosure sale, then Oros would pay a down payment and borrow the remainder from the lender. After the auction Friday morning, Oros provided Anderson a check in the amount of \$85,025 for the down

payment. RP June 10, 42:2-18 and 77:10-16. The foreclosure sale occurred July 10, 2009. RP June 11, 132:12-25.

The next morning (Saturday), the Oroses drove by the Renton property and houses in the immediate area. They became concerned and called Anderson and told Anderson they did not want to purchase the Renton property. RP June 10, 37:1-40:23 and 129:4-130:9. Oros also met with the lender, Dean Street, the following Monday and conveyed to Mr. Street they (the Oroses) did not wish to purchase the property. RP June 10, 43:11-44:9 and 61:6-11.

Oros had not signed any sale documents; all that occurred was the lender committed to buying the property. RP June 10, 44:10-13. Anderson encouraged Oros to go through with the purchase, and agreed to look for another purchaser. RP 44:20-45:5.

Three weeks after the foreclosure sale for the Renton property, Anderson called Oros and said she would buy the property herself. RP June 10, 45:6-48:3. The Andersons had “flipped” houses before, and at this time (late July and early August 2009), they were in the middle of one. RP June 10, 151:19-15; and RP June 11, 79:23-80:20; and RP June 11, 29:1-2 and 34:25-35:7. In fact, Paula Anderson had told Oros the Renton property is one that “couldn’t lose money” and “that there was nothing to worry about.” RP June 10, 73:18-74:3.

On August 3, 2009, Anderson asked the Oroses to meet her at a restaurant in Totem Lake to sign an agreement by which Anderson would take the property. *Id.* and RP June 10, 130:24-10. What was signed was the August 3, 2009 “Property Agreement” admitted as Trial Ex. 4 (the “Property Agreement”), and which is the basis of Oros’ lawsuit.

Under the Property Agreement, Anderson took title to the Renton property and became the borrower. *See Trial Exs. 3 and 5-7.* Anderson took the benefit of the Oroses’ \$85,025 down payment; she did not have to use her own funds, nor pay the Oroses back right away. Instead, the “Property Agreement” stated:

(b) Buyer [Anderson] shall execute a junior position deed of trust behind Lender in the amount of \$85,025.00 in favor of Seller [Oros]. In the event that Buyer is able to sell the Property for a purchase price in the amount of \$450,000 or more. Seller shall receive \$2000.00 in addition to the return of their principal. In the event the Buyer sells the Property for a purchase price of less than \$450,000.00 Seller shall have \$2000.00 deducted from the principal amount. No interest shall accrue on the unpaid balance and the principal shall be due 180 days from the date of this Agreement. Seller's deed of trust shall be paid from the proceeds of the closing of the sale of the Property. Buyer agrees to use best efforts to list, market and sell the Property.

*See Trial Ex. 4, pg. 1, §1(b).*<sup>1</sup>

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<sup>1</sup> Despite this language for Anderson to execute a deed of trust to secure her debt to the Oroses, no deed was ever executed. Oros was unaware of it because they did not read the Property Agreement. RP June 10, 48:7-15 and 131:9-10.

Anderson believed she “absolutely” could re-pay Oros the \$85,025 down payment. RP June 11, 35:20-23. Anderson then undertook some improvements and other work to the Renton property, and sold it for \$414,800 in December 2009. *See Trial Exs. 12-13.* With the sale price less than \$450,000, under the Property Agreement Anderson owed Oros \$83,025 (\$2,000 less). *See Trial Ex. 4, pg. 1, §1(b).*

Anderson received from the sale \$125,692.65 in proceeds, i.e. after paying the “hard money” lender (Dean Street), the property taxes, and the typical closing and escrow costs. *See Trial Ex. 13 (Seller’s Closing Statement).* Anderson, however, paid Oros only \$32,381, leaving a balance of \$50,644. *See Trial Ex. 14 (checks from Anderson).*

Anderson testified the reason she failed to pay Oros in full was because she felt she lost money, she wanted Oros to “[lose] the same amount. RP June 11, 109:7-12. Anderson testified she first deducted from the over \$125,000 in sale proceeds the amounts she claimed were expended to improve the Renton property, then split the remainder “50/50” with Oros. RP June 11, 109:7-12. Again, she paid Oros \$32,381. Anderson disclosed in discovery that from the sale proceeds, she paid ARE both (a) a commission of \$18,000 and (b) over \$75,000 in costs and expenses. CP 88 (Resp. to Rog. 3, pg. 12, lines 6-8); and RP June 11,

129:1-131:23. Of that over \$75,000, Anderson had ARE pay to her personally \$19,499. RP June 12, 23:17-21.

In addition to paying herself, Anderson also withheld (deducted out) more than just the expenses toward the Renton property. *See, generally*, RP June 12, 25:9-28:4. Anderson listed several items that were paid *before* the July 10 foreclosure sale for the Renton property: \$5,000 to a contractor on June 9; a \$2,744 payment in April; and \$44 to her own daughter on June 19. Anderson also paid Shawn Cook his share of the commission (Mr. Cook, again, is the one Anderson employed to “cold call” and generate sales leads for her). RP June 12, 26:13-16.

#### **B. STATEMENT OF PROCEDURE**

Oros commenced this action in January 2013 by serving Anderson, seeking the unpaid \$50,644. CP 1-6, and Affidavit of Service<sup>2</sup>. Oros asserted three causes of action, but only two, breach of contract and conversion, were pursued at trial. CP 477-478 and 485.

Anderson asserted a panoply of defenses, nine in total. CP 125-126. Her defenses sought to hold the Property Agreement unenforceable on a variety of bases, such as mutual mistake, duress, and lack of consideration. CP 125-126 (defenses (c) – (f) stating the Property

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<sup>2</sup> Oros filed a Designation of Additional Clerk’s Papers and Trial Exhibits on April 23, but has not at the time of completing this Brief received from the Trial Court Clerk the page designation in the Clerks’ Papers.

Agreement “should not be enforced...”). Apropos to the instant appeal, Anderson did not, however, assert off-set or set-off as a defense. *Id.*

Anderson also asserted a counterclaim for breach of two distinct contracts. CP 126-129. First, Anderson alleged Oros entered into a “Buyer’s Agency Agreement” with RE/Max Northwest Realtors for RE/Max to serve as the broker for foreclosure sales, where RE/Max appointed Anderson its agent. *See* CP 126 (¶1-3, agreement between RE/Max and Oros). Despite the “Buyer’s Agency Agreement” being between Oros and RE/Max, Anderson nonetheless alleged Oros breached it in failing to sign the documents to purchase the Renton property, and Anderson was damaged. CP 127-129 (¶7-12, 14).

The second agreement Anderson alleged as part of her counterclaim was an oral agreement with Mr. Oros whereby Oros agreed to provide labor and services to help remodel and improve the Renton property for sale. CP 128 (¶11 of Counterclaim) and CP 85 (discovery response re repudiation); and RP June 11, 41:7-42:6 (oral agreement) and RP June 12, 55:4-18 (oral “long before” Aug.3 Property Agreement).

Anderson flip-flopped with whom Oros made this alleged oral agreement. In her Counterclaim, she alleged it was made by her company, ARE. CP 128 (¶11). She testified to the same in her deposition. RP June 12, 18:23-20:25 and CP 99 (Dep. pgs. 130:10-24). In addressing Oros’

motions in limine, Anderson's counsel represented Anderson was not alleging any contract by Anderson personally, i.e. that it was by ARE. RP June 9, 26:21-27:11.

Then, during trial, Anderson testified the alleged agreement was between her personally and Mr. Oros. RP June 11, 28:23-30:16 (referring to "we" of Paula and husband and Simon), 31:5-24 (agreement with Oros) and 41:7-42:6 (oral agreement between the two). Anderson's counsel then argued in response to Oros' motion under CR 50 to dismiss the counterclaim that the agreement "was a personal contract with Mr. Oros, not her corporation or LLC." RP, June 12 81:8-12.

Regardless of with whom Oros made this alleged oral agreement to provide labor and services, Anderson alleged it was made in July 2009, whereas Anderson did not assert it until March 2013. RP June 12, 55:4-18 (oral "long before" Aug.3 Property Agreement), and CP 126-129.

In discovery, Anderson did not and was unable to identify any damages for her counterclaims. CP 89 (Response to Rog. 7, pg. 13, lines 13-19). Anderson stated she was "still calculating the exact amount." *Id.*

### **C. MOTIONS IN LIMINE**

Oros filed six motions in limine, four of which are apropos to the instant appeal. CP 10-23. The Oroses' first was aimed at Anderson's first affirmative defense: that ARE was the proper, and Oros should have

named ARE and not the Andersons personally, as the defendant. CP 13-14 (Motion I) The second motion sought to maintain the separateness between Anderson as shareholder and ARE as a corporate entity, seeking to preclude Anderson from offering evidence or arguing claims and defenses that belonged to ARE (CP 14-16, Mtn. II). Again, Anderson alleged the purported agreements on which she based her counterclaim were made by her company, ARE (CP 126-129).

As to these two motions in limine, Anderson conceded them:

THE COURT....**The first motion** is to exclude evidence argument that the defendants' corporation should have been made a party.

MR. JACOBSON: And **we're going to concede the – that particular motion.**

THE COURT: Okay. I had written down here defendant does not oppose, so that may have some effect on some of these other motions, too, I guess.

MR. JACOBSON: There's actually **one other one that we would concede** as a result, that being that -- the lack of standing motion in limine, although --

THE COURT: **Is that the second motion?**

MR. JACOBSON: I believe it is.

THE COURT: And I'm reading it here: **Motion to exclude evidence and argument as to claims and defenses of the corporation. That's -- that's No. 2.**

MR. JACOBSON: **Yes.**

RP June 9, 13:23-14:19 (bold added).

Nonetheless, Anderson argued that ARE was administratively dissolved, and the legal consequence of which was that all of the corporation's (ARE's) claims and liabilities automatically passed to Anderson as the shareholder. CP 48:1-17 (Response), and CP 52-55 (Decl. of Paula Anderson declaring ARE was administratively dissolved).

The Trial Court heard argument and granted Oros' second motion in limine; the Trial Court precluded Anderson from offering evidence or arguing any claims or defenses that belong to ARE. RP June 9, 22:23-24:19 and CP 131 (¶2 of Order). The Trial Court provided five bases for its ruling: (1) Anderson did not allege "she's a successor to the corporation"; (2) unfair "to mush things together"; (3) lack of timeliness; (4) confusion of the jury; and (5) unfair (prejudice) to Oros. CP June 9, 22:23-24:19.

Oros' third motion in limine sought to preclude evidence and argument of the alleged oral agreement for Oros to provide labor and services. CP 16 (Mtn. III). Oros argued the three year statute of limitations under RCW 4.16.030(3) for an oral agreement had expired, so there was no claim to make, and it did not matter with whom – ARE or Anderson personally – Oros supposedly agreed. CP 16.

The Trial Court denied the motion because it could not yet ascertain the facts Anderson was alleging and which party – ARE or

Anderson – supposedly made the oral agreement with Oros. RP June 9, 26:21-28:8.<sup>3</sup> So, the Trial Court allowed Anderson to put on evidence of her alleged oral agreement. CP 130-132.

In addition, in its colloquy with counsel, the Trial Court raised *sua sponte* that even if Anderson’s counterclaim as to an alleged oral agreement had expired due to the statute of limitations, Anderson may still be able to assert it as a defense through offset. RP June 9, 26:2-20. Oros acknowledged the statute of limitations may not bar a defense as a means reduce the damages. *Id.* The Trial Court noted that Anderson had not, however, pled that defense. *Id.* Anderson, however, did not request leave to add that defense. CP 45-51, and RP June 9, 26:2-62:15.

Oros’ fourth motion in limine apropos to the instant appeal sought to preclude Anderson from stating any amount as to damages, because Anderson had not disclosed any at any point. CP 22-23 (Mtn. IX). The Trial Court recognized Anderson’s failure and the “difficulty” Anderson placed Oros in, but denied the motion. RP June 9, 50:16-52:6 and CP 131-132 (¶9).

Nothing in the Trial Court’s rulings precluded Anderson from putting on evidence as to an alleged oral contract, or to any damages

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<sup>3</sup> The Trial Court was unclear even though even though Anderson, in addressing Oros’ motions in limine, stated ARE and not Anderson made the oral agreement. RP June 9, 26:21-27:11.

Anderson may have suffered. CP 130-132; RP June 9, 26:2-28:8; and RP June 9, 50:16-52:6.

#### IV. LEGAL AUTHORITY AND ARGUMENT

##### A. STANDARD OF REVIEW

Anderson seeks review of the Trial Court's ruling on motions in limine, whether to grant leave to amend under CR 15, and award of pre-judgment interest, as well as the amount of attorney fees' awarded. All of these matters are reviewed for manifest abuse of discretion. *Garcia v. Providence Med. Center*, 60 Wash. App. 635, 642, 806 P.2d 766 (1991) (citation omitted) (motion in limine); *Herron v. Tribune Publ'g Co.*, 108 Wash.2d 162, 165, 736 P.2d 249 (1987) (leave to amend); *Colonial Imports v. Carlton Northwest, Inc.*, 83 Wash.App. 229, 242, 921 P.2d 575 (1996) (award of pre-judgment interest); and *Lay v. Hass*, 112 Wash.App. 818, 826, 51 P.3d 130 (2005) (award of attorneys' fees).

An abuse of discretion is "discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971). More simply, a Trial Court's decision should only be reversed "if no reasonable person could have so ruled." *Medcalf v. The Department of Licensing*, 83 Wash. App. 8, 16, 920 P.2d 228 (1996).

**B. AS ANDERSON SIGNED THE PROPERTY AGREEMENT PERSONALLY, THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE THAT OROS SHOULD HAVE MADE ARE THE DEFENDANT**

The trial properly granted Oros' first motion in limine for at least two reasons: (1) Anderson conceded the motion, and (2) it was and is undisputed Anderson personally signed the Property Agreement.

First, Anderson conceded the motion; it was unopposed. *See* CP 45-51 (Resp. to Motions) and RP June 9, 14:4-7. Since Anderson agreed, she cannot assign error on appeal.

Second, Anderson signed the Property Agreement in her personal capacity. Anderson represented to the Court that Anderson executed the Property Agreement in their personal capacity. RP June 9, 49:12-15. This was then confirmed at trial.

The Property Agreement demonstrates Anderson signed in her personal capacity. *See Trial Ex. 4*. And, the loan documents (promissory note and deed of trust) were signed by the Andersons in their personal capacity. *See Trial Exs. 5-7*. Both Peter and Paula Anderson testified they each signed all the documents personally. RP June 13, 11-13:25; RP June 11, 78:1-79:19; RP June 12 55:22-56:6; and RP June 11, 79:14-19. Indeed, the Andersons conceded this in their brief. *See Appellants' Brief, pg. 13* (purchased "property in their personal capacity").

Thus, there is no question that the Andersons personally were the proper Defendant to Oros' claims. This Court should uphold the Trial Court's ruling in limine precluding evidence and argument that ARE "is the proper defendant or the responsible party, or is somehow liable [to Oros] instead of [the Andersons personally]. CP 130-131 (¶1).

**C. THE TRIAL COURT PROPERLY PRECLUDED CLAIMS OF ARE BECAUSE ANDERSON DID NOT INVESTIGATE AND PLEAD THEM**

**1. Because Anderson Had not Pleaded She Was A Corporate Successor, The Issue Before the Court Was Whether to Grant Anderson Leave to Amend**

There is no question Anderson did not plead that her corporation (ARE) was dissolved and she, as a shareholder, automatically and instantaneously acquired whatever claim or defense ARE had related to Oros. CP 126-129 (counterclaim). Anderson pled only that the agreements and transactions with Oros were by and through her corporation, ARE. CP 126-128 (¶1, Oros agreement with RE/Max, and ARE appointed as agent; ¶11, ARE "and plaintiffs agreed that [ARE] would assume the...loan"; and ¶11, ARE and Oros agreed Oros would provide labor and services).

Also, presented to the Trial Court with the motion in limine was Anderson's representation to Oros through discovery responses that Anderson was "in the process of verifying the exact dates which [ARE]

existed and/or was active.” CP 84:1-2. Anderson did not do that, however, and did not amend her discovery responses. The Trial Court also had before it Anderson’s deposition testimony that she could not recall if her corporate entity was first and LLC or an “inc” corporation. CP 97 (Dep. pgs. 38:7-39:2). When shown printouts from the Secretary of State’s website, Anderson still could not say if or when her corporate entity existed or if it had even been dissolved. CP 98 (Dep. pgs. 122:5-124:13).

But, in responding to Oros’ motion in limine, Anderson then submitted a declaration claiming under the penalty of perjury ARE was administratively dissolved. CP 52-55. Anderson did not, however, explain how or why she now knew it was a corporation first that was not just dissolved, but administratively dissolved. *Id.*<sup>4</sup> Anderson presumably changed her story and testified she personally entered into the oral agreement because of the Court’s Order in Motions in Limine

The effect of Anderson claiming her corporation was administratively dissolved was, for all intents and purposes, to amend her Answer and Counterclaims, although Anderson had not in fact requested leave. Anderson was proposing to the Trial Court that she be permitted to

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<sup>4</sup> Although, at trial, Anderson flipped back to her deposition testimony and testified ARE was not dissolved, but that she simply “changed status” from a corporation to an LLC. *Compare* CP 97 (Dep. pg. 38-39) and RP June 12, 29:17-30:9

amend her counterclaims to assert: (1) ARE was administratively dissolved, (2) Anderson was alleging that because of the dissolution, all claims and liabilities passed to her, and (3) therefore, Anderson could recover personally for any damages Oros caused ARE.

## **2. The Trial Court Properly Denied Anderson Leave To Amend**

The Trial Court did not abuse its discretion in declined to allow amendment and granted the motion in limine. CP June 9, 22:23-24:19. The Trial Court provided four bases for its ruling: (1) Anderson did not allege “she’s a successor to the corporation”; (2) unfair “to mush things together”; (3) lack of timeliness; (4) confusion of the jury; and (5) unfair (prejudice) to Oros. CP June 9, 22:23-24:19.

The purposes of Rule 15 are to “facilitate a proper decision on the merits” and provide each party with adequate notice of the basis of the claims or defenses asserted against him. *Herron, supra*, 108 Wash.2d at 165 (citations omitted). While leave is to be freely given, leave should not be granted “where prejudice to the opposing party would result.” *Id.* (citations omitted). In determining prejudice, a Trial Court any consider undue delay and unfair surprise, and “the timing of a motion to amend pleadings—in terms of the progress of the litigation—may result in prejudice but otherwise is not dispositive.” *Id.* at 165-166. The Court

may also “consider whether the amendment to the complaint is likely to result in jury confusion, the introduction of remote issues, or a lengthy trial.” *Id.* at 165-166 (citations omitted).

The Trial Court in the instant action did just as *Herron* indicates. The Trial Court determined that Anderson did not investigate whether her or ARE had standing to assert the claims, and that allowing amendment at this stage would “mush things together” and “confuse the jury”; and that prejudice would result to Oros. CP 22:23-24:19.

Prejudice would have resulted to Oros because Anderson would be asserting an entirely new legal theory (dissolution of ARE and transfer of claims) – a theory Oros inquired about in discovery but Anderson did not disclose. There is no “judicial preference” to allow an amendment when the amendment raises a new claim or new factual issues. *Herron, supra*, 108 Wash.2d at 167.

When a new claim or factual issue is raised, as Anderson did here, then the responding party (Oros in this instance) “is more likely to suffer prejudice because he has not been provided with notice of the circumstances giving rise to the new claim and may have to renew discovery.” *Herron, supra*, 108 Wash.2d at 167.

This is exactly what happened in the instant action. Anderson was served before the lawsuit was filed. *See Affidavit of Service*. Upon

service, Anderson was on notice of the suit and the need to assert all claims and defenses relating to the Renton property, whether they belonged to ARE or her personally. When Anderson answered two months later, she stated the agreements and transactions were by her company, ARE. CP 126-128.

Then, in response to Oros' discovery requests as to the defenses Anderson asserted, Anderson stated she was "in the process of verifying the exact dates which [ARE] existed and/or was active." CP 84:1-2. Anderson did not do that, however, and when deposed, Anderson did not know if her corporation was dissolved. CP 97 (Dep. pgs. 38:7-39:2) and CP 98 (Dep. pgs. 122:5-124:13). Anderson did not "look into" if and when ARE was dissolved until "a couple weeks" before trial. RP June 9, 19:21-20:2.

Faced with Anderson's dilatory conduct and failure to disclose her legal theory, the Trial Court properly ruled Oros would be prejudiced and the jury would likely be confused. The Trial Court had sufficient, tenable grounds to grant Oros' motion in limine and deny Anderson leave to amend. It therefore was not an abuse of discretion and this Court should uphold the Trial Court's ruling.

**3. Amendment Would Have Been Futile Anyway Because Zimmerman Did Not and Does Not Apply**

The Trial Court had a further basis to preclude Anderson from asserting a new theory at trial, that it would have been futile. A motion to amend is properly denied if the proposed amendment would be futile. *See Ino Ino, Inc. v. City of Bellevue*, 132 Wash.2d 103, 142, 937 P.2d 154 (1997) (citations omitted). Here, allowing Anderson to assert on her own behalf claims that belonged to her corporation would be futile because the claims never transferred.

Relying exclusively on *Zimmerman v. Kyte*, 53 Wash.App. 11, 765 P.2d 905 (1988), Anderson seemingly argues that upon dissolution of the ARE entity, any and all assets and liabilities automatically and immediately – without any winding up or action by Anderson – transferred to Anderson as a shareholder. This is incorrect.

*Zimmerman* is based upon the former Washington Business Corporation Act (the “WBCA”), Chapter 23A RCW, superseded in 1989 by Chapter 23B RCW. As *Zimmerman* was decided in 1988, it was citing to and applying the former WBCA in stating that when a corporation is *administratively* dissolved, it ceases to exist. 53 Wash.App. at 18 (“When a corporation is dissolved administratively, it ceases to exist. RCW 23A.28.125(3).”).

The former statute stated as follows:

Upon the filing of the certificate of administrative dissolution, the existence of the corporation shall cease, except as otherwise provided in this chapter, and its name shall be available to and may be adopted by another person or corporation after the dissolution.

RCW 23A.28.125(3).

Under the former WBCA (Chapter 23A), when a corporation voluntarily sought to dissolve, the corporate existence continued. *See* RCW 23A.28.050 (“corporate existence shall continue until certificate of dissolution has been issued by the secretary of state”) and RCW 23A.28.120 (“Upon filing of the articles of dissolution, the existence of the corporation shall cease...”).

In contrast to a voluntary dissolution, when a corporation was delinquent in some respect, the Secretary of State provided written notice advising the corporation of the delinquency, and warned that failure to cure will result in dissolution. RCW 23A.28.125(2)-(3). If left uncured, the Secretary of State then filed a certificate of dissolution and the corporation ceased to exist upon that filing. RCW 23A.28.125(3).

The distinction of the status of a corporation depending on voluntary or administrative dissolution was eliminated with the passage of Chapter 23B RCW. Now, since 1989, regardless of type of dissolution, a corporation continues its corporate existence. When a corporation is

dissolved, for whatever reason, it “continues its corporate existence.”

RCW 23B.14.050(1) and RCW 23B.14.210(3).

As such, dissolution is not the death of the corporation:  
The WBCA's legislative history reinforces the conclusion  
that ‘dissolution’ has a special statutory meaning. Under  
the statute, ‘corporate dissolution’ should not be equated  
with ‘corporate death’

*Donlin v. Murphy*, 174 Wash.App. 288, 298-299, 300 P.3d 424 (2013).

After dissolution, the corporation is to “devote itself to winding up its  
affairs and liquidating its assets.” *Id.*

Thus, upon “dissolution,” the corporation retains its claims, with  
the intent of resolving those claims as part of the winding-up process.  
RCW 23B.14.050(2)(e) specifically states dissolution does not “[p]revent  
commencement of a proceeding by or against the corporation in its  
corporate name.” RCW 23B.14.050(1)(e) provides that a dissolved  
corporation may do “every other act necessary to wind up and liquidate its  
business and affairs.” Together, these two statutes establish that  
dissolution does not strip a corporation of its legal claims, and the  
corporate claims do not, as Anderson alleges, automatically transfer to the  
shareholders.

Further, post-dissolution, the corporation may bring any suit, not  
just those related to winding-up. *Ballard Square Condo. Owners Ass’n. v.*

*Dynasty Const. Co.*, 158 Wash.2d 603, 613, 146 P.3d 914 (2006).

Corporate claims do not transfer the shareholders upon dissolution.

Here, Anderson did not wind-up her corporation at all. RP June 12, 31:19-25. Rather, despite Anderson believing she just switched from a corporation to a LLC, the evidence reflected that three months after failing to pay Oros in full Anderson just closed her corporation – the corporation she believed had contracted with Oros. RP June 12, 29:11-32:6.

Therefore, *Zimmerman* is not applicable, and nothing transferred to Anderson. The current WBCA under Chapter 23B RCW applied to ARE, and that statutory scheme provides ARE retained all of its claims. Any amendment to assert Anderson automatically acquired ARE's claims would have been legally incorrect and futile.

**D. THE TRIAL COURT DID ALLOW ANDERSON TO PRESENT HER COUNTERCLAIM AND DAMAGES**

Anderson argues the Trial Court failed to allow the jury to consider damages as to a defense of setoff, premised upon Anderson's assertion that the Trial Court dismissed the counterclaim under CR 50. *See Appellants' Brief*, pg. 23, citing RP June 12, 82:14-19.

Anderson confuses the issue on appeal. While the Trial Court precluded evidence and argument regarding claims that belonged to ARE (CP 131, ¶2), it did not preclude evidence and argument regarding any

claim based upon an agreement Anderson made in her personal capacity (CP 131, ¶3). The Trial Court denied that motion, Oros' third motion in limine, and specifically stated it would "let evidence be introduced" (RP June 9, 27:20-25), and nothing in the Court's Order on Motions in Limine precluded Anderson from asserting evidence of damages. CP 130-132. The Trial Court also denied Oros' motion to preclude evidence of Anderson's alleged damages. RP June 9, 50:16-52:6; CP 131-132 (¶9).

At trial, Anderson offered evidence as to an alleged oral agreement, that Oros would provide labor and services toward the improvement of the Renton property. And, Anderson changed her story; she had alleged all the way through the first day of trial that this purported oral agreement was made by company, but at trial testified the alleged agreement was between her personally and Mr. Oros. RP June 11, 28:23-30:16 (referring to "we" of Paula and husband and Simon), 31:5-24 (agreement with Oros) and 41:7-42:6 (oral agreement between the two). Anderson's counsel then argued in response to Oros' motion under CR 50 to dismiss the counterclaim that the agreement "was a personal contract with Mr. Oros, not her corporation or LLC." RP, June 12 81:8-12.

So, by Anderson changing her story as to which party made the oral agreement with Oros, Anderson was able to put on all the evidence she wanted as to the alleged oral agreement.

Further, Anderson also had an opportunity to present evidence of damages, and Anderson attempted to do so. But, Anderson failed to present a coherent, admissible theory as to damages and all the costs and expenses she incurred. *See generally* RP June 11, 102:3-126:1. Anderson even presented a witness to try to authenticate a spreadsheet listing alleged damages. *See* RP June 11, 91:1-92:6 and 95:1-97:2 (Wendy Stansbury).

Indeed, when specifically asked what amount she was alleging and seeking, Anderson was unable to do so. RP June 11, 127:14-128:25. In the midst of cross-examination in front of the jury, Anderson sought the assistance of her counsel as to what if any amounts she was claiming. RP June 11, 127:18-19.

Upon Anderson resting her case, Oros then renewed his motion to dismiss Anderson's counterclaim regarding the alleged oral agreement, this time under CR 50. CP June 12, 78:8-80:18. Oros argued because Anderson could not identify any damages, she failed to establish one of the required elements for a breach of contract claim. *Id.* The Trial Court granted the motion on statute of limitations grounds. CP June 12, 82:1-82:25.

At that point, Anderson then moved to amend her answer to add setoff as a defense; Anderson did not cite CR 15(b) to the Trial Court as she does on appeal. RP June 12, 84:12 – 85:13. Oros objected, and the

Trial Court denied leave to add the defense. RP June 12, 85:14-86:15. The Trial Court stated, "it's just too late." RP June 12, 86:14-15.

Here, the Trial Court properly denied leave for at least two reasons: (1) it was indeed "just too late" and (2) it would have been futile because Anderson failed to submit evidence as to any damages.

First, While Anderson asserted nine defenses, many seeking to void the Property Agreement, she did not plead set-off. CP 125-126. At no time before she rested her case did Anderson seek leave to amend. In fact, the Trial Court alerted Anderson in limine to the possibility of the defense and Oros acknowledged the statute of limitations does not typically bar the defense. RP June 9, 24:20-26:16.<sup>5</sup> But, Anderson did not then seek leave. So, at the close of trial, *after* Anderson had rested her case and Oros moved under CR 50, it frankly was "just too late."

Moreover, CR 15(b) does not apply because that Rule allows amendment to add "issues not raised by the pleadings [but which] are tried by express or implied consent of the parties." By the plain language, for the Rule to even be implicated, Oros would have had to consent, either impliedly or expressly, to the evidence as to set-off, to wit: evidence of the alleged oral agreement and damages. "[A]mendment under CR 15(b)

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<sup>5</sup> Oros recognizes a distinction between off-set and setoff, and that the Court used the term off-set. However, because Anderson uses the term setoff in her appellate brief, Oros uses that term as well for consistency,

cannot be allowed if ...the issues have not in fact been litigated with the consent of the parties.” *Harding v. Will*, 81 Wash.2d, 132, 137, 500 P.2d 91 (1972).

In determining whether the parties impliedly tried an issue, an appellate court will consider the record as a whole, including whether the issue was mentioned before the trial and in opening arguments, the evidence on the issue admitted at the trial, and the legal and factual support for the Trial Court's conclusions regarding the issue. *See Dewey v. Tacoma School Dist.*, 95 Wash.App. 18, 26, 974 P.2d 847 (1999).

Oros did not consent at all. Oros sought to exclude all such evidence by the motions in limine. The Court only denied Oros' motion, and allowed Anderson to submit evidence, because Anderson was vague and unclear as to the facts of, and who were the parties to, the purported oral agreement. RP June 9, 26:21-28:8. The Court ruled that Oros could renew the motion under CR 50. CP 131 (¶3). Oros not only made the motion under CR 50, but also objected at several points during trial of evidence Anderson sought to introduce regarding damages. RP June 11, 96:20, 112:1-114:19, 115:12-13, and 116:8-10; and RP June 12, 50:15-16, 52:24-25, and 85:14.

These facts are similar to those in *Dewey, supra*, where the court denied leave to amend under CR 15(b). In *Dewey*, the defendant school

district moved under CR 50 at the close of Mr. Dewey's case. 95 Wash.App at 23. In response, Mr. Dewey sought leave to add a claim under CR 15(b) pointing out that he had pled facts to support the claim although he did not specifically identify the claim. *Id.* at 24-25. The court still denied the motion because Dewey had not pled the claim, and the only time it was actually raised was in oral argument at a prior summary judgment hearing. *Id.* at 26.

Likewise, Anderson here failed to pled setoff as a defense, and never raised it until Oros moved under CR 50. And, the only time setoff was ever mentioned was by the Court in limine, and not Anderson. RP June 9, 26:2. Anderson never raised the issue in her trial brief, interrogatory answers, or in response to Oros' motions in limine. *See also Fed. Signal Corp. v. Safety Factors*, 125 Wash.2d 413, 435-436, 886 P.2d 172 (1994) (denied leave under CR 15(b) to add defense of mitigation in part because defense not raised in discovery, trial briefs, or in opening argument).

Second, the amendment would have been futile because Anderson was unable to identify any damages. Again, the Trial Court did not preclude Anderson from presenting evidence as to damages, and Anderson did present such evidence. However, Anderson was unable to identify any specific damages.

The purpose of CR 15(b) is to avoid the necessity of a new trial and a multiplicity of lawsuits. *See, Harding, supra*, 81 Wash.2d at 136. Here, Anderson was provided an opportunity to present evidence as to her damages and failed to do so. No new trial is needed; the Trial Court did not abuse its discretion and Anderson should not be given a second bite at the apple.

**E. SINCE ANDERSON FAILED TO PROPOSE A “SET-OFF” JURY INSTRUCTION, AND FAILED TO OBJECT TO THE ABSENCE OF ONE, SHE CANNOT CLAIM ANY ERROR**

Anderson complains the Trial Court erred in failing to give the jury an instruction as to the defense of “set-off.” *See Appellants Brief at 6 (Assgnmnt. Of Error 3) and 24-25 (re failure of jury instruction)*. But, Anderson failed to both (a) object to the lack of one and (b) failed to offer one. Her errors are fatal on appeal.

Under CR 51(f), if a party would like an instruction given, it must propose it to the Court, and if the Court fails to give it, that party must take exception in order to preserve the issue for appeal:

If a party is dissatisfied with an instruction, it is that party's duty to propose an appropriate instruction and, if the court fails to give the instruction, take exception to that failure. If a party does not propose an appropriate instruction, it cannot complain about the court's failure to give it

*Hoglund v. Raymark*, 50 Wash.App. 360, 368, 749 P.2d 164 (1987).

Here, Anderson failed to offer the instruction she desired regarding set-off as a defense, and made but two objections to the Trial Court's proposed instructions. RP June 12, 95:6-10 and 101:5-14. Indeed, Anderson did object to lack of an instruction for her defense of lack of consideration (RP June 12, 95:8-10) and made certain to "make [her] record" of that objection (RP June 12, 96:22). Then, Anderson told the Trial Court she was "not going to object to [other] instructions" not being given. RP June 12, 101:13-14. Thus, Anderson failed to preserve for review her third Assignment of Error.

One step further, assuming for the sake of argument that Anderson did propose a set-off instruction, she would not have been entitled to it because Anderson failed to present evidence to support it. For a party to be entitled to a jury instruction, there must be substantial evidence to support it. *See, e.g., Kelsey v. Pollock*, 59 Wash.2d 796, 798–99, 370 P.2d 598 (1962). That evidence "must rise above speculation and conjecture" to be substantial. *Bd. of Regents of Univ. of Wash. v. Frederick & Nelson*, 90 Wash.2d 82, 86, 579 P.2d 346 (1978).

Here, Anderson failed to present a coherent theory as to damages, and failed to articulate her damages. At best, her testimony was speculative and conjecture, which is legally insufficient to warrant a jury instruction.

**F. THE TRIAL COURT PROPERLY AWARDED PRE-JUDGMENT INTEREST AS AN ELEMENT OF OROS' DAMAGES**

Anderson argues RCW 4.56.110(1) required the Trial Court to award no pre-judgment interest. Appellants' Brief at 26. However, RCW 4.56.110 applies to *post*-judgment interest, not *pre*-judgment interest. The very first sentence of the statute begins, “[i]nterest on judgments...” Thus, by the plain language, specifically the preposition “on,” the statute applies to post and not pre-judgment interest.

Rather, where the parties did not agree to pre-judgment interest, pre-judgment interest is based upon a public policy to compensate a party for the “injury” of loss of use of money. *See Colonial Imports, supra*, 83 Wash.App. at 242 (C.J. Baker, dissenting); and *Bailie Comm. v. Trend Business Systems*, 61 Wash.App. 151, 162, 810 P.2d 12 (1991).

It is an element of damages as opposed to a contract right. *Farm Credit Bank v. Tucker*, 62 Wash.App. 196, 201, 813 P.2d 619 (1991) (distinguishing between contract right to interest and pre-judgment interest as damages); and *Prier v. Refrigeration Eng'g Co.*, 74 Wash.2d 25, 32, 442 P.2d 621 (1968) (“interest as damages”). Pre-judgment interest is a measure of damages because an award is based upon the principal “who retains money which he ought to pay to another should be charged interest upon it.” *Prier, supra*, 74 Wash.2d at 34.

As such, the obligation to pay pre-judgment interest “springs from a promise, or is one which is imposed by law apart from contract.” *Prier, supra*, 74 Wash.2d at 32 (“awarded...for default in paying money when due, or [for] breach of contract” among others). Prejudgment interest therefore, “is a make-whole remedy which is grounded in the “sense of justice in the business community ... that he who retains money which he ought to pay to another should be charged interest on it.’ The touchstone for an award of prejudgment interest is that a party must have the use value of the money withheld.” *Crest, Inc. v. Costco Wholesale Corp.*, 128 Wash.App. 760, 775-776, 115 P.3d 349 (2005) (citations omitted).

As an element of damages, an award is still proper even if the contract or note provides for zero percent interest, as the Property Agreement did here. *Mehlenbacher v. DeMont*, 103 Wash.App. 240, 251, 11 P.3d 871 (2000) (interest from date of default at statutory rate).

Oros sought an award on these principles; that once Anderson sold the Renton property but failed to pay Oros in full, she wrongfully retained money belonging to Oros. As such, Oros was deprived the “use” of his funds and Anderson must compensate Oros for that lost “use value.” *See Oros’ Mtn. for Entry of Judgment and Award of Interest*, pg. 2-5. Specifically, once Anderson sold the Renton property, she was obligated

to pay Oros, and Oros was entitled to the “use” of those funds. But, Anderson did not pay, instead retaining for herself an \$18,000 commission, reimbursing her corporation (ARE) over \$75,000 of which over \$19,000 that corporation then paid to Anderson.

There is no question there was substantial evidence to support the Trial Court’s Order that by Anderson failing to pay Oros, she “wrongfully retained money [she was] obligated to pay [Oro] and deprived [Oros] the use of those funds.” CP 517 (¶3).

Oros and the Trial Court recognized that the legal principals cited above entitled Oros to pre-judgment interest only after the sale of the Renton property. Oros therefore only sought, and the Trial Court only awarded, pre-judgment interest from January 30, 2010, which is over 30 days after the closing of the sale of the Renton property. CP 517 (¶4).

Anderson on appeal does not attempt to distinguish the above authorities, nor does she offer any different authority or reasoning as to how the Trial Court erred. She only asserts that the Trial Court had discretion to disallow some interest. *See* Brief at 27. Of course, this assumes the Trial Court’s actual ruling was well founded and the Trial Court could have made an award, but complains the Trial Court should have exercised its discretion to reach a different result. But, the Trial Court’s ruling is tenable, is not manifestly unreasonable, and is supported

by the evidence. This Court therefore should uphold the Trial Court's award of pre-judgment interest.

**G. THE TRIAL COURT WEIGHED THE PROPER FACTORS, ENTERED APPROPRIATE FINDINGS, AND AWARDED THE CORRECT AMOUNT OF FEES**

Anderson does not dispute that Oros was the prevailing party and entitled to an award of attorney fees. Anderson assigns error to the amount awarded. *See* Brief at 28-29.

While a trial court may in determining the amount of fees to award consider the amount in controversy as a factor, a reduction is typically only when the fee request "grossly exceeds the amount involved." *Scott Fetzer Co. v. Weeks*, 122 Wash.2d 141, 150, 859 P.2d 1210 (1993) (reducing fees, but still awarding \$22,000 when \$19,000 in controversy). Here, the amount requests does not "grossly exceed" the amount in controversy; it is roughly half.

The Trial Court may have considered the amount in controversy, but its Order is silent in that regard. However, a Court is not *required* to set the amount of the fees awarded in proportion to the amount in controversy. *Scott Fetzer Co.*, *supra*, 122 Wash.2d 141 at 150; and *Lay*, *supra*, 112 Wash.App. at 826. Indeed, courts routinely award fees that exceed the amount in controversy. *See*, e.g., *Lay*, *supra*, 112 Wash.App. at 826 (over \$13,000 in fees for \$433 in controversy); and *Lindsay v.*

*Pacific Topsoils*, 129 Wash.App. 672, 685-686, 120 P.3d 102 (2000) (over \$29,000 in fees when less than \$18,000 in controversy).

Here, the record demonstrates the Trial Court properly reviewed the submissions and arguments, applied “the criteria in RPC 1.5” as well as the applicable law. CP 517 (lines 1-6) and CP 518 (¶8). The Trial Court entered findings that properly supported the amount of fees it awarded, including effective presentation, quality of work, and “novelty and difficulty of the legal and factual questions involved.” CP 518 (¶8).

The Trial Court may have also considered, but did not expressly state in its Order, that Anderson increased the time and expenses. That is, Anderson asserted nine defenses seeking to void the Property Agreement (the Court and jury rejected all of them); that Anderson failed to properly investigate and plead her claims and defenses, making 11<sup>th</sup> hour changes in testimony and pleas to amend, all of which caused Oros increased expenses; and that while Oros’ case-in chief lasted less than one day even with Anderson’s cross-examination, Anderson took over two days. RP June 10-12.

#### **H. REQUEST FOR AWARD OF FEES AND COSTS ON APPEAL**

Under RAP 18.1, Oros requests an award of costs, expenses, and attorney fees incurred on appeal. The Property Agreement, at Trial Ex.

4, contains a broad provision for the non-breaching, or prevailing party, to recover all of its costs, expenses, and fees:

If either party hereto breaches any provision of the this Agreement, the breaching party shall pay to the non-breaching party **all attorneys' fees and other costs and expenses** incurred by the non-breaching party in enforcing the Agreement or preparing for legal or other proceedings regardless of whether suit is instituted. [and award to prevailing party in an action]

*See Property Agreement at Trial Ex. 4, ¶1(k), pg. 2 (bold added).*

Since there is a contractual provision for an award, an award is mandatory. *See, e.g., Singleton v. Frost*, 108 Wash.2d. 723, 727-729, 742 P.2d. 1224 (1987). Further, the Court should award “all attorneys’ fees and other costs and expenses” because that is what the parties agreed to.

Cost and fee provisions are interpreted – and enforced – like any other contract provision. *Walji v. Candyco*, 57 Wash.App. 284, 287-288, 787 P.2d 946 (1990) (parties’ intent of term “prevailing party” and not statutory definition applied); and *Hawk v. Branjes*, 97 Wash.App. 776, 783-784, 986 P.2d 841 (1999) (no award of costs because contract provided only for award of fees). In regard to fee and cost provisions, the “intentions of the parties are to be given effect.” *Walji*, 57 Wash.App. at 288. Here, the intent of the parties is expressed in the unambiguous

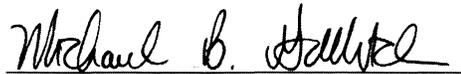
language of an award of “all fees and other costs and expenses,” and so that is what the Court should award.

## V. CONCLUSION

Under the preceding reasons, authorities, and arguments, the Court should find that the Trial Court properly exercised its discretion. All issues to which Anderson assign error are reviewed for abuse of discretion. All of the Trial Court’s rulings to which Anderson assign error are supported by the evidence and law, and so are tenable and not manifestly unreasonable. All the errors of which Anderson complains were of her own making and failures. Anderson had the money to pay Oros but simply elected to pay herself. Then, she closed her company. When Oros sued for the amount clearly due and owing, Anderson failed to investigate and plead her claims, and failed to articulate a clear legal theory and basis for recovery. She could not even say the amount by which she was allegedly damaged. She should only blame herself and not the Trial Court.

Dated this 24<sup>th</sup> day of April 2015.

PUGET SOUND BUSINESS & LITIGATION



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Plaintiffs and Respondents

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2015 APR 24 PM 4:12

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

SIMON OROS and VIORICA OROS,  
husband and wife,

NO. 72238-7-I

Plaintiffs,

DECLARATION OF SERVICE

v.

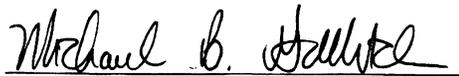
PAULA G. ANDERSON and JOHN DOE  
ANDERSON, husband and wife,

Defendants.

I declare under the penalty of the perjury of the State of Washington that, on the date signed below, I filed the Respondents' Brief with the Court of Appeals, and served a copy on counsel for Appellants via both e-mail and by depositing a copy in the US Mail, postage prepaid.

Dated this 24<sup>th</sup> day of April 2015.

PUGET SOUND BUSINESS & LITIGATION



Michael B. Galletch, WSBA 29612  
Attorney for Respondents/Plaintiffs