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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

IAN AND KERRI SCHUMACHER,
Plaintiffs/Respondents,

v.

T. GARRETT CONSTRUCTION, INCORPORATED,
Defendant/Appellant.

RESPONDENTS' BRIEF

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III. ARGUMENT

A. Appellant fails to assign error to or to argue error in the trial court's judgment.

Appellant fails to include in its assignments of error a specific assignment of error to the trial court's judgment. RAP 10.3 (a) (4) provides as follows: "*The brief of the appellant or petitioner should contain under appropriate headings and in the order here indicated: ... A separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error.*"

Appellant also fails to include argument regarding the trial court's judgment. RAP 10.3 (a) (6) provides as follows: "*...The argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record.*"

A party's failure to assign error to or provide argument and citation to authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of the alleged error. *Escude v. King County*, 117 Wn. App. 183, 190 n. 4, 69 P. 3d 895 (2003); *Avellaneda v. State*, 167 Wn. App. 474, 485 n. 5, 273 P. 3d 477 (2012). Therefore, because Appellant has failed to either assign error to the trial court's judgment or to provide argument and authority in support of such

an assignment of error, the Court cannot consider any claim of error in the trial court's judgment.

B. Standards of review.

Appellant has chosen not to appeal any finding of fact made by the trial court.¹ Nor has Appellant provided this Court with a report of proceedings of the trial in this case. Therefore, each and every one of the trial court's 45 findings of fact are verities on appeal. *Morris v. Woodside*, 101 Wn. 2d 812, 815, 682 P.2d 905 (1984); *Haberman v. Ellis*, 42 Wn. App. 744, 746, 713 P. 2d 746 (1986). Consequently, the Court's review is limited to determining whether the findings support the trial court's conclusions of law and judgment. *Washington State Bar Ass'n v. Great W. Union Fed. Sav. & Loan Ass'n*, 91 Wash.2d 48, 53, 586 P.2d 870 (1978); *Haberman v. Ellis*, 42 Wn. App. 746.

C. The doctrine of caveat emptor has been rejected by Washington courts in cases involving the sale of new residential dwellings by builder-vendors.

Appellant argues the doctrine of caveat emptor in the sale of real property has never been abrogated and remains the default rule in Washington.² To the contrary, the rule is stated in *Westlake View Condominium Association v. Sixth Avenue View Partners, LLC*, 146 Wn. App. 760, 767, 193 P. 3d 161 (2008): "*Washington has followed*

¹ Appellants' Brief, p. 2-3.

² Appellants' Brief, p. 11-13.

*Carpenter v. Donohoe*¹ [154 Colo. 78, 388 P.2d 399 (1964)] in abandoning the doctrine of caveat emptor as applied to the sale of new residential dwellings by builder-vendors and in recognizing an implied warranty. *House v. Thornton*, 76 Wash.2d 428, 457 P.2d 199 (1969)” See also, *Atherton Condominium Apartment Owners Association Board of Directors v. Blume Development Co.*, 115 Wn. 2d 506, 517-19, 799 P. 2d 250 (1990). Appellant avoids any discussion of *Westlake View* in its discussion of the doctrine of caveat emptor. Nor does Appellant cite any Washington authority for the proposition that caveat emptor remains the default rule in this State. Arguments unsupported by authority should not be considered. RAP 10.3 (a) (6); *Pacific Corp. v. Washington Utilities and Transportation Commission*, -- Wn. App.--, 2016 WL 2343036 at 6 n.15 (2016).

D. The trial court correctly awarded Respondents damages for improperly installed stone on their garage wall.

At issue is the trial court’s Conclusion of Law 12:

As purchasers of a new residential home, the Schumachers expected that the stone on the wall around the garage would be installed properly. The Schumachers’ damages are \$5,500.00 plus \$522.50 sales tax for this improperly installed item.³

³ CP 110.

Conclusion 12 is supported by Findings of Fact 37, which provides, in pertinent part, as follows:

Subsequent to closing, the Schumachers contacted TGC and complained about a number of problems including the exterior stone veneer around the garage....⁴

Conclusion 12 is also supported by Finding 38:

TGC met with the Schumachers and a representative of the stone manufacturer to determine the cause or causes of the problem on the exterior garage wall.⁵

Conclusion 12 is also supported by Finding 39:

TGC removed about ten loose stones from the exterior garage wall and marked with blue tape other stones that appeared loose.⁶

Conclusion 12 is also supported by Finding 40:

It was later determined that the stone on the exterior garage wall was improperly installed by TGC.⁷

Conclusion 12 is also supported by Finding 41:

In 2015, Reliable Masonry Service submitted a bid to the Schumachers in the amount of \$5,500 plus sale tax (\$522.50 computed at 9.5%) to remove and replace the stone on the exterior garage wall.⁸

⁴ CP 106.

⁵ CP 106.

⁶ CP 106.

⁷ CP 106.

⁸ CP 106.

Conclusion 12 is also supported by Finding 42:

In January 2015, TGC notified the Schumachers in writing that either TGC or its subcontractor(a) would repair some of the alleged defects at no cost to the Schumachers, including repairing the cabinet and trim problems in the kitchen and entirely replace the stone of the exterior garage wall.⁹

Conclusion 12 is also supported by Finding 43:

The Schumachers declined TGC's offer to perform free repairs.¹⁰

Conclusion 12 is also supported by Finding 44:

Although there are aesthetic defects in and around the home, there are no leaks and there are no problems with the foundation or structure of the home and though loose and falling stones above the garage may be dangerous, there is no defect that presents a significant safety risk to the occupants of the home.¹¹

In light of the foregoing Conclusion 12 is supported by the above-quoted trial court's findings.

Appellant's argument against Conclusion 12 focuses on the absence of express or implied warranties and Washington's refusal to recognize negligent construction.¹² The trial court's oral ruling reveals the award to Respondents of damages in connection with the exterior masonry

⁹ CP 106.

¹⁰ CP 107.

¹¹ CP 107.

¹² Appellants' Brief, p. 13-16.

was made under the contract: “*The biggest expense that I think, again, is due to Schumachers under the contract is the exterior masonry. I think that’s kind of obvious.*”¹³

Conclusion 12 does not explicitly state it was awarding Respondents damages under that contract. It does however state Respondents expected that the stone on the wall around the garage would be installed properly.¹⁴ It is therefore reasonable to infer from Conclusion 12 the Court was awarding those damages under the contract, as contract damages are ordinarily based on the injured party's expectation interest. *Mason v. Mortgage America, Inc.*, 114 Wn. 2d 842, 849, 792 P. 2d 142 (1990); *Panorama Village Homeowners Association v. Golden Rule Roofing, Inc.*, 102 Wn. App. 422, 427, 10 P. 3d 417, *review denied*, 142 Wn. 2d 1018, 16 P. 3d 1266 (2001).

The trial court’s award of damages also finds solid support in the parties’ exhibits. In the Counteroffer Addendum (Form 36), signed by the parties on October 23, 2013, attached to the Real Estate Purchase and Sale Agreement (REPSA), dated October 20, 2013, the parties agreed “[m]asonry stone to be installed in all areas as shown on attached Exhibit B (see circled areas).”¹⁵ The attached Exhibit B is a single page flyer from

¹³ RP 021116, p. 18 lines 5-7.

¹⁴ CP 110.

¹⁵ EX 1.

Coldwell Banker advertising the property at 3722 114th Ave E, Edgewood depicting the stone masonry attached to the front wall of the house.¹⁶

Defects in the garage wall masonry are accurately depicted in 22 photographs.¹⁷ Defects in the masonry are also described in the June 24, 2015 Condition Report submitted by Reliable Masonry.¹⁸ Therein, the report stated installation of wire was hung incorrectly, the installation process was also done incorrectly, as no notch trowel was made to the surface, giving poor bonding to the stone.¹⁹ The report also states a stronger form of mortar should have been used.²⁰

The trial court's award to Respondents in Conclusion 12 of \$5,500 for the masonry was taken from Exhibit 29.²¹

Appellant argues the trial court's use of an alleged two-prong test to award damages to Respondents for the garage wall masonry and the kitchen cabinets was created sua sponte and was not suggested or argued by either party.²² Appellants fail to recognize CR 54 (c) provides, in pertinent part, "*every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not*

¹⁶ *Ibid.*

¹⁷ EX 54, 55.

¹⁸ EX 39.

¹⁹ *Ibid.*

²⁰ *Id.*

²¹ RP 02/22/16 P. 18-19; EX 29.

²² Appellants' Brief, p. 18.

demanded such relief in her or his pleadings.” State ex rel. A.N.C. v. Greely, 91 Wn. App. 919, 929-30, 959 P.2d 1130 (1998); *Alstot v. Edwards*, 114 Wn. App. 625, 632, 60 P. 3d 601, *review denied*, 149 Wn. 2d 1028, 78 P. 3d 656 (2003).

Appellant argues a buyer has no cause of action against the seller for an improperly installed item unless there is a breach of express warranty, breach of implied warranty of habitability, fraudulent concealment or CPA violation.²³ To the contrary, Washington courts permit breach of contract actions against a builder even where a warranty remedy is otherwise available. *See Panorama Village Homeowners Association v. Golden Rule Roofing, Inc.*, 102 Wn. App. 430 (“*Panorama properly sought damages for breach of the construction contracts instead of demanding performance under the warranties.* (Citations omitted)”).

In Washington, the intent of the parties to limit the remedies available to the parties must be clearly shown to be present. *Graoch Associates #5 Limited Partnership v. Titan Construction Corp.*, 126 Wn. App. 856, 865, 109 P. 3d 830 (2005) (*Quoting Board of Regents v. Wilson*, 27 Ill. App. 3d 726, 326 N.E. 2d 216, 220 (1975)). *See also, 1000 Virginia LP v. Vertecs Corp.*, 127 Wn. App. 899, 908, 112 P. 3d 1276, *affirmed*,

²³ Appellant’s Brief, p. 18.

158 Wn. 2d 566, 146 P. 3d 423 (2006). Appellants offer no evidence that such was the parties intent in this case.

In support of their argument Respondents as new homebuyers have no cause of action against the seller for an improperly installed item unless there is a breach of express warranty, breach of implied warranty of habitability, fraudulent concealment or CPA violation, Appellant relies upon the following quote in *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn. 2d 406, 745 P.2d 1284 (1987):

Beyond the terms expressed in the contract of sale, the only recognized duty owing from a builder-vendor of a newly completed residence to its first purchaser is that embodied in the implied warranty of habitability, which arises from the sale transaction.²⁴

Appellant misinterprets the first clause of the above quote. The first clause can only reasonably be interpreted as meaning in addition to. Such a construction is necessary to preserve to the contracting parties the terms they agreed to in the contract. Thus, under *Stuart*, the implied warranty of habitability is an additional remedy available to the purchaser of a newly completed residence, and is not the purchaser's exclusive remedy.

²⁴ Appellant's Brief, p. 19.

Beyond that, *Stuart* adds little to the analysis in this case. The court in *Stuart* addressed three issues: (1) whether the trial court correctly determined the time the plaintiff's causes of action accrued for purposes of the discovery rule; (2) whether the trial court properly applied the implied warranty of habitability; (3) whether the trial court erred in recognizing a new cause of action in negligent construction. 109 Wn. 2d 413. None of those issues are present here.

Further, the court in *Stuart* was not called upon to address, nor did it address, whether the implied warranty of habitability precluded a claim for breach of contract in an action by a purchaser against a vendor-builder of new residential construction. Appellant's argument for an exclusive remedy of implied warranty of habitability in this case must therefore fail.

Equally misplaced is Appellant's reliance upon *Warner v. Design & Build Homes, Inc.*, 156 Wn. App. 760, 770, 193 P. 3d 161 (2005).²⁵ In *Warner*, the plaintiffs, purchasers of a new house, brought suit against the builder-vendor of the home and the stucco contractor for breach of implied warranty of habitability and breach of an implied warranty of workmanlike performance in the contract between the builder-vendor and the stucco contractor, to which the plaintiff claimed to be a third party beneficiary. The plaintiff's claim for implied warranty of habitability was

²⁵ Appellant's Brief, p. 19

dismissed because of the “as-is” clause in the agreement which the plaintiff’s agent drafted. The court also concluded that Washington does not recognize an implied warranty of workmanlike performance and the plaintiff was not a third party beneficiary of the contract between the builder-vendor and the stucco contractor. 128 Wn. App. 42-43.

In *Warner*, as in *Stuart*, the court was not called upon to address, and did not address, whether the implied warranty of habitability was the exclusive remedy for the purchaser of new residential property from a builder vendor. Therefore, *Warner*, like *Stuart*, is distinguishable here.

Appellant quotes the following excerpt from *Warner*: “*Contracting parties have their remedies for breach and can negotiate for warranties if they so choose.*” 128 Wn. App. 42 (*Quoting Urban Dev. Inc., v. Evergreen Bldg Prods. LLC*, 114 Wn. App. 639, 646, 59 P. 3d 112, *aff’d sub nom. Fortune View Condo Ass’n v. Fortune Star Dev. Co.*, 151 Wn. 2d 534, 90 P. 3d 1062 (2004)). In *Urban Dev., Inc.*, the issue before the court was whether an implied warranty of workmanlike performance was implicit in construction contracts and whether the plaintiff in that case was a third party beneficiary of such implied warranty. 114 Wn. App. 645-46. On review, the Washington Supreme Court in *Fortune View* ruled that express warranties made in siding manufacturer’s advertising brochure provided a sufficient basis for contractor’s implied indemnity claim. Thus, neither

Warner, nor *Urban Dev. Inc.*, nor *Fortune View* address whether the implied warranty of habitability precludes Respondents' claim for breach of contract.

As *Warner*, *Urban Dev. Inc.*, and *Fortune View* are not controlling here, as Appellant has no authority to support its argument the trial court effectively imposed upon it a warranty of workmanship.²⁶

Appellant argues there is no Washington authority that a seller of a home is liable for defects that a buyer is not able to view during a reasonable inspection prior to purchase.²⁷ In *Atherton Condominium Apartment-Owners Association Board of Directors v. Blume Development Co.*, 115 Wn. 2d 506, 521-22, 799 P. 2d 250 (1999), the Washington Supreme Court discussed the policy considerations that undergird the implied warranty of habitability. First, the court noted the implied warranty of habitability protects purchasers from latent construction defects. 115 Wn. 2d 521. Imposing liability in this case upon Appellant for breach of contract for latent defects would equally protect purchasers such as Respondents from such defects.

Second, the Court in *Atherton* recognized the implied warranty of habitability fixes liability for defective construction on the builder-vendor rather than the purchaser because the builder-vendor's position throughout

²⁶ Appellant's Brief, p. 19.

²⁷ Appellant's Brief, p. 20.

the construction process is markedly superior to that of the purchaser, and because the builder-vendor has a far better opportunity to avoid the alleged defect. 115 Wn. 2d 521. Here, Appellant's position as builder-vendor throughout the construction process was no less superior to that of Respondents. Further, as in *Atherton*, Appellant had a far better opportunity than did Respondents to avoid defects in the masonry installation.

Third, the Court in *Atherton* recognized purchasers have a right to expect to receive that for which they bargained and that which the builder-vendor has agreed to construct and convey to them, that is, a house that is reasonably fit for use as a residence. 115 Wn. 2d 522. Respondents have an equal right to receive that for which they bargained and that which the Appellant has agreed to construct and convey to them.

In light of the foregoing, the considerations that support liability of a builder-vendor for latent defects in an implied warranty claim equally support the same liability for Appellant for latent defects on Respondents' breach of contract claim.

In light of the foregoing, the Court should affirm the trial court's Conclusion of Law 12.

E. The trial court correctly awarded Respondents damages for Appellant's failure to build them a cedar fence.

At issue is Conclusion of Law 14:

The Schumachers are entitled to damages for \$3,400 for TGC not building them a cedar fence.²⁸

Conclusion 14 is supported by Finding of Fact 24, which provides, in pertinent part, "...TGC constructed a pre-stained wood fence (not a cedar fence) in front of the house and which ran along the side of the house."²⁹

In its oral ruling of February 11, 2016, the trial court explained its ruling on the cedar fence:

Another thing that I want to address is the cedar fence. Now Ms. Petkov said the split-rail fence was the cedar fence. I'm assuming she meant that seriously. I took it almost facetiously that would be a fence. Split rail wouldn't do anything. And this is where *Berg v. Hudesman* comes in. I looked through the spec sheets, all of them, and none of them mentioned much about the fence. Looking beyond the language of the contract and the specs, it doesn't say fence. We do have the MLS Flier that said there would be a cedar fence. They didn't get a cedar fence. They got a fence that looks to me like it was well constructed and looks good, but it's not a cedar fence.³⁰

²⁸ CP 111.

²⁹ CP 104.

³⁰ RP 02/11/16 p. 19, lines 2-15.

Appellant argues Respondents did get a cedar fence in the spit rail fence behind their house.³¹ The trial court found the idea the split rail fence satisfied the parties contract less than credible: *“I took it almost facetiously that would be a fence. Split rail wouldn’t do anything.”*³² Moreover, Appellant fails to establish whether the split rail cedar fence is located on Respondents’ property or on the adjacent environmentally sensitive area.

Appellant argues the cedar fence was not in the REPSA.³³ To the contrary, Exhibit B to the Counteroffer Addendum (Form 36), signed by the parties on October 23, 2013, attached to the Real Estate Purchase and Sale Agreement (REPSA), dated October 20, 2013, recites *“Cedar Fence.”*³⁴

Washington courts recognize *“if it appears to the court that the entire agreement of the parties was made up of more than one written document, that such documents were made as parts of the same transaction, related to the same subject matter and were not inconsistent with each other, all of them may be considered together, and from them a determination made as to all of the terms of the agreement and the intention of the parties.”* *Paine-Gallucci, Inc., v. Anderson*, 41 Wn. 2d 46,

³¹ Appellant’s Brief, p. 24.

³² RP 02/11/16 p. 19, lines 5-6.

³³ Appellant’s Brief, p. 24-25.

³⁴ EX 1.

50, 246 P. 2d 1095 (1952). Thus, the Coldwell Banker Flyer entitled “*New Construction in Edgewood*” attached as Exhibit B to the parties’ Counteroffer Addendum is part of the parties’ contract in this case.

Appellant argues Respondents waived the right to object to the fence built by Appellant in their front yard was not a cedar fence because Respondents did not comply with the inspection addendum.³⁵ The inspection addendum is dated October 23, 2013.³⁶ The inspection addendum is dated October 23, 2013, and contains a 10-day inspection period.³⁷ Appellant fails to establish whether the fence it installed was in place during the 10-day inspection period. If Appellant constructed the fence after the 10-day inspection period had lapsed, its waiver argument will fail. As Appellant fails to establish the facts necessary to support its argument, that argument should not be considered. *Bercier v. Kiga*, 127 Wn. App. 809, 824, 103 P. 3d 232, *review denied*, 155 Wash.2d 1015, 124 P.3d 304 (2005) (“*We need not consider arguments that are not developed in the briefs...*”).

³⁵ Appellant’s Brief, p. 26-29.

³⁶ EX I.

³⁷ *Ibid.*

F. The trial court correctly awarded Respondents damages for improperly installed kitchen cabinets and trim.

Appellant assigns error to Conclusion of Law 13:

As purchasers of a new residential home, the Schumachers expected that the cabinets and trim in the kitchen would be installed properly. The Schumachers' damages are \$350.00 for these improperly installed items.³⁸

Conclusion 13 is supported by Finding of Fact 37:

Subsequent to closing, the Schumachers contacted TGC and complained about a number of problems including...kitchen cabinets and trim...³⁹

In its oral ruling, the trial court explained its award of damages to Respondents for the kitchen cabinets and trim:

I do think that some of the finish work couldn't have been reasonable seen on inspection and there is some to do. We have two bids that cover that, Eddy's and Always. They don't really break it out, but it'd not s huge amount. I'm going to award \$350 for the minor finish work that needs to be done in the kitchen that wasn't available that was seen on inspection.⁴⁰

The arguments and authorities in Paragraph VI D, supra, regarding Respondents' claim for breach of contract in connection with the garage wall masonry apply equally here to support Conclusion of Law 13.

³⁸ CP 111.

³⁹ CP 106.

⁴⁰ RP 02/11/16 p. 17 line 23-p. 18 line 4.

Further, as in Paragraph VI E, supra, Appellants' failure to establish when the work on the kitchen cabinets and trim was done in relation to the 10-day inspection period under the inspection addendum precludes the Court's consideration of his argument regarding waiver of those defects.

G. The trial court correctly awarded Respondents attorney fees and costs.

Appellant challenges the trial court's award of attorney fees to Respondents.⁴¹ In paragraph 2 of the Judgment, the trial court found Respondents to be the substantially prevailing part and awarded them their reasonable attorney fees of \$11,675.00 and costs of \$1,346.11 incurred pursuant to RCW 4.84.330.⁴² The amount of attorney fees awarded was approximately half of the amount of fees requested by Respondents.⁴³

Under RCW 4.84.330, attorney fees are awarded to the prevailing party. A prevailing party is one in whose favor the trial court entered final judgment. *Riss v. Angel*, 131 Wn. 2d 612, 633, 934 P. 2d 669 (1997); *Hawkins v. Diel*, 166 Wn. App. 1, 10, 269 P. 3d 1049 (2011). If neither party wholly prevails, then the party who substantially prevails on its claims is the prevailing party. *Ibid*. The substantially prevailing party need not prevail on his or her entire claim. *Silverdale Hotel Associates v. Lomas*

⁴¹ Appellant's Brief, p. 29-38.

⁴² CP 113.

⁴³ CP 57.

& *Nettleton Co.*, 36 Wn. App. 762, 774, 677 P. 2d 773, *review denied*, 101 Wn. 2d 1021 (1984); *Kysar v. Lambert*, 76 Wn. App. 470, 493-94, 887 P. 2d 431, *review denied*, 126 Wn. 2d 1019, 894 P. 2d 564 (1995).

In this case, Respondents are the only parties in whose favor an affirmative judgment was entered. Further, Respondents recovered substantial amounts on their claim for the garage wall masonry and the cedar fence. Therefore, under *Riss v. Angel*, *Hawkins v. Diel*, *Silverdale Hotel Associates v. Lomas & Nettleton*, and *Kysar v. Lambert*, Respondents are prevailing parties for purposes of an attorney fee award under RCW 4.84.330.

Appellant's claim to being the prevailing party fails. As in *Hawkins v. Diel*, the trial court entered no affirmative judgment in Appellant's favor. And the fact Appellant successfully defended a portion of Respondents' suit does not qualify Appellant as a prevailing party. *Hawkins v. Diel*, 166 Wn. App. 12 (“*But DMC successfully defending a portion of the Hawkins' suit does not make them a prevailing party.*”).

Neither *Marassi v. Lau*, 71 Wn. App. 912, 859 P.2d 605 (1993), nor *Phillips Building Co., Inc.*, 81 Wn. App. 696, 915 P.2d 1146 (1996), nor *Crest, Inc. v. Costco Wholesale Corporation*, 128 Wn. App. 760, 115 P. 3d 349 (2005) support Appellant. In *Marassi*, the court applied a proportionality analysis to distinct and severable claims. Here, in contrast,

Appellant's argument for proportionality is based largely on prevailing on discrete items of damage ("*TGC prevailed on 20 of 22 construction defect claims and ...TGC prevailed on 26 of 27 breach of contract claims.*").⁴⁴

Appellant also argues he prevailed on the implied warranty of habitability claim and the implied warranty of fitness claim.⁴⁵ Of those two claims, only the implied warranty of habitability is recognized as a claim under the contract for attorney fees purposes. *Burbo v. Harley C. Douglas, Inc.*, 125 Wn. App. 684, 701, 106 P. 3d 258 (2005). Appellant has made no attempt to establish the amount of attorney fees it incurred on that claim. In light of the foregoing, Appellant has failed to establish grounds for employing *Marassi's* proportionality analysis in this case.

Phillips Building Co. v. An, 81 Wn. App. 696, 915 P. 2d 1146 (1996) is distinguishable here. In *Phillips Building Co.*, both parties filed claims. Those claims were heard by an arbitrator. The arbitrator ruled each party should bear their own attorney fees and costs. The face of the arbitrator's award did not disclose who was the prevailing party in that arbitration. The court therefore held it could modify that award. 81 Wn. App. 704. Here, in contrast, Appellant did not file a counterclaim. The trial court did not enter a judgment in Appellant's favor. This case did not

⁴⁴ Appellant's Brief, p. 34.

⁴⁵ *Ibid.*

involve arbitration. Therefore, *Phillips Building Co. v. An* is not controlling here.

In *Crest, Inc. v. Costco Wholesale Corporation*, 128 Wn. App. 760, 115 P. 3d 349 (2015), the court upheld the trial court's award to the defendant general contractor of 90 percent of its attorney fees was based upon an undisputed finding that by far most of the time in the case was spent on one issue, the concrete slab. 125 Wn. App. 773. Here, in contrast, the trial court made no similar finding. Appellant made no effort in the trial court to establish the percentage of time spent by his counsel on individual issues or claims on which Appellant prevailed, choosing instead to simply argue for an 80 percent award.⁴⁶ Appellant's argument regarding *Crest, Inc. v. Costco Wholesale Corporation* therefore fails.

Appellant also argues in the alternative that neither party qualifies as a prevailing party.⁴⁷ Appellant fails to identify whether he made such an argument in this trial court. Issues not raised in the trial court may not be raised for the first time on appeal. RAP 2.5 (a); *Clapp v. Olympic View Pub. Co., LLC*, 137 Wn. App. 470, 476, 154 P. 3d 230, *review denied*, 162 Wash.2d 1013, 175 P.3d 1093 (2008).

⁴⁶ CP 81

⁴⁷ Appellant's Brief, P. 37-38.

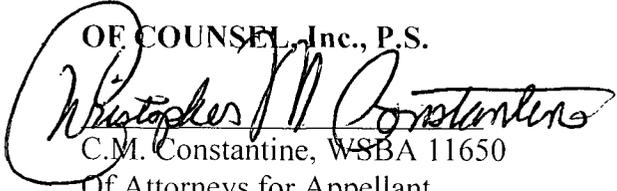
H. Respondents request an award of attorney fees on appeal in the event the Court affirms the trial court.

In the event they prevail, Respondents request an award of attorney fees incurred on appeal, pursuant to RAP 18.1 and RCW 4.84.330.

IV. CONCLUSION

The trial court's Conclusions of Law Nos. 12, 13, and 14 should be affirmed, together with the Judgment. The Court should grant Respondents' request for attorney fees in the event they prevail.

Respectfully submitted,

OE COUNSEL, Inc., P.S.

C.M. Constantine, WSBA 11650
Of Attorneys for Appellant

V. CERTIFICATE OF MAILING

The undersigned does hereby declare that on July 6, 2016, the undersigned delivered a copy of RESPONDENTS' BRIEF filed in the above-entitled case to the following persons:

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DATED this 6th day of July, 2016.

By: 
Printed Name: Christopher