

COURT OF APPEALS NO. 39284-4-II

APPEALS  
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STATE  
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COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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JARNAIL MAAN,

Respondent

v.

ANTHONY G. MALELLA,

Appellant

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APPEAL FROM SUPERIOR COURT OF CLARK COUNTY  
HONORABLE JUDGE JOHN WULLE  
CLARK COUNTY CAUSE NO. 06-2-06264-1

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BRIEF OF APPELLANT

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## **I. ASSIGNMENT OF ERRORS**

### **A. ASSIGNMENT OF ERRORS**

1. The trial court erred in denying Defendant's request for attorney's fees and costs as requested within Defendant's motion for summary judgment.

2. The trial court erred in denying an award of attorney's fees and costs as part of an Amended Order Granting Judgment on Arbitration Award in favor of Defendant and denying an award of attorney's fees and costs to Defendant when Defendant was the prevailing party at the arbitration.

### **B. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS**

#### **1. Assignment of Error No. 1**

1.1 Did the trial court err as a matter of law in denying Defendant's request for attorney's fees and costs as requested within Defendant's motion for summary judgment when Defendant was the prevailing party in this matter after Plaintiff dismissed his complaint, thus entitling defendant to attorney's fees under the lease?

1.2 Did the trial court err as a matter of law in denying Defendant's request for attorney's fees and costs as requested

within Defendant's motion for summary judgment because Plaintiff's complaint was a frivolous action under RCW 4.84.185, thus entitling Defendant to attorney's fees and costs?

1.3 Did the trial court abuse its discretion by denying Defendant's request for attorney's fees as requested within Defendant's motion for summary judgment because Plaintiff's complaint was frivolous under CR 11, thus entitling Defendant to attorney's fees and costs?

**2. Assignment Error No. 2**

2.1 Did the trial court err as a matter of law in denying Defendant's request for attorney's fees as the prevailing party after arbitration as authorized under the lease?

**II. STATEMENT OF THE CASE**

**A. Procedural History of the Case**

In this case, Mr. Malella was the defendant and counterclaimant at the trial level and is now the appellant before the Court of Appeals. Jarnail Maan was the plaintiff at the trial level and is now the respondent before the Court of Appeals. On November 28, 2006, Plaintiff filed his Complaint for damages in the Superior Court of Clark County. (CP 3) Defendant filed his Answer and Affirmative Defenses on April 6, 2007.

(CP 8) On April 10, 2007, Defendant filed an Amended Answer and Affirmative Defenses. (CP 9)

On July 10, 2007, Defendant filed a Notice to Set for Trial and Statement of Arbitrability. (CP 13) On July 25, 2007, Defendant filed a motion to amend his Amended Answer along with a declaration from his then attorney, Susanna Southworth. (CP 16, 17) On August 1, 2007, Plaintiff filed his response to Defendant's motion to amend his Amended Answer. (CP 19) On August 15, 2007, Defendant filed his Reply to Plaintiff's Response to Defendant's motion to amend his Amended Answer, along with an affidavit of Defendant in support of his reply. (CP 23, 24) On August 17, 2007, Defendant filed his Second Amended Answer, Affirmative Defenses, and Counterclaims. (CP 28) On October 18, 2007, Plaintiff filed his Reply to Defendant's Counterclaims. (CP 31A)

On June 13, 2008, Defendant filed a motion for Summary Judgment, along with a Memorandum in Support of Summary Judgment, and the Declarations of Bruce Holmstrom, Daniel Force, James Babbitt, and Defendant. (CP 50, 51, 52, 53, 54, 56) On June 30, 2008, Plaintiff filed his Response to Defendant's motion for Summary Judgment along with declarations submitted by attorney Kevin Sampson, Jarnail Maan and Ravi Singh. (CP 57, 58, 59). On June 30, 2008, Plaintiff submitted, and

the trial court entered, his voluntary dismissal and order of dismissal of his Complaint pursuant to CR 41(a)(1)(B). (CP 61) On July 3, 2008, Defendant filed his motion to amend Plaintiff's Voluntary Order of Dismissal of Complaint and for Award of Attorney's Fees. (CP 64)

On July 7, 2008, Defendant filed his Response to Plaintiff's Response for Summary Judgment, along with declarations in support of the response by Defendant, Ronald Greenen, and Daniel Force. (CP 67, 68, 69, 70) On July 9, 2008, Plaintiff filed a Response to Defendant's motion to amend Plaintiff's Voluntary Dismissal. (CP 71) On July 11, 2008 the trial court entered an order of partial voluntary dismissal of Defendant's counterclaims, which specifically excluded Defendant's counterclaim regarding Plaintiff's failure to arbitrate the rental rate for the final term of the lease. (CP 73) This ordered Plaintiff to arbitrate the rental rate. (CP 73) On August 6, 2008, Plaintiff filed a response to Defendant's motion for costs and fees. (CP 74) On August 27, 2008, Defendant submitted a declaration regarding attorney's fees and costs. (CP 77) On September 23, 2008, Defendant submitted a memorandum regarding attorney's fees. (CP 80) On September 25, 2008, Plaintiff submitted his response to Defendant's memorandum regarding attorney's fees. (CP 81)

On April 10, 2009, Defendant submitted a motion and declaration for entry of judgment on arbitration award in favor of Defendant and for award of attorney's fees and costs and an affidavit of attorney Ronald Greenen in support of the motion. (CP 83, 84) On April 15, 2009, Plaintiff submitted a response to Defendant's motion for attorney's fees and costs and a declaration of attorney Kevin Sampson in support of the response. (CP 86, 87) On April 17, 2009, Plaintiff's attorney Ronald Greenen submitted a responsive declaration regarding Plaintiff's response. (CP 87A) On April 17, 2009, the trial court entered an order denying attorney's fees and costs from the September 26, 2008 hearing. (CP 89) On April 29, 2009, Plaintiff submitted a response to Defendant's motion for costs and a declaration of Mr. Sampson in support of said response. (CP 91, 92) On April 30, 2009, the trial court entered an amended order granting judgment in favor of Defendant on the arbitration award which denied attorney's fees and costs. (CP 94)

### **III. STATEMENT OF FACTS**

This lawsuit concerns a commercial lease for a business operating in Clark County, State of Washington. (RP 9) Defendant is the owner of commercial real property located at 1800 NE 78<sup>th</sup> Street, Vancouver, Clark County, Washington ("property"). (RP 11, CP 56) In July of 1986, Daniel Force purchased the business located on the property and leased

the building and real property from Defendant, with Defendant remaining the property and building owner at all times thereto. (RP 11, CP 56) At that time, the property contained a fully functional car wash. (See Declaration of Daniel Force, Defendant in support of CP 56) As part of the lease agreement between, Mr. Force and Defendant, Mr. Force was required to keep the building and property, including the car wash, in good repair and working order. (See Declaration of Daniel Force, Defendant in support of CP 56) During the course of the lease, Mr. Force allowed the car wash to fall into disrepair. (See Declaration of Daniel Force, Defendant in support of CP 56)

In July of 1996, Mr. Force wanted to sell the business to Plaintiff (aka Jarnail Dhada). (See Declaration of Daniel Force, Defendant in support of CP 56) At that time, Mr. Force had outstanding obligations under his contract and lease agreement with Defendant, including back rent, back property taxes and deferred maintenance. (See Declaration of Daniel Force, Defendant in support of CP 56) During these transactions with Mr. Force, Defendant was represented by attorney David Jahn. (See Declaration of Defendant in support of CP 56) The deferred maintenance resulted from Mr. Force's failure to maintain the store's upkeep, particularly the car wash. (See Declaration of Daniel Force, Defendant in support of CP 56) After gathering bids for the repair of the car wash to

make it functional again, Mr. Force and Defendant agreed that Mr. Force would pay Defendant \$17,000.00 at the closing of the sale of the business to Mr. Maan, thereby fulfilling Mr. Force's financial obligations to Defendant under the lease, including his failure to maintain the property and car wash. (See Declaration of Daniel Force, Defendant in support of CP 56) In consenting to the sale agreement, Defendant agreed to lease the building and real property to Plaintiff, and Mr. Force agreed to pay to Defendant \$17,000.00, to reimburse him for the deferred maintenance. (See Declaration of Daniel Force, Defendant in support of CP 56) This money was paid by Mr. Force to Defendant for the sole purpose of reimbursing him for the loss in value to the property caused by Mr. Force during his tenancy, including allowing the car wash to become inoperable. (See Declaration of Daniel Force, Defendant in support of CP 56) At no point in time was Plaintiff a party to this agreement, nor was there any discussion or agreement between Defendant and Plaintiff that this \$17,000.00 would be available to Plaintiff for maintenance of the property. (See Declaration of Daniel Force, Defendant in support of CP 56)

The lease between Defendant and Plaintiff was for five (5) years beginning on August 1, 1996 and ending on July 31, 2001, with the option of two (2) additional five (5) year terms. (See Exhibit A to CP 56)

Further, Plaintiff was required to give written notice to Defendant not less than 180 days prior to the expiration of the initial term and/or renewal. (See Exhibit A to CP 56) Such notice was to be mailed to Defendant as required in Clause 23 of the Lease. (See Exhibit A to CP 56) The rent for the first term was \$3,000.00 per month. (See Exhibit A to CP 56) The rent for the second term was set at \$3,500.00. (See Exhibit A to CP 56) It was agreed in the lease that if Plaintiff exercised his second lease option, that the rental rate would be negotiated to reflect the current fair market rate to be determined in binding arbitration. (See Exhibit A to CP 56) Up to the date of the entry of the order directing Plaintiff to arbitrate the rental rate for the final term of the lease, Plaintiff had refused to enter arbitration. Arbitration was held before the Honorable Retired Judge Skimas who ruled in favor of Defendant setting the monthly rental rate at \$4,000.00 per month and ordering payment of \$15,500.00 back rent. (CP 90 and Exhibit B to CP 91)

On January 8, 1998, Plaintiff brought a claim against Defendant in which the same alleged "deferred maintenance" compensation was at issue. (CP 56) Plaintiff failed to prosecute this claim and as a result the claim was dismissed for a lack of prosecution on March 5, 2002. Plaintiff then commenced this action on the same issue in November 2006. (CP 56)

#### IV. ARGUMENT

##### A. STANDARD OF REVIEW

Construction of statutes and court rules are issues of law that the Court of Appeals reviews de novo. Hutson v. Costco Wholesale Corp., 119 Wn. App. 332, 334, 80 P.3d 615 (2003), citing Stuckey v. Dept. of Labor & Indus., 129 Wn.2d 289, 295, 916 P.2d 399 (1996). An appellate court reviews a trial court's decision regarding whether or not a CR 11 violation exists for an abuse of discretion. Guardianship of Lasky, 54 Wn. App. 841, 851, 776 P.2d 695 (1989), citing Cooper v. Viking Ventures, 53 Wn. App. 739, 742, 770 P.2d 6559 (1989). An appellate court reviews a trial court's decision whether or to award attorney's fees for an abuse of discretion. Guardianship of Lasky, 54 Wn. App. 841, 851, 776 P.2d 695 (1989), citing Cooper v. Viking Ventures, 53 Wn. App. 739, 742, 770 P.2d 6559 (1989). A trial court abuses its discretion by basing its decision on manifestly unreasonable or untenable grounds. State ex. rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

**1. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DENYING DEFENDANT'S MOTION FOR ATTORNEY'S FEES AS REQUESTED WITHIN DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE DEFENDANT WAS THE PREVAILING PARTY IN THE MATTER AND THUS ENTITLED TO ATTORNEY'S FEES UNDER THE LEASE.**

Construction of statutes and court rules are issues of law that the Court of Appeals reviews de novo. Hutson v. Costco Wholesale Corp., 119 Wn. App. 332, 334, 80 P.3d 615 (2003), citing Stuckey v. Dept. of Labor & Indus., 129 Wn.2d 289, 295, 916 P.2d 399 (1996).

The trial court erred as a matter of law in denying Defendant's request for attorney's fees and costs as requested within Defendant's motion for summary judgment because after Plaintiff dismissed his complaint under CR 41 and Clause 32(b) of the lease defendant is the prevailing party. As a general rule, when a plaintiff is granted a voluntary dismissal under CR 41, the defendant is the "prevailing party" for purposes of a contractual provision authorizing an attorney fee award to the prevailing party in an action on the contract. Walji v. Candyco, 57 Wn. App. 284, 288, 787 P.2d 946 (1990). Although a voluntary dismissal under CR 41(a)(1) generally divests a court of jurisdiction to decide a case on the merits, "an award of attorneys" fees pursuant to a statutory provision or contractual agreement is collateral to the underlying proceeding. Hawk vs. Branjes, 97 Wn. App. 776, 782-783, 986 P.2d 841 (1999). As a result, the court retains jurisdiction for the limited purpose of considering defendant's motion for fees. Id. The purpose of this retention of jurisdiction is because "the case may never be renewed, it is essential to apply the attorney fee provision of the lease at the time of dismissal to

effectuate the intent of the parties.” Walji vs. Candyco, Inc., 57 Wn. App. at 288. “This interpretation will inhibit frivolous or badly prepared lawsuits and will protect parties from the expense of defending claims which do not result in liability.” Id.

RCW 4.84.330 states that the “prevailing party” in any action to enforce the provisions of a lease is entitled to reasonable attorney’s fees and costs when the lease provides for the fees and costs of one of the parties. The term prevailing party is defined as “the party in whose favor final judgment is rendered.” RCW 4.84.330. However, “RCW 4.84.330 is only relevant in any given case to the extent that the statute overrides the parties’ intent on matters covered by the statute. Hawk, 97 Wn. App. at 779. When there is a dispute between parties to a lease, RCW 4.84.330 “only applies if the lease agreement provided for fees and costs exclusively to one of the parties.” Id. The intent of the statute is to turn a unilateral attorney’s fees provision into a bilateral one. Id. at 780. In cases where a dispute between parties to a lease is based on a lease agreement that contains a bilateral attorney’s fees provision RCW 4.84.330 is inapplicable and the lease controls. Id.

Our case began by Plaintiff filing a complaint for damages on November 28, 2006. (CP 3) In this complaint Plaintiff alleged Defendant had breached the terms of the lease causing damages to be proven at trial.

(CP 3) On August 17<sup>th</sup>, 2007, Defendant filed his second amended answer and counterclaim. (CP 28) Among the counterclaims asserted by Defendant was that “[p]laintiff had failed to negotiate the basic rental (rate) to be paid during the third five year term and refuses to negotiate this issue by way of binding arbitration, and so is in breach” of the lease. (CP 28) On June 13, 2008, Defendant filed a motion for and memorandum in support of summary judgment. (CP 54, 56) In his motion for summary judgment, Defendant requested that the trial court to award defendant fees and costs incurred while defending against plaintiff’s complaint. (CP 56)

Plaintiff then filed a response to defendant’s motion for summary judgment and a voluntary dismissal pursuant to CR 41 of his complaint against defendant on June 30, 2008. (CP 57, 61) On July 7, 2008, Defendant filed his reply to Plaintiff’s response to motion for summary judgment. (CP 67) In this reply, Defendant once again asserted his request for attorney’s fees. (CP 67) On July 11, 2008, the court entered a partial voluntary order of dismissal of Defendant’s counterclaims. (CP 73) The order specifically stated that Defendant’s claim set forth in Section 6.2 of Defendant’s compulsory claims filed with the court on August 17, 2007 regarding arbitration of the rental amount was not being dismissed. (CP 73) At this point the only claim left was Defendant’s

claim of failing to arbitrate. (RP 13) On that same date, the court entered an order requiring Plaintiff to arbitrate the rental amount for the final term of the lease, thus making Defendant the prevailing party on its claim. (CP 73) Thus, Defendant prevailed on his counterclaim.

The lease agreement between Plaintiff and Defendant contains a bilateral attorney's fees clause. Clause 32 (b) of the lease states: "[i]f an action be commenced to enforce any of the provisions of this lease, the prevailing party shall, in addition to its other remedies, be entitled to recover reasonable attorneys' fees." (See Exhibit A to CP 56) Thus, RCW 4.84.330 does not apply in our case, clause 32 (b) of the lease controls. Further, because Plaintiff voluntarily dismissed his complaint against Defendant under CR 41, Defendant is the "prevailing party" and under clause 32 (b) of the lease agreement is entitled to reasonable attorney's fees.

It is unclear as to whether or not the trial court judge ever made a ruling as to whether or not Defendant was the prevailing party in our case. At the hearing on August 29, 2008, Defendant began addressing the issue of Defendant being the prevailing party in this matter but was interrupted by the trial court judge with questions regarding the definition of frivolous. (RP 14) At that hearing the court repeatedly discussed whether or not a lawsuit barred by the statute of limitations is frivolous and

eventually set the matter over to September 26, 2008 to further discuss the issue of whether Plaintiff's complaint was frivolous. (RP 18)

At the hearing on September 26, 2008, the court once again only discussed the issue of whether or not the lawsuit was frivolous and did not in any way address the issue of whether or not the Defendant was the prevailing party in the matter. (RP 19 – 30) On April 17, 2009, the trial court entered an order denying Defendant's request for fees and costs. (CP 89).

It is assumed for purposes of this appeal that the trial court did in fact rule that Defendant was not the prevailing party and that was the reason he was not entitled to fees under clause 32 (b) of the lease, although the basis for such a decision is unknown. In our case, Plaintiff dismissed his complaint against Defendant on June 30, 2008. (CP 61) At this point, the trial court retained jurisdiction for the purpose of considering whether or not Defendant was entitled to attorney's fees as the prevailing party in this matter. Hawk, 97 Wn. App. at 776. It was essential that the trial court make this ruling because this matter may never be renewed and the parties may never be able to apply the attorney fee provision of the lease at the time of the dismissal by Plaintiff in order to effectuate the intent of the parties. Walji, 57 Wn. App. at 288.

In our case, Plaintiff dismissed his complaint against Defendant. Defendant continued to pursue his claim against Plaintiff regarding Plaintiff's failure to arbitrate and dismissed his other claims against Plaintiff. The court then entered an order in favor of defendant requiring arbitration of the rental rate issue, thus defendant prevailed on Section 6.2 of his compulsory counterclaims, was entitled attorney's fees as the prevailing party under clause 32(b) of the lease.

Therefore, Defendant requests that the appellate court reverse the trial court's denial of Defendant's request for reasonable attorney's fees and award Defendant reasonable attorney's fees as the prevailing party in this matter under clause 32(b). Failure to do so would allow Plaintiff to repeat what he has already done twice and file yet another frivolous lawsuit making Defendant incur additional legal fees to defend against Plaintiff's frivolous complaints again. In the alternative, Defendant requests that the appellate court return this matter to the trial court and order the trial court judge to make a specific ruling as to whether or not the Defendant is the prevailing party in this matter and awarding defendant his attorney's fees.

**2. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DENYING DEFENDANT'S MOTION FOR ATTORNEY'S FEES AS REQUESTED WITHIN DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE PLAINTIFF'S LAWSUIT A**

**FRIVOLOUS ACTION UNDER RCW 4.84.185 THUS DEFENDANT IS ENTITLED TO ATTORNEY'S FEES.**

Construction of statutes and court rules are issues of law that the Court of Appeals reviews de novo. Hutson v. Costco Wholesale Corp., 119 Wn. App. 332, 334, 80 P.3d 615 (2003), citing Stuckey v. Dept. of Labor & Indus., 129 Wn.2d 289, 295, 916 P.2d 399 (1996).

The trial court erred as a matter of law in denying Defendant's request for attorney's fees and costs as requested within Defendant's motion for summary judgment under RCW 4.84.185 because the complaint filed by Plaintiff was frivolous and advanced without reasonable cause, thus entitling defendant to reasonable attorney's fees and costs. RCW 4.84.185 states, in pertinent part, that "[i]n any civil action, the court having jurisdiction may, upon finding by the judge that the action . . . was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action . . . . This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal. . . ."

Under RCW 4.16.080(3), the statute of limitations for "an action upon a contract liability, express or implied, which is not in writing, and does not arise out of any written instrument" is three years. "If parol

evidence is necessary to establish any material element of the written contract, then the contract is partly oral and the three-year statute of limitations applies.” Barnes v. McLendon, 128 Wn.2d 563, 570, 910 P.2d 469 (1996), citing Cahn v. Foster & Marshall, Inc., 33 Wn. App. 838, 841, 658 P.2d 42, review denied, 99 Wn.2d 1013 (1983). A cause of action accrues when the plaintiff has a right to seek relief in courts. Janicki Logging v. Schwabe, Williamson, & Wyatt, P.C., 109 Wn. App. 655, 659, 37 P.3d 309 (2001). The purpose of statutes of limitations is to shield defendants and the judicial system from stale claims. When plaintiffs sleep on their rights, evidence may be lost and memories may fade. Crisman v. Crisman, 85 Wn. App. 15, 19, 931 P.2d 163 (1997).

In this case, Plaintiff voluntarily dismissed his complaint against defendant. (CP 61) The court then ordered the parties to arbitrate the rental rate issue. As noted above, this made Defendant the prevailing party in this matter. The complaint asserted by Plaintiff in this case was frivolous and advanced without reasonable cause due to the obvious nature that Plaintiff’s complaint was time barred by the statute of limitations. Plaintiff’s claim that Defendant was required under the contract to pay for the paving of the parking lot out of “deferred maintenance” money is not contained in written contract/lease agreement. The three year statute of limitations would apply to plaintiff’s claim because parol evidence would

have been needed by Plaintiff in order to prove such a claim. The original lease between the two parties was signed in July of 1996. Plaintiff originally filed suit on January 8, 1998, where the “deferred maintenance” compensation was at issue and that case was subsequently dismissed on March 5, 2002. This demonstrates that Plaintiff was fully aware of his claim in 1998. Plaintiff filed this complaint in 2006, once again alleging the same “deferred maintenance” money, a period of 10 years since the original lease was signed, and almost 4 and one half years after his original suit was dismissed. It is quite apparent that the statute of limitations had run and Plaintiff’s action was frivolous and advanced without reasonable cause. Therefore, under RCW 4.84.185, Defendant is entitled to attorneys’ fees and costs incurred in defending against Plaintiff’s frivolous complaint.

Therefore, Defendant requests that the appellate court reverse the trial court’s denial of Defendant’s request for reasonable attorney’s fees and award Defendant reasonable attorney’s fees based upon having to defend, once again, against Plaintiff’s frivolous action. Failure to do so would allow Plaintiff to repeat what he has already done twice and file yet another frivolous lawsuit making Defendant incur additional legal fees to defend against Plaintiff’s frivolous complaints again. In the alternative, Defendant requests that the appellate court return this matter to the trial

court and order the trial court judge to make a specific ruling as to whether or not the Defendant is the prevailing party in this matter and awarding Defendant his attorney's fees and costs.

**3. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENDANT'S MOTION FOR ATTORNEY'S FEES AND COSTS UNDER CR 11 AS REQUESTED WITHIN DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE PLAINTIFF'S COMPLAINT WAS FRIVOLOUS.**

An appellate court reviews a trial court's decision regarding whether or not a CR 11 violation exists for an abuse of discretion. Guardianship of Lasky, 54 Wn. App. 841, 851, 776 P.2d 695 (1989), citing Cooper v. Viking Ventures, 53 Wn. App. 739, 742, 770 P.2d 6559 (1989). A trial court abuses its discretion by basing its decision on manifestly unreasonable or untenable grounds. State ex. rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The trial court's denial of Defendant's request for attorney's fees and costs as requested within Defendant's motion for summary judgment under CR 11 was an abuse of its discretion because Plaintiff's complaint lacked a factual and legal basis and Plaintiff's attorney failed to conduct a reasonable inquiry into the factual basis and legal basis of plaintiff's claim. The trial court's denial was based upon manifestly unreasonable and/or untenable grounds and therefore constituted an abuse of discretion.

CR 11 provides in pertinent part:

“The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney had read the pleading, motion, or legal memorandum, and that to the best of the party’s or attorney’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; . . . If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.”

“CR 11 addresses two types of problems relating to pleadings, motions and legal memoranda: filings which are not ‘well grounded in fact and . . . warranted by . . . law’ and filings interposed for ‘any improper purpose.’” Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 218, 829 P.2d 1099 (1992). CR 11 imposes requirements on individuals and/or attorneys who sign and file any “pleading, motion or legal memorandum.” Id. Therefore, an individual and/or attorney who signs and files a complaint

must comply with CR 11's requirements. Id. "CR 11 requires attorney's to 'stop, think and investigate more carefully before serving and filing papers.'" Id. A court can impose CR 11 sanctions when the complaint lacks a factual or legal basis and the court finds that the attorney who signed and filed the complaint failed to conduct a reasonable inquiry into the factual basis and legal basis of the claim. Id. at 220, citing Townsend v. Homan Consulting Corp., 929 F.2d 1358, 1362 (9<sup>th</sup> Cir. 1990).

The reasonableness of an attorney's inquiry is evaluated by an objective standard. Id., citing Miller v. Badgley, 51 Wn. App. 285, 299-300, 753 P.2d 350, review denied, 111 Wn. 2d 1007 (1988). The court may consider the following factors in determining whether an attorney conducted a reasonable inquiry prior to filing the lawsuit: "the time that was available to the signer, the extent of the attorney's reliance upon the client for factual support, whether a signing attorney accepted a case from another member of the bar or forwarding attorney, the complexity of the factual and legal issues, and the need for discovery to develop factual circumstances underlying a claim. Id., citing Miller, 51 Wn. App. at 301-02.

In this case, it is quite apparent that Plaintiff's complaint was not well grounded in fact and the filing was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing

law or the establishment of new law as required by CR 11. Plaintiff and his attorney had a requirement under CR 11 to “stop, think, and investigate” whether or not to file this second complaint involving the exact same issue from the first complaint ten years prior. If Plaintiff and his attorney had conducted a reasonable inquiry into the factual basis and legal basis for his claim it would have been obvious it was time barred by the statute of limitations.

As noted above, Plaintiff’s claim that Defendant was required under the contract to pay for the paving of the parking lot out of “deferred maintenance” money is not contained in the written contract/lease agreement. The three year statute of limitations would have applied to plaintiff’s claim because parol evidence would have been needed by Plaintiff to prove such a claim. The original lease between the two parties was signed in July of 1996. Plaintiff originally filed suit on January 8, 1998, where the deferred maintenance was at issue, but failed to prosecute so the case was dismissed on March 5, 2002. This proves that Plaintiff was fully aware of his claim in 1998. Plaintiff did not file this current lawsuit until 2006, a period of 10 years since the original lease was signed, 8 years since his first lawsuit over this matter, and almost 4 and one half years after his original suit was dismissed.

In applying the factors set forth in Miller, it is objectively apparent that sanctions under CR 11 are appropriate in this matter. 51 Wn. App. at 299-300. Plaintiff and his attorney had plenty of time available to file investigate this matter as the statute of limitations had already passed years ago. Plaintiff's attorney did not accept this case from another member of the bar or forwarding attorney and the factual and legal issues involved in this matter were not complex. Lastly, all the discovery needed to determine that this case was barred by the statute of limitations was available well before Plaintiff filed his complaint.

The trial court's denial of Defendant's request for attorney's fees and costs as requested within Defendant's motion for summary judgment under CR 11 was an abuse of the court's discretion because Plaintiff's complaint lacked a factual and legal basis and Plaintiff's attorney failed to conduct a reasonable inquiry into the factual basis and legal basis of Plaintiff's claim. Therefore, defendant requests that the appellate court reverse the trial court's denial of defendant's request for reasonable attorney's fees and costs under CR 11 and award Defendant reasonable attorney's fees and costs.

**4. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENDANT'S REQUEST FOR ATTORNEY'S FEES AND COSTS AS THE PREVAILING PARTY AFTER ARBITRATION AS AUTHORIZED UNDER THE LEASE.**

An appellate court reviews a trial court's decision whether or to award attorney's fees for an abuse of discretion. Guardianship of Lasky, 54 Wn. App. 841, 851, 776 P.2d 695 (1989), citing Cooper v. Viking Ventures, 53 Wn. App. 739, 742, 770 P.2d 6559 (1989). A trial court abuses its discretion by basing its decision on manifestly unreasonable or untenable grounds. State ex. rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The trial court's denial of Defendant's request for attorney's fees and costs as the prevailing party after arbitration was based upon manifestly unreasonable and/or untenable grounds and therefore constituted an abuse of discretion. Following the voluntary dismissal of Plaintiff's complaint, the only claim that remained in this case was the counterclaim filed by Mr. Malella for the increased rent due to him under the third term of the lease, for which the trial court ordered mandatory arbitration at the request of Defendant. (CP 87A) Arbitration was subsequently held in February 2009 and the rent for the third term of the lease was established at \$4,000.00 per month. (CP 87A) Defendant was awarded \$15,500.00 in back rent prorated from August 1, 2006 through February 2009 and rent was to be paid at \$4,000.00 per month thereafter, thus prevailing at the arbitration. (CP 87A)

Paragraph 4 of the lease in pertinent part states that “[i]n the event that the issue of basic rental for the third five (5) year term cannot be agreed upon by the parties, the issue of basic rent shall be determined by binding arbitration pursuant to paragraph 33.” (See Exhibit A to CP 56, Lease) Paragraph 33 of the lease state, in pertinent part, that “[a]ny controversy arising out of this Lease Agreement relating to the amount of basic rental for the second five (5) year term of the lease, pursuant to paragraph 4 above, shall be determined by binding arbitration.” Paragraph 32(b), entitled “Attorney’s Fees,” states that [i]f an action be commenced to enforce any of the provisions of this lease, the prevailing party shall, in addition to its other remedies, be entitled to recover its reasonable attorneys’ fees.” (See Exhibit A to CP 56, Lease)

Plaintiff submitted to the trial court that he never refused to enter into arbitration. (RP 58) However, Defendant submitted evidence as proof to the contrary. (CP 87A) This evidence included a copy of a letter from Defendant to Plaintiff’s attorney, Mr. Sampson dated August 1, 2006 demanding an increase in the rental amount for the property. (See Exhibit E to CP 87A) Defendant also submitted a letter from his former attorney, Susanna Southworth, to Mr. Sampson dated July 6, 2007 requesting arbitration on the back rent issue as required under the lease. (See Exhibit F to CP 87A) Defendant also submitted a letter from Mr. Sampson to Ms.

Southworth dated July 10, 2006 indicating they were not interested in mediating the matter. (See Exhibit G to CP 87A) Lastly, Defendant submitted copies of letters from Mr. Sampson to Ms. Southworth and to Judge Wulle dated the same date of July 10, 2007 accompanying Plaintiff's Notice to Set for Trial and Statement of Arbitrability. (See Exhibit G and H to CP 87A) In his Notice to Set for Trial and Statement of Arbitrability, Plaintiff specifically selected the box that states this case is not subject to arbitration. (See Exhibit H to CP 87A) This correspondence clearly demonstrates that Plaintiff and his attorney both refused to enter into arbitration in July of 2007. From that time to the time the trial court entered an order compelling Plaintiff to arbitrate the issue of rent, Plaintiff made no effort in any way to arbitrate the rent issue. In fact, the trial court had to enter an order directing Plaintiff to arbitrate the issue of rent. (CP 64)

The trial court ruled that because he lacked a "smoking gun" involving Plaintiff denying arbitration in order to trigger the prevailing party attorney's provision. (RP 63-64) The trial court judge went on to rule that the arbitration of the rent issue involved "the filing of a separate legal action that deals with issues that are unrelated to that (the arbitration) provision." (RP 64) This is incorrect. First, all of the issues in this matter involve the same legal action. Plaintiff filed an initial complaint alleging

damages from Defendant's failure to pay "deferred maintenance money."  
(CP 3) In response Defendant filed his answer, amended answer and second amended answer, with counterclaims. (CP 8, 9, 28) In the second amended answer and counterclaim, Defendant specifically asserts a counterclaim regarding Plaintiff's refusal to arbitrate the rent issue. (CP 28) This second amended answer was signed by Defendant's then attorney, Ms. Southworth, acknowledging that everything in the second amended answer was true and correct.

The trial court's denial of Defendant's request for attorney's fees and costs under the "prevailing party" clause of the lease was an abuse of the court's discretion. The trial court made this ruling on manifestly unreasonable and untenable grounds. The evidence submitted by Defendant clearly demonstrated that Plaintiff had continually failed to enter into arbitration and did not do so until the court ordered it. At arbitration, Defendant prevailed and a judgment was entered in his favor. Thus, Defendant prevailed two fold, first by successfully having the court order Plaintiff to arbitrate and second by prevailing at the arbitration. Both of these trigger the attorney's fees clause in the lease, thus entitling Defendant to fees. Therefore, Defendant requests that the appellate court reverse the trial court's denial of attorney's fees and costs under the

provisions of the lease and award Defendant reasonable attorney's fees and costs.

#### **V. REQUEST FOR ATTORNEY'S FEES**

Lastly, Defendant asks the appellate court to award Defendant attorneys' fees and costs incurred while defending against this lawsuit at the trial court level and at the appellate level pursuant RAP 18.1 and Clause 32(b) of the commercial lease, which states that "If an action be commenced to enforce any of the provisions of this lease, the prevailing party shall, in addition to its other remedies, be entitled to recover its reasonable attorney's fees." (EX A to CP 56)

#### **VI. CONCLUSION**

In conclusion, Defendant requests that the appellate court (a) reverse the trial court's denial of Defendant's motion for attorney's fees as requested within Defendant's motion for summary judgment as the prevailing party in this matter and award Defendant reasonable attorney's fees pursuant to the lease; or order the court to make a ruling as to whether the Defendant is the prevailing party and thus entitled to fees; (b) reverse the trial court's denial of Defendant's motion for attorney's fees as requested within Defendant's motion for summary judgment and award Defendant reasonable attorney's fees and costs under RCW 4.84.185 based on Plaintiff's frivolous lawsuit; (c) reverse the trial court's denial of

Defendant's request for attorney's fees and costs under CR 11 within Defendant's motion for summary judgment because Plaintiff's complaint was frivolous; (d) reverse the trial court's denial of Defendant's request for attorney's fees and costs as the prevailing party under the lease after arbitration and award Defendant reasonable attorney's fees and costs; and (e) award attorney's fees and costs to Defendant under RAP 18.1.

RESPECTFULLY SUBMITTED this 21st day of July, 2009.



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**RONALD W. GREENEN**, WSB #6334  
of Attorneys for Appellant

## APPENDIX

### BRIEF OF APPELLANT

#### A. Washington Court Rules

##### 1. CR 11 – Signing of Pleadings, Motions, and Legal Memoranda: Sanctions

(a) Every pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and signed by at least one attorney of record in the attorney's individual name, whose address and Washington State Bar Association membership number shall be stated. A party who is not represented by an attorney shall sign and date the party's pleading, motion, or legal memorandum and state the party's address. Petitions for dissolution of marriage, separation, declarations concerning the validity of a marriage, custody, and modification of decrees issued as a result of any of the foregoing petitions shall be verified. Other pleadings need not, but may be, verified or accompanied by affidavit. The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. If a pleading, motion, or legal memorandum is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party,

or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

(b) In helping to draft a pleading, motion or document filed by the otherwise self-represented person, the attorney certifies that the attorney has read the pleading, motion, or legal memorandum, and that to the best of the attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact, (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. The attorney in providing such drafting assistance may rely on the otherwise self-represented person's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which instance the attorney shall make an independent reasonable inquiry into the facts.

## **2. CR 41 – Dismissal of Actions**

(a) Voluntary Dismissal.

(1) Mandatory. Subject to the provisions of rules 23(e) and 23.1, any action shall be dismissed by the court:

(A) By stipulation. When all parties who have appeared so stipulate in writing; or

(B) By plaintiff before resting. Upon motion of the plaintiff at any time before plaintiff rests at the conclusion of his opening case.

(2) Permissive. After plaintiff rests after his opening case, plaintiff may move for a voluntary dismissal without prejudice upon good cause shown and upon such terms and conditions as the court deems proper.

(3) Counterclaim. If a counterclaim has been pleaded by a defendant prior to the service upon him of plaintiff's motion for dismissal, the action shall not be dismissed against the defendant's

objection unless the counterclaim can remain pending for independent adjudication by the court.

(4) Effect. Unless otherwise stated in the order of dismissal, the dismissal is without prejudice, except that an order of dismissal operates as an adjudication upon the merits when obtained by a plaintiff who has once dismissed an action based on or including the same claim in any court of the United States or of any state.

(b) Involuntary Dismissal; Effect. For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him or her.

(1) Want of Prosecution on Motion of Party. Any civil action shall be dismissed, without prejudice, for want of prosecution whenever the plaintiff, counterclaimant, cross claimant, or third party plaintiff neglects to note the action for trial or hearing within 1 year after any issue of law or fact has been joined, unless the failure to bring the same on for trial or hearing was caused by the party who makes the motion to dismiss. Such motion to dismiss shall come on for hearing only after 10 days' notice to the adverse party. If the case is noted for trial before the hearing on the motion, the action shall not be dismissed.

(2) Dismissal on Clerk's Motion.

(A) Notice. In all civil cases in which no action of record has occurred during the previous 12 months, the clerk of the superior court shall notify the attorneys of record by mail that the court will dismiss the case for want of prosecution unless, within 30 days following the mailing of such notice, a party takes action of record or files a status report with the court indicating the reason for inactivity and projecting future activity and a case completion date. If the court does not receive such a status report, it shall, on motion of the clerk, dismiss the case without prejudice and without cost to any party.

(B) Mailing notice; reinstatement. The clerk shall mail notice of impending dismissal not later than 30 days after the case becomes eligible for dismissal because of inactivity. A party who does not receive the clerk's notice shall be entitled to reinstatement of the case, without cost, upon motion brought within a reasonable time after learning of the dismissal.

(C) Discovery in process. The filing of a document indicating that discovery is occurring between the parties shall constitute action of record for purposes of this rule.

(D) Other grounds for dismissal and reinstatement. This rule is not a limitation upon any other power that the court may have to dismiss or reinstate any action upon motion or otherwise.

(3) Defendant's Motion After Plaintiff Rests. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in rule

52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subsection and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under rule 19, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross Claim, or Third Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross claim, or third party claim. A voluntary dismissal by the claimant alone pursuant to subsection (a)(1) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Costs of Previously Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of taxable costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

(e) Notice of Settlements. If a case is settled after it has been

assigned for trial, it shall be the duty of the attorneys or of any party appearing pro se to notify the court promptly of the settlement. If the settlement is made within 5 days before the trial date, the notice shall be made by telephone or in person. All notices of settlement shall be confirmed in writing to the clerk.

**3. RAP 18.1 –Attorney’s Fees and Expenses**

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

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

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

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

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

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

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

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

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

(j) Fees for Answering Petition for Review. If attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party's preparation and filing of the timely answer to the petition for review. A party seeking attorney fees and expenses should request them in the answer to the petition for review. The Supreme Court will decide whether fees are to be awarded at the time the Supreme Court denies the petition for

review. If fees are awarded, the party to whom fees are awarded should submit an affidavit of fees and expenses within the time and in the manner provided in section (d). An answer to the request or a reply to an answer may be filed within the time and in the manner provided in section (e). The commissioner or clerk of the Supreme Court will determine the amount of fees without oral argument, unless oral argument is requested by the commissioner or clerk. Section (g) applies to objections to the award of fees and expenses by the commissioner or clerk.

**B. Revised Code of Washington**

**1. RCW 4.16.080. Actions limited to three years.**

The following actions shall be commenced within three years:

- (1) An action for waste or trespass upon real property;
- (2) An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated;
- (3) Except as provided in RCW 4.16.040(2), an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument;
- (4) An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;
- (5) An action against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in his official capacity and by virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution; but this subdivision shall not apply to action for an escape;
- (6) An action against an officer charged with misappropriation

or a failure to properly account for public funds intrusted to his custody; an action upon a statute for penalty or forfeiture, where an action is given to the party aggrieved, or to such party and the state, except when the statute imposing it prescribed a different limitation: PROVIDED, HOWEVER, The cause of action for such misappropriation, penalty or forfeiture, whether for acts heretofore or hereafter done, and regardless of lapse of time or existing statutes of limitations, or the bar thereof, even though complete, shall not be deemed to accrue or to have accrued until discovery by the aggrieved party of the act or acts from which such liability has arisen or shall arise, and such liability, whether for acts heretofore or hereafter done, and regardless of lapse of time or existing statute of limitation, or the bar thereof, even though complete, shall exist and be enforceable for three years after discovery by aggrieved party of the act or acts from which such liability has arisen or shall arise.

**2. RCW 4.84.185 -Prevailing party to receive expenses for opposing frivolous action or defense.**

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

The provisions of this section apply unless otherwise specifically provided by statute.

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

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

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

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

**C. Exhibits**

1. **Exhibit A to CP 56**

Copy of Commercial Lease

2. **Exhibit B to CP 91**

Arbitration Decision (Amended)

3. **Exhibit E to CP 87A**

Letter dated August 1, 2006 from A.G. Malella to Kevin Sampson

4. **Exhibit F to CP 87A**

Letter dated July 6, 2007 from Susanna L. Southworth to Kevin Sampson.

5. **Exhibit G to CP 87A**

Letter dated July 10, 2007 from Kevin Sampson to Susanna Love Southworth.

6. **Exhibit H to CP 87A**

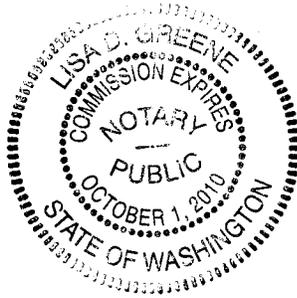
Letters dated July 10, 2007 from Kevin Sampson to Susanna Love Southworth and to Judge John P. Wulle with copy of plaintiff's Notice to Set for Trial.



The document(s) described as: BRIEF OF APPELLANT

  
\_\_\_\_\_  
JENNY CASTILLO

SUBSCRIBED AND SWORN to before me this 21<sup>st</sup> day of July, 2009.



  
\_\_\_\_\_  
NOTARY PUBLIC in and for the State of  
Washington. Residing at Vancouver.  
My commission expires: \_\_\_\_\_

AFFIDAVIT OF SERVICE RE:  
BRIEF OF APPELLANT - 2

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