

65159-5

No. ~~6515-5-1~~

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE

ROBERTO RODRIGUEZ,

Respondent,

v.

WINDERMERE REAL ESTATE/WALL STREET, INC.,

Appellant.

RESPONDENT'S BRIEF

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ORIGINAL

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I. INTRODUCTION

The trial court's award of reasonable attorney's fees and costs to Mr. Rodriguez was both appropriate and necessary pursuant to Washington law and its public policies. A finding otherwise would have validated a unilateral fees clause and resulted in the precise inequity the statute intends to remedy. This Court should disregard Windermere's attempt to truncate the relevant contractual language and misconstrue the law, and affirm the trial court's award of attorney's fees award to Mr. Rodriguez. Likewise, the trial court's award of prejudgment interest at 18%, as the parties had agreed was the reasonable rate of interest between them, was correct and should be affirmed.

II. ASSIGNMENTS OF ERROR

Mr. Rodriguez assigns error to the trial court's Findings of Fact Nos. 2 and 3 of the Amended Order Awarding Attorneys' Fees and Costs:

2. The court withdraws the finding of fact numbered 6 [of the Order Awarding Attorneys' Fees and Costs to Plaintiff, CP 397-400].
3. The court expressly finds that real estate commissions, the source of which is a third party rather than the broker, do not constitute wages or salary.

CP 401-02.

Mr. Rodriguez further assigns error to the trial court's Conclusion of Law No. 1 of the amended Order Awarding Attorneys' Fees and Costs:

1. Mr. Rodriguez is not entitled to an award of attorneys' fees and costs under RCW 49.48.030.

CP 401-02.

III. STATEMENT OF THE CASE

A. In Bad Faith and Without Reasonable Basis, Windermere Breached Its Termination Agreement with Mr. Rodriguez by Failing to Pay an Agreed Upon Commission

This dispute began over a mere \$16,800 listing commission that Windermere Real Estate/Wall Street, Inc. ("Windermere") owed to Roberto Rodriguez on a real estate transaction. CP 5-9; TE 100.

Mr. Rodriguez is a licensed real estate agent who worked out of Windermere's Wall Street office. CP 91. Sara Thompson was, until her death in 2010, a licensed real estate agent who also worked out of Windermere's Wall Street office. CP at 91. In May 2004, Mr. Rodriguez and Ms. Thompson formed an express oral partnership in which the two would contribute efforts to obtain property listing and sales and would split equally the commissions realized on those sales. CP 92, 95. Richard "Jake" Jacobsen is a licensed broker and is the branch manager of Windermere's Wall Street office. CP 91.

On April 4, 2005, without explanation, Mr. Jacobsen terminated Mr. Rodriguez's agency with Windermere. CP 92. As part of the termination agreement, Mr. Jacobsen reviewed the files for five pending transactions and agreed that Mr. Rodriguez was entitled to one half of the listing commission on those transactions (the other half was to be paid to Ms. Thompson). CP at 92. Windermere and Mr. Rodriguez executed a written salesperson exit agreement that provided certain sums due Mr. Rodriguez from those five pending transactions would be paid when the transactions closed. CP at 92; TE 5. Among the amounts Windermere agreed to pay Mr. Rodriguez was \$16,800 for his share of the listing commission on the sale of the Brady property. CP 92; TE 11.

In November 2005, however, before the Brady transaction closed, Mr. Jacobsen unilaterally changed the commission disbursement form in a way that eliminated Mr. Rodriguez's share of the listing commission. CP 92; TE 14. Neither Mr. Jacobsen nor Ms. Thompson ever told Mr. Rodriguez of the change or that he would not receive his \$16,800 share of the commission from the Brady transaction. CP 94.

B. The Court of Appeals Rejected Windermere's Efforts to Force Mr. Rodriguez to Arbitrate with Windermere's Unfair Panel of Handpicked Arbitrators

When Mr. Rodriguez learned that the Brady transaction closed, and unaware of Mr. Jacobsen's change to the commission disbursement

form, Mr. Rodriguez asked to be paid his share of the listing commission that Windermere had agreed to pay. CP 240-41. Windermere either did not respond or did not engage in any meaningful dialogue about it. CP 241. When he realized that there was a dispute over his share of the commission, Mr. Rodriguez offered to arbitrate that dispute before a single neutral arbitrator. CP 241; TE 100. He did not want to use Windermere's arbitration procedures by which it alone would appoint three non-neutral Windermere employees to decide the matter. CP 241; TE 100. When Windermere refused, and indeed failed even to respond to Mr. Rodriguez's subsequent demand for neutral arbitration, Mr. Rodriguez filed suit in the King County Superior Court. CP 5-9.

Windermere then moved to compel Mr. Rodriguez to arbitrate under Windermere's non-neutral arbitration procedures. CP. 242. The trial court declined to compel arbitration because of the inherent unfairness in Windermere's arbitration procedures. CP 456-57. Windermere appealed to the Court of Appeals which affirmed the trial court's ruling. CP 458. This Court ruled that because the potential arbitrators were employees within the Windermere franchisee family, selected by Windermere, and have a known, existing and substantial relationship with the party-franchisee, the Windermere arbitration process did not satisfy the neutrality requirements of RCW 7.04A.110(2).

Rodriguez v. Windermere Real Estate/Wall Street, Inc., 142 Wn. App. 833, 841-42, 175 P.3d 604 (Div. 1), *rev. denied*, 164 Wn.2d 1017, 195 P.3d 89 (2008).

C. In Retaliation Windermere Sought to Make the Litigation as Expensive and Time Consuming as Possible to Dissuade Mr. Rodriguez and other Agents from Asserting Claims against Windermere

Throughout the course of this litigation, Windermere has deliberately sought to make it as expensive and time consuming as possible for Mr. Rodriguez.

Initially, Windermere would not answer the Complaint or answer discovery requests until Mr. Rodriguez moved to compel it to do so. CP 242. Windermere resisted Mr. Rodriguez's efforts to serve Ms. Thompson, refusing to disclose her whereabouts even when her address was requested in discovery. CP 241. Even after the Court of Appeals issued its decision, Windermere rejected Mr. Rodriguez's renewed offer to arbitrate with a neutral third party arbitrator. CP 242. After the mandate issued, Windermere refused to stipulate to resetting the trial date. CP 243.

When it finally answered the Complaint and began to participate in discovery, Windermere made discovery as expensive as possible. Windermere provided its discovery response in November 2008, two years

after the case was filed and Mr. Rodriguez first served discovery requests.

CP 243. At one point it refused to produce documents regarding

Ms. Thompson's several other real estate listings and transactions unless

Mr. Rodriguez agreed to pay hundreds of dollars for copying costs.

CP 243. Not until the depositions of Mr. Jacobson and Ms. Thompson

several months later did Windermere reveal that it routinely scanned

completed transaction files onto DVDs, had all of the requested

documents in electronic format and could have produced them at virtually

no cost. CP 244.

Despite Mr. Rodriguez's explicit request, Windermere never

implemented litigation hold procedures to prevent the destruction of

potentially relevant documents. CP at 244. In their depositions

Mr. Jacobson and Ms. Thompson both admitted that they used email and

routinely deleted or destroyed email, but that Windermere's counsel had

never advised them to either search for relevant email or stop deleting

potentially relevant email. CP 244.

Windermere dragged its feet in scheduling depositions, provided

late and incomplete discovery responses and at least twice forced

Mr. Rodriguez to prepare and file motions to compel discovery on issues it

ultimately did not challenge. CP 243-45. Rather than agreeing to stipulate

to routine and procedural matters, Windermere forced Mr. Rodriguez to

incur fees and costs to file motions that it never opposed, such as the motion to reset the trial schedule after the first appeal and the motion to amend the Complaint. CP 242-47.

Mr. Rodriguez also incurred fees and costs preparing for and attending a mediation that failed due to Windermere's bad faith: Windermere refused to exchange written materials in advance; failed to bring to the mediation decision makers with authority to settle; and even failed to reply to Mr. Rodriguez's last offer as it promised to do. CP 246.

In addition to the expected costs of litigation and trial preparation, because of Windermere's deliberate lack of cooperation, Mr. Rodriguez's counsel spent time and incurred fees for tasks intended to be shared by the parties, such as preparing and delivering copies of exhibits to the Court and preparing a joint statement of trial readiness. CP 247-48.

Windermere and its counsel bore none of the costs of those efforts.

D. In the Course of Discovery, Mr. Rodriguez Learned that His Partner Ms. Thompson Had Cheated Him Out of Other Commissions

It was through one of Mr. Rodriguez's connections that the Mr. Rodriguez and Ms. Thompson as partners met Satwant Singh and the opportunities for their partnership flourished. CP 96. The partners listed several properties in the Kent Valley that traced to one of Mr. Rodriguez's referrals, each of which Mr. Singh or his company Skyline Construction

purchased. CP 96. The connection with Mr. Singh proved to be particularly attractive and lucrative for Ms. Thompson. CP 97. As Ms. Thompson established her own contact with Mr. Singh, she cut her partner Mr. Rodriguez out from business opportunities. CP 97. She arranged to meet with clients without telling Mr. Rodriguez, something she had not done before. CP 97. She also concealed the existence of several property listing opportunities in the Kent Valley in disregard of her partnership agreement with Mr. Rodriguez. CP 97. Mr. Jacobsen knew that Ms. Thompson and Mr. Rodriguez were working the Kent Valley together as partners. CP 96. He did nothing to stop Ms. Thompson's behavior.

Only during discovery did Mr. Rodriguez learn that Ms. Thompson cheated him and took entirely for herself the commissions on several properties in the Kent Valley that Mr. Singh or Skyline Properties purchased. CP 244. When Mr. Rodriguez learned of these transactions, he amended his complaint to add claims for the commissions Windermere paid Ms. Thompson that should have been shared with him under the partnership agreement. CP 476-83.

E. The Trial Court Ruled in Favor of Mr. Rodriguez against Both Windermere and Ms. Thompson

After a three day bench trial, the trial court ruled in favor of Mr. Rodriguez both as to his claims against Windermere for failing to pay his share of the listing commission on the Brady transaction and against Ms. Thompson for one half of the several other commissions that she took as her own. CP 90-102.

The trial court found that the way in which Mr. Jacobsen stripped Mr. Rodriguez of his share of the listing commission on the Brady transaction was neither in good faith nor reasonable, and was in breach of the agreements between Windermere and Mr. Rodriguez. CP 94-95. The trial court also concluded that by concealing the existence of property sales that were rightly partnership opportunities, Ms. Thompson breached the partnership agreement and the fiduciary duties she owed Mr. Rodriguez. CP 100.

F. The Trial Court Awarded Mr. Rodriguez Attorneys' Fees and Costs against Both Windermere and Ms. Thompson

After trial, Mr. Rodriguez moved for an award of attorneys' fees and costs against both Windermere and Ms. Thompson. CP 108-22.

The trial court awarded Mr. Rodriguez fees against Windermere pursuant to RCW 4.84.330 based on the unilateral contractual fee provision in the termination section of Windermere's contract. CP 397-

402. Earlier Judge Washington had granted in part Mr. Rodriguez's motion for summary judgment ruling that Mr. Rodriguez would be entitled to an award of his reasonable attorneys' fees and costs pursuant to RCW 49.48.030 if he prevailed at trial. CP 484-87. Initially, in ruling on Mr. Rodriguez's post trial motion for fees, Judge Barnett confirmed that earlier ruling. CP 398. In amending her order awarding fees, however, Judge Barnett changed her mind finding that real estate commissions, the source of which is a third party rather than the broker, do not constitute wages or salary and Mr. Rodriguez was not entitled to fees based on RCW 49.48.030. CP 401-02.

The trial court awarded Mr. Rodriguez fees against Ms. Thompson pursuant to *Hsu v. Tang*, 87 Wn.2d 796, 557 P.2d 342 (1976) and *Green v. McAllister*, 103 Wn. App. 452, 14 P.3d 795 (2000), because her breach of fiduciary duty was tantamount to fraud. CP 397-402.

The trial court included in the award both the attorney fees incurred at the trial level and the attorneys' fees that Mr. Rodriguez had incurred on Windermere's first appeal, calculated by a lodestar multiplier of 1.5 in recognition of the costs Mr. Rodriguez necessarily incurred to respond to the excessively aggressive tactics employed by Windermere, as well as "the contingent risk and delay in payment." CP 108, 402.

G. Windermere Has Paid the Judgments Entered Against It and Ms. Thompson, But the Other Against Ms. Thompson Will Never be Paid

The trial court entered two judgments. CP 436-438. The first was joint and several against Windermere and Ms. Thompson for Mr. Rodriguez's share of the listing commission on the Brady transaction and that portion of Mr. Rodriguez's attorneys' fees relating to those claims. *Id.* The second was solely against Ms. Thompson for Mr. Rodriguez's share of the several other commissions Ms. Thompson had received and the remaining portion of Mr. Rodriguez's attorneys' fees and costs. *Id.*

Windermere paid Mr. Rodriguez the first judgment in the amount of \$186,678.25, which included the principal amount, a portion of the attorneys' fees and costs, and pre and post judgment interest. CP 436-38.

When Mr. Rodriguez sought to collect the second judgment against Ms. Thompson, she filed for Chapter 7 bankruptcy protection. *See In re Thompson*, Case No. 10-03978-PCW7 (W.D. Wash.). After Ms. Thompson died on November 2, 2010, and shortly thereafter the bankruptcy court discharged the trial court's judgments against her and dismissed Mr. Rodriguez's adversary proceeding for nondischargeability of those judgments. *Id.*; *see also* Motion to Change Party Designation (filed

Dec. 29, 2010). Mr. Rodriguez has no hope of ever collecting his second judgment.

IV. ARGUMENT

A. **Mr. Rodriguez Prevailed on a “Claim on the Contract” and is Entitled to Attorneys’ Fees Pursuant to RCW 4.84.330**

1. Mr. Rodriguez’s Claims Arose out of an Agreement, Mandating a Fee Award

Mr. Rodriguez’s claim arose directly from a contract that included a unilateral attorneys’ fees provision. RCW 4.84.330 makes one-sided contractual fee provisions reciprocal, providing that in an action “on a contract” where a contract provision allows for awarding attorneys’ fees and costs to one party, the prevailing party, “whether he is the party specified in the contract or [] not, shall be entitled to reasonable attorney’s fees in addition to costs and necessary disbursements.” RCW 4.84.330. An action is “on a contract” if it arises out of the contract and if the contract is central to the dispute. *Seattle-First Nat’l Bank v. Wash. Ins. Guar. Ass’n*, 116 Wn.2d 398, 413, 804 P.2d 1263 (1991). Courts interpret this language broadly to effectuate the purpose of RCW 4.84.330, to include any action in which it is “alleged that a person is liable on a contract.” *Herzog Aluminum, Inc. v. Gen. Am. Window Corp.*, 39 Wn. App. 188, 197, 692 P.2d 867 (1984); *see also Scoccolo Constr., Inc. ex rel. Curb One, Inc. v. City of Renton*, 158 Wn.2d 506, 520-21, 145 P.3d

371 (2006) (affirming award of attorney fees based on RCW 4.84.330, noting language of fees clause applies to enforcement of contract provisions); *Quality Food Centers v. Mary Jewell T, LLC*, 134 Wn. App. 814, 142 P.3d 206 (2006) (concluding contract allowed for fee award to either breaching party or party accused of breach by operation of RCW 4.84.330).

Where an action arises out of a contract with a unilateral fee provision, an award of attorneys' fees to the prevailing party under RCW 4.84.330 is mandatory. The court has no discretion to decide whether fees should be allowed, only how much should be allowed. *State v. Farmers Union Grain Co.*, 80 Wn. App. 287, 294, 908 P.2d 386 (1996). The statute says that the "prevailing party [] shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements." RCW 4.84.330 (emphasis added). As used in the statute, a prevailing party means the party in whose favor final judgment is rendered. RCW 4.84.330; *Singleton v. Frost*, 108 Wn.2d 723, 727, 742 P.2d 1224 (1987); see also *Metro. Mortgage & Sec. Co. v. Becker*, 64 Wn. App. 626, 632, 825 P.2d 360 (1992) (court's discretion is limited to deciding amount of reasonable fees).

Because Mr. Rodriguez prevailed in his efforts to collect from Windermere a commission that it owed him — he is the prevailing party

— and under RCW 4.84.330 he is entitled to an award of his attorneys’ fees and costs. The trial court did not err in awarding his reasonable attorneys’ fees, costs and necessary disbursements pursuant to RCW 4.84.330. *Bloor v. Fritz*, 143 Wn. App. 718, 745, 180 P.3d 805 (2008); *cf. Mt. Hood Beverage Co. v. Constellation Brands, Inc.*, 149 Wn.2d 98, 121-22, 63 P.3d 779 (2003).

2. Section 13 of the Agreement Contains a Unilateral Fee Provision

Mr. Rodriguez’s claim for his share of the commission on the Brady transaction after termination of his agency with Windermere arose from the same contract clause providing for an award of attorneys’ fees to Windermere for collection of any amounts due after termination. The sales person exit agreement that Windermere and Mr. Rodriguez executed incorporated the terms of Mr. Rodriguez’s broker/sales associate agreement, and provided any commission due Mr. Rodriguez would be controlled by his broker/sales associate agreement. TE 5; TE 1. The agreement includes the following relevant portions of a termination provision:

13. TERM AND TERMINATION. . . .

Pending Commissions and Transactions: Any commission pending (i.e. buyer and seller have reached mutual acceptance on a purchase and sale agreement, lease, listing or other similar document, but the subject transaction has not yet closed) at the time of termination shall be paid in

accordance with this Agreement and shall be subject to settlement of Associate's obligations to Broker. Associate authorizes Broker to hold all commissions in Broker's account pending resolution of any disputes over division of the commission funds, or of any existing or potential legal actions.

. . . Broker is authorized to compensate other such licenses in an amount determined by Broker in its sole discretion, and to deduct such amounts from Associate's share of the commission up to and including the full amount owed to Associate.

* * * *

Unpaid Obligations to Broker: Upon termination Associate will immediately pay all amounts due Broker. If Associate moves to another real estate brokerage, Associate hereby . . . authorizes the new Broker to deduct and forward such shortfalls out of commissions earned at Associate's new brokerage to Broker until owed amounts are paid in full. Collection costs on amounts not paid, including attorney fees, shall be paid by Associate.

TE 1 at 4-5.

Although Windermere conveniently cites only the last clause,¹ when read in its entirety, Section 13 of the Agreement anticipates an accounting and resolution of all outstanding obligations between Windermere and an agent at the termination of their relationship. Section 13 specifically includes an attorneys' fees provision in favor of Windermere. *Id.* In a dispute over amounts owed between Windermere and a terminated agent, Windermere is entitled to its fees. *Id.*

Significantly for the agent to collect amounts owed to him or her after

¹ Indeed, Windermere's Appendix as submitted to the Court omits pages 3 and 4 of the agreement, discarding entirely the first part of Section 13.

termination, Section 13 obligates the agent to allow the broker to hold any unpaid commissions pending “resolution of any disputes regarding the commission funds, or of any existing potential legal actions.” *Id.*

Section 13 further authorizes the broker to designate other agents to close the terminated agent’s pending transactions, and then “in its sole discretion” deduct the amounts from the agent’s commission “up to and including the full amount owed to Associate.” *Id.*

The practical effect of Section 13 in a dispute over money due between Windermere, as broker, and an agent after termination of the agent is this: Windermere is entitled to its attorneys’ fees and it is allowed to hold any disputed funds. If Windermere sought to collect unpaid obligations from Mr. Rodriguez in the same way that Mr. Rodriguez pursued his unpaid commissions here, Windermere would be entitled to its attorneys’ fees because of Section 13. Under Section 13, Windermere reserves for itself the right to recover its attorneys’ fees in any dispute over money due after termination, but denies the agent the right to an award of fees in just the same dispute. This arrangement is at best, inequitable — at worst, predatory — but clearly is unilateral. This is precisely the situation RCW 4.84.330 intends to remedy.

3. RCW 4.84.330 is Founded on the Equitable Principle of Mutuality of Remedy and is Intended to Remedy Biased Fee Provisions

RCW 4.84.330 incorporates the equitable principle of mutuality of remedy. See *Kaintz v. PLG, Inc.*, 147 Wn. App. 782, 788-89, 197 P.3d 710 (2008) (discussing equitable underpinnings of RCW 4.84.330 and principle of mutuality of remedy). This doctrine provides for the enforceability of a fees provision even where a party successfully argues the invalidity of a contract containing the fee clause. *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 840, 100 P.3d 791 (2004) (citing *Mt. Hood Beverage Co. v. Constellation Brands, Inc.*, 149 Wn.2d 98, 121-22, 63 P.3d 779 (2003)). Specifically, Washington courts effectuate RCW 4.84.330 and the principle of mutuality of remedy in order to ensure “no party will be deterred from bringing an action on a contract or lease for fear of triggering a one-sided fee provision.” *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 489, 200 P.3d 683 (2009); see also *Zuver v. Airtouch Commc’ns, Inc.*, 153 Wn.2d 293, 317-18, 103 P.3d 753 (2004) (emphasizing long history of mutuality of obligation in Washington courts); *Mt. Hood Beverage Co.*, 149 Wn.2d at 121-22 (expanding scope of principles underlying mutuality of remedy doctrine and RCW 4.83.330 to apply to statutory awards of attorney’s fees).

These policies are especially pertinent to a case such as this. If not for RCW 4.84.330 and the mutuality of remedy doctrine, terminated agents such as Mr. Rodriguez would be deterred from attempting to collect amounts rightfully owed for fear of exactly what happened here, Windermere would deliberately run up the costs with no risk of having to pay fees if it lost, making the agent's claim economically untenable. The agent also would be deterred by the possibility of a counterclaim that could trigger an award of fees in Windermere's favor, a remedy that the agent could not obtain. By the same token, Windermere, if it did not just keep all amounts owed, could sue the terminated agent and bully the agent with the threat of an award of attorneys' fees against the agent, a remedy that Windermere seeks to deny the terminated agent. In other words, the equitable principles underlying RCW 4.84.330 and the doctrine of mutuality of remedy warrant the precise result reached by the trial court in this case. The trial court made reciprocal the award of attorneys' fees in a dispute over amounts owed between Windermere and a terminated agent.

This concept of mutuality of remedy is especially important in the master/servant relationship. The master (whether an employer or contractor for labor services) can unilaterally adopt and change the terms and conditions of employment. *See, e.g., Thompson v St. Regis Paper Co*, 102 Wn.2d 219, 229, 685 P.2d 1081 (1984); *Gaglidari v Denny's*

Restaurants, Inc., 117 Wn.2d 426, 434, 815 P.2d 1362 (1991).

Washington is, “a pioneer in the protection of employee rights.”

Drinkwitz v. Alliant Techsystems, Inc., 140 Wn.2d 291, 300, 996 P.2d 582

(2000). Pursuant to these policies, Washington courts have held

employment contract clauses “may be so one-sided and harsh as to render

them substantively unconscionable,” without a finding of procedural

unconscionability. *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 346-47,

103 P.3d 773 (2004); *see also Walters v. A.A.A. Waterproofing, Inc.*, 151

Wn. App. 316, 321, 211 P.3d 454 (2009) (finding fees provision may be

substantively unconscionable if it “effectively undermines an employee’s

ability to vindicate his statutory rights”); *Ingle v. Circuit City Stores, Inc.*,

328 F.3d 1165, 1173-74 (9th Cir. 2003) (concluding employer-employee

contract to arbitrate creates rebuttable presumption of substantive

unconscionability unless employer could prove bilateral effect).

Windermere has taken advantage of its position as master earlier in

this case when it sought to impose on Mr. Rodriguez an unconscionable

arbitration agreement. It is continuing its efforts by claiming that only it

can have the advantage of a fee shifting provision in its agreements with

its sales agents. But Washington courts interpret contracts to render them

enforceable “whenever possible.” *Patterson v. Bixby*, 58 Wn.2d 454, 459,

364 P.2d 10 (1961).

Here, Windermere's asks this Court to read the contract in a way that would render the contract substantively unconscionable as a unilateral fees provision, which this Court should decline to do.

In light of these principles, there are only two possibilities: either Windermere's fees provision may be upheld as crafted to intentionally avoid the effect of RCW 4.84.330, or the clause must have bilateral effect under Washington law.

4. Windermere's Argument Misconstrues the Relevant Case Law

Not only does Windermere's citation of Section 13 conveniently omit the relevant language, Windermere fails to support its argument with any relevant case law.

One set of cases upon which Windermere relies focuses on the issue of whether a claim for attorneys' fees exists where claims are brought on contracts separate and apart from the contract that includes the attorneys' fee provision. For example, Windermere claims *Marks v. Benson*, 62 Wn. App. 178, 813 P.2d 180 (1991), is a "good example" of why Mr. Rodriguez should not recover reciprocal fees as the prevailing party. However, *Marks* is a case in which the Court of Appeals held an attorneys' fees clause intended to apply to controversies between the maker of a note and the borrower did not apply to a claim by the assignee

of the note. *Id.* at 186. The Court went on to emphasize the dispute arose from the assignment agreement, a contract entirely separate from the underlying note. *Id.* (citing *Hemenway v. Miller*, 16 Wn.2d 725, 742-43, 807 P.2d 863 (1991)); *see also CPL (Delaware) LLC v. Conley*, 110 Wn. App. 786, 797, 40 P.3d 679 (2002) (affirming denial of fees because attorneys' fees clause existed only in a "related agreement"). Clearly, these cases do not apply here, where Mr. Rodriguez's claim for breach of contract arose from not only the same contract, but the same section that provides for attorneys' fees to Windermere.

Windermere also cites liberally from cases discussing when and whether an attorneys' fees provision is triggered. This line of cases is inapplicable to the pertinent issue, missing the point of the trial court's decision regarding reciprocity of an attorneys' fees award for the prevailing party on a contract claim. For example, in *C-C Bottlers, Ltd. v. J.M. Leasing, Inc.*, 78 Wn. App. 384, 386-87, 896 P.2d 1309 (1995), plaintiff sued to enforce two promissory notes and defendant counter-claimed for securities fraud. When defendant prevailed on its securities fraud claim, the trial court awarded attorneys' fees for the entire case based on the fees provisions in the promissory notes. *Id.* at 386. The Court of Appeals reversed the award, finding the attorneys' fees clauses applied only to claims arising from the notes themselves, not the claims

for securities fraud, which “do not affect, nor are they affected by, the outcome of the promissory notes claims.” *Id.* at 387.

In *Belfor USA Group, Inc. v. Thiel*, 160 Wn.2d 669, 671, 160 P.3d 39 (2007) (emphasis added), the Supreme Court denied fees “*at this stage of the proceedings*” on an interlocutory appeal of an order compelling arbitration, because the provision allowing fees would not be triggered until the conclusion of the litigation on the merits. *Keyes v. Bollinger*, 27 Wn. App. 755, 761, 621 P.2d 168 (1980), also features an attorneys’ fees provision that is triggered only upon the occurrence of an event (the non-payment of a broker’s commission), which had not occurred. *See also Stevens v. Sec. Pac. Mortgage Corp.*, 53 Wn. App. 507, 523, 768 P.2d 1007 (1989) (fee provision based on lender’s acceleration of loan not triggered in borrower’s declaratory judgment action to void loan based on usury); *Hindquarter Corp. v. Prop. Dev. Corp.*, 95 Wn.2d 809, 815, 631 P.2d 923 (1981) (not decided under RCW 4.84.330; fee award affirmed for fees apportioned to default issue under fee provision for costs associated with curing defaults).²

Each of these cases is easily distinguished from this one.

Mr. Rodriguez’s claim was not a separate tort or based on a condition

²Without explanation, *Windermere* cites to a block quote from *Bogle and Gates, P.L.L.C. v. Holly Mountain Res.*, 108 Wn. App. 557, 563-64, 32 P.3d 1002 (2001), where the Court of Appeals upheld an award of reciprocal fees for enforcement of a collection action under RCW 4.84.330.

precedent that never occurred — it arises out of enforcement of Section 13, the very same contract provision for which the agreement provides attorneys' fees for Windermere in any post termination dispute.

RCW 4.84.330 requires that this provision operate reciprocally. The trial court did not err in awarding Mr. Rodriguez the attorneys' fees and costs as mandated by RCW 4.83.330 and Section 13 of the Agreement. Such a determination was not only appropriate, it was mandatory.

B. Mr. Rodriguez Would Be Entitled To Fees Under RCW 49.48.030 As Well

On summary judgment, Judge Washington ruled that Windermere was liable for attorneys' fees under RCW 49.48.030 if Mr. Rodriguez prevailed. CP 484-86. Judge Washington's ruling is consistent with the law. But after trial, Judge Barnett denied Mr. Rodriguez attorneys' fees under RCW 49.48.030 on the basis that real estate commissions do not constitute wages or salary. CP 401-02. Judge Barnett's ruling is contrary to the law but this Court could affirm the trial court's award of attorneys' fees on this additional basis.

While Mr. Rodriguez did not cross-appeal assigning error to this finding, because he is the prevailing party and seeks no further affirmative relief, he is not required to assign error to Judge Barnett's ruling as the respondent. *State v. Bobic*, 140 Wn.2d 250, 257-58, 996 P.2d 610 (2000).

Instead, Mr. Rodriguez is “entitled to argue any grounds in support of the superior court’s order that are supported by the record.” *McGowan v. State*, 148 Wn.2d 278, 287-88, 60 P.3d 67 (2002) (citing *Bobic*, 140 Wn.2d at 257-58). *See also* RAP 2.4(a) (appellate courts may grant affirmative relief even absent party request “if demanded by the necessities of the case”); *see also Phillips Bldg. Co. v. An*, 81 Wn. App. 696, 700 n.3, 915 P.2d 1146 (1996) (filing cross appeal is necessary if respondent seeks “affirmative relief as distinguished from the urging of additional grounds for affirmance”) (citing RAP 5.1(d)).

Any person who recovers a judgment for wages owed to him is entitled to reasonable attorneys’ fees assessed against the former employer. RCW 49.48.030. The statute is remedial and is to be construed liberally in favor of the worker to protect the employee’s wages and assure payment. *Wise v. City of Chelan*, 133 Wn. App. 167, 174, 135 P.3d 951 (2006); *Flower v. T.R.A. Indus., Inc.*, 127 Wn. App. 13, 34, 111 P.3d 1192 (2005) (attorneys’ fees under RCW 49.48.030 recoverable in actions for lost wages in breach of employment contract), *rev. denied*, 156 Wn.2d 1030 (2006). In fact, the policies supporting an employees’ award of fees under this statute are so protective of their right to pursue statutory remedies against employers that this Court has previously found a *reciprocal* fees provision in an arbitration agreement unconscionable.

Walters v. A.A.A. Waterproofing, Inc., 151 Wn. App. at 324. In so holding, the *Walters* court noted the assumption of the risk of paying fees to the employer posed such an “enormous deterrent” to the employee that such a provision was unconscionable and thus, unenforceable. *Id.* at 324-25.

For purposes of this statute, “wages” includes back pay, front pay, bonuses, commissions and reimbursement for sick leave. *Bates v. City of Richland*, 112 Wn. App. 919, 940, 51 P.3d 816 (2002); *Int’l Ass’n of Fire Fighters Local 46 v. City of Everett*, 146 Wn.2d 29, 35, 42 P.3d 1265 (2002); *Flower v. T.R.A. Indus.*, 127 Wn. App. at 34. Unlike RCW 49.52.070, attorneys’ fees are recoverable under RCW 49.48.030 even if there exists a bona fide dispute between the employer and the employee. *Id.*

Moreover, RCW 49.48.030 is not limited to recovery strictly by “employees,” but includes recovery by “any person.” *Wise*, 133 Wn. App. at 174. Thus, the statute provides for attorneys’ fees “in any action” in which “a person” recovers wages owed. *Gaglidari*, 117 Wn.2d at 449; *Hanson v. Tacoma*, 105 Wn.2d 864, 872, 719 P.2d 104 (1986). In *Wise*, for example, the Court of Appeals held that RCW 49.48.030 applies whether plaintiff is an employee or independent contractor and for “any

type of compensation owed by reason of services provided.” *Wise*, 133 Wn. App. at 175.

Here, Mr. Rodriguez was denied compensation for services provided and is therefore entitled to an award of his attorney’s fees under RCW 49.48.030. Because Mr. Rodriguez prevailed, he is entitled to his reasonable attorneys’ fees assessed against Windermere. This is another ground on which the Court may affirm the trial court’s award.

C. The Court Properly Determined the Parties Agreed to a Contractual Rate of Interest of 18%

The trial court’s finding that the parties’ contract provided for an 18% interest rate for amounts owed is correct. Washington law mandates the 18% contractual interest rate applies because (1) the amount of Mr. Rodriguez’s claim was liquidated; (2) the policies underlying the statute providing for interest warrants such a result; and (3) the parties agreed that an 18% interest rate is reasonable for amounts owed between them.

1. The Parties Agreed to an Eighteen Percent Interest Rate

Where the parties have agreed to a contractual interest rate, that rate applies rather than the statutory default prejudgment interest rate of

twelve percent (12%). *See* RCW 4.56.110(1).³ Here, the parties agreed in writing in two separate places to an eighteen percent (18%) interest rate accruing from thirty days after a payment became due:

Balances remaining after commission deductions shall be due on the 7th day of each month. If Associate fails to pay remaining balances by the deadline, then Broker may assess a late fee. *All balances that remain unpaid thirty days after becoming due shall accrue interest at the rate of 18% until paid.*

This language appears twice in the broker/sales associate agreement, first in the body of the main agreement and again in Windermere's commission agreement, Schedule A to the main agreement.

⁴ TE 1 at 2 and Sch. A (W0071 and W0076). No other interest rate is mentioned in the agreement. Windermere obviously agreed that eighteen percent interest was a reasonable rate of interest that applied to amounts owed between Windermere and Mr. Rodriguez.

Without any support, Windermere provides nothing more than a conclusory statement that the trial court's use of this interest rate was unfounded. Because the parties agreed that eighteen percent interest is a

³ "Judgments founded on written contracts, providing for the payment of interest until paid at a specified rate, shall bear interest at the rate specified in the contracts: PROVIDED, That said interest rate is set forth in the judgment." RCW 4.56.110(1).

⁴ Not surprising in light of the discussion above, the contract does not provide a specific interest rate for amounts owed to Mr. Rodriguez by Windermere, as it does not anticipate such an eventuality ever occurring. However, the equitable principles underlying both RCW 4.84.330 and the mutuality of remedies doctrine, as properly applied by the trial court, mandate that such an interest rate apply to amounts owed to Mr. Rodriguez as well.

reasonable rate of interest on amounts owed between them, the trial court's ruling on prejudgment interest should be affirmed.

2. The Damages Assessed are Liquidated

A claim is liquidated when the amount of damages can be determined from the evidence with precision and without reliance on opinion or discretion. *Simpson v. Thorslund*, 151 Wn. App. 276, 288, 211 P.3d 469 (2009) (citing *Hansen v. Rothaus*, 107 Wn.2d 468, 473, 730 P.2d 662 (1986), *Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d 25, 32 P.2d 621, 625-26 (1968)). A dispute over the claim or the amount of the claim is irrelevant to a determination of whether the claim is liquidated. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 723, 153 P.3d 846 (2007); *Aker Verdal, A/S v. Neil F. Lampson, Inc.*, 65 Wn. App. 177, 190-91, 828 P.2d 610 (1992); *Prier*, 74 Wn.2d at 33. The amount of damages here was calculated with simple mathematics applied to documentary evidence — calculating a one-half (50%) share of the commission on the Brady transaction paid to Ms. Thompson. The calculation was purely objective and did not rest on opinion or discretion in any way. The damages were readily and objectively ascertainable with certainty before trial and remained so through the date of the trial court's ruling. The damages are liquidated.

3. Mr. Rodriguez is Entitled to Prejudgment Interest as a Matter of Right.

Short of a narrow exception not applicable here, prejudgment interest of a liquidated sum is a matter of right. *Colonial Imports v. Carlton Nw., Inc.*, 83 Wn. App. 229, 921 P.2d 575 (1996).⁵ The purpose of the award is to compensate plaintiff for the “use value” of the money, representing plaintiff’s damages for the period of time from his loss to the date of judgment. *Simpson v. Thorslund*, 151 Wn. App. 276, 288, 211 P.3d 469 (2009) (citing *Hansen v. Rothaus*, 107 Wn.2d 468, 473, 730 P.2d 662 (1986)). It is a “make-whole remedy, which is grounded in the sense of justice in the business community ...that he who retains money which he ought to pay to another should be charged interest on it.” *Crest, Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 775, 115 P.3d 349 (2005) (internal citation and quotation omitted).

Here, Mr. Rodriguez has been deprived the use of money owed to him for as long as four years. Where, as here, the amount due can be determined with precision and without resort to opinion and where the delay in payment is not attributable to Mr. Rodriguez, he is entitled to prejudgment interest to compensate for the “use value” of the damages award. Had Windermere wanted to avoid accruing interest on the claims,

⁵ “[P]rejudgment interest on liquidated claims ordinarily is a matter of right, but [. . .] Washington trial judges have discretion to disallow such interest during periods of unreasonable delay in completing litigation that is attributable to claimants.” *Id.* at 245.

it could have paid the amount into the court registry, but it chose not to do so. 128 Wn. App. at 775.

D. Mr. Rodriguez is Entitled to Attorneys' Fees Incurred in Both the First Appeal and Now This Appeal

Mr. Rodriguez is entitled to an award of his appellate attorneys' fees for the same reason he is entitled to an award of his attorneys' fees and costs in the trial court.⁶ Mr. Rodriguez is the prevailing party; as such, under Washington law and RAP 18.1, "[a] contractual provision for an award of attorney fees at trial supports an award of attorney fees on appeal." *IBF, LLC v. Heuft*, 141 Wn. App. 624, 638-39, 174 P.3d 95 (2007) (quoting *Reeves v. McClain*, 56 Wn. App. 301, 311, 783 P.2d 606 (1989)). Specifically, in *IBF*, the Court of Appeals awarded attorneys' fees on appeal based on a fee provision made reciprocal by RCW 4.94.330. *Id.*; see also *Equitable Life Leasing Corp. v. Cedarbrook, Inc.*, 52 Wn. App. 497, 506-07, 761 P.2d 77 (1988) (same) (citing RAP 18.1); *West Coast Stationary Eng'rs Welfare Fund v. City of Kennewick*, 39 Wn. App. 466, 479, 694 P.2d 1101 (1985) (same).

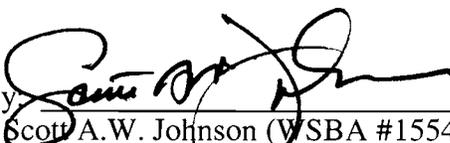
⁶ Mr. Rodriguez did not seek a fee award from the Court of Appeals in his first appearance before this Court because the appeal was interlocutory, however, he reserved the right to request his appellate fees from the trial court as part of his fee application after trial. CP 124; *Wascisin v. Olsen*, 90 Wn. App. 440, 444, 953 P.2d 467 (1997) (request for fees on interlocutory appeal deferred until judgment in trial court). The Court of Appeals awarded Mr. Rodriguez the full \$327.04 of costs incurred in connection with the first appeal, but did not award fees. CP 124. The trial court included as part of the judgment the attorneys' fees Mr. Rodriguez incurred on the first appeal. CP 397-402. To the extent Windermere challenges the trial court's inclusion of fees Mr. Rodriguez incurred in the first appeal, the trial court's ruling should be affirmed.

This is such a case. Mr. Rodriguez is the prevailing party on enforcement of a contract clause with an attorneys' fee provision made reciprocal by RCW 4.84.330. The appellate fees are a component of Mr. Rodriguez's collection costs for the underlying claim. *See Wascisin v. Olsen*, 90 Wn. App. at 444. The trial court correctly awarded Mr. Rodriguez's attorneys' fees incurred in the first interlocutory appeal. This Court should award Mr. Rodriguez the attorneys' fees and costs he has incurred in this second appeal.

V. CONCLUSION

For these reasons, Mr. Rodriguez requests that this Court affirm the trial court's award of attorneys' fees and costs, and prejudgment interest against Windermere, and award Mr. Rodriguez his additional fees incurred in this second appeal.

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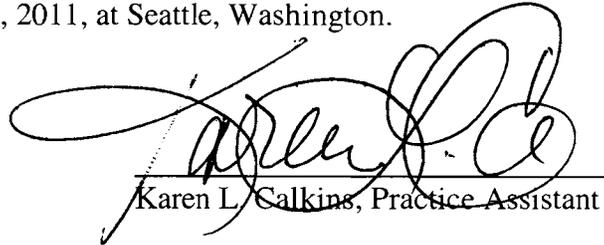
CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 5th day of April, 2011, I caused a true and correct copy of the foregoing document, "**Respondent's Brief**," to be delivered by messenger to the following counsel of record:

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Dated this 5th day of April, 2011, at Seattle, Washington.


Karen L. Calkins, Practice Assistant

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