

COA No. 30014-5-III

JAN 17 2017

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JAMES R. DAVEY and DANA DAVEY, husband and wife,

Appellants/Cross-Respondents,

v.

WINDERMERE SERVICES CO., et al.

Respondents/Cross-Appellants

BRIEF OF RESPONDENTS/CROSS-APPELLANTS

WILLIAM D. SYMMES, WSBA # 683
MATTHEW W. DALEY, WSBA # 36711
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I. INTRODUCTION & RELIEF REQUESTED

This appeal arises from the Spokane County Superior Court's dismissal, at summary judgment, of James and Dana Daveys' claims against Windermere Service Co., Windermere Manito, LLC, Joseph Nichols, Sr., Yvonne DeBill, and Kathy Pate (collectively, "Windermere") and from the Superior Court's denial of Windermere's request for an award of attorney fees and costs as the prevailing party.

In July 2007, the Daveys agreed to sell their home, in Spokane, Washington, to Robert and Sharon Pratt. The Pratts agreed to pay the Daveys' full asking price of \$266,000. A month later, the Daveys reneged on the deal and refused to proceed to closing.

The Pratts then sued the Daveys, asking the Court to order the Daveys to close on the sale. By way of a defense, the Daveys contended that the Real Estate Purchase and Sale Agreement with Earnest Money Provision ("Purchase Agreement") – between themselves and the Pratts – was invalid. The Daveys argued that the Pratts failed to timely accept the Daveys' counteroffer. After considering the evidence presented at bench trial, Judge Robert D. Austin (the "Court") resolved that issue against the Daveys and ordered specific performance. The Court of Appeals affirmed Judge Austin's order and the Washington State Supreme Court declined

review. The Daveys have, nevertheless, spent the past three and a half years attempting to re-litigate the issue.

A. THE DAVEYS HAD THEIR DAY IN COURT AND THE TRIAL COURT PROPERLY DISMISSED THEIR CLAIMS AGAINST WINDERMERE.

In this action, the Daveys brought four separate claims against both Windermere and the closing agent, Charles V. Carroll.¹ Those claims were for (i) violation of the Consumer Protection Act ("CPA"); (ii) breach of fiduciary duty, (iii) fraud; and (iv) intentional infliction of emotional distress (outrage). The Daveys' Complaint alleged that the Pratts failed to timely accept the Daveys' counteroffer and that Windermere falsified documents and lied in order to make it appear that the Pratts timely accepted the counteroffer.

All of the Daveys' claims against Windermere emanate from the Daveys' refusal to accept Judge Austin's factual determination that the Daveys' counteroffer was timely accepted by the Pratts.

Judge Austin's determination is now a verity, and the doctrine of collateral estoppel forbids re-litigation of the issue. In this lawsuit, Judge

¹ The Daveys dismissed their claims against closing agent Charles V. Carroll and the Law Offices of Charles V. Carroll, PLLC one month prior to the Sypolt Court's hearing on Windermere's motion for summary judgment. Prior to that dismissal, Mr. Carroll had also moved for summary judgment on the basis of collateral estoppel. (CP 553-651). Due to the voluntary dismissal, that motion was never considered. However, Windermere incorporated the Carroll Defendants' moving papers into Windermere's motion for summary judgment. (CP 47).

Gregory D. Sypolt² correctly determined that the core issue in the Daveys' claims against Windermere had already been decided against the Daveys in the Pratt litigation. The Sypolt Court, therefore, properly granted Windermere's motion for summary dismissal.

The Daveys admit that collateral estoppel prevents them from challenging the validity of the contract, but contend that collateral estoppel principals do not apply to their claims because (i) the issues in this case are different than those in the Pratt litigation; and (ii) application of the doctrine would work an injustice. (Appellant's Brief, pp. 3, 7-8).

The Daveys first argue that the Pratt litigation "did not address breach of fiduciary duty, fraud, CPA violations, outrage, and fraud [sic]". (Appellant's Brief, pp. 6-7). The Daveys' contention that collateral estoppel does not apply because the **claims** in the two actions are different conflates the doctrines of *res judicata* (claim preclusion) and collateral estoppel (issue preclusion). Windermere never argued that the Daveys' four **claims** (in this suit) were previously litigated. Instead, Windermere argued that collateral estoppel required dismissal of the Daveys' claims because the sole factual **issue** underlying all of the Daveys' claims had been finally and conclusively decided. Regardless of how the Daveys

² In order to avoid confusion, the Trial Court in this matter will be referred to as "the Sypolt Court" and the Trial Court in the prior litigation (the suit brought by the Pratts) will be referred to as "the Austin Court."

style their claims, collateral estoppel principles prevent the Daveys from re-litigating factual issues that have already been resolved against them.

The Daveys also contend that the Sypolt Court erred in dismissing the Daveys' claims because the Court of Appeals (in the Pratt litigation) "ignored everything found by Judge Austin and decided the case on waiver, a theory neither pleaded, argued, nor considered at trial in *Pratt v. Davey*." (Appellant's Brief, pp. 2, 9; RP 46-47). In truth, the Court of Appeals adopted and relied upon Judge Austin's determination that the Daveys' counteroffer was timely accepted by the Pratts. That fact determination is now unimpeachable, and it required each of the Daveys' claims to be dismissed.

In addition to being legally correct, the Sypolt Court's dismissal order furthered the interests of justice. The Daveys had every opportunity to prove their claims before the Austin Court. The Daveys were afforded a full and fair opportunity to be heard, and sitting as trier of fact, the Austin Court found that the Pratts timely accepted the Daveys' counteroffer and, thereby, formed a valid and binding contract. Yet, the Daveys argue that it would be unjust to deny them the opportunity to re-litigate those allegations through new legal causes of action. (Appellant's Brief, pp. 10-11). Rather than allowing the Daveys two bites at the apple, justice requires finality, justice requires consistency in outcomes, and

justice required the Sypolt Court to prevent the Daveys from harassing Windermere with baseless and repetitive allegations of falsification of documents and lying under oath. The Sypolt Court correctly and justly held that collateral estoppel bans the Daveys' claims.

The Sypolt Court recognized that resolution of each of the Daveys' claims against Windermere required the Court to determine whether the Pratts timely accepted the Daveys' counteroffer. Because that issue had already been decided against the Daveys, the Sypolt Court properly dismissed each of the Daveys' claims. The Court of Appeals should affirm the Sypolt Court's order.

B. INDEPENDENT OF COLLATERAL ESTOPPEL, THE TRIAL COURT PROPERLY DISMISSED THE DAVEYS' CLAIMS, DUE TO THE DAVEYS' FAILURE TO MEET THEIR *CELOTEX* BURDEN .

Windermere's motion for summary judgment also challenged the Daveys to bring forward admissible evidence creating triable issues on each element of their claims, pointing out that the record demonstrated a lack of genuine issues of material fact. Windermere's motion was supported by Judge Austin's incontrovertible findings of fact and conclusions of law from the prior Pratt litigation.

Rather than responding to Windermere's motion with facts and admissible evidence, the Daveys offered only allegations, conjecture, speculation, and argument. Thus, the Sypolt Court properly dismissed the

Daveys' claims because the Daveys failed to meet their burden under *Celotex v. Catrett*, 477 U.S. 317 (1986).

The Daveys attempt to excuse their failure to meet their summary judgment burden by alleging that they were not afforded sufficient discovery. However, the issue in this case is a pure issue of law, regarding which no relevant discovery was, or could have been, sought.

Additionally, Windermere responded to all appropriate discovery and properly sought a protective order when the Daveys propounded improper and abusive discovery requests (seeking information about the Defendants' childrens' extracurricular activities). The Sypolt Court properly exercised its authority and discretion over discovery, and no amount of discovery can change the fact that the Daveys cannot support their claims against Windermere.

C. THE TRIAL COURT ERRED BY DENYING WINDERMERE'S REQUEST FOR ATTORNEYS' FEES AND COSTS AS A PREVAILING PARTY.

Windermere has incurred and continues to incur substantial attorneys' fees and costs in defending against the Daveys' claims. Both the Daveys' listing agreement with Windermere and the Purchase Agreement contain broad attorneys' fees provisions. Under either contract, Windermere is entitled to an award of its costs and attorneys' fees incurred in obtaining dismissal of the Daveys' claims.

The Sypolt Court erroneously concluded that the Daveys' lawsuit was not brought under either of those contracts and, therefore, Windermere was not entitled to an award of fees and costs. However, each of the Daveys' claims is based on the Purchase Agreement and Listing Agreement. Moreover, to the extent that the denial of Windermere's fees and costs was owing to the unilateral nature of attorneys' fees under the Consumer Protection Act, the Sypolt Court erred. Windermere's right to fees and costs comes from contract, and the Daveys cannot defeat that contractual right by asserting a statutory claim.

The Sypolt Court, therefore, erred in denying Windermere's contractual right to attorneys' fees and costs as the prevailing party. The Court of Appeals should reverse the Sypolt Court's denial of Windermere's costs and attorneys' fees and remand the case for a calculation and award of those fees and costs – including fees and costs on appeal.

II. ISSUES PRESENTED

A. The doctrine of collateral estoppel prevents parties from relitigating issues already decided against them, in a final decision on the merits. Each of the Daveys' claims against Windermere is based on an issue that was decided against them in a prior action, and that action was resolved on its merits. Did the Sypolt Court properly hold that collateral

estoppel principles required the Daveys' claims against Windermere to be dismissed?

B. Facing a motion for summary judgment, the Plaintiffs must bring forward admissible evidence creating triable issues regarding each element of each of their claims. In response to Windermere's motion for summary judgment, the Daveys failed to offer prima facie evidence of claims and failed to establish any triable issues thereon. Did the Sypolt Court properly dismiss the Daveys' claims for failure to meet their burden under *Celotex v. Catrett*, 477 U.S. 317 (1986)?

C. Where a contract entitles the prevailing party to recover attorneys' fees and costs, RCW 4.84.330 requires the Court to award such costs and fees. The Daveys and Windermere are parties to two such contracts. Windermere prevailed in this lawsuit, yet the Sypolt Court denied Windermere's fee request. Did the Sypolt Court err in denying Windermere's request for attorneys' fees and costs?

III. STATEMENT OF FACTS

A. THE DAVEYS ENTERED INTO A CONTRACT TO SELL THEIR HOME TO ROBERT AND SHARON PRATT.

On July 14, 2007, the Daveys and Windermere, by and through real estate agent Yvonne DeBill, executed an Exclusive Right to Sell Listing Agreement ("Listing Agreement"). (CP 360). Pursuant to that

Listing Agreement, the Daveys appointed Windermere as the Daveys' agent to receive offers and sell the Daveys' home at 3720 W. Rosamond, in Spokane, Washington (the "House") for \$266,000. (CP 360).

The Pratts viewed the House and made an offer to purchase it. (CP 77). And on July 26, 2007, the Pratts executed a Purchase Agreement, pursuant to which they offered to pay the Daveys \$260,000 to purchase the House. (CP 59-70, 77).

The Daveys rejected the Pratt's offer on July 28, 2007 and counteroffered for the listed sales price of \$266,000. (CP 77). By its terms, that counteroffer expired on July 29, 2007. (CP 59).

The Pratts accepted the Daveys' counteroffer on July 28, 2007. (CP 59, 79). They did so by initialing the changes that the Daveys had made to the original Purchase Agreement. (*Id.*). The Pratts accepted the Daveys' counteroffer prior to its expiration. (*Id.*). Mutual acceptance of the Daveys' counteroffer, therefore, occurred on July 28, 2007. (CP 61, 79).

B. THE DAVEYS DENIED THE EXISTENCE OF A VALID CONTRACT TO SELL THE HOUSE AND REFUSED TO SIGN CLOSING DOCUMENTS.

On August 20, 2007, the Daveys called their agent, Yvonne DeBill, to tell her that the House was not sold because they did not have a contract. (CP 80). On August 29, 2007, Ms. DeBill informed the Daveys

that Windermere and the Pratts believed that there was a valid and binding contract to sell the House. (*Id.*). The Daveys sent Ms. DeBill an email on that same date, reiterating their contention that there was no valid and binding contract between the Daveys and the Pratts. (*Id.*). On September 4, 2007, the Daveys wrote the Pratts a letter telling them that the Daveys would not sell the House. (*Id.*). On September 10, 2007, closing agent Charles V. Carroll contacted the Daveys and advised them that documentation pertaining to closing was ready for signature. (*Id.*). The Daveys advised Mr. Carroll that they would not sign the closing documents. (*Id.*). Later that same day, the Daveys called the Pratts and again indicated that they would not sell the House. (*Id.*)

The Pratts performed all of the terms and conditions required of them under the Purchase Agreement. (CP 79-81). However, the Daveys breached and defaulted by refusing to sign the closing documents and failing to complete the transaction. (CP 80-81).

C. THE PRATTS SUED THE DAVEYS FOR SPECIFIC PERFORMANCE AND THE AUSTIN COURT PROPERLY ORDERED THE DAVEYS TO CLOSE THE SALE.

In *Pratt v. Davey*, Spokane County Superior Court Case Number 07-2-04300-9 (the "Pratt litigation"), the Pratts sued the Daveys for specific performance and damages resulting from the Daveys' refusal to

execute closing documents in accordance with the terms of the Purchase Agreement. (CP 54).

Between October 10 and October 11, 2007, the matter was tried before Judge Robert D. Austin, Spokane County Superior Court. (CP 75, 378). Sitting as trier of fact and law, the Austin Court received testimony from Robert Pratt, James Davey, Dana Davey, Kathi Pate, Yvonne DeBill, and Charles V. Carroll. (CP 76, 380-474). Judge Austin also received various documents into evidence, including the fully executed Purchase Agreement. (CP 76, 391).

At trial, the Daveys argued that there was no binding agreement between the parties, because the Pratts did not deliver their acceptance to the seller's broker on time nor did they tender the earnest money in a timely fashion. (CP 76, 94, 484-494). All evidence was to the contrary. (CP 77-81). Yet, the Daveys challenged the veracity of Windermere agent, Kathi Pate's, testimony regarding the timeliness of the Pratt's acceptance. (CP 487-490). Indeed, Mr. Davey argued that "it's logical to believe that Ms. Pate obtained both the [Pratt's] initials and the earnest money check on July 31st," though she had testified to having obtained the same days earlier. (CP 490).

After considering evidence and the arguments, Judge Austin issued an oral ruling in which His Honor decided: (i) that the Pratts had timely

accepted the Daveys' counteroffer; (ii) that there was a binding contract; and (iii) that the Daveys had no excuse for not closing the sale. (CP 500).

Responding to the Daveys' contention that their counteroffer was not timely accepted, the Austin Court stated:

I have to tell you, in . . . 25 years on the bench, and . . . 11 years of doing [real estate] work, I have never heard anyone make an argument, ["] well I don't know if the date on here saying it's mutual assent of 7-28 is really, really correct. Because I really think everyone is lying to me.["] I have never heard that clause attacked for that reason. Nor is it subject to attack. It could have been, perhaps, if somehow, like about August 3rd, you said wait a minute, one we didn't know we had an accepted offer on our counteroffer, and two, I have reason to believe it really wasn't done on the 28th. We only get this kind of argument after there is a request for specific performance.

(CP 497).

On November 15, 2007, Judge Austin issued written Findings of Fact and Conclusions of Law. (CP 75). His Honor resolved approximately 30 factual issues and 10 legal issues against the Daveys; each of which was crucial to the Court's holding that a valid and binding contract was formed. (*Id.*). Chief among the issues decided by Judge Austin were the following:

- The Pratts received and accepted the Daveys' counteroffer on July 28, 2007. (CP 79).

- Mutual acceptance of the final offer occurred on July 28, 2007.
(Id.).
- A valid purchase and sale contract was formed. (CP 81).
- The Pratts fully performed their obligations under the Purchase Agreement. (CP 80-81).
- The Daveys refused to execute the closing documents. (CP 80).
- The Daveys' refusal to sign all documentation required to complete the closing as specified in the Purchase Agreement constitutes an act of default under the Purchase Agreement. (CP 81).
- The Daveys' default entitled the Pratts to: (1) an Order directing the Daveys to meet with the closing agent to sign all documents necessary to complete the closing; (2) an award for damages incurred as a result of the Davey's default; and (3) an award of attorneys' fees pursuant to the Purchase Agreement. (CP 82).

On November 15, 2007, Judge Austin entered a Judgment for the Pratts, in which his Honor directed the Daveys to meet with the closing agent to sign all documents necessary to complete the closing and awarded damages, as well as attorneys' fees, to the Pratts. (CP 85).

D. THE COURT OF APPEALS AFFIRMED THE TRIAL COURT'S DECISION AND THE SUPREME COURT DENIED REVIEW.

The Daveys appealed Judge Austin's decision to Division III of the Court of Appeals. (CP 622). In *Pratt v. Davey*, No. 26620-6-III, slip op. (Div. III 2008), the Court of Appeals considered the Daveys' arguments that there was no valid contract to sell the House because (i) the Pratts did not timely tender their earnest money immediately upon acceptance of the Daveys' counteroffer; and (ii) the Pratts did not timely deliver or fax their acceptance of the counteroffer to the office of the Daveys' broker. (CP 96).

The Court of Appeals affirmed Judge Austin's decision and adopted Judge Austin's findings that:

[t]he Pratts accepted the counteroffer that same day [July 28, 2007] by initialing the changes the Daveys had made to the agreement. Ms. Pate delivered the Pratts' acceptance of the Daveys' counteroffer to the Daveys' listing agent, Ms. DeBill.

(CP 91).

The Court of Appeals held that the Daveys had waived strict compliance with the terms of the Purchase Agreement. (CP 90). The Court of Appeals did not overturn, or find error in, any of Judge Austin's findings of fact or conclusions of law.

The Daveys sought discretionary review from the Washington State Supreme Court. By Order dated September 8, 2009 the Daveys' request was denied. *Pratt v. Davey*, 166 Wn. 2d 1023 (2009) (Table).

E. THE DAVEYS FILED THIS LAWSUIT, ALLEGING FACTS THAT HAD ALREADY BEEN RESOLVED AGAINST THEM IN THE PRATT LITIGATION.

On July 27, 2010, the Daveys, acting *pro se*,³ brought the present lawsuit against Windermere and its agents on four separate claims: (i) violation of the Consumer Protection Act ("CPA"); (ii) breach of fiduciary duty; (iii) fraud; and (iv) intentional infliction of emotional distress (outrage). (CP 1-23). Each cause of action turned on the underlying factual allegation that no valid contract was formed because the Pratts had failed to timely accept the Daveys' counteroffer.

Though the Daveys now deny that their claims are based on the allegation that the Pratts failed to timely accept the counteroffer, the Daveys' complaint repeatedly avers just that. Specifically, the Daveys allege:

Although required by the Real Estate Purchase and Sale Agreement for acceptance of a counteroffer, a signed-around contract was neither delivered nor faxed on July 28,

³ Although the Daveys filed this action as *pro se* litigants, during the course of this lawsuit the Daveys were, at different times, represented by four different attorneys: Barbara Russell (CP 111); Michael Beyer (CP 141; RP 1); Jeff Swindler (CP 307; RP 24); and Ken Kato (CP 323; RP 25).

2007, to the broker's office of defendant, WINDERMERE MANITO, LLC. . . **Plaintiffs did not receive a copy of the signed Real Estate Purchase and Sale Agreement when the Pratts allegedly accepted the counteroffer on July 28, 2007 because, on information and belief, they did not sign the counteroffer that day.** The counteroffer lapsed. Defendants YVONNE DEBILL and KATHI PATE, however, represented that the Pratts did sign.

(CP 6) (emphasis added).

The Complaint alleges that no valid contract existed between the Daveys and the Pratts, that the Pratts' acceptance was untimely, and that Windermere lied about the Pratts' acceptance on no fewer than five additional occasions. (CP 6-11).

Factual issues in this case are, therefore, identical to those that were at issue in the Pratt litigation. Those issues were previously determined against the Daveys. *See* ¶ III(C), *supra*.

F. THE TRIAL COURT SUMMARILY DISMISSED THE DAVEYS' COMPLAINT.

On March 25, 2011, Windermere moved for summary judgment on each of the Daveys' claims. (CP 24-26). Windermere made two primary arguments. First, Windermere argued that each of the Daveys' claims relied upon issues of fact that were decided against the Daveys in the Pratt litigation and that the doctrine of collateral estoppel, therefore, prohibited the Daveys from relitigating those issues. (CP 27-48). Second, Windermere challenged the Daveys, pursuant to *Celotex*, to come forward

with admissible evidence creating triable issues of fact on the essential elements of their claims. (*Id.*). Windermere also sought fees and costs under the Listing Agreement and the Purchase Agreement. (CP 46, 352).

On May 20, 2011, the Sypolt Court heard argument on Windermere's motion and issued an oral ruling summarily dismissing all four of the Daveys' causes of action. (CP 530-40; RP 48-51). His Honor dismissed the Daveys' claims on the bases of (i) collateral estoppel and (ii) the Daveys' failure to present sufficient evidence to substantiate every element of their claims. (CP 538-540; RP 48-51). The Sypolt Court, however, denied Windermere's request for attorneys' fees and costs. (CP 51-52).

The Daveys timely appealed the Sypolt Court's summary dismissal of their Complaint, and Windermere cross-appealed on the denial of its request for attorneys' fees. (CP 541, 546).

IV. ARGUMENT: RESPONSE

A. STANDARD OF REVIEW.

The Court of Appeals reviews orders on summary judgment *de novo*. *Sheikh v. Choe*, 156 Wn.2d 441, 447 (2006). As a result, the Court of Appeals undertakes the same analysis as the Trial Court. (*Id.*).

Summary judgment must be granted when there is no genuine issue as to the material facts and the moving party is entitled to judgment

as a matter of law. CR 56(e). A genuine issue for trial exists only if "the evidence is such that a reasonable jury can return a verdict" for the party opposing summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Wilson v. Steinbach*, 98 Wn.2d 434, 437 (1982).

The party opposing summary judgment must present specific evidence of every essential element of each claim on which that party bears the burden of proof. *See Matter of Estate of Hansen*, 81 Wn. App. 270, 285 (1996), citing *Celotex v. Catrett*, 477 US 317, 323 (1986). A party opposing summary judgment must do so with "supporting . . . affidavits [that] shall set forth such facts as would be admissible in evidence." CR 56(e). Additionally, in responding to a summary judgment motion, an adverse party "may not rest upon mere allegations or denials in his pleadings." (*Id.*).

B. THE TRIAL COURT PROPERLY DISMISSED THE DAVEYS' CLAIMS BASED UPON THE DOCTRINE OF COLLATERAL ESTOPPEL.

Collateral Estoppel, otherwise known as issue preclusion, prevents re-litigation of specific issues that have already been decided by a court. *City of Aberdeen v. Regan*, 170 Wn.2d 103, 108 (2010). It applies regardless of whether the later proceeding involves a different claim or cause of action. *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 737-38 (2009) ("When a subsequent action is based on a different claim,

yet depends on issues which were determined in a prior action, the re-litigation of those issues is barred by collateral estoppel”) (Internal Quotations Omitted).

Washington’s Courts have established a clear and meaningful distinction between collateral estoppel (issue preclusion) and *res judicata* (claim preclusion):

The general term *res judicata* encompasses claim preclusion, (often itself called *res judicata*) and issue preclusion, also known as collateral estoppel. Under the former a plaintiff is not allowed to recast his claim under a different theory and sue again. **Where a plaintiff’s second claim clearly is a new, distinct claim, it is still possible that an individual issue will be precluded in the second action under the doctrine of collateral estoppel or issue preclusion.** In an instance of claim preclusion, all issues which might have been raised and determined are precluded. In the case of issue preclusion, only those issues actually litigated and necessarily determined are precluded.

Shoemaker v. City of Bremerton, 109 Wn.2d 504, 507 (1987) (emphasis added), citing *Seattle-First Nat’l Bank v. Kawachi*, 91 Wn.2d 223, 228 (1978). Stated differently:

The doctrine of collateral estoppel differs from *res judicata* in that, instead of preventing a second assertion of the same claim or cause of action, it prevents a second litigation of issues between the parties, even though a different claim or cause of action is asserted.

Rains v. State, 100 Wn.2d 660, 665 (1983).

Thus, collateral estoppel promotes three chief goals: (i) avoiding harassment of litigants by repetitive proceedings; (ii) preserving judicial economy; and (iii) ensuring consistency of outcomes. *State v. Mullin-Coston*, 115 Wn. App. 679, 685 (Div. I 2003), citing *State v. Dupard*, 93 Wn.2d 268, 272 (1980).

A party asserting the defense of collateral estoppel bears the burden of demonstrating that:

- (i) The issue decided in the prior action was identical to the issue presented in the second action;
- (ii) The prior action ended in a final judgment on the merits;
- (iii) The party to be estopped was a party to the prior action, or is in privity with a party to the prior action; and
- (iv) Application of the doctrine would not result in an injustice.

State v. Vasquez, 148 Wn. 2d 303, 308 (2002) (citations omitted); *Shoemaker v. Bremerton*, 109 Wn. 2d 504, 507 (1987); *Pederson v. Potter*, 103 Wn. App. 62, 69 (Div. III 2000) (citations omitted).

The Sypolt Court correctly determined that Windermere established each of the elements of collateral estoppel and that the Daveys offered no evidence to rebut Windermere's showing. On appeal, the Daveys concede that the Pratt litigation resulted in a decision on the merits

and that they were parties to that action. (Appellant's Brief, p. 3). The Court of Appeals' inquiry is, therefore, focused on whether the issues in the two lawsuits are identical and whether application of the doctrine of collateral estoppel would result in an injustice.

1. The Issues Underlying the Daveys' Claims Against Windermere Are Identical to the Issues Decided in the Pratt Litigation.

The Daveys are collaterally estopped from relitigating each issue that was actually litigated in the Pratt litigation and that was necessarily determined by the Austin Court. Chief among those issues is the fact that the Pratts timely accepted the Daveys' counteroffer, on July 28, 2007. (CP 79-81).⁴ In the Pratt litigation, the Daveys defense focused on an allegation that the Pratts did not timely accept the Daveys' counteroffer. (CP 76, 94, 484-494). In articulating the defense, the Daveys were quite blunt in asserting that Windermere agent Kathi Pate's testimony regarding the timeliness of the Pratt's acceptance was untruthful – that is, accusing her of perjury. (CP 487-490).

The Daveys' entire case turns on whether the Pratts failed to timely accept the Daveys' counteroffer. (CP 6-11). The Pratt litigation

⁴ Judge Austin's oral ruling and written findings of fact unambiguously demonstrate that his Honor considered the Daveys' challenge to the timeliness of acceptance to be a central issue in the case. (CP 79, 81, 497).

conclusively determined that the Pratts had timely and properly accepted the Daveys' counteroffer. (CP 79-81). Indeed, the issues decided in the Pratt litigation and the issues underlying the Daveys' Complaint against Windermere are identical, and the doctrine of collateral estoppel prevents the Daveys from relitigating them in this lawsuit.

On appeal, the Daveys argue that the only issue before the Court in the Pratt litigation was "the validity of the contract, which the Daveys do not contest" and that "[c]ollateral estoppel prevents the Daveys from contesting the validity of the contract." (Appellant's Brief, pp. 7-8). However, the Daveys' argument does not square with what they actually pled; on no fewer than six occasions, the Daveys' complaint avers that the Pratts failed to timely accept, that no valid contract between themselves and the Pratts was formed, and that Windermere lied about the Pratts' acceptance. (CP 6-12).

The Daveys attempt to side-step collateral estoppel by characterizing their legal causes of action as "issues" rather than "claims." Thus, the Daveys argue that the issues in this case are not identical to those in the Pratt litigation, because Judge Austin "did not address breach of fiduciary duty, fraud, CPA violations, outrage, and fraud [sic]." (Appellant's Brief, pp. 6-7). The Daveys' argument conflates the doctrines of res judicata (claim preclusion) and collateral estoppel (issue

preclusion). *Shoemaker*, 109 Wn.2d at 507; *Rains*, 100 Wn.2d 660, 665 (1983). Windermere has never argued that the Daveys' four *claims* against them were previously litigated. Rather, Windermere's motion for summary judgment was brought and granted because the core factual issue underlying all of the Daveys' claims was previously decided against them.

Finally, the Daveys contend that the two cases lack identical issues because the Court of Appeals, in affirming the Trial Court in the Pratt litigation, "ignored everything found by Judge Austin and decided the case on waiver, a theory neither pleaded, argued, nor considered at trial in *Pratt v. Davey*." (Appellant's Brief, pp. 2, 9; RP 46-47). However, the Court of Appeals affirmed the Trial Court's decision and order without reversing or overturning any of Judge Austin's findings or conclusions. In fact, the Court of Appeals adopted and relied upon Judge Austin's findings in its opinion. (CP 91).

The fact that the Court of Appeals found an alternative or additional legal basis to affirm the Court's decision in the Pratt litigation does not change the fact that Judge Austin's findings of fact remain a verity which cannot be contradicted. Under Washington law, if a party appeals a judgment and even if part of that judgment is reversed, the parts that are not reversed retain their effects in subsequent litigation. *State ex rel. Carriger v. Campbell Food Markets, Inc.*, 65 Wn. 2d 600, 607 (1965);

Calistro v. Spokane Valley Irr. Dist. No. 10, 78 Wn. 2d 234, 236, (1970).

Thus, the Daveys cannot credibly argue that the Court of Appeals' affirmation of Judge Austin's order, albeit on additional legal grounds, reversed his findings of fact – particularly where the Court of appeals adopted those findings.

The Sypolt Court correctly determined that each of the Daveys' claims against Windermere relied upon factual issues that were resolved in the Pratt litigation. The Court of Appeals should affirm that decision.

2. *Application of the Doctrine of Collateral Estoppel Would Not Work Any Injustice.*

The Daveys contend that application of the doctrine of collateral estoppel would work an injustice upon them because they have not previously litigated their **claims** for breach of fiduciary duty, outrage, CPA and fraud against Windermere. (Appellant's Brief, pp. 10-11). As detailed above, the Daveys' argument conflates the doctrines of *res judicata* (claim preclusion) and collateral estoppel (issue preclusion). See *City of Aberdeen v. Regan*, 170 Wn.2d 103, 108 (2010). The Court cannot allow Davey, or any other similar party, to restyle claims under a different legal theory, in order to avoid an adverse judicial decision. Allowing such an outcome would lead to unfair litigation harassment and repetitive

proceedings. Justice demands consistency in judicial outcomes and the avoidance of claims that harass litigants with repetitive proceedings.

Allowing the Daveys to re-litigate these issues would work an injustice upon Windermere and its agents. Windermere and its agents (some of whom had their truthfulness unfairly questioned in open court) continue to expend valuable time and money defending against the Daveys' repetitive allegations and claims. The Daveys had a full and fair opportunity to litigate their claims, and after receiving testimony and after listening to argument, the Austin Court found the Daveys' factual allegations to be without basis. The Sypolt Court was correct to put an end to the Daveys' abusive litigation tactics, and the Court of Appeals should affirm.

The Windermere Defendants have, therefore, established (i) that the issues decided in the Pratt litigation are identical to the issues in this case; (ii) that the Pratt litigation ended in a final judgment on the merits; (iii) that the Daveys were a party in the Pratt litigation; and (iv) application of collateral estoppel would not be unjust. The Sypolt Court correctly held that the Daveys' claim against Windermere rises and falls on a factual issue that was already raised, argued, evaluated, and resolved in the Pratt litigation. The factual determinations from the Pratt litigation have been affirmed by a Washington appellate Court and are, therefore,

absolute verities. The Daveys' claims against Windermere cannot proceed in light of those verities. The Court of Appeals should, therefore, affirm the Sypolt Court's dismissal order.

C. THE TRIAL COURT PROPERLY DISMISSED THE DAVEYS' CLAIMS FOR FAILURE TO COME FORWARD WITH ADMISSIBLE EVIDENCE IN RESPONSE TO WINDERMERE'S CELOTEX MOTION.

1. Facing Windermere's Motion for Summary Judgment, the Daveys Were Obligated to Come Forward with Admissible Evidence on Each Element of their Claims – They Failed To Do So.

At summary judgment, the moving party bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party is a defendant, that initial showing requires nothing more than pointing out that there is an absence of evidence to support the plaintiff's case. *Id.* at 325, cited by *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, n.1 (1989).

The burden then shifts, and if the plaintiff “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial,” the trial court should grant the motion. *Celotex*, 477 U.S. at 322. In making a responsive showing, the plaintiff cannot rely on the allegations made in its pleadings. *Young*, 112 Wn.2d at 225. A plaintiff opposing summary judgment must create more than “some metaphysical doubt as to the

material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

As the plaintiffs in this lawsuit facing Windermere's motion for summary judgment, the Daveys bore the burden of producing significant and probative evidence to support each element of each of their claims. *Intel Corp. v. Hartford Acc. & Indem Co.*, 952 F.2d 1551 (9th Cir. 1991) at 1558. In doing so, the Daveys were not entitled to rest upon mere allegations or denials, but were obliged to set forth competent facts to establish every essential element of their claims. CR 56(e). However, the Daveys did not confront Windermere's motion for summary judgment with evidence. Instead, the Daveys did precisely what the Rules forbid – they relied upon arguments, allegations and denials.

The Daveys failed to offer any evidence on the *prima facie* elements of their claims. In fact, the Daveys' opposition to Windermere's motion for summary judgment and their brief on appeal read like defense *Celotex* motions – that is, the Daveys state their allegations and accuse Windermere of failing to come forward with evidence to disprove the Daveys' claims. *See Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 236-8 (1989).

2. The Daveys Cannot Offer Evidence Establishing their Claims or Establishing Triable Issues Thereon.

The Daveys bore the burden of providing significant and probative evidence to support each element of each of their claims. *Celotex*, 477 U.S. at 322. The Daveys failed to offer any evidence supporting a *prima facie* case against Windermere. Tellingly, the Daveys' opening appeal brief does not include even a single citation to evidence in the record. (See Appellant's Brief at pp. 11-18). Indeed, the Daveys' only citations (with respect to this argument) are to the allegations in the Daveys' own Complaint. *Id.* at 17. The Daveys' inability to cite to any evidence supporting their claim is a direct result of there being no such evidence in the record, or in existence.

a. Consumer Protection Act.

In order to survive summary judgment dismissal of their claim under Washington's Consumer Protection Act ("CPA"), the Daveys were obligated to present evidence of five necessary elements of proof: (i) an unfair or deceptive practice; (ii) that is occurring in trade or commerce; (iii) that has an impact on the public interest; (iv) that proximately caused; (v) damage to the Plaintiff's property or business. *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780 (1986). Each of those elements must be established by admissible evidence, and

failure to support any one element is fatal to the Daveys' claim. *See Brown ex rel. Richards v. Brown*, 157 Wn. App. 803, 816 (2010); *Hangman Ridge*, 105 Wn.2d at 789-90.

With regard to their CPA claim against Windermere, the only allegedly deceptive acts cited by the Daveys "relat[e] to the timeliness of acceptance of the counteroffer." (Appellant's Brief, p. 13). As detailed above, the Daveys are estopped from denying that the counteroffer was accepted in a timely manner. *See* paragraph IV(B), *supra*. The Daveys have alleged that Windermere falsified documents and lied to the Daveys about the execution of the Purchase Agreement. However, the Daveys have produced absolutely no evidence that Windermere lied or falsified any documentation, and without evidence the Daveys' claim must be dismissed.

The Daveys have equally failed to offer any evidence to establish the proximate cause or damages elements of their CPA claim.

Hangman Ridge requires CPA plaintiffs to establish a causal link "between the unfair or deceptive act complained of and the injury suffered." 105 Wn.2d at 785. Washington's State Supreme Court clarified that the CPA's causation element requires an affirmative showing that "the injury complained of . . . would not have happened if not for defendant's violative acts." *Schall v. AT&T Wireless Services, Inc.*, 168

Wn.2d 125, 144 (2010) (*quoting Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 82 (2007)). The Daveys have not offered any evidence to establish that “but for” Windermere's alleged misconduct, the Daveys would not have "lost their home and/or incurred attorney fees in appealing the decision in *Pratt v. Davey*." (Appellant's Brief, p. 13). Despite allegations in their Complaint to the contrary, the Daveys now admit that the Purchase Agreement is a valid and enforceable contract. (Appellant's Brief, p. 7). The Daveys did not, and cannot, present any evidence to show how they were damaged as a result of receiving their full asking price for the sale of the House because they suffered no damage to property or business.

b. Breach of Fiduciary Duty.

To support their claim for breach of fiduciary duty, the Daveys were obliged to present evidence that (i) Windermere owed the Daveys a duty; (ii) Windermere breached that duty; and (iii) then that the breach caused the Daveys' injury. *Hansen v. Friend*, 118 Wn.2d 476, 479 (1992).

Windermere does not dispute that, as real estate agents and brokers, they owed certain fiduciary duties to the Daveys. The Daveys, however, offered no evidence showing that any of the Defendants breached any duty, much less a fiduciary duty.

Moreover, uncontested facts demonstrate that Windermere exercised reasonable skill and care, and fully complied with its fiduciary obligations, by advising the Daveys that they had a valid contract to sell their house to the Pratts. (CP 80). The Austin Court's decision confirmed that Windermere's analysis and advice was correct. (CP 79, 81). The Daveys simply refused to heed Windermere's advice and refused to comply with their contractual obligations.

The Daveys' claim for breach of fiduciary duty also fails because they suffered no losses or damages. *See Mueller v. Staples & Son Fruit Co., Inc.*, 611 P.2d 801, 26 Wn. App. 166, *review denied* 94 Wn. 2d 1005 (Div. III 1980). The Daveys' claim for breach of fiduciary duty fails because they suffered no compensable damage.

c. Fraud.

In order to survive summary judgment on their claim of fraud, the Daveys had to present evidence of: (i) a representation of an existing fact; (ii) materiality of the representation; (iii) falsity of the representation; (iv) scienter (the Defendants' knowledge of its falsity or reckless disregard as to its truth); (v) Defendant's intent to induce reliance on it by the Plaintiff; (vi) Plaintiff's ignorance of its falsity; (vii) Plaintiff's reliance on its truth; (viii) Plaintiff's right to rely on it (i.e., justifiable reliance); and (ix) damages. *Farrell v. Score*, 67 Wn. 2d 957 (1966). The Sypolt Court

properly found that the Daveys had not presented sufficient evidence to establish a *prima facie* case for fraud.

The Daveys' only argument on appeal is that they satisfied the heightened pleading requirements in Rule 9. (Appellant's Brief, pp. 17-18). However, at summary judgment the Daveys had to prove their claims, not merely plead them, and the Daveys offered no evidence to substantiate their claim for fraud.

d. Intentional Infliction of Emotional Distress.

To establish a *prima facie* case of intentional infliction of emotional distress, otherwise known as the tort of “outrage”, the Daveys were required to present evidence of: (i) an act by Windermere amounting to extreme and outrageous conduct; (ii) intent on the part of Windermere to cause the Daveys to suffer severe emotional distress, or recklessness as to such consequences; (iii) causation; and (iv) actual damages of severe emotional distress. *Doe v. Finch*, 133 Wn. 2d 96, 942 P.2d 359 (1997). In evaluating the first element, the Court looks at the defendant’s position, the plaintiff’s susceptibility to emotional distress and whether the defendant knew of this, the severity of the degree of emotional distress, and the probability of the defendant’s actions causing such distress. *Keates v. City of Vancouver*, 73 Wn. App. 257 (1994).

The Daveys concede that they failed to present evidence of emotional distress:

THE COURT: In reference to the outrage claim, have you presented any evidence, on actual emotional damage, through an expert?

MR. SWINDLER: No, Your Honor. And I would agree with the Court. That is a challenge for us.

(RP 43). On appeal, the Daveys still do not identify any evidence to substantiate their claim, but instead demand that Windermere produce evidence to disprove the Daveys' unfounded allegations. Because the Daveys have failed to plead or present evidence necessary to establish each essential element of each of their claims, the Sypolt Court correctly dismissed the Complaint and the Court of Appeals should affirm.

3. *The Daveys Had Ample Time and Opportunity to Prove Their Claims.*

The Daveys argue that Windermere's motion was premature and attempt to explain their inability to prove their claims with complaints that they were not afforded sufficient discovery. (Appellant's Brief, pp. 4, 5, 12, 18). The Daveys, however, had more than enough time and opportunity to prove their claims – the Daveys cannot prove their claims because no evidence exists to support the Daveys' contentions.

The Daveys filed this lawsuit almost three years after the Purchase Agreement was executed and approximately nine months prior to

Windermere's motion for summary judgment. Despite their official status as *pro se* plaintiffs, the Daveys admit that they had the assistance of counsel in conducting discovery during the intervening period. (CR 1, 657). On March 3, 2011, Windermere responded to the Daveys' first set of interrogatories and requests for production by producing the entire contents of Windermere's files regarding the transaction, including the files of agents Yvonne DeBill and Kathi Pate. (CP 135, 144, 183-193, 655; RP 16). Although Windermere noted its objections to the Daveys' discovery requests, no documents were withheld. The Daveys never filed a motion to compel or contacted Windermere's counsel to conduct a CR 26(i) conference. (CP 144, 224).

On April 13, 2011 (more than two weeks after Windermere filed its motion for summary judgment), the Daveys served Windermere's counsel with additional discovery requests. (CP 24, 144). These requests were objectionable, and Windermere requested a discovery conference. (CP 177). The Daveys refused to withdraw the objectionable requests and Windermere moved for a protective order. (CP 145, 236). The Daveys never submitted papers in opposition to that motion, but the Sypolt Court's summary dismissal of the Daveys' Complaint rendered the motion moot. In short, the Daveys got all discovery that they were entitled to, and they had plenty of time to locate and present evidence to support their claims.

The Daveys' claims failed because there is no evidence to support them, not because they lacked time to amass that evidence.

V. ARGUMENT: CROSS-APPEAL

A. STANDARD OF REVIEW.

The Court of Appeals reviews Trial Court decisions regarding the award of attorney fees for abuse of discretion. *Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 141 (2006). The Trial Court abuses its discretion where its decision is based on untenable grounds or reasons. (*Id.*).

B. THE TRIAL COURT ERRED IN DENYING WINDERMERE'S REQUEST FOR ITS ATTORNEYS' FEES PURSUANT TO RCW 4.84.330.

RCW 4.84.330 requires that a Court award the prevailing party on a contract their reasonable attorneys' fees, where the parties' contract provides for the prevailing party to recover its fees. *Singleton v. Frost*, 108 Wn.2d 723, 727-8 (1987). The defendant "prevails" under RCW 4.84.330 by successfully defending a contract action. *Mike's Painting, Inc. v. Carter Welsh, Inc.*, 95 Wn. App. 64, 68 (1999).

Even where a party elects to bring an action in tort, rather than an enforcement of contract claim, the prevailing party is still entitled to its fees if the tort action is based on a contract. *Brown v. Johnson*, 109 Wn. App. 56, 58 (2001). An action is based "on a contract" where (i) the

action arose out of the contract and (ii) if the contract is central to the dispute. *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn. App. 834, 855 (Div. I, 1997), citing *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 130 (1993).

In *Edmonds*, the Court of Appeals upheld an award of attorney fees to a prevailing plaintiff who sued for breach of fiduciary duty and other tort claims when her real estate broker failed to return her earnest money upon the termination of a real estate transaction. The broker, instead, disbursed the money to himself and to the seller – in accord with the purchase and sale agreement's terms. (*Id.*). Although the plaintiff's causes of action sounded in tort, the Court of Appeals concluded that the plaintiff's action was "on a contract" because her claims arose out of the duties created by the real estate contracts. (*Id.*). Because the agreements contained an attorney fee provision, the Court of Appeals determined that the prevailing plaintiff was entitled to fees. (*Id.*).

As in *Edmonds*, the Purchase Agreement executed by the Daveys and prepared by Windermere agents Kathi Pate and Yvonne DeBill includes an attorney fee provision that provides:

Attorney's Fees. If Buyer, Seller, or any real estate licensee or broker involved in this transaction is involved in any dispute relating to any aspect of this transaction or this Agreement, each prevailing party shall recover their

reasonable attorneys' fees. This provision shall survive Closing.”

(CP 63). Also like in *Edmonds*, the Listing Agreement between the Daveys and Windermere, their broker, contained a broad attorney fee provision, which states:

If it becomes necessary for either of the parties to obtain the services of an attorney to enforce the provisions hereof, the defaulting party shall pay the substantially prevailing party all damages and expenses resulting from the default, including all reasonable attorney's fees and all court costs and other expenses incurred by the substantially prevailing party.

(CP 361).

All four of the Daveys' tort claims against Windermere arise out of the Purchase Agreement and/or the parties' Listing Agreement. The Sypolt Court appropriately recognized that the Pratts' acceptance of the Daveys' counteroffer, memorialized by the Purchase Agreement, is the "material", "core", and "central" issue "from which everything emanates and revolves around for purposes of determination of this case." (RP 48-49). Without the Purchase Agreement, the Daveys would have no basis to assert such claims against Windermere.

The Daveys' claims against Windermere also arise out of the Listing Agreement between Windermere and the Daveys. By its own terms, the Listing Agreement expressly "creates an agency relationship

between [the Daveys] and [Windermere] and [Yvonne DeBill]." (CP 361). As in *Edmonds*, the Daveys' Complaint alleges that Windermere and its agents breached certain fiduciary duties when preparing the Purchase Agreement. *Edmonds*, 87 Wn. App. 834, 855-856 (1997). (CP 3-9). Whatever fiduciary duties Windermere and Yvonne DeBill owed the Daveys as real estate agents and brokers were triggered by, and thus arise out of, the Listing Agreement.

In fact, this entire controversy arises out of the Daveys' breach of the Listing Agreement and the Purchase Agreement. Those documents obligate the Daveys to execute all documents necessary to close on the sale of the House. (CP 15, 361). The Daveys now admit that they had a valid contract to sell the House, but refused to close on the sale. (Appellant's Brief, pp. 7-8; CP 80). That was a breach of those agreements, and that breach entitles Windermere to its fees and costs.

The Sypolt Court erred in denying Windermere's motion for fees and costs because the Daveys' claims necessarily arose under the Listing and the Purchase Agreements. Under those agreements' broad attorneys' fees provisions, Windermere is entitled to attorneys' fees as the prevailing party – including fees on appeal. The Sypolt Court abused its discretion in denying Windermere its statutory and contractual right to attorneys' fees. To the extent that the Sypolt Court's denial of Windermere's fees and costs

resulted from the unilateral nature of the fees provision within Washington's CPA, His Honor erred. Windermere is not relying upon the CPA or any other statutory scheme for its entitlement to fees and costs. Windermere's right to fees and costs stems from the contracts, whereby the parties mutually agreed to allocate certain risks in the event of a dispute. One of those risks was the cost of litigation, and the parties agreed that the prevailing party would not bear those costs.

The Court of Appeals should reverse and remand this case for a calculation of the fees to which Windermere is entitled, and award Windermere all fees and costs on appeal.

VI. FEES ON APPEAL

When a contract or agreement provides for payment of fees, the prevailing party is also entitled to its reasonable fees and costs incurred on appeal. RAP 18.1; *Quality Food Centers v. Mary Jewell T, LLC*, 134 Wn. App. 814 (Div. I 2006) (trial judge erroneously denied lessor attorney fees at trial for successful defense of suit brought by lessee; lessor also entitled to attorney fees on appeal). Windermere is entitled to fees on appeal for the same reasons that it was entitled to fees from the Sypolt Court.

Windermere prevailed in the Sypolt Court by successfully defending against all of the Daveys' claims, which necessarily arose under the Purchase Agreement and Listing Agreement. As the prevailing party in

this lawsuit, Windermere is entitled to its attorneys' fees and costs in the Sypolt Court and on appeal. Windermere respectfully asks the Court of Appeals to award Windermere fees on appeal.

VII. CONCLUSION

The Daveys are pursuing this action against Windermere because they refuse to accept Judge Austin's findings of fact and conclusions of law from the Pratt litigation. The Daveys are free to disagree with Judge Austin's decision, but they cannot continue to litigate issues decided against them and affirmed on appeal. The Sypolt Court correctly applied the doctrine of collateral estoppel to dismiss the Daveys' claims.

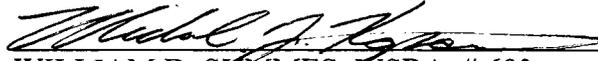
Additionally, the Daveys failed to meet their burden under *Celotex*. The Daveys failed to provide *prima facie* evidence establishing Windermere's liability.

The Court of Appeals should affirm the Sypolt Court's dismissal of the Daveys' claims.

The Sypolt Court, however, erred in denying Windermere's request for attorneys' fees and costs. The Court of Appeals should reverse the Sypolt Court's denial of Windermere's fees and costs and remand this matter for a computation of the amount of damages – including fees on appeal.

RESPECTFULLY SUBMITTED, this 17th day of January, 2012.

WITHERSPOON· KELLEY, P.S.

A handwritten signature in black ink, appearing to read "Michael J. Kapaun", written over a horizontal line.

WILLIAM D. SYMMES, WSBA # 683
MATTHEW W. DALEY, WSBA # 36711
MICHAEL J. KAPAUN, WSBA # 36864
Counsel for Respondents/Cross-Appellants

CERTIFICATE OF SERVICE

On the 17th day of January, 2012, I caused to be served a true and correct copy of the within document described as BRIEF OF RESPONDENTS/CROSS-APPELLANTS on all interested parties to this action as follows:

Kenneth H. Kato 1020 N. Washington St. Spokane, WA 99201 Phone: (509) 220-2237 Counsel for Appellants/Cross-Respondents	Via United States Mail [] Via Federal Express [] Via Hand Delivery [x] Via Facsimile [] Via Electronic Mail []
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JANET L. FERRELL
Legal Assistant