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No. 66504-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ATLAS SUPPLY, INC.,

Appellant,

v.

REALM, INC., a corporation; DAVID L. FOLLETT and
JANE DOE FOLLETT, a marital community,

Respondents,

and

DAVID L. FOLLETT and JANE DOE FOLLETT,
a marital community; CONTRACTORS BONDING AND INSURANCE
COMPANY, a domestic/foreign insurance company;
AMERICAN CONTRACTORS INDEMNITY COMPANY,
a domestic/foreign insurance company; and
STATE OF WASHINGTON DEPARTMENT OF
GENERAL ADMINISTRATION, a Washington state public entity,

Defendants.

REPLY BRIEF OF APPELLANT ATLAS SUPPLY

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A. INTRODUCTION

Realm's brief¹ submitted in response to Atlas's opening brief misstates the facts in the case and offers legal arguments mischaracterizing the cases it cites in support of its position. Realm fails to address the cases cited by Atlas in its opening brief that afford a broad interpretation to attorney fee provisions relating to "costs of collection."

Initially, Realm asserts that Atlas argued the incorrect standard of review on attorney fees. It is wrong. Ironically, the standard claimed by Realm to apply *benefits Atlas*.

Further, Realm argues that this Court should analyze the credit provision and subsequent sales orders at issue here in isolation from each other. Its argument is not only legally unsupported, it makes no practical sense. Without the credit provision in which Realm's president personally guaranteed his company's obligation to Atlas, Atlas never would have sold Realm any product. The credit provision was intrinsic to the transaction. The credit provision operated in unison with sales orders, allowing Realm to purchase goods from Atlas. Considering the credit and sales aspects of the transaction in isolation hobbles any reasonable

¹ This Court rejected Realm's first brief for failure to comply with the RAP. Realm then filed a motion to submit an "amended" brief to make its argument that Atlas somehow failed to address the key issue on appeal. Throughout this brief, Atlas references Realm's revised brief.

understanding of the dispute between Atlas and Realm, and perpetuates the trial court's error.

Realm's arguments are ultimately strained and unconvincing. Nothing offered in Realm's brief should dissuade this Court from reversing the trial court judgment on fees and remanding the case to the trial court for an award of attorney fees to Atlas based on all of Atlas's costs of collection against Realm.

B. REPLY ON THE FACTS

Realm's brief does not address the Statement of the Case in Atlas's opening brief. Instead, Realm offers a fantasy version of the facts. Contrary to Realm's assertion in its brief at 1, the parties did not enter into a credit agreement alone. In fact, the credit provision was signed on May 11, 2006. CP 325. Thereafter, Realm conducted business with Atlas on an open and continuing basis, purchasing materials. Consistent with such a relationship, Realm issued a purchase order on August 25, 2008 based on a May 13, 2008 material quote. CP 327, 330. Atlas invoiced Realm for the materials thereafter. CP 334-89. The credit provision was specifically designed to allow Realm to buy from Atlas, on continuing credit terms, coating products manufactured by Lava-Liner, Ltd. and Pacific Polymers International, Inc. for the DNR Building in Olympia. CP 320, 325.

Realm does not deny that it reneged on its obligation to pay Atlas for the materials, compelling Atlas to sue it to collect them. Nor does Realm deny that it interposed an array of defenses pertaining to the product, noting that “extensive written discovery and depositions” were required. Br. of Resp’t at 3. Without any citations to the record (in violation of RAP 10.3(a)(5)), Realm asserts that certain actions occurred at a mediation. *Id.*²

Realm wants to leave the impression that the summary judgment proceedings favored it. Br. of Resp’t at 3-4. Again, Realm fails to cite to the record in support of such a proposition. That is because the record is to the contrary. When Atlas filed its collection action against Realm, Realm counterclaimed against Atlas for breach of contract, negligent misrepresentation, and product defects. CP 8-13. Its claims against Atlas were in excess of \$650,000. CP 769. Atlas was compelled to file a third-party action against Lava-Liner and Pacific Polymers by Realm’s actions. CP 14-20. Based on Realm’s two payment applications to the State in January and March 2009, Realm was paid in full for Atlas’s materials. Thereafter, Realm settled with the State and received substantial moneys designed to pay for additional materials provided to Realm. CP 769-70.

² Realm’s effort to characterize what occurred at the mediation violates mediation confidentiality as well. RCW 7.07.030-.040. The parties here have not waived confidentiality. RCW 7.07.040(1).

Nevertheless, *it still refused to pay Atlas*. It brought a fourth party complaint against Lava-Liner and Tim VanderLinda, the manufacturer's representative. CP 35-40. Realm proceeded against that company and its representative because the State assigned its claim against both to Realm as part of the settlement. CP 770.

Atlas's summary judgment motion was filed on June 23, 2010. CP 174. The mediation by all of the parties occurred on July 21, 2010. CP 771. Atlas was entirely unaware of the amount of Realm's settlement with the product manufacturers at the mediation because it was not a party to the settlement agreement. CP 771. This belies Realm's claim in its brief at 4 that the parties' stipulation to dismiss was based on an agreement to pay \$525,000. The bottom line is that in the face of Atlas's summary judgment motion, despite its counterclaims and its extensive litigation tactics, *Realm agreed to pay Atlas exactly the price of the goods Atlas sold it, plus interest, and attorney fees*. CP 332, 771. The trial court granted Atlas's summary judgment motion to that effect. CP 745-47. The only issue left was not the right to fees – Realm *conceded* Atlas's right to recover them,³ but rather the amount of fees.

C. ARGUMENT

³ Realm has no answer to Atlas's assertion that Realm's failure to appeal the summary judgment order renders the trial court's ruling that Atlas is entitled to fees the law of the case. Br. of Appellant at 10 n.3.

(1) Standard of Review

Generally, an award of attorney fees is reviewed for abuse of discretion. *Guillen v. Contreras*, 169 Wn.2d 769, 774, 238 P.3d 1168 (2010). In its brief, Realm describes the standard of review in this case as de novo. Br. of Resp't at 6. Realm even claims there that Atlas did not discuss the standard of review in its brief; this assertion is flatly untrue. Br. of Appellant at 11. In fact, the correct standard of review is set forth in Atlas's opening brief, but, ironically, if Realm's unsupported understanding of the standard of review is correct, a de novo standard is more beneficial *to Atlas* as it is less deferential to the trial court's decision.

(2) Atlas Appealed From the Trial Court's Key Legal Ruling

More strange than its argument on the standard of review is Realm's contention that Atlas has not assigned error to the trial court's ruling that the fee clause at issue here is confined to the collection of delinquent accounts. Br. of Resp't at 7-8. This argument is belied by the fact that Atlas specifically assigned error to the trial court's fee rulings, and Atlas's *entire brief* is devoted to arguing the fee issue.

Atlas assigned error to each of the trial court's rulings on fees and the final judgment. Br. of Appellant at 2. The section of its brief relating to the issues pertaining to the assignments of error makes clear that the amount of fees was at issue. *Id.* Further, Atlas summarized its argument

at the outset by stating that “The trial court abused its discretion when it confined Atlas’s fee recovery under a contractual attorney fee provision allowing it to recover fees for the “costs of collection”... *Id.* at 10.⁴

Realm’s insistence that Atlas somehow failed to properly preserve the error relating to fees is a reflection of its own confusion concerning the standard of review and the issues on appeal. Its argument on this issue is spurious.

(3) The Credit Provision and Subsequent Sales Orders Must Be Read In Conjunction

Realm insists that the credit provision bears no relationship to the sales orders for coating products so that there were two separate, independent matters between Atlas and Realm which have no relationship to one another. Its argument is commercially unreasonable, and legally unsupported.⁵

⁴ Even if Atlas had failed to specifically assign error as Realm argues, an appellant's failure to properly assign error will be excused when the nature of the challenge is perfectly clear. *State v. Slanaker*, 58 Wn. App. 161, 166, 791 P.2d 575, *review denied*, 115 Wn.2d 1031 (1990). Given that Atlas’s brief is devoted to arguing that the trial court erred in limiting Atlas’s attorney fees, the nature of the challenge in this case is abundantly clear.

⁵ Neither the credit provision, the purchase order, or any invoices contained an integration clause. CP 325-89. Such an integration clause might arguably have foreclosed the credit provision and sales order being read together. As this Court noted in *King v. Rice*, 146 Wn. App. 662, 670 n.17, 191 P.3d 946 (2008), *review denied*, 165 Wn.2d 1049 (2009), an integrated contract is one where the parties intend that it alone is the expression of their agreement. Neither the credit provision, the sales order, nor the invoices constituted an integrated contract.

The credit provision was signed on May 5, 2006 by Realm and Dave Follett (“Follett”) as personal guarantor. CP 325. Realm acknowledges that its purpose was to provide an open line of credit to Realm, much as a business would with a local bank. Br. of Resp’t at 9-10. Realm acknowledges that when it ultimately chose to purchase goods from Atlas, it could either purchase on credit or pay upon receipt. *Id.* at 10. Realm further acknowledges that by extending credit, Atlas had the right to file suit to collect any delinquent account and collect attorney fees. *Id.*

In Realm’s view, however, the credit provision and the sale of goods are strangers to one another. Realm insists that the provisions of the credit provision have absolutely no bearing on the sales, despite acknowledging the fact that it purchased materials from Atlas by using the very credit extended to it under the terms of the credit provision. Nowhere does Realm explain how purchasing materials on credit allows it to escape the terms of the credit provision.

The credit provision is interrelated with the sales orders. Atlas would plainly never have sold anything to Realm had it not been protected by the attorney fee provision in the credit provision. This is evident from the language of the credit provision and the personal guarantee. The credit provision states, “In the event applicant becomes delinquent in his account, applicant agrees that Atlas ...shall have the right to bring suit

against applicant and if this occurs applicant agrees to pay the costs of collection, including reasonable attorney fee...” CP 325. Without a subsequent purchase, the applicant could not become “delinquent in his account.” Without a purchase on credit, the credit agreement itself is of no consequence - it exists in a world of pure potential. From a practical standpoint, a “costs of collection” attorney fee provision in the credit provision has no meaning in the absence of a failure by Realm to pay for the materials it ordered. There is nothing to *collect*. The fee provision is operative when a buyer like Realm fails to pay for the goods it bought from Atlas on credit.

The personal guarantee Follett signed is likewise forward looking. In it, Follett agreed unconditionally to “guarantee all sums owed pursuant to this agreement. This is a *continuing* guarantee...” *Id.* (emphasis added). Thus, the personal guarantee, like the credit provision, explicitly contemplates some future transaction covered by the credit provision along with the personal guarantee. The credit provision cannot stand alone, divorced from any actual purchase.

To argue that the credit provision and future sales agreements are not linked defies common business sense. They are inseparably bound together, and the personal guarantee only enhances the bond. What Atlas

sought to collect under the credit provision was the cost of goods provided in the sales agreement. It is obtuse to insist otherwise.⁶

This Court interprets contracts in a commercially reasonable manner which recognizes the commercial context in which they were made. *State v. Slanaker*, 58 Wn. App. 161, 166, 791 P.2d 575, review denied, 115 Wn.2d 1031 (1990). Realm's argument that the credit provision and guarantee and sales contracts are distinct is commercially unreasonable.

(4) Atlas Is Entitled to Attorney Fees Because Realm's Counterclaims Arose Out of the Contract With Atlas

Realm has conceded that it had a valid contract with Atlas. By not assigning any error to the trial court, it also concedes that Atlas is entitled to at least \$56,000 in attorney fees. Br. of Appellant at 10 n.3. But it insists that Atlas may not recover the significant attorney fees it expended in two years of fending off Realm's ultimately invalid counterclaims.

⁶ As Realm itself acknowledges, Atlas extended Realm credit much like a local bank. Br. of Resp't at 10. Letters of credit are frequently used to facilitate the financing of commercial transactions between buyers and sellers by providing certain and reliable means to ensure payment for goods delivered or services rendered. *Alhadeff v. Meridian on Bainbridge Island, LLC*, 167 Wn.2d 601, 611, 220 P.3d 1214 (2009). Letter of credit transactions usually involve three parties, the applicant, the issuer, and the beneficiary, and give rise to three distinct relationships: (1) the contract between the applicant and the issuer, usually the applicant's bank, to issue the LOC; (2) the LOC, under which the issuer agrees to pay the beneficiary upon complying presentation; and (3) *the underlying contract between the applicant and the beneficiary* that necessitates the LOC in the first place. *Id.* at 611-12. Thus, credit provisions like LOCs are commonly contemplated to be part and parcel of a sales transaction.

Realm's argument is not supported by Washington law or common sense. Realm largely ignores case law cited by Atlas in its opening brief which supports Atlas's argument that attorney fees are awardable because the action in the present case arose out of the contracts between the parties. Furthermore, Realm offers scant argument and no authority to rebut Atlas's assertion that an award of full attorney fees to Atlas is appropriate under RCW 39.08.030(1) and RCW 60.28.030.

Under Washington law, for purposes of a contractual attorney fee provision, an action is on a contract if the action arose out of the contract and if the contract is central to the dispute. *Seattle First Nat'l Bank v. Washington Ins. Guar. Ass'n*, 116 Wn.2d 398, 413, 804 P.2d 1263 (1991); *Deep Water Brewing LLC v. Fairway Resources, Ltd.*, 152 Wn. App. 229, 278-79, 215 P.3d 990 (2009). A contract is central to the dispute if the dispute could not be resolved without referring to it. *Burns v. McClinton*, 135 Wn. App. 285, 310, 143 P.3d 630 (2006), *review denied*, 161 Wn.2d 1005 (2007). Furthermore, Washington law allows the recovery of fees expended to defeat defenses to recovery, even where those defenses are compulsory counterclaims. *Brown v. Johnson*, 109 Wn. App. 56, 34 P.3d 1233 (2001); *Moritzky v. Heberlein*, 40 Wn. App. 181, 183-84, 697 P.2d 1023 (1985).

Realm has scarcely any answer to either *Brown* or *Moritzky*. Realm asserts that *Brown* is distinguishable from the present case, but does not advance any actual argument beyond implicitly rearguing that the credit provision and future sales are separate matters. Br. of Resp't at 16-17. As argued above, Realm is wrong.

Realm's argument in its brief at 18 about *Moritzky* is likewise unpersuasive. That the *Moritzky* court made a determination as to which was the prevailing party is not dispositive. The point is that the Court held that the homeowner's counterclaims were compulsory under CR 13(a), were tried as one lawsuit with the action to foreclose on the mechanic's lien, and entitled the homeowner who received the affirmative net judgment to attorney fees under the lien statute.⁷ 40 Wn. App. at 181, 183. The reasoning in *Moritzky* is directly applicable here, where Realm's counterclaims were compulsory and were tried as one lawsuit with Atlas's collection action against Realm.

The two cases upon which Realm principally relies to support its nebulous argument, *Hindquarter Corp. v. Property Development Corp.*, 95 Wn.2d 809, 631 P.2d 923 (1981), and *Seaborn Pile Driving Co. v.*

⁷ The lien was brought under former RCW 60.04.130, a mechanics and materialmen's lien statute like the retention lien statute in the present case, RCW 60.28.030.

Glew, 132 Wn. App. 261, 131 P.3d 910 (2006), *review denied*, 158 Wn.2d 1027 (2007) are respectively distinguishable and wildly mischaracterized.

Realm cites *Hindquarter* for the proposition that courts will not extend a contract fee provision beyond its express terms. Br. of Resp't at 12. This is an unsurprising legal maxim, but *Hindquarter's* holding is too narrow to apply here. In *Hindquarter*, the Court held a landlord was not obligated to renew a lease with a tenant who was consistently late in making lease payments, or paid with rubber checks. The landlord was not seeking to collect past-due rent, but merely declined to renew the lease. The Court addressed the question of attorney fees only briefly. It reversed the trial court's award of attorney fees to the landlord for litigating the renewal issue, noting that the terms of the lease authorized attorney's fees only for curing default, and the award of fees should reflect only those services rendered toward that end. 95 Wn. App. at 815. The *Hindquarter* holding does not in any way support Realm's argument. While the Court did not offer any details about the attorney fee provision in question, it made it clear that the provision applied only to curing default and could not be extended to apply to actions based on other provisions of the lease. That is not the case here, where Atlas sought only to collect what it was owed under its agreements with Realm.

While Realm's reliance on the passing treatment of an attorney fee clause in *Hindquarter* is merely inadequate, its interpretation of *Seaborn* is disturbingly off-the-mark. Br. of Resp't at 13-14. Realm wildly misstates the holding in that case.

Seaborn dealt with a CR 68 offer of judgment to dismiss counterclaims. The contract at the center of the dispute contained *two separate* attorney fee provisions; one dealing with collections which defined "costs" to include attorney fees, and a second, regarding litigation on the contract, which defined attorney fees as *separate* from the other costs. 132 Wn. App. at 266. The collection clause covered "all reasonable costs and charges incurred in collection" while the litigation clause applied to "any arbitration or lawsuit." *Id.* at 267. The plaintiff argued that the collection clause applied bilaterally to the defendant's counterclaims. The court agreed that under RCW 4.84.330, a contract clause that awards attorney fees to only one party is construed bilaterally to both parties. "But that does not mean that the collection clause applies to non-collection actions on the contract. If so, the litigation clause of the contract would be meaningless." 132 Wn. App. at 268. The Court's holding is dramatically different from how it is characterized in Realm's brief which states "...the fact that the counterclaims were brought in the context of a suit to collect on a contract does not transform them into 'costs and charges incurred in

collection.’” Br. of Resp’t at 14. The holding in *Seaborn* turned explicitly on the fact that there were *two separate attorney fee provisions* in the contract, and fees awardable under one provision were not necessarily awardable under the other. No such dueling attorney fee provisions are present here. *Seaborn* stands for the proposition that an offer is construed to include attorney fees if the underlying statute or contract defines attorney fees as costs. *McGuire v. Bates*, 169 Wn.2d 185, 190, 234 P.3d 205 (2010). It does not at all stand for the proposition that the attorney fee provision in the credit agreement cannot be applied to “non-collection” actions on the contract, as Realm claims it does. *Seaborn* is not applicable, and Realm’s brief summary of it gravely misstates the Court’s holding.

Realm attempts to evade the fact that its counterclaims arose from the sales agreement which was, in turn, subject to the attorney fee clause in the credit provision. It describes the case as arising out of the failure of the product, as distinct from its failure to pay its bill. But the counterclaims inevitably arose out of the contracts with Atlas, and under *Brown* and *Moritzky*, the attorney fee clause of the credit provision applies. Even though Realm was paid in full in early 2009 for the materials Atlas supplied it, Realm simply refused to pay Atlas, and its counterclaims were a stalling mechanism. Its defective product claims

were more properly directed to the manufacturers and distributors, not to Atlas who it refused to pay – even though Realm itself had already been paid over a million dollars by the State.

That Atlas may be awarded attorney fees under the credit provision, despite Realm's insistence to the contrary is made plain in this Court's holding in *Cornish College of the Arts v. 1000 Virginia Limited Partnership*, 158 Wn. App. 203, 242 P.3d 1 (2010), *review denied*, 171 Wn.2d 1014 (2011), Cornish College filed an action against the owner and manager of a leased building for specific performance of a purchase option and damages for wrongful eviction. The College successfully defended against the defendants' counterclaims for tortious interference with economic relations which were dismissed by the trial court. Virginia Limited petitioned for removal of the case to bankruptcy court. The bankruptcy court denied Virginia Limited's motion to reject the purchase option and dismissed the bankruptcy petition, describing it as a "litigation tactic rather than a bona fide effort to reorganize." *Id.* at 235. This Court reiterated that under Washington law, an action is on a contract for purposes of a contractual attorney fee provision if the action arose out of the contract and if the contract is central to the dispute. *Id.* Because Cornish College's involvement in the bankruptcy proceedings was initiated to protect its contractual rights pursuant to the agreement, the trial

court's award of attorney fees and costs incurred in connection with the bankruptcy proceeding was proper. *Id.*

The situation with Atlas is precisely analogous. Atlas brought suit against Realm to get paid for the goods it supplied Realm. Realm, in turn, brought its compulsory counterclaims.⁸ In order to ensure it was paid, Atlas was then forced to undergo two years of litigation, including discovery litigation in Thurston County. Realm's claims were unquestionably "on the contract." If it had not signed the credit provision with Atlas, it would never have been able to purchase the goods it claimed were defective.⁹ Rather, the defenses and counterclaims merely hindered and delayed Atlas's ability to collect what it was owed. Much as the *Cornish* defendants' attempt to enter bankruptcy was a litigation strategy, rather than a genuine attempt to reorganize, Realm's counterclaims were calculated to forestall Atlas's attempt to collect what it was owed. Had Atlas not defended against Realm's spurious counterclaims, it would not have prevailed in its collection action.

Finally, Realm contends that the fee clause here is somehow "ambiguous." Br. of Resp't at 14-17. Realm neither acknowledges nor

⁸ As discussed above, those claims were more properly brought against the material manufacturers than against Atlas.

⁹ It was likely Realm's improper application of the materials, rather than any defect in the materials themselves which caused the material application to fail. Realm never performed the necessary moisture tests while applying the material. CP 214-15.

distinguishes the authorities cited by Realm that “costs of collection” attorney fee agreements are common and well-understood in the law. Br. of Appellant at 17-18.

In sum, the trial court erred in its truncated, impractical reading of the fee agreement here.

(5) RCW 39.08 and RCW 60.28 Provide For the Award of Attorney Fees

RCW 60.28.030 and RCW 39.08.030 provide for attorney fees in any action brought to enforce a lien and/or payment bond in a public works project. *Keller Supply Co. v. Lydig Constr. Co.*, 57 Wn. App. 594, 601, 789 P.2d 788, *review denied*, 115 Wn.2d 1012 (1990).

Realm argues that the above statutes do not apply here. But its argument rests solely on its faulty insistence that Atlas’s claims and Realm’s counterclaims are entirely separate actions. As detailed above, Realm’s counterclaims arose out of the contract with Atlas. Thus, Realm’s argument – which is entirely unsupported by any authority – fails. Both statutes support the award of attorney fees where the parties make claims and counterclaims.

This Court’s holding in *Diamaco, Inc. v. Mettler*, 135 Wn. App. 572, 145 P.3d 399 (2006), *review denied*, 161 Wn.2d 1019 (2007) is illustrative. In *Diamaco*, the contractor Diamaco refused to pay a

subcontractor, ARM. ARM filed a notice of claim against the contractor's payment bond and retainage pursuant to chapters 39.08 and 60.28 RCW. Diamaco sued ARM seeking both liquidated damages and damages for delay of the project. ARM counterclaimed seeking to recover the balance owed and the costs of extra work. Diamaco's surety, Travelers denied ARM's claim and requested that ARM's counterclaim be dismissed. ARM prevailed at trial and the trial court awarded ARM attorney fees in the amount of \$135,000 under RCW 39.08.030 and RCW 60.28.030.

Diamaco and Travelers appealed, contending the trial court erred in awarding attorney fees. Travelers' primary contention is that it did not have a sufficiently adverse interest in the matter to justify an award of fees under chapter 39.08 RCW. This Court disagreed, holding that Traveler's denial of ARM's claim was sufficient to create an adverse relationship between the parties. *Id.* at 577.

Travelers also argued that the trial court erred in awarding attorney fees under RCW 60.28.030. This Court noted that a surety contests a right to recover when it denies the allegations in a complaint and seeks dismissal of an action. *Id.* at 578. The Court held that the trial court's award of attorney fees was appropriate because Travelers actively resisted ARM's claims by denying liability to ARM. *Id.*

Just as in *Diamaco*, Realm's sureties denied that Atlas is entitled to be paid the sum owing from the contract retainage and payment bond together with interest, costs and attorney fees. CP 5, 9, 10. As in *Diamaco*, the sureties asked that Atlas's claims be denied, and that Realm's counterclaims be granted in their entirety. CP 13.

Not only did Realm and its sureties deny Atlas's claims and seek to dismiss them, they also sought attorney fees and costs under the personal guarantee – and under RCW 39.08 et. seq. CP 13. Yet they now insist that attorney fees may not be awarded on the counterclaims under the very same statute.

Realm asserts erroneously, and without citing any authority, that the attorney fee provisions in the bond and retention statutes are narrowly drafted and would apply only to Atlas's collection claims. Br. of Resp't at 19-20. Realm is mistaken. Once a party comes within the terms of the bond and retainage statutes, the courts will liberally construe the statutes to provide security for all parties intended to be protected by them. *Better Financial Solutions, Inc. v. Transtech Elec., Inc.*, 112 Wn. App. 697, 703, 51 P.3d 108 (2002), *review denied*, 149 Wn.2d 1010 (2003). Under *Diamaco*, Atlas is entitled to attorney fees and costs pursuant to RCW 60.28.030 and RCW 39.08.030.

(6) Atlas Is Entitled to Its Appellate Fees

Realm contends it is entitled to its fees on appeal. Br. of Resp't at 22. In so doing, it mis-cites *Herzog Aluminum, Inc. v. General American Window Corp.*, 39 Wn. App. 188, 692 P.2d 867 (1984). That case does not stand for the proposition that a party may recover fees if it establishes that there is no enforceable contract, as Realm contends. Rather, a party is entitled to recover fees under RCW 4.84.330 only to the extent the contract allows. In *Herzog*, the contract contained a fee provision. Herzog filed suit alleging that General American breached the contract. Great American defended that action asserting that no contract existed between the parties because there had been no meeting of the minds on the terms of payment. The trial court and Court of Appeals agreed with Great American. The contract had a unilateral fee provision allowing Herzog to recover fees if there was "any dispute relating to this order." This Court held that RCW 4.84.330 rendered the fee provision mutual, and Great American was entitled to its fees even where no contract was present. Of course, in this case, Realm does not dispute that a contract existed. It would be entitled to fees under the fee clause in the credit provision to the same extent Atlas would be entitled to fees. If Realm is correct that Atlas's action is not "on the contract" within the meaning of decisions like *Burns v. McClinton*, *supra* at 309-10 (no recovery of fees for tort theories

based on contractual fee provision where partnership agreement was merely the background to the parties' disputes and not central to them), then it cannot recover fees on the contract. Realm cannot have it both ways – it cannot contend Atlas's collection action for Realm's failure to pay for the coating materials was unrelated to the credit provision and simultaneously argue the fee clause in that provision entitled it to fees.

Realm does not dispute that if Atlas prevails on appeal, however, that Atlas would be entitled to a fee award under RAP 18.1.

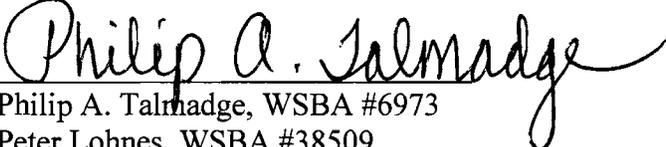
D. CONCLUSION

Realm's arguments on the standard of review and that Atlas has not appealed the trial court's "key legal ruling" are spurious. Realm's attempt to separate the credit provision from sales orders is unavailing and unreasonable. Its arguments regarding the bond and retainage statutes are likewise strained and unconvincing.

This Court should remand the case to the trial court for a supplemental fee award, allowing Atlas to recover its fees incurred in defending the Realm defenses/counterclaims and Thurston County action. Costs on appeal, including reasonable attorney fees, should be awarded to Atlas.

DATED this 19th day of July, 2011.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973

Peter Lohnes, WSBA #38509

Talmadge/Fitzpatrick

18010 Southcenter Parkway

Tukwila, WA 98188

(206) 574-6661

Randal S. Thiel, WSBA #18320

Thiel, McCafferty & Steinmark, PLLC

520 Pike Street, Suite 2210

Seattle, WA 98101

(206) 728-0260

Attorneys for Appellant Atlas Supply, Inc.

APPENDIX



FAXED 6/28/06

Atlas Supply, Inc., 611 S. Charlestown St., Seattle, WA 98108. Tel: (206) 623-4697

641400
641401

FIRM NAME Realm Inc.
BILLING ADDRESS PO Box 580 CITY DuPont STATE WA ZIP 98327
SHIPPING ADDRESS (job specific) CITY _____ STATE _____ ZIP _____
PHONE (360) 456-7627 FAX (360) 456-7627 E-MAIL ADDRESS RealmInn@AOL.COM

NATURE OF BUSINESS (ie, product or service, mfg. or supplier.) General & Earthwork Contracting

TYPE OF BUSINESS CORPORATION PARTNERSHIP SOLE PROPRIETORSHIP SUBSIDIARY OF _____

CONTRACTORS LICENSE NO. REALMT*027 EXPIRATION DATE 9/07 BONDING CO. CBC BOND# 901232

DATE BUSINESS STARTED 9/19/95 HOW LONG A PRESENT ADDRESS 10 yrs

IF CORPORATION, DATE INCORPORATED AND STATE 9/19/95 Oregon CREDIT LINE REQUESTED _____

PURCHASE ORDERS REQUIRED? YES NO STATEMENT REQUIRED? YES NO SALES TAX APPLICABLE YES NO

COPY OF EXEMPTION CERTIFICATE (see back side) MUST BE FORWARDED. TAX MUST BE CHARGED UNTIL VALID CERTIFICATION IS RECEIVED.

PAYMENT WILL BE MADE FROM THIS OFFICE OTHER OFFICE

AS APPLICABLE, LIST NAME(S) OF CORPORATE OFFICERS, PARTNERS OR OWNERS:

NAME	TITLE	SS#	HOME ADDRESS	PHONE
<u>Dave Follett</u>	<u>President</u>		<u>5026 Sleater-Kinney Oly</u>	<u>491-55778</u>

NUMBER OF EMPLOYEES 9 ANNUAL DOLLAR VOLUME SALES \$1,500,000.

NAME OF BANK	BRANCH ADDRESS	ACCOUNT NO.	ACCOUNT(S) TYPE
<u>South Sound Bank</u>	<u>4530 Lacey Blvd SE Lacey, WA</u>		<u>Checking</u>

TRADE REFERENCES	CITY, STATE	PHONE	FAX
<u>United Pipe & Supply</u>	<u>Astoria, OR</u>	<u>Acct 235895 (503) 788-8813</u>	<u>(503) 788-0144</u>
<u>Puget Sound Plants</u>	<u>Olympia, WA</u>	<u>Acct Realm (360) 943-0480</u>	<u>(360) 943-9251</u>
<u>Evergreen Concrete</u>	<u>Sumner, WA</u>	<u>Acct Realm (206) 480-1494</u>	<u>(253) 538-7229</u>

Applicant is (Corporation / Partnership / Sole Ownership) and undersigned is (Officer / Authorized person thereof) authorized to make this application and to certify that the above statements are true. In the event applicant becomes delinquent in his account, applicant agrees that Atlas Supply, Inc. shall have the right to bring suit against the applicant and if this occurs applicant agrees to pay the costs of collection, including reasonable attorney fee in suit by Atlas Supply, Inc. or assigns for the merchandise sold to applicant on credit subsequent to the date hereof. Applicant further agrees that venue of any suit may be laid in King County, Washington. Applicant further agrees to give Atlas Supply, Inc. permission to make inquiry on financial and related matters at applicant's bank, bonding company or lending firm, and authorizes such firms to give same to Atlas Supply, Inc. Terms of sale will be shown on each invoice, and it is agreed invoices will be paid by due date or a 1 1/2% per month late charge is acceptable.

Dave Follett/President
PRINT APPLICANT'S NAME & TITLE

[Signature]
APPLICANT'S SIGNATURE

5/11/06
DATE

PERSONAL GUARANTEE: The undersigned agrees to unconditionally guarantee payment of all sums owed pursuant to this agreement. This is a continuing guarantee and shall not be revoked except by written notice to creditor.

Signature [Signature]

Date 5/11/06

Oct. 05 2006 03:27PM P3

PHONE NO. : 360 456 7627

FROM : Realm Inc.

Application may be faxed to (206) 382-9319. Please forward the original application by mail.



MATERIAL QUOTE

Quote Number: SQ-0001138

Page: 1

Date of Quote: 05/13/08

Valid through:

Atlas Supply - Lakewood

4425 100 St SW
Lakewood, WA 98498
(253) 983-8882

FAX: (253) 983-8068

Salesperson: 005 - Evan Moran
Phone:
E-Mail:

Customer #: 641400
Entered By: EMM

Quote For:
REALM, INC
P O BOX 580
DUPONT, WA 98327
United States

Ship To:
REALM, INC
NRB ESTIMATED MATERIAL COST
**BASED ON 23000 SQ FT
OLY, WA 98327

RFQ #:
Customer Job:
Contact:
Phone:

FOB:
Ship Via:
Ship Date: 05/13/08
Lead Time:

Item No.	Description	UoM	Quantity	Unit Price	Total Price
LLUFE990C15	LAVALINER ULTRAFLEX EP990C 15G	KIT	8	1,228.01	9,832.08
LLUF5000P	LAVA LINER UF 5000 5 GALLON	KIT	290	276.26	80,115.40
LLAP1745	LAVA-LINER ADH.PROMOTER 174 PL	PAIL	15	233.22	3,498.30
PP16001ALGRYP	6001AL TOPCOAT CON.GRY 5-GAL	PAIL	73	213.25	15,567.25
JAE28451-4.7"	JAEGER 28451 KIESEL 4.7"X 164'	ROLL	31	93.15	2,867.65
PP1MONTEREYS	PAC POLY MONTEREY SAND 100 LB	EACH	16	19.76	316.00
LL5000TGGAL	LAVA LINER 5000 TROWEL GRADE 5-gal	GALLO	35	300.08	10,502.80

Transferred to page 2.....

122,719.48



MATERIAL QUOTE

Quote Number: SQ-0001138

Page: 1

Date of Quote: 05/13/08

Valid through:

Atlas Supply - Lakewood

4425 100 St. SW
Lakewood, WA 98498
(253) 983-8882

FAX: (253) 983-8068

Salesperson: 005 - Evan Moran
Phone:
E-Mail:

Customer #: 6414001
Entered By: EMM

Quote For:
REALM, INC
P O BOX 580
DUPONT, WA 98327
United States

Ship To:
REALM, INC
NRB ESTIMATED MATERIAL COST
**BASED ON 23000 SQ FT
OLY, WA 98327

RFQ #:
Customer Job:
Contact:
Phone:

FOB:
Ship Via:
Ship Date: 05/13/08
Lead Time:

Item No.	Description	UoM	Quantity	Unit Price	Total Price
LLUFE990C15	LAVALINER ULTRAFLEX EP990C 15G	KIT	8	1,229.01	9,832.08
LLUF5000P	LAVA LINER UF 5000 5 GALLON	KIT	290	276.26	80,115.40
LLAP1745	LAVA-LINER ADH.PROMOTER 174 PL	PAIL	15	233.22	3,498.30
PPI6001ALGRYP	6001AL TOPCOAT CON.GRY 5-GAL	PAIL	73	243.25 256.69	17,767.25 18,738.37
JAE28451-4.7"	JAEGER 28451 KIESEL 4.7"X 164'	ROLL	31	93.15	2,887.65
PPIMONTEREYS	PAC POLY MONTEREY SAND 100 LB	EACH	16	19.75	316.00
LL5000TGGAL	LAVA LINER 5000 TROWEL GRADE 5-gal	GALLO	35	300.08	10,502.80

** Price increased between time of quote & date of actual purchase 8-25-08 (5-13-08)*

Amount Subject to Sales Tax	0.00	Amount Exempt from Sales Tax	122,719.48	Subtotal:	122,719.48
				Total Sales Tax:	0.00
				Quote Total:	122,719.48

THERE WILL BE A MINIMUM 20% RESTOCKING CHARGE FOR AUTHORIZED MATERIAL RETURNS

We appreciate your business and we want you to be totally satisfied with our products and services. However, we wish you to understand the following:

Recommendations for the use of our products are based on information that we believe to be reliable. Manufacturer and/or seller are not responsible for the results where the product is used under conditions beyond our control. Under no circumstances will Atlas Supply, Inc. be liable for damages to anyone in excess of the purchase price of the product.

*** TEST ANY PRODUCT FIRST IN YOUR APPLICATION ! *** MSDS AVAILABLE UPON REQUEST ***

328

ATLAS 0097

Realm Inc.

P.O. Box 580
DuPont, WA 98327

Purchase Order

DATE	P.O. NO.
8/25/2008	1

Vendor
Atlas Supply 4425 100 St. SW Lakewood, WA 98498 (253) 983-8882

Ship To
Realm Inc. P.O. Box 580 DuPont, WA 98327

ITEM	DESCRIPTION	QTY	RATE	AMOUNT
Gen Mat	MATERIAL QUOTE SQ-0001138 DATED 5/13/08 NRB GARAGE PROJECT TOTAL PRICE OF \$122,719.48 (STILL WAITING ON 6001AL TOPCOAT COLOR CONFIRMATION)		122,719.48	122,719.48
			Total	\$122,719.48

--

DECLARATION OF SERVICE

On the day stated below, I emailed and deposited in the U.S. Mail a true and accurate copy of: Reply Brief of Appellant in Court of Appeals Cause No. 66504-9-I to the following parties:

Randal S. Thiel
Thiel, McCafferty & Steinmark
520 Pike Street, Suite 2210
Seattle, WA 98101

Thomas F. Miller
Jennifer Modak
Miller Law Office, P.S.
2620 RW Johnson Blvd. SW, Suite 212
Tumwater, WA 98512

Original and copy filed with:

Court of Appeals, Division I
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: July 19, 2011, at Tukwila, Washington.



Christine Jones
Talmadge/Fitzpatrick