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COURT OF APPEALS
OF THE STATE OF WASHINGTON
BY _____

NO: 311066-III

(Benton County Superior Court Cause No. 06-2-02539-1)

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

BRUCE RICK AND JOANNE COMINS RICK,

Respondents.

v.

PROSSER SCHOOL DISTRICT NO. 116,

Appellant.

APPELLANT'S OPENING BRIEF

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ASSIGNMENTS OF ERROR, WITH ISSUES

Assignments of Error:

1. The Benton County Superior Court erred in denying Prosser School District's Motion for Reconsideration.
2. The Benton County Superior Court erred in partially denying Prosser School District's Motion for Summary Judgment by not excusing Prosser School District from the previously ordered attorney's fees in the amount of \$18,480.00, plus interest as ordered in March 27, 2007.
3. The Benton County Superior Court erred in partially denying Prosser School District's Motion for Summary Judgment for breach of Agreement by Respondents by denying Prosser School District's request for damages in the form of attorney's fees incurred for representation of Prosser School District by attorney Jonie R. Kerr in the Special Education Hearings.

Issues:

1. Did Benton County Superior Court error in denying Prosser School District's Motion for Reconsideration?
2. Did Benton County Superior Court error in partially denying Prosser School District's Motion for Summary Judgment by not excusing Prosser School District from the previously ordered attorney's fees in the amount of \$18,480.00, plus interest as ordered in March 27, 2007, where

the court found Respondents had repudiated and/or breached the Agreement of the parties?

3. Did Benton County Superior Court error in partially denying Prosser School District's Motion for Summary Judgment by denying Prosser School District's request for damages in the form of attorney's fees where the breach of Agreement by Respondents was done in bad faith?

I. STATEMENT OF THE CASE

A. Prior Rulings.

Prior to this matter being filed within the Benton County Superior Court by the Respondents, Bruce Rick and Joanne G. Comins Rick (hereinafter "Comins Rick"), the Appellant, Prosser School District No. 116 (herein referred to as "Prosser School District"), and Comins Rick were involved in special education litigation under cause numbers 2005-SE-0138 and 2006-SE-0021. (CP 45, CP 59-64, CP 66-67, CP 69-70). Settlement was reached between the parties by an agreement of July 31/August 11, 2006 (herein referred to as "Agreement"). (CP 27-28, CP 30, CP 826-27, CP 829). The trial court found the terms of the Agreement to include placement of Student G.R. for the 2006-2007 school year at Prosser School District. (CP 634, CP 881, CP 1068). Following the Agreement, Comins Rick failed to enroll Student G.R. at Prosser

School District as required under the Agreement, sued Prosser School District for attorney's fees as set forth in the Agreement, and then re-filed virtually the same special education litigation they were to dismiss pursuant to the Agreement. **(CP 857)**. All the while, undisclosed to Prosser School District until after the Agreement, Student G.R. was enrolled and attending school in Pennsylvania commencing July of 2006. **(CP 955, CP 995, CP 1050)**. Student G.R. attended the entire school year of 2006-2007 in Pennsylvania.

Comins Rick filed this lawsuit in Benton County Superior Court on October 12, 2006, and sued for enforcement of the Agreement to obtain their attorney's fees only. **(CP 1-9)**. On November 14, 2006, the Prosser School District filed its answer and counterclaim indicating Comins Rick breached the Agreement. **(CP 13-17)**. On November 27, 2006, the Prosser School District filed its amended answer to complaint and second counterclaim. **(CP 21-37)**.

On March 27, 2007, the Benton County Superior Court ruled that there was in fact a valid Agreement between the parties and further identified the specific terms of that Agreement. **(CP 631-41, CP 878-86, CP 1065-73)**.

Some of the essential elements of the Agreement recognized by the court, as found in the order of March 27, 2007, were:

1. Student G.R. would attend Prosser School District for the 2006-2007 school year;
2. The District would provide year-round program and placement within the Prosser School District for the 2006-2007 school year;
3. Student G.R. is to receive to two (2) years compensatory education;
4. The District would pay attorney's fees for one (1) attorney for fees to July 31, 2006, in the amount of \$18,480.00, upon the presentment of a properly itemized attorney's fees statement;
5. The District would dismiss Special Education case No. 2006-SE-0021;
6. The Plaintiffs would dismiss the Special Education Case No. 2005-SE-0138. (**CP 634, CP 881, CP 1068**).

The major issue in Special Education Case No. 2005-SE-0138 (the case to be dismissed by Comins Rick according to the Agreement) was proper school placement of Student G.R. Comins Rick was requesting placement at the expense of Prosser School District at Woods in Pennsylvania.

B. Special Education Cause No. 2006-SE-0089 – Judge Shave.

Although Comins Rick agreed to dismiss the Special Education Case No. 2005-SE-0138 pursuant to the Agreement (it was dismissed September 8, 2006) (**CP 51, CP 134-35, CP 137-38**), Comins Rick soon after filed a virtually identical claim on November 13, 2006,

Special Education Cause No. 2006-SE-0089, again requesting placement at the expense of Prosser School District at Woods in Pennsylvania. (CP 679, CP 900-35). This complaint was assigned to Administrative Law Judge Janice E. Shave. (CP 679). Prosser School District was forced to expend extensive time and legal resources to defend a “re-filing” of the case Comins Rick agreed to dismiss under the Agreement. (CP 851, CP 858-59). The major issue in Special Education Cause No. 2006-SE-0089 was proper school placement of Student G.R. (i.e. Woods School in Pennsylvania as opposed to Prosser School District).

On August 13, 2007, Judge Shave entered her *Findings of Fact, Conclusions of Law, and Order* establishing that Prosser School District had a proper program in place, Student G.R. could have been placed in the Prosser School District under a proper program, and that Comins Rick “did not engage in good faith dealings with the School District by their conduct, and did not intend to return the Student to the School District.” (CP 761, CP 770, CP 810, CP 971) (emphasis added).

C. Comins Rick’s Appeal of Judge Shave’s Decision.

On November 9, 2007, Comins Rick appealed Judge Shave’s *Findings of Fact, Conclusions of Law, and Order* to the United States District Court for the Eastern District of Washington (hereinafter “District

Court”). (CP 860). On September 4, 2008, the District Court affirmed the Decision of Judge Shave. (CP 860).

On September 12, 2008, Comins Rick filed a Motion for Reconsideration with the District Court regarding their Order affirming Judge Shave’s *Findings of Fact, Conclusions of Law, and Order*. (CP 860). On October 21, 2008, the District Court denied Comins Rick’s Motion for Reconsideration. (CP 860).

On October 23, 2008, Comins Rick submitted their Notice of Appeal to the United States Court of Appeals for the Ninth Circuit (hereinafter “Court of Appeals”), for both the District Court’s Order Affirming the decision of the Administrative Law Judge, entered September 4, 2008, and the District Court’s Order Denying Comins Rick’s Motion for Reconsideration entered on October 21, 2008. (CP 860).

D. Prosser School District’s Prior Summary Judgment Motion on Issue of Breach of Contract and Damages – August 22, 2007.

Soon after Judge Shave issued her *Findings of Fact, Conclusions of Law, and Order*, Prosser School District filed its Motion for Summary Judgment on Issue of Breach of Contract and Damages, dated August 22, 2007, submitting that Judge Shave’s *Findings of Fact, Conclusions of Law, and Order* effectively eliminated any question of fact as to whether

the Agreement between the parties had been breached by Comins Rick. (CP 763-65).

Due to the pendency of the above referenced appeals by Comins Rick, Prosser School District's Motion for Summary Judgment was stayed. (CP 976-77).

During the stay of this action, the Court of Appeals dismissed Comins Rick's appeal in case 2006-SE-0089 on February 13, 2009. (CP 979). As a result of the dismissal, Judge Shave's *Findings of Fact, Conclusions of Law, and Order* were left intact and is a final order on Special Education Cause No. 2006-SE-0089. (CP 811-12).

E. Special Education Cause No. 2007-SE-0111 – Judge Gaffney.

Although Comins Rick had agreed to dismiss the Special Education Case No. 2005-SE-0138 pursuant to the Agreement, and lost case 2006-SE-0089, Comins Rick filed a second virtually identical claim on November 15, 2007, Special Education Cause No. 2007-SE-0111, assigned to Judge John M. Gaffney. (CP 981-91). Prosser School District was again forced to expend time and legal resources to defend a "re-filing" of the case Comins Rick agreed to dismiss pursuant to the Agreement. (CP 851, CP 881).

Again, the major issue in the above referenced special education case was proper school placement of Student G.R. (CP 930-32, CP 989-

91). The parents again requested placement at Woods School in Pennsylvania at Prosser School District's expense. (CP 930-32, CP 989-91).

Student G.R. was enrolled in Prosser School District for the 2007-2008 school year. (CP 1011).

On January 30, 2008, Judge Gaffney issued *Findings of Fact, Conclusions of Law, and Order* finding that Prosser School District prevailed on all issues. (CP 992-1012). Judge Gaffney specifically held that: (1) the IEP developed by Prosser School District for the Student was appropriate and provided the Student free appropriate public education; and (2) the Student should not be placed at Woods, a residential treatment facility in Pennsylvania, at public expense. (CP 1011).

F. Comins Rick's Appeal of Judge Gaffney's Decision.

On April 28, 2008, Comins Rick appealed Judge Gaffney's *Findings of Fact, Conclusions of Law, and Order* to the District Court. (CP 863, CP 851). After filing the appeal, Comins Rick moved the court to open the administrative record of the Judge Gaffney hearing to consider additional evidence that was later discovered. (CP 863, CP 851). After a hearing on the motion, the case was remanded back to the Administrative Law Judge Gaffney so he could consider the new evidence and thereafter issue a ruling. (CP 863, CP 851).

On July 15, 2009, Judge Gaffney issued his *Findings of Fact, Conclusions of Law, and Order*. (CP 1014-19). Judge Gaffney found that the additional evidence was of marginal relevance, not material, cumulative, and provided no quantitative difference. (CP 1018).

On October 15, 2009, Comins Rick filed a Petition for Judicial Review and Complaint under the IDEA and a Motion to Reopen the case, which the court granted on November 6, 2009. (CP 863, CP 851). The Court permitted Comins Rick to reopen the case and file an Amended Complaint. (CP 863, CP 851). Prosser School District filed a motion to dismiss for lack of jurisdiction. (CP 863, CP 851).

On February 26, 2010, the District Court granted Prosser School District's motion to dismiss, in part. (CP 864, CP 851). The District Court ruled that Comins Rick filed an untimely appeal of Judge Gaffney's decision regarding whether the record should be re-opened to include the new evidence and struck the Amended Complaint. (CP 864, CP 851). However, the District Court found that Comins Rick timely filed their appeal of Judge Gaffney's January 30, 2008, order. (CP 864, CP 851).

On April 1, 2011, the District Court affirmed Judge Gaffney's *Findings of Fact, Conclusions of Law, and Order*, denied Comins Rick's appeal, and ordered that the file be closed. (CP 864, CP 851).

On April 29, 2011, Comins Rick submitted their Notice of Appeal to the Ninth Circuit Court of Appeals for both the order affirming Judge Gaffney's decision, denying the appeal, and ordering the file to be closed entered April 1, 2011; as well as the order granting Prosser School District's motion to dismiss, in part, entered on February 26, 2010. **(CP 864, CP 851)**.

On January 31, 2012, the Ninth Circuit Court of Appeals dismissed Comins Rick's appeal. **(CP 1021)**.

As a result of the dismissal, Judge Gaffney's *Findings of Fact, Conclusions of Law, and Order* were left intact and is a final order on case no. 2007-SE-0111. **(CP 865, CP 1011)**.

G. Prosser School District's Amended Motion for Summary Judgment.

On April 30, 2012, Prosser School District brought an Amended Motion for Summary Judgment on the Issue of Breach of Contract and Damages, as all special education cases, 0089 and 0111, were concluded. **(CP 847-49)**.

On May 31, 2012, the Benton County Superior Court partially granted Prosser School District's Amended Motion for Summary Judgment on the Issue of Breach of Contract and Damages. **(CP 1049-51)**. The Court found the Comins Rick had breached the Agreement by

enrolling Student G.R. in Woods Services, Inc. in Pennsylvania in July of 2006. **(CP 1049-51)**. In spite of Comins Rick's breach of the Agreement, the Court ordered the payment of attorney's fees by Prosser School District with no set off for any damage claimed by Prosser School District. **(CP 1050-51)**. Further, the court ordered that Prosser School District was not entitled to the attorney's fees of Ms. Joni R. Kerr as damages as there was no contract provision allowing such in the Agreement, and no statute allowing such award. **(CP 1051)**. The court ruled Prosser School District was required to pay \$18,480.00, plus interest, consistent with the prior ruling of March 27, 2007. **(CP 1050-51)**.

On July 2, 2012, Prosser School District filed a Motion for Reconsideration of the court's order entered May 31, 2012, enforcing the attorney's fees provision of the Agreement in the amount of \$18,480.00 plus interest, and for reconsideration of the court order dismissing Prosser School District's second counterclaim, specifically as to damages in the form of attorney's fees requested by Prosser School District. **(CP 1038-40)**.

On August 9, 2012, the court found that a breach by Comins Rick of the Agreement did not relieve Prosser School District of the obligation to pay attorney's fees. **(CP 1053)**. The court denied Prosser School

District's Motion for Reconsideration and dismissed the case. (CP 1052-53).

H. Matter Before this Court.

On September 6, 2012, Prosser School District filed its Notice of Appeal to this Court (CP 1054-56) seeking review of the Order on Defendant's Motion for Reconsideration entered August 14, 2012 (CP 1058-59); the Order Partially Granting Defendant's Amended Motion for Summary Judgment on the Issue of Breach of Contract and Damages entered July 10, 2012 (CP 1061-63); the Order Granting Defendant's Summary Judgment Dismissing Plaintiffs' Complaint and Granting Partial Summary Judgment on Defendant's Counterclaim (CP 1065-1073); and Order and Judgment entered in this case by the above-entitled court on March 27, 2007. (CP 1075-76).

II. ARGUMENT

A. Summary of Argument.

Prosser School District was entitled to a judgment as a matter of law that, as a result of Comins Rick's breach of the Agreement, Prosser School District is excused from performance (i.e. payment of attorney's fees) under the Agreement. Prosser School District is entitled to damages in the form of attorney's fees expended in litigating Special Education Nos. 2006-SE-0089 and 2007-SE-0111 under equitable grounds as

Comins Rick acted in bad faith and requested relief from the trial court with unclean hands.

B. Standard of Review.

“The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court.”

Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.3d 1068 (2002);

Smith v. Safeco Ins. Co., 150 Wn.2d 478, 483, 78 P.3d 1274, 1276 (2003).

When reviewing a motion for reconsideration, an abuse of discretion standard is applied. Lian v. Stalick, 106 Wn. App. 811, 823-24, 25 P.3d 467 (2001). An abuse of discretion occurs when a trial court bases its decision on untenable grounds or reasons, or when its decision is manifestly unreasonable. Lian, 106 Wn. App. at 824.

C. The Trial Court Found that Comins Rick Breached the Agreement Between the Parties and as such, Prosser School District is Excused from Performance As a Matter of Law.

1. Repudiation Excuses Performance by Injured Party.

Settlement agreements are contracts. And so, the court applies general principles of contract law. Morris v. Mak, 69 Wn. App. 865, 868, 850 P.2d 1357 (1993).

Repudiation of a contract by one party may be treated by the injured party as a breach which will excuse his own performance.

Hemisphere Loggers & Contractors, Inc. v. Everett Plywood Corp., 7 Wn.

App. 232, 234, 499 P.2d 85, 87 (Div. 1 1972), review denied; Trompeter v. United Ins. Co., 51 Wn.2d 133, 316 P.2d 455 (1957); 17 Am.Jur.2d Contracts s 449 (1964).

An “anticipatory breach occurs when one of the parties to a bilateral contract either expressly or impliedly repudiates the contract prior to the time of performance. A party’s intent not to perform may not be implied from doubtful and indefinite statements that performance may or may not take place.” Wallace Real Estate Inv., Inc. v. Groves, 124 Wn.2d 881, 898, 881 P.2d 1010, 1019 (1994) (citing Lovric v. Dunatov, 18 Wn. App. 274, 282, 567 P.2d 678, 682 (Div. 1 1977)). Anticipatory breach or repudiation requires a “positive statement or action by the promisor indicating distinctly and unequivocally that he either will not or cannot substantially perform any of his contractual obligations.” Wallace Real Estate Investment, Inc. v. Groves, supra (quoting Olsen Media v. Energy Sciences, Inc., 32 Wn. App. 579, 585, 648 P.2d 493, 497 (Div. 1 1982)).

One who is ready, willing and able to tender performance is relieved of that duty when the other party by word or act indicates that he will not perform. Bakotich v. Swanson, 91 Wn. App. 311, 957 P.2d 275 (Div. 2 1998) (holding modified by, Ford v. Trendwest Resorts, Inc., 146 Wn.2d 146, 43 P.3d 1223 (2002)); Sherman v. Lunsford, 44 Wn. App. 858, 723 P.2d 1176 (Div. 1 1986) (under agreement, permit holder waived

right to full payment at time specified for payment); Kreger v. Hall, 70 Wn.2d 1002, 425 P.2d 638 (1967) (buyers were relieved of obligation to tender money based on seller's failure to furnish clear title to property).

2. There is No Dispute Comins Rick Repudiated / Breached the Agreement.

Judge Shave's *Findings of Fact, Conclusions of Law, and Order* in itself effectively eliminated any question of fact as to whether the Agreement between the parties had been breached by Comins Rick. (CP 766-813). Prosser School District was entitled to a judgment as a matter of law.

a. Comins Rick Never Enrolled and Never Intended to Enroll Student G.R. in Prosser School District for the 2006-2007 School Year.

The Benton County Superior Court previously held that the Agreement between the parties provided that:

Student G.R. would attend Prosser School District for the 2006-2007 school year; (CP 881).

It is undisputed that Student G.R. did not attend Prosser School District in the 2006-2007 school year. This is an undisputed breach of the Agreement between the parties requiring Comins Rick to enroll Student G.R. to attend Prosser School District for the 2006-2007 school year. (CP 881).

The trial court found that Comins Rick had breached the Agreement by enrolling Student G.R. in Woods Services, Inc. in Pennsylvania in July of 2006. (CP 1050). Prosser School District is not appealing this finding of the trial court.

Prosser School District further submits that Comins Rick's breach was egregious in nature as Judge Shave clearly found that Comins Rick breached the Agreement with the District by never *intending* to enroll Student G.R. in the Prosser School District for the 2006-2007 school year. (CP 973).

“The Parents provided notice to the School District approximately one and one half months after they enrolled the Student at Woods, not ten days prior. The enrollment at Woods was done July 3, 2006, under a contract to remain in effect until October 20, 2006. The check for that placement was written June 30, 2006. Congress could have pegged the notice provision to the date a student was withdrawn or disenrolled from public school. However, as in this case, many times parents do not withdraw their student, they merely enroll elsewhere. The Student was not placed at Woods merely for a summer school placement, despite the Parents’ assertion. Under the totality of circumstances presented here, reimbursement to the Parents for the cost of Woods for the 2006-2007 school year is inappropriate and is denied.” (CP 971)
(emphasis added).

Judge Shave further indicated:

“The Parents’ conduct, including their misrepresentations to the School District and concealment of facts known only to them, leads to the conclusion that the Parents simply did not intend to return the Student to the School District for the 2006-2007 school year. As the Parents had already stated to the School District during the course of the 2005-2006 school year, they felt the Student’s only chance was at Woods. They did not believe the School District was capable of providing appropriate placement for the Student. It would not have mattered what program the School District proposed to the Parents in August of 2006, other than payment for Woods, the program selected by the Parents.” (CP 971) (emphasis added).

The undisputed facts and Judge Shave’s *Findings of Fact, Conclusions of Law, and Order*, eliminate any question of fact as to whether Comins Rick breached the Agreement between the parties by never enrolling and further never *intending* to enroll Student G.R. into the Prosser School District for the 2006-2007 school year. (CP 971). The District was entitled to a judgment as a matter of law establishing that Comins Rick breached this term of the Agreement between the parties. (CP 881).

b. Comins Rick Failed to Cease Litigation for the Relief Requested in Special Education Cause No. 2005-SE-0138 (the settled case).

Benton County Superior Court previously held that the Agreement between the parties provided that:

The Plaintiffs would dismiss the Special Education Cause No. 2005-SE-0138. **(CP 881).**

Although Comins Rick agreed to dismiss the Special Education Cause No. 2005-SE-0138 pursuant to the Agreement, Comins Rick soon after filed a nearly *identical* claim on November 13, 2006. **(CP 900-35).** This case was effectively a “re-filing” of the 2005-SE-0138 case in the disguise of a “new matter.” **(CP 900-35).** Comins Rick then further continued litigating the Woods placement at the expense of Prosser School District in Special Education Cause No. 2007-SE-0111, after Judge Shave ruled against the parents in 2006-SE-0089 (August 13, 2007). **(CP 981-91).**

These two (2) special education complaints forced Prosser School District to expend extensive time and legal resources to defend a re-filing of the case Comins Rick agreed to dismiss under the Agreement and to re-litigate matters previously resolved under the Agreement. **(CP 850-55).**

The actions of Comins Rick are not in dispute. There is no question of fact as to whether Comins Rick breached the Agreement

between the parties by continuing litigation of Special Education Cause No. 2005-SE-0138 disguising it as “new matter” filed under cause no. 2006-SE-0089, heard by Judge Shave, and cause no. 2007-SE-0111, heard by Judge Gaffney.

Prosser School District is entitled to a judgment as a matter of law establishing that Comins Rick breached the Agreement between the parties by failing to enroll Student G.R. at Prosser for the 2006-2007 school year (as previously held by the trial court) *and* by filing Special Education Cause Nos. 2006-SE-0089 and 2007-SE-0111. A ruling otherwise is manifestly unreasonable.

3. Prosser School District is Excused from Performance Under the Agreement Due to Comins Rick’s Unclean Hands and Undisputed Breaches.

a. Comins Rick Has Unclean Hands.

One who does not come with clean hands must be denied all relief, whatever may have been the merits of his claim. Hall v. Wright, 240 F.2d 787, 794 -95 (C.A.9 1957) (citing Hazel-Atlas Co. v. Hartford Co., 322 U.S. 238, 64 S.Ct. 997 (1944), rehearing denied 322 U.S. 772, 64 S.Ct 1281)).

Comins Rick expressly and impliedly repudiated the Agreement between the parties and furthermore never *intended* to comply with the Agreement. Comins Rick is requesting relief from the Court under an

Agreement to which they *never intended* to comply with themselves.

Comins Rick does not approach this Court with clean hands and therefore should not be able to enforce only the provisions of the Agreement to which they benefit. Unclean hands is based upon “considerations that make for the advancement of right and justice.” Keystone Driller Company v. General Excavator Company, 290 U.S. 240, 245, 54 S.Ct. 146, 147, (1933). Out of justice, this Court should not provide aid in the commission of Comins Rick’s wrong.

b. Comins Rick Undisputedly Breached the Agreement.

Repudiation gives the aggrieved party the right to terminate the contract and discharge his or her remaining obligations. “[O]ne party's repudiation of a duty to render performance discharges the other party's remaining duties to render performance.” Restatement (Second) of Contracts § 253(2) (2012).

It would be inappropriate to pick and choose which provisions of an Agreement are enforceable where one side has breached or anticipatorily breached the Agreement.

Where a party repudiates or breaches an agreement, the injured party is excused from performance. Hemisphere Logger & Contractors v. Everett Plywood, 7 Wn. App. 232, 499 P.2d 85 (1972). One who is ready, willing and able to tender performance is relieved of that duty when the

other party by word or act indicates that he will not perform. Bakotich v. Swanson, 91 Wn. App. 311, 957 P.2d 275 (Div. 2 1998) (holding modified by, Ford v. Trendwest Resorts, Inc., 146 Wn.2d 146, 43 P.3d 1223 (2002)); Sherman v. Lunsford, 44 Wn. App. 858, 863, 723 P.2d 1176 (1986); Kreger v. Hall, 70 Wn.2d 1002, 425 P.2d 638 (1967).

There is no question of fact that Comins Rick's breach or repudiation occurred when Comins Rick, four (4) days after the parties entered into the settlement agreement (August 11, 2006), made public the breach of the Agreement by notifying Prosser School District they did not intend to enroll their student in Prosser School District (**CP 1004**) and in fact had enrolled Student G.R. at Woods July 3, 2006. Furthermore, the notice from the parents' stating that they intended to enroll G.R. at Woods is a blatant misrepresentation as Student G.R. was *already* enrolled at Woods on July 3, 2006.

PARENTS' STATED INTENT TO ENROLL
(REDACTED) IN A PRIVATE SCHOOL AT
PUBLIC EXPENSE:

The 2006-2007 school year begins on Tuesday, August 29, 2006. Notice is hereby given to the Prosser School District, that we, the parents/legal guardians, are removing (redacted) from Prosser School District, effective August 29, 2006, which is the first day of the upcoming 2006/07 school year. This notice is given on August 15, 2006, which is *at least 10 business days prior to*

the removal of the student from public school, as required by WAC 392-172-231. The district has not yet provided a placement for (redacted) for the upcoming year. However, we are rejecting the placement which we anticipate will be proposed by the district, and hereby state that we intend to enroll (redacted) at Woods Services, Inc. a private school, at public expense. (CP 96) (emphasis added).

Comins Rick positively asserted that they will not perform under the Agreement. **(CP 95-106)**. Judge Shave found that Comins Rick breached the Agreement between the parties and further that Comins Rick never *intended* to perform under the Agreement. **(CP 973)**. The trial court ruled on May 31, 2012, that Comins Rick breached the Agreement. **(CP 1049-51)**.

Despite the repeated findings of breach and a finding of lack of legitimate intention, the trial court then incorrectly required Prosser School District to pay Comins Ricks' attorney's fees in the amount of \$18,480.00, plus interest.

Prosser School District was ready, willing, and able to provide year-round program and placement within Prosser School District for the 2006-2007 school year. The court found that Comins Rick breached the Agreement. As such, Prosser School District should be excused from performance under the Agreement breached by Comins Rick and should

not be required to pay attorney's fees in the amount of \$18,480.00, plus interest.

As previously argued, Comins Rick *further* breached the Agreement by failing to cease litigation on Special Education Cause No. 2005-SE-0138 by filing Special Education Cause Nos. 2006-SE-0089 *and* 2007-SE-0111.

Requiring Prosser School District to pay attorney fees to Comins Rick under the Agreement when Comins Rick in bad faith breached the Agreement and further never intended to comply with the Agreement from the Agreement's commencement is contrary to law, inequitable, and rewarding unclean hands. Comins Rick did not comply with essential elements of the Agreement while Prosser School District was willing and able to perform on all parts. Allowing Comins Rick to benefit from their bad faith goes contrary to the notions of fairness within general contract law and equity.

D. Prosser School District is Entitled to Damages in the Form of the Cost of Attorney's Fees for Joni R. Kerr in Litigating Special Education Cause Nos. 2006-SE-0089 and 2007-SE-0111.

Under repudiation, the injured party is entitled to restitution for damages. Turner v. Gunderson, 60 Wn. App. 696, 807 P.2d 370 (Div. 3 1991); Bakotich v. Swanson, 91 Wn. App. 311, 957 P.2d 275 (Div. 2

1998) (holding modified by, Ford v. Trendwest Resorts, Inc., 146 Wash. 2d 146, 43 P.3d 1223 (2002)).

Prosser School District recognizes that attorney fees are generally not awardable as damages. See Weiss v. Bruno, 83 Wn.2d 911, 523 P.2d 915 (1974). However, attorney fees are awarded on equitable grounds in cases of bad faith. See Hsu Ying Li v. Tang, 87 Wn.2d 796, 798, 557 P.2d 342 (1976). Courts have “recognize[d] a number of equitable exceptions to the no-attorney-fees rule.” Id. at 798. Bad faith has been recognized as a basis for an equitable attorney fees award. Kirk v. Gobel, 622 F.Supp.2d 1039, 1047 (E.D.Wash. 2009) (citing Miotke v. Spokane, 101 Wn.2d 307, 338, 678 P.2d 803 (1984)). A court may award attorney fees if a party’s conduct constitutes bad faith or wantonness. Public Util. Dist. No. 1 v. Kottsick, 86 Wn.2d 388, 390, 545 P.2d 1 (1976); State ex rel. Macri v. Bremerton, 8 Wn.2d 93, 113, 111 P.2d 612 (1941). “[B]ad faith litigation can warrant the equitable award of attorney fees.” In re Recall of Pearsall-Stipek, 136 Wn.2d 255, 267 & n. 6, 961 P.2d 343 (1998).

A party may demonstrate bad faith by, *inter alia*, delaying or disrupting litigation. State v. S.H., 102 Wn. App. 468, 475, 8 P.3d 1058, 1061 (Div. 1 2000) (citing Chambers v. NASCO, Inc., 501 U.S. 32, 46, 111 S.Ct. 2123 (1991)). The courts have held that a finding of

“inappropriate and improper” is tantamount to a finding of bad faith. Wilson v. Henkle, 45 Wn. App. 162, 175, 724 P.2d 1069 (1986); see also DLC Management Corp. v. Town of Hyde Park, 163 F.3d 124, 136 (1998) (concluding that trial court’s finding that defendants acted in conscious disregard of their discovery obligations was “sufficiently concise and based on clear evidence” so as to amount to the bad faith sufficient to support sanctions under the court’s inherent authority); Optyl Eyewear Fashion Int’l Corp. v. Style Cos., Ltd., 760 F.2d 1045, 1051 (9th Cir.1985) (concluding that evidence of tactical maneuvers undertaken in bad faith is bad faith).

The Prosser School District is not requesting this Court to award attorney’s fees on the basis of either contract or statute. Prosser School district submits that an award of attorney’s fees as damages is appropriate in this matter on equitable grounds of bad faith. Hsu Ying Li v. Tang, 87 Wn.2d 796, 798, 557 P.2d 342 (1976); Public Util. Dist. No. 1 v. Kottsick, 86 Wn.2d 388, 390, 545 P.2d 1 (1976); State ex rel. Macri v. Bremerton, 8 Wn.2d 93, 113, 111 P.2d 612 (1941). To be clear, Prosser School District is requesting damages based upon the attorney’s fees for Joni R. Kerr as this is the most direct methodology to establish damages with certainty.

It is Prosser School District’s position that the breach of the Agreement by Comins Risk justifies an award of damages in the form of

attorney's fees, as the breach was in bad faith - Comins Rick attempted to circumvent the Agreement by re-filing a case which was to be dismissed under the Agreement and it was found the Comins Rick never intended to perform other obligations under the Agreement.

1. Comins Rick's Attempt to Circumvent the Agreement is in Bad Faith.

As damages, Prosser School District submits it's entitled to the attorney fees for Joni R. Kerr for litigating the special education due process hearings before Judge Shave and Judge Gaffney. The Agreement between the parties required Comins Rick to dismiss Special Education Cause No. 2005-SE-0138. **(CP 634, CP 881, CP 1068)**. As previously argued, Comins Rick dismissed the matter and then simply re-filed the same matter under Special Education Cause No. 2006-SE-0089, which was assigned to Judge Shave. **(CP 900-35)**. In both cases, Comins Rick requested placement of Student G.R. at Woods in Pennsylvania.

Then, after Judge Shave ruled against Comins Rick under Special Education Cause No. 2006-SE-0089, they filed Cause No. 2007-SE-0111 which again dealt with the Woods placement already resolved by the parties under the Agreement and ruled on by Judge Shave. **(CP 981-91)**.

As a result of Comins Rick's bad faith and unfair dealings, Prosser School District was forced to expend resources to defend the same settled

matter twice. (CP 881). Prosser School District is entitled to recover as damages Joni R. Kerr's attorney fees expended in defending the duplicate litigation.

2. **Comins Rick in Bad Faith Never Intended to Comply with the Agreement.**

The District submits that the *Findings of Fact, Conclusion of Law, and Order* of Administrative Law Judge Shave alone establishes a basis for the award of attorney fees as damages.

“They did not engage in good faith dealings with the School District by their conduct and did not intend to return the Student to the School District.” (CP 761). (emphasis added).

“For the parents to assert at the hearing, as they did, that there was no need for an IEP to be in effect at the start of this school years, and the Parents would have gladly waived that requirement, is disingenuous.” (CP 752) (emphasis added).

“The Parents’ conduct, including misrepresentation to the School District and concealment of facts known only to them, leads to the conclusion that the Parents simply did not intend to return the Student to the School District for the 2006-2007 school year, . . .” (CP 759) (emphasis added).

“Given the Mother’s employment as an attorney, and her history of positions of significant responsibility both for her private clients and for here earlier client, the U.S.

government, on various jobs which included contract compliance, the Mother's testimony is not found to be credible on this point. A term as important as cancellation of a contract at the daily rate of \$458.00 is a significant term, and would need to be included in the terms of the contract. It is not credible that a knowledgeable attorney, or parent, would negotiate such a term then not notice it was not included in the contract." (CP 794-795) (emphasis added).

"The Mother testified she wrote this letter (Exhibit P37) on August 15, 2006, after receiving and reviewing the School District's August 15, 2006, proposed IEP. The Father testified the Mother began to write the letter on August 14, 2006, a day prior to the family's receipt of the proposed IEP. The Father's testimony is more credible on this point. It would be difficult, if not impossible, to read the School District's proposed IEP, evaluate the proposed IEP and write a lengthy, detailed response in just over one hour. The fact that the Mother is found to have written her rejection of the School District's proposed IEP beginning the day before she received the proposed IEP supports the determination that the Parents had already decided to reject whatever IEP was proposed by the School District prior to any proposal." (CP 795) (emphasis added).

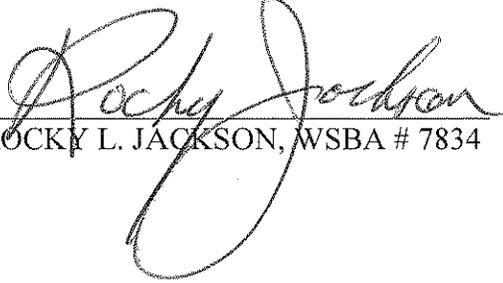
Prosser School District submits that the above *findings of fact and conclusions of law, and order* establish that Comins Rick acted in bad faith and misrepresented and concealed facts. It is without question that

Comins Rick requested relief under the Agreement with unclean hands. Comins Rick's bad faith and misrepresentations are a basis for awarding damages in the form of the cost of attorney's fees to litigate the Special Education cases, which were held in front of Judge Shave and Judge Gaffney, to Prosser School District under principles of equity. Prosser School District spent a total of \$235,083.50 in attorney's fees for Ms. Joni R. Kerr defending Special Education Cause No. 2006-SE-0089, assigned to Judge Shave, and Special Education Cause No. 2007-SE-0111, assigned to Judge Gaffney. **(CP 850-55)**. Prosser School District is entitled to be reimbursed those fees as Comins Rick acted in bad faith.

III. CONCLUSION

For the reasons stated above, this Court should find that Prosser School District is entitled to a judgment as a matter of law establishing that Comins Rick's breached the Agreement. As a result of Comins Rick's breach of the Agreement, Prosser School District is excused from performance (i.e. payment of attorney's fees) under the Agreement. Furthermore, that Prosser School District is entitled to damages in the form of attorney's fees expended in litigating Special Education Nos. 2006-SE-0089 and 2007-SE-0111 under equitable grounds as Comins Rick acted in bad faith and requested relief from the trial court with unclean hands.

Respectfully submitted this 7th day of November, 2012.


ROCKY L. JACKSON, WSBA # 7834

Certificate of Service

I certify, under penalty of perjury, under the laws of the State of Washington, I am a citizen of the United States and of the State of Washington; over the age of 18 years of age; not a party interested in the above matter and competent to be a witness in said cause. That on this 7th day of November, 2012, I served true copies of *Appellant's Opening Brief* to the following parties as identified below:

Original and One copy via UPS Next Day Courier:

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Dated in Yakima, Washington, this 7th day of November, 2012.



Natalie K. Bennett