

No. 74631-6

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

ROBERT BOYD and MARGARET WEIDNER,  
husband and wife,

Appellants,

v.

SUNFLOWER PROPERTIES LLC,  
a Washington limited liability company,

Respondent.

FILED  
Aug 10, 2016  
Court of Appeals  
Division I  
State of Washington

APPEAL FROM THE SUPERIOR COURT  
FOR SAN JUAN COUNTY  
THE HONORABLE DONALD E. EATON

CROSS-REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT

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**TABLE OF CONTENTS**

I. INTRODUCTION .....1

II. CROSS-REPLY ARGUMENT ..... 2

    A. Sunflower was entitled to an award of attorney fees under the purchase and sale agreement for prevailing in Weidner’s action seeking an easement over property retained by Sunflower. .... 2

        1. Weidner’s action was in fact a disguised attempt to reform the purchase and sale agreement to include an easement, warranting an award of attorney fees. .... 3

        2. Weidner’s claim for an implied easement concerns, and arises out of, the purchase and sale agreement, warranting an award of attorney fees to Sunflower for defending the action. .... 8

    B. This Court should award attorney fees to Sunflower on appeal. ....15

III. CONCLUSION .....15

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>Boguch v. Landover Corp.</i> , 153 Wn. App. 595, 224 P.3d 795 (2009).....	9-11
<i>Brown v. Johnson</i> , 109 Wn. App. 56, 34 P.3d 1233 (2001) .....	8, 10
<i>Deep Water Brewing, LLC v. Fairway Res. Ltd.</i> , 152 Wn. App. 229, 215 P.3d 990 (2009), <i>rev.</i> <i>denied</i> , 168 Wn.2d 1024 (2010).....	9-10
<i>Denaxas v. Sandstone Court of Bellevue, L.L.C.</i> , 148 Wn.2d 654, 63 P.3d 125 (2003) .....	4, 6
<i>Edmonds v. John L. Scott Real Estate, Inc.</i> , 87 Wn. App. 834, 942 P.2d 1072 (1997), <i>rev.</i> <i>denied</i> , 134 Wn.2d 1027 (1998) .....	8, 10
<i>Herzog Aluminum, Inc. v. Gen. American Window Corp.</i> , 39 Wn. App. 188, 692 P.2d 867 (1984).....	14
<i>Hill v. Cox</i> , 110 Wn. App. 394, 41 P.3d 495, <i>rev. denied</i> , 147 Wn.2d 1024 (2002) .....	9, 11
<i>Hudson v. Condon</i> , 101 Wn. App. 866, 6 P.3d 615 (2000), <i>rev. denied</i> , 143 Wn.2d 1006 (2001).....	11
<i>Hurley v. Port Blakely Tree Farms L.P.</i> , 182 Wn. App. 753, 332 P.3d 469 (2014), <i>rev.</i> <i>denied sub nom. Hurley v. Campbell Menasha, LLC</i> , 182 Wn.2d 1008, 344 P.3d 688 (2015) .....	4, 7
<i>Kincaid v. Baker</i> , 66 Wn.2d 550, 403 P.2d 888 (1965) .....	7
<i>Landberg v. Carlson</i> , 108 Wn. App. 749, 33 P3d 406 (2001), <i>rev. denied</i> , 146 Wn.2d 1008 (2002) .....	14

*Silver v. Strohm*,  
39 Wn.2d 1, 234 P.2d 481 (1951)..... 5

*Stryken v. Panell*,  
66 Wn. App. 566, 832 P.2d 890 (1992) .....13-14

**Statutes**

RCW 4.84.330.....15

**Rules and Regulations**

RAP 18.1 .....15

## I. INTRODUCTION

Respondent Sunflower sold undeveloped, platted property to appellants Weidner under a purchase and sale agreement. The agreement placed the burden on Weidner to verify all information provided by Sunflower or its listing agent regarding the property, and to confirm the property had adequate access to a public road. The agreement also provided that in any lawsuit “concerning this Agreement, the prevailing party is entitled to reasonable attorneys’ fees and expenses.” Seven years later, Weidner sued Sunflower claiming an easement over property retained by Sunflower, relying almost entirely on sales listings that they claimed implied they were entitled to the easement, despite having been given the opportunity to verify the property’s easement access.

The trial court properly dismissed the implied easement claim after concluding that the sales listings were “ambiguous at best,” and in any event, Weidner could not prove that any access easement over Sunflower’s property was ever used in an “apparent and continuous” manner. The trial court however erred in denying Sunflower attorney fees as the prevailing party since Weidner’s implied easement claim “concerns” the purchase and sale agreement.

This Court should affirm the trial court's decision dismissing the implied easement claim, but reverse its denial of attorney fees to Sunflower. This Court should remand with directions to the trial court to award attorney fees to Sunflower, and award attorney fees to Sunflower on appeal.

## II. CROSS-REPLY ARGUMENT

### A. **Sunflower was entitled to an award of attorney fees under the purchase and sale agreement for prevailing in Weidner's action seeking an easement over property retained by Sunflower.**

The trial court properly rejected Weidner's claim for an easement over property that Sunflower retained (Lot 3) to benefit property (Lots 4 and 5) that Weidner acquired under a purchase and sale agreement from Sunflower. Weidner failed to present any competent evidence that the property retained by Sunflower was ever used continuously to access the property purchased by Weidner, which would imply an easement for the property's benefit. (CP 765-66) The trial court however erred in denying Sunflower attorney fees incurred in successfully defending against Weidner's action. (CP 954)

If Weidner believed they were entitled to an easement, the purchase and sale agreement placed the burden on Weidner as the buyers to independently verify that "access to the property is provided by an insurable non-exclusive easement for ingress, egress

and utilities.” (CP 107) Weidner’s failure to do so, and their later action for an “implied easement” to correct this failure, “concerns” the purchase and sale agreement. Sunflower was thus entitled to attorney fees under the provision that if “buyer or seller institutes suit against the other concerning this Agreement, the prevailing party is entitled to attorneys’ fees and expenses.” (CP 98)

- 1. Weidner’s action was in fact a disguised attempt to reform the purchase and sale agreement to include an easement, warranting an award of attorney fees.**

In defending the trial court’s decision to not award attorney fees to Sunflower, Weidner claims that their Complaint asserted only one cause of action – establishment of an implied easement – that they allege was independent of the parties’ purchase and sale agreement. (Cross-Resp. Br. 17-18) To support this claim, Weidner asserts that “the parties’ written agreement does not mention, nor did it contemplate use of the Gravel Drive”<sup>1</sup> (Cross-Resp. Br. 19), which is entirely untrue. In their original offer, Weidner sought a boundary adjustment that would have included the property that they are now seeking as an “implied easement.” (CP 89) This offer

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<sup>1</sup> Despite Weidner’s continued characterization of the alleged easement as a “Gravel Drive,” the trial court rejected this characterization since using the “words driveway or Drive connote a usage that is at issue here.” (CP 765)

was rejected by Sunflower in part because the purchase price offered by Weidner was inadequate to compensate for the additional property they sought. (CP 61) Therefore, Weidner's action seeking rights to property that they were specifically denied "concerns" the purchase and sale agreement, warranting attorney fees to Sunflower as the prevailing party.

Weidner denies that they were in fact seeking to "reform" the agreement to include an unbargained-for easement that would indisputably trigger the attorney fee provision of the agreement. (Cross-Resp. Br. 19) *Denaxas v. Sandstone Court of Bellevue, L.L.C.*, 148 Wn.2d 654, 671, 63 P.3d 125 (2003) (awarding attorney fees to seller defending against an action to reform contract). But as this Court has held, "a party's characterization of the theory of recovery is not binding on the court. It is the nature of the claim that controls." *Hurley v. Port Blakely Tree Farms L.P.*, 182 Wn. App. 753, 771, ¶ 30, 332 P.3d 469 (2014), *rev. denied sub nom. Hurley v. Campbell Menasha, LLC*, 182 Wn.2d 1008, 344 P.3d 688 (2015) (holding that plaintiffs' nuisance claim was the same as their negligence claim and affirming dismissal of nuisance claim as duplicative).

Although Weidner purported to seek an "implied easement," the "nature of the claim" was in fact a demand for an easement that

they believed was part of their purchase of Lots 4 and 5, due to what they claimed were alleged misrepresentations by Sunflower in listing the property. In other words, Weidner sought to “prove that the contract as written fails to conform to the parties’ agreement.” (Cross-Resp. Br. 19) Weidner’s complaint alleged no facts to support a determination there was “apparent and prior continuous use” of an easement over Sunflower’s property – one of three factors for an implied easement. (See CP 4-8) *Silver v. Strohm*, 39 Wn.2d 1, 5, 234 P.2d 481 (1951). Instead, Weidner’s complaint focused on their unilateral belief that they had an easement over Sunflower’s property because of the way that Sunflower listed the property.

In their complaint, Weidner alleged that Sunflower’s sales listing “represented the permanent availability of the Gravel drive to those lots” (CP 6, ¶ 3.3), that Weidner “relied on Sunflower’s listing with respect to the use of the Gravel Drive when they purchased Plaintiffs’ Property” (CP 6, ¶ 3.6), and that Weidner “reasonably believed when they purchased Plaintiffs’ Property that they would have ingress and egress over the Sunflower Property via the Gravel Drive.” (CP 7, ¶ 3.19) In Margaret Weidner’s declaration in support of summary judgment for their claim for an implied easement, she alleged that the manner the property was “marketed,” not “apparent

and prior continuous use” of an easement benefitting the property, “tricked” them into buying the property with the belief that it had an easement. (CP 453) In claiming they were entitled to an easement as a matter of law, Weidner further argued, “critically, neither Sunflower nor their listing agent for the Lots bothered to inform Plaintiffs of the lack of access to the property from the north.” (CP 360) Finally, their complaint requested an “award of damages in an amount to be proven at trial [and] such other relief as the court may deem appropriate.” (CP 8) Weidner testified that the “damages” they sought were in fact “attorney fees” (CP 859), thus acknowledging that the purchase and sale agreement allowed for an award of attorney fees for their action.

Based on these facts alleged in Weidner’s complaint and motion for summary judgment, the “nature” of their claim is not one for an implied easement, but one to reform the purchase and sale agreement to include an easement, based on Weidner’s purported unilateral mistake and the alleged misconduct of Sunflower.<sup>2</sup> *Denaxas v. Sandstone Court of Bellevue, L.L.C.*, 148 Wn.2d 654,

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<sup>2</sup> The trial court did not find any misconduct by Sunflower. It instead acknowledged that Sunflower never intended to include a northern easement with the sale of Lots 4 and 5 to Weidner and the documents that Weidner claimed misled them into believing they would receive an easement were “ambiguous at best.” (CP 764-65)

669, 63 P.3d 125 (2003) (a party may seek reformation if “one of them made a mistake and the other engaged in inequitable conduct”) (*discussed* Cross-App. Br. 22-24); *see also Kincaid v. Baker*, 66 Wn.2d 550, 551, 403 P.2d 888 (1965) (in an action to reform a deed, the plaintiff must prove a unilateral mistake on her part and inequitable conduct on the part of the defendant). In fact, the trial court recognized that Weidner “devoted much of their attention to facts that would perhaps have supported a reformation claim, but which were not relevant to their implied easement claim.” (CP 939)

The fact that Weidner’s reformation claim is “presented in the garb” of an implied easement claim does not change the fact that the relief they sought, based on the facts they alleged, was an easement that they, through their own unilateral mistake, believed was included under the purchase and sale agreement when they acquired the property. *See Hurley*, 182 Wn. App. at 770, ¶ 27 (citations omitted). Because the nature of Weidner’s claim was to reform the purchase and sale agreement to include an easement, Sunflower was entitled to fees under the purchase and sale agreement, which authorizes an award of attorney fees to the prevailing party if either party “institutes suit against the other concerning this Agreement.” (CP 98)

**2. Weidner's claim for an implied easement concerns, and arises out of, the purchase and sale agreement, warranting an award of attorney fees to Sunflower for defending the action.**

Even if Weidner's claim was solely for an "implied easement," the action nevertheless "concerns" the purchase and sale agreement, as the agreement was central to the dispute. Weidner would have no claim for an implied easement if Sunflower had not agreed to sell, and Weidner agreed to purchase, Lots 4 and 5, and if Sunflower had not refused to sell Weidner the alleged implied easement area, all of which was the subject of the agreement.

To be awarded attorney fees as a prevailing party in a contract dispute does not require that the action be directly related to a breach of the contract, so long as the action "concerns" and/or "arises out of" the contract. *See Brown v. Johnson*, 109 Wn. App. 56, 58-59, 34 P.3d 1233 (2001) (awarding attorney fees under a purchase and sale agreement based on claim of misrepresentation) (*discussed at Cross-App. Br. 42-43*); *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn. App. 834, 855-56, 942 P.2d 1072 (1997), *rev. denied*, 134 Wn.2d 1027 (1998) (awarding attorney fees under a broker agreement and earnest money agreement based on claims of breach of fiduciary duty and negligence) (*discussed at Cross-App. Br. 43-44*);

*Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229, 278-79, ¶¶ 131-33, 215 P.3d 990 (2009), *rev. denied*, 168 Wn.2d 1024 (2010) (awarding attorney fees under a contract based on claim of tortious interference with a contract) (*discussed* at Cross-App. Br. 44-45); *Hill v. Cox*, 110 Wn. App. 394, 411-12, 41 P.3d 495, *rev. denied*, 147 Wn.2d 1024 (2002) (awarding attorney fees under a sale agreement even though plaintiff brought his action as a statutory claim for timber trespass) (*discussed* at Cross-App. Br. 45-46).

*Boguch v. Landover Corp.*, 153 Wn. App. 595, 224 P.3d 795 (2009), relied on by the trial court (CP 942) and Weidner on appeal (Cross-Resp. Br. 20-22), does not support denying attorney fees to Sunflower as the prevailing party in Weidner's action for an easement. In *Boguch*, the appellate court reversed an award of attorney fees to the defendant because the seller's claims did not allege a breach of the parties' contract, but relied on the defendants' statutory and common law duties of care owed to the seller. *Boguch*, 153 Wn. App. at 620, ¶ 45. In denying attorney fees, the court relied on the provision in the agreement, which provided that "in the event either party employs an attorney to *enforce* any terms of this Agreement and is successful, the other party agrees to pay reasonable

attorneys' fees." *Boguch*, 153 Wn. App. at 607, ¶ 18 (emphasis added).

Here, the attorney fees provision in the purchase and sale agreement is not as narrow as the one in *Boguch*. The provision here does not require that the action be one to "enforce" the agreement, but authorizes attorney fees in any suit "concerning" the agreement. (CP 98: "if Buyer or Seller institutes suit against the other party concerning this Agreement, the prevailing party is entitled to reasonable attorneys' fees and expenses"). This attorney fee provision is similar to those in the earlier cited cases that compelled an award of attorney fees in any action that "concerns" and "arises out of" a contract, regardless whether a party claims breach. *See e.g. Brown*, 109 Wn. App. at 59 (compelling award of attorney fees if a party "institutes a suit concerning this agreement"); *Edmonds*, 87 Wn. App. at 855 (the exact language of the agreement is not described, but holding that attorney fees are warranted if action arose out of the contract and if the contract is central to the dispute); *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn. App. at 277, ¶ 126 (compelling award of attorney fees "in the event of any controversy, claim, or dispute relating to this Agreement");

*Hill*, 110 Wn. App. at 411-12 (awarding attorney fees even though party brought action as timber trespass instead of breach of contract when contract provided “in the event either party hereto institutes, defends, or is involved with any action to enforce the provisions of this contract”); *see also Hudson v. Condon*, 101 Wn. App. 866, 6 P.3d 615 (2000) (holding that the prevailing party was not required to segregate its fees since the provision in the agreement allowing for fees “related to the partnership” was broad enough to include all of the causes of actions), *rev. denied*, 143 Wn.2d 1006 (2001).

Weidner’s claim for an implied easement “concerns” the purchase and sale agreement. While the trial court did not rely on the purchase and sale agreement in dismissing Weidner’s implied easement claim, the facts alleged by Weidner to support their claim required “examination” of the purchase and sale agreement, making the agreement ancillary to the dispute. *See Boguch*, 153 Wn. App. at 619, ¶ 41 (a claim requiring examination of the agreement, makes the contract ancillary to the dispute, allowing for attorney fees).

To prove the “apparent and prior continuous use” of an easement over Sunflower’s property, Weidner alleged in their complaint that Sunflower’s “listing represented the permanent availability of the Gravel Drive to those lots.” (CP 6) But the

purchase and sale agreement provided that “Buyer shall have 10 days after mutual acceptance to verify all information provided from Seller or Listing Agent related to the Property.” (CP 99)

Weidner also alleged that the “Gravel Drive is the only practicable access from any main road to Plaintiffs’ Property” to prove “reasonable necessity” for an easement over Sunflower’s property. (CP 6, ¶ 3.11) But the purchase and sale agreement provided that “if the Property does not have direct access to a public road, this offer is contingent on the Buyer’s independent verification during the Inspection Contingency period that access to the Property is provided by an insured non-exclusive easement for ingress, egress, and utilities.” (CP 107)

To also prove “reasonable necessity” of an easement over Sunflower’s property, Weidner alleged that if they were required to use the easement that was granted to them to access where they intended to build their home, it would require them to construct a “very long, steep driveway,” which would be “cross-prohibitive” and “frustrate the purpose of purchasing [the] property.” (CP 6-7, ¶¶ 3.13, 3.16, 3.18) But the purchase and sale agreement provided it is “the buyer’s responsibility to verify [ ] whether or not the Property can be platted, developed and/or built on (now or in the future) and

what it would cost to do this.” (CP 99) Therefore, all of the facts alleged by Weidner to support their implied easement claim “concerns” the agreement because it required “examination” of the agreement for Sunflower to defend against their claims, including whether Weidner should be foreclosed in relying on those allegations to claim an implied easement.

Weidner cannot avoid paying attorney fees under the purchase and sale agreement simply because their claim for an implied easement is “derived from equitable principles.” (Cross-Resp. Br. 21) In defending against their claim, Sunflower prevailed in asking the court to enforce the purchase and sale agreement by rejecting Weidner’s demand for an easement that was not part of their agreement. The fact that one party asserts an “equitable claim” in a dispute arising from a contract containing an attorney fee provision does not preclude an award of attorney fees. *See Stryken v. Panell*, 66 Wn. App. 566, 572, 832 P.2d 890 (1992).

In *Stryken*, the trial court granted the plaintiff his requested equitable remedy of rescinding the contract, over plaintiff’s alternate request to enforce the contract, but denied attorney fees because it had concluded the contract was void and unenforceable. Relying on

this Court's decision in *Herzog Aluminum, Inc. v. Gen. American Window Corp.*, 39 Wn. App. 188, 692 P.2d 867 (1984), the Court of Appeals reversed, holding that in an action where a party is alleged to be liable on a contract, a party who successfully proves no contract was formed on equitable grounds is still entitled to attorney fees if the contract allows for an award. *Stryken*, 66 Wn. App. at 572.

Finally, *Landberg v. Carlson*, 108 Wn. App. 749, 33 P3d 406 (2001), *rev. denied*, 146 Wn.2d 1008 (2002) does not support Weidner's argument that Sunflower was not entitled to attorney fees. (Cross-Resp. Br. 25) In *Landberg*, the appellate court reversed an award of attorney fees to defendant after affirming the trial court's decision dismissing plaintiffs' implied easement claim. The court rejected defendant's reliance on the deed of trust for an award of attorney fees, stating that it was "irrelevant to the [ ] easement claim." *Landberg*, 108 Wn. App. at 758. However, beyond that one line, no other analysis was provided in support of its decision, including any description of the fee provision – if any – in the deed of trust.

In this case, the purchase and sale agreement plainly provides for an award of attorney fees to the prevailing party in any action "concerning" the agreement. Weidner's implied easement claim

clearly concerns the agreement because it seeks to reform the agreement to include an easement that was not previously bargained for, and Weidner's alleged facts in support of their claim require an examination of the agreement. Because Sunflower was the prevailing party in Weidner's action, the trial court erred in denying attorney fees.

**B. This Court should award attorney fees to Sunflower on appeal.**

Because Weidner's implied easement claim concerns the purchase and sale agreement, Sunflower is entitled to attorney fees incurred on appeal defending the trial court's decision. RCW 4.84.330 (prevailing party entitled to attorney fees if provided for under a contract); RAP 18.1.

**III. CONCLUSION**

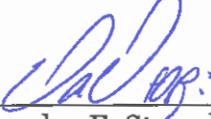
This Court should affirm the dismissal of the implied easement claim, reverse the denial of attorney fees in the superior court with directions on remand to award the fees Sunflower incurred defending the implied easement claim, and award attorney fees to Sunflower on appeal.

Dated this 10<sup>th</sup> day of August, 2016.

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**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on August 10, 2016, I arranged for service of the foregoing Cross-Reply Brief of Respondent/Cross-Appellant, to the court and to the parties to this action as follows:

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**DATED** at Seattle, Washington this 10<sup>th</sup> day of August, 2016.

  
Jenna L. Sanders