

66504-9

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No. 66504-9-I

IN THE COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

ATLAS SUPPLY, INC.,

Appellant,

vs.

REALM, INC., a corporation; DAVID L. FOLLET and
CARRIE FOLLET, a marital community,

Respondents.

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AMENDED BRIEF OF RESPONDENTS REALM, INC., and
DAVE and CARRIE FOLLETT

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I. COUNTERSTATEMENT OF THE CASE

On May 11, 2006 Realm, Inc. (“Realm”) and Atlas Supply, Inc. (“Atlas”) entered into a Commercial Credit Agreement, whereby Atlas agreed to sell construction and industrial supplies to Realm on credit. (CP 320). Dave Follett the owner of Realm personally guaranteed the payment of any materials purchased on credit by Realm. (CP 320). The Commercial Credit Agreement (“CCA”) allows Atlas to file suit to collect any delinquent account and to be paid its attorney fees and costs for such collection action. (CP 325).

On May 13, 2008 Atlas provided a written Material Quote to Realm for materials to be used in a traffic coating system at the Natural Resources Building (“NRB”) on the Washington State Capital Campus. (CP 328). On August 25, 2008 Realm accepted the Material Quote by issuing a Purchase Order to Atlas. (CP 330). This is a UCC Sales Contract controlled by RCW 62A.2 et seq. This UCC Sales Contract does not contain a provision for attorney fees or costs nor does it incorporate by reference the CCA.

Atlas provided the materials ordered by Realm under the UCC Sales Contract and issued Realm invoices for the materials as delivered. (CP 947 – 1003). Realm installed the materials provided by Atlas and in October 2008 the traffic coating system immediately failed. Realm

spent the next 5 months selecting and installing an alternative product for the traffic coating and selected a system named Polytuff. After completing the removal of the Atlas supplied material and installing the Polytuff system Realm submitted a claim to the State of Washington in the amount of \$1, 422, 313, and 41. (CP 778). The State of Washington agreed to pay \$750,000 as noted on Line 15 of Realm's summary of claimed costs. (CP 778). This left a balance of \$672, 313, 41 as the damages claimed against Atlas for its UCC counterclaims. (CP 778). Realm's original contract with Atlas was \$247,500.00 (CP 769). Even with the payments from the State of Washington ,Realm still had a significant loss which it pursued against Atlas. Realm did not pay for the materials received because of the immediate system failure and the extra cost incurred to correct the problems with the Atlas materials.

Atlas then brought a Collection Action in King County Superior Court against Realm and Dave and Carrie Follett personally as guarantors based under the CCA. (CP 1-7). Realm then counterclaimed against Atlas for its breach of implied warranties for a particular purpose, breach of contract and negligent misrepresentation under the UCC Sales Contract. Atlas then brought action against third-party defendants Lava-Liner and Pacific Polymer on a pass-thru basis for Realms UCC breach of implied warranties for a particular purpose.

Realm directly brought action against Lava-Liner for breach of the UCC implied warranties for a particular purpose and negligent misrepresentation.

After extensive written discovery and depositions occurring over a year, all the parties to the underlying litigation, Atlas, Realm, Pacific Polymers International, Inc. (“Pacific Polymers”) and Lava Liner, Ltd. (“Lava Liner”) participated in a mediation conference. Lava Liner and Pacific Polymers agreed to pay Realm \$525,000.00 for its counterclaims under the UCC Sales Contract asserted against Atlas and for which Atlas asserted on a pass thru basis. Atlas agreed at the mediation to accept a reduced payment amount for Realm’s unpaid account balance. Realm agreed to pay the reduced account balance offered by Atlas. Atlas however refused to reduce or negotiate its substantial claim for attorney fees and costs at the mediation. Realm was thereby forced to let the trial court decide the amount of attorney fees and costs to be awarded Atlas.

Atlas had filed a motion for summary judgment and an award of attorney fees and costs which was set for hearing on July 23, 2010 just three days after the mediation. At the hearing the trial court granted summary judgment to Atlas for its prosecution of its collection action against Realm for \$194,546.91 as the amount agreed upon at mediation.

(CP 745-747). Realm tendered payment in full to Atlas before commencement of the hearing. The trial court did not grant summary judgment against Realm for its counterclaims on the UCC Sales Contract. Both Atlas and Realm had executed a prior stipulation that Pacific Polymer International, Inc. and Lava Liner, Ltd. would be dismissed with prejudice based on the agreement that Realm was to be paid \$525,000.00. (CP 737-744)

Atlas in its moving papers for attorney fees and costs submitted a request that included all of the attorney fees and costs incurred by Atlas for prosecution of its collection action as well as its defense of Realms UCC based counterclaims. The trial court made an oral ruling that the attorney fee provision relied upon by Atlas was limited to the fees and costs for prosecution of its "Collection Action" to collect a delinquent account under the CCA. The court acknowledged that Atlas was entitled to its reasonable fees and costs necessary to collect the delinquent account, but not all of its fees and costs, and allowed Atlas an opportunity to resubmit its request in accord with its decision. (CP 747).

Atlas resubmitted its request for attorney's fee and costs with a supporting memorandum on August 30, 2010. Realm filed an opposition on September 3, 2010. Atlas then filed a reply brief on September 7,

2010. Atlas has not made these pleadings part of the “record of review” for this appeal. On October 6, 2010 Judge Ramsdell in review of the latest request for attorney fees and costs by Atlas issued a written ruling and order denying any attorney fees and costs to Atlas. (CP 1159-1164). Atlas was denied any attorney fees and costs because they refused to comply with Judge Ramsdell’s order to segregate their attorney fees and costs to those necessary for the action to collect the delinquent account.

(CP 1159-1164). The court ruled it had no obligation to segregate the fees and costs for Atlas and because Atlas had refused to make a good faith effort to segregate the fees and costs by forcing the Judge into an all or nothing approach, Judge Ramsdell denied the request for fees and costs.

Atlas then moved for reconsideration of Judge Ramsdell’s October 6, 2010 ruling and properly segregated its fees and costs and submitted a more reasoned request for those fees and costs necessary to prosecute the a ”Collection Action”. Judge Ramsdell granted reconsideration and awarded attorney fees and costs to Atlas in the amount of \$ 56,247.14. (CP 1272-1274) Realm paid this judgment in full with interest.

Atlas has appealed Judge Ramsdell's decision to award attorney fees and costs to only those necessary for prosecuting the "Collection Action" under the CCA.

II. ASSIGNMENT OF ERROR

Respondent Realm does not assign any error to the Trial Court.

1. The trial court did not err when it did not grant attorney fees except for the collection of the delinquent debt. The trial court properly construed the attorney fee provision to be limited to the collection of the delinquent debt.

The trial court's decision should be reviewed under a *de novo* standard for the construction of the contract language. There has been no showing by Appellants or even a discussion by Appellants that the proper review is *de novo* review of the contract language. Appellants mislead this Court and argue the Trial Court was wrong in an abuse of discretion in deciding the appropriate amount of attorney fees.

III. ARGUMENT

A. The Standard Of Review Is De Novo: Atlas Has Failed To Appeal From The Key Legal Ruling.

Judge Ramsdell ruled that the following attorney fee provision in the CCA was limited to collecting delinquent accounts:

In the event applicant becomes delinquent in his account, applicant agrees that Atlas Supply, Inc. shall have the right to bring suit against the applicant and if this occurs applicant agrees to pay the costs of collection, including reasonable attorney fee in suit by Atlas Supply Inc. or

signs for the merchandise sold to applicant on credit subsequent to the date hereof.

(CP 320). This provision limits any fee award to the cost of collection of a delinquent account, which is precisely what Judge Ramsdell awarded to Atlas. To the extent that there might be another reasonable reading of the provision, the provision is ambiguous, and must be construed against Atlas. *See, e.g., King v. Rice*, 146 Wn. App. 662, 191 P.3d 946 (2008), *rev. denied*, 165 Wn.2d 1049 (2009).

“Whether a contract or statute authorizes an award of attorney fees is a question of law reviewed de novo.” *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 126-27, 857 P.2d 1053 (1993). But Atlas has simply ignored this key ruling of the trial court. As further discussed below, this is an independently sufficient ground to affirm.

Nonetheless, Atlas argues that the standard of review is abuse of discretion. Br. Appellant 11-12. Atlas attacks only Judge Ramsdell’s exercise of his broad discretion. Since Atlas has failed to challenge the key legal ruling limiting the scope of the fee provision, the sole legal question before this Court is whether Judge Ramsdell abused his discretion in awarding only fees for collecting the delinquent account under a fee provision that permits recovery of only fees for collection of delinquent accounts. The answer is self evident.

B. Atlas's Failure To Challenge The Trial Court's Key Legal Ruling Should Result In Summary Affirmance.

Since Atlas has failed to challenge Judge Ramsdell's key legal ruling that the fee provision in the CCA is limited to collecting delinquent accounts, this Court should summarily affirm. Judge Ramsdell could not possibly have abused his discretion by awarding precisely the fees permitted under the fee provision. Since there cannot be an error, there cannot be a reversal.

For instance, our Supreme Court refused to consider several claims, where the appellant failed to assign error, just as Atlas has done here. *McKee v. American Home Products Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989) (citing RAP 10.3; *Transamerica Ins. Group v. United Pac. Ins. Co.*, 92 Wn.2d 21, 28-29, 593 P.2d 156 (1979)). Similarly, the Supreme Court refused to consider even an assignment of error, where the appellant failed to state an argument regarding the assignment in the brief. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). *Cowiche* also stands for the well-established proposition that it is too late to make the argument for the first time in a reply brief. *Id.*

In sum, Atlas has failed to challenge Judge Ramsdell's dispositive legal ruling that the fee provision in the CCA is limited to collecting delinquent accounts. This Court should summarily affirm.

C. Attorney Fees Only Allowable Under The Commercial Credit Agreement.

Courts in Washington have consistently refused to award attorney's fees as part of the costs of litigation in the absence of a contract, statute, or recognized ground of equity. See *Hsu Ying Li V. Tang*, 87 Wn.2d 796, 557 P.2d 342 (1976). The threshold legal issue is to determine the extent of the contract(s) between Realm and Atlas. Realm contends there are **1**) a contract for the extension of credit (CCA) and **2**) a contract for the sale of materials (UCC Sales). Atlas assumes only **1 (one)** global contract with Realm. With two contracts, the attorney fee and cost provision would unquestionably fall only within the CCA. Any reimbursement of attorney fees and costs expended in defending the Realms counterclaims would then not be a contract right for Atlas. This is the result reached by Judge Ramsdell.

The CCA was signed on May 5, 2006 by Realm and Dave Follett personally as a guarantor for any delinquent account. This contract signing was over two years before the NRB project purchases. The purpose of the CCA is to provide an open line of credit to Realm

much as any business has with their local bank. Atlas took on the position of a bank with a line of credit issued to Realm. When Realm chose to purchase materials from Atlas for the NRB project, they could either purchase on credit or pay upon receipt. Atlas by extending an open line of credit received in return an agreement on the payment terms and right to file suit to collect any delinquent account and to be awarded attorney fees and costs for doing so.

The other contract in this lawsuit is for the purchase of materials for the NRB project. When Atlas offered the written Material Quote and Realm accepted by issuing Purchase Order a contract was formed. The contract terms not included in the Material Quote or Purchase Order are established by the Uniform Commercial Code for Sales. The contract to purchase materials for the NRB is a **“UCC Sales Contract”**. Atlas as a commercial supplier of materials or merchant and Realm as a contractor in the business of procuring materials meet the threshold requirements to fall within the statutory provisions of the Uniform Commercial Code codified in Washington State in RCW 62A.2 et.seq. The UCC Sales Contract under which the materials were purchased for the NRB has no attorney fee provision in contrast to the CCA which has an attorney fee provision for collecting a delinquent debt.

Atlas implies in its briefing that there is only one contract between Realm and Atlas. For that assumption to be true, the CCA must be incorporated by reference or merged into the UCC Sales Contract. There is no evidence by way of testimony in the record from any witness that the intent of Atlas was to merge or incorporate the CCA or any of its terms into the UCC Sales Contract. The terms of the CCA only give right of Atlas to bring suit unless Realm is delinquent in its account. There is no writing in the Material Quote from Atlas that references the CCA. (CP 325). There are notes at the lower part of the Material Quote there are conditions placed on the Material Quote, but no mention or incorporation of the CCA. (CP 325). The Purchase Order issued by Realm makes no mention of the CCA. (CP 330). The invoices issued by Atlas for materials shipped to Realm make no mention of the CCA. (CP 334). The rational conclusion is that there are two contracts between the parties and the attorney fee and cost provision is contained in the CCA. If there is both a credit contract and UCC Sales Contract, Atlas has no contractual right to attorney fees and costs for defending against the UCC counterclaims alleged by Realm.

D. The Trial Court Properly Construed The Attorney Fee Provision is Limited to the Collection Action.

1. The Trial Court Properly Construed the Attorney Fee Provision is Limited to the Collection Action.

If the terms of the CCA are considered terms of every UCC Sales Contract Atlas is still not entitled to attorney fees and costs. A contract fee provision is to be strictly interpreted. Washington courts have declined to extend a contract fee provision beyond its express terms. *Hindquarter Corp. v. Property Development Corp.*, 95 Wn.2d 809, 631 P.2d 923 (1981) (lease authorized attorney fees only for curing default; the award of fees should only reflect services rendered toward that end). The court should strictly interpret the attorney fee provision as to the cost of collection for the delinquent account.

The attorney fee provision in the CCA reads “applicant agrees to pay the costs of collection, including reasonable attorney fees.” “Collecting” is defined as “to receive or compel payment of: *to collect a bill.*” Dictionary.com. *Dictionary.comUnabridged*.RandomHouse, Inc. The CCA was signed by Dave Follett, owner of Realm; with an unconditional guarantee agreeing to pay for the invoices owed Atlas. (CP 300). The language connotes to an average businessman that if you do not pay the bill the material supplier has the right to bring a lawsuit

to collect the delinquent account and warns that attorney fees will be added to the bill,

The construction or legal effect of a contract is determined by the courts as a matter of law. *Rosen v. Ascentry Technologies*, 143 Wn. App. 364, 177 P.3d 765 (2008) (where facts are not in dispute, trial and appellate courts treat legal effect of contract as question of law). In the event that a contract is susceptible to either a reasonable or unreasonable meaning, the court should give effect to the more rational meaning. *Universal/Land Const. Co. v. City of Spokane*, 49 Wn. App. 634, 745 P.2d 53 (1987). The trial court properly gave effect to the more rational meaning.

A recent case *Seaborn Pile Driving Co., v. Glew*, 132 Wn. App. 261, 131 P.3d 910 (2006), is very illustrative and supports the rational decision by Judge Ramsdell. The contract in *Seaborn* included two attorney's fee clauses, the first of which reads:

If any outstanding amount is referred to collection, the purchaser agrees to pay, in addition to any amounts due and late charges, and all reasonable costs and charges incurred in collection, including any attorney's fees and all amounts and/or percentages paid to licensed collection agencies.

Brief of Appellant at 5, *Seaborn Pile Driving Co., v. Glew*, 132 Wn. App. 261, 131 P.3d 910 (2006), No. 54796-8-1 (Feb. 2, 2005).

A second attorney's fees clause provides, in pertinent part:

In the event of any arbitration or lawsuit, the prevailing party shall be entitled to the reasonable attorney's fees, in addition to any other amounts due.

Brief of Appellant at 5, *Seaborn Pile Driving Co., v. Glew*, 132 Wn. App. 261, 131 P.3d 910 (2006), No. 54796-8-1 (Feb. 2, 2005).

In *Seaborn*, the Court ruled that although attorney fee provisions are bilateral, it does not mean that the collection clause applies to non-collection actions on a contract. *Seaborn v. Glew*, 132 Wn. App. 261, 268. Further, the fact that the counterclaims were brought in the context of a suit to collect on a contract does not transform them into "costs and charges incurred in collection." *Id.*

Seaborn is directly on point. Even if the court concludes there is only one contract, the language of the attorney fee provision in the CCA does not include defending the UCC counterclaims. While the present case has only one attorney provision it is a collection provision as testified to by Evan Moran of Atlas. (CP 320). A strict construction of the attorney fee and cost provision supports Judge Ramsdell's decision below.

A widely recognized rule by the Washington courts to aid in construction of contracts is that a contract is generally construed against the drafter. Rest. (2nd) Contracts §206 (1981); *Universal/Land Const.*

Co. v. City of Spokane, 49 Wn. App. 634, 745 P.2d 53 (1987) (after attempting to find unitary meaning of key phrase in contract, trial court correctly found that contract for construction of storm sewers was ambiguous, and therefore construed ambiguity against drafter); *Huber v. Coast Inv. Co., Inc.*, 30 Wn. App. 804, 638 P.2d 609 (1981) (loan agreement should be construed against drafter). The drafter is in a better position to prevent mistakes or ambiguities. *Continental Ins. Co. v. PACCAR*, 96 Wn.2d 160, 819 P.2d 291 (1981). The Restatement offers further clarification on the rationale behind this rule to the effect that the drafter is likely to provide more carefully for the protection of his own interests rather than for those of the other party, and is more apt to know of uncertainties of meaning within the text of the agreement. Rest. (2nd) Contracts §206 (1981).

In the instant case, the trial court properly concluded “that the “cost of collection” provision by its own terms required a more limited construction; the provision obligated Realm to pay the reasonable attorney fees and costs associated only with the pursuit of a delinquent account”. (CP 1162). The court by this decision, and rightly so, did not extend the attorney fees provision in the CCA to the defense of the claims that all arose out of the UCC Sales Contract.

Generally, ambiguous contracts are to be construed against the drafter. *King v. Rice*, 146 Wn. App. 662, 191 P.3d 946 (2008), *rev. den'd*, 165 Wn.2d 1049, 208 P.3d 554 (2009). The trial court properly ruled “at the very least the provision is ambiguous and, therefore, must be construed against the drafter.” (CP 1163). Here, the CCA must be construed against Atlas. As a business, Realm sought to purchase products from a supplier, and in that manner signed an agreement to purchase products on credit. Atlas drafted the contract with the intention of carefully protecting itself from any default payments by collecting debts. If Atlas wanted a global fee provision for any dispute or claim for the sales of product they could have easily included such a provision. Atlas is a sophisticated merchant having drafted a credit application with a narrow fee provision. They could have included an attorney fee provision in the purchase order or referenced the CCA, if they so desired. They did neither.

The right to bring suit to collect the debt in the CCA only arises when the account is delinquent. Therefore, if the account is not delinquent, Atlas has no right to bring suit for collection, but Realm still has the right to bring a suit for breach of contract and UCC implied warranty claims against Atlas. In this scenario, Realm would have no basis for attorney fees in successfully prosecuting these claims as the

condition precedent necessary creating the right for attorney fees. Looking at these various scenarios the only rational conclusion I that the attorney fee provision is limited to collecting the debt, which is Judge Ramsdell's decision.

Further, Washington courts employ the context rule when reviewing written agreements to determine parties' intent. "A court can consider extrinsic evidence as an aid to interpretation of the words of a contract, but it cannot import an unexpressed intention of one of the parties into the writing." *Seaborn*, at 270. Once again Atlas could have expressed their interest to have a fee provision in the event of any dispute. They did not.

Atlas further erroneously contends that *Brown v. Johnson*, 109 Wn. App. 56, 34 P.3d 1233 (2001), supports its argument that because the Credit Application included a provision for attorney fees it applies. *Brown* is distinguishable. In *Brown*, the purchase and sale agreement that contained the attorney fee provision was the contract from which the dispute arose. *Brown*, 109 Wn. App. 56, 59 (2001). The provision in *Brown* was a very broad attorney's fee clause that covered reasonable attorney's fees on any claim. *Id* (Purchase and sale agreement attorney fee provision states: "If Buyer, Seller, Listing Agent or Selling Licensee institutes suit concerning this Agreement, including, but

not limited to claims brought pursuant to the Washington Consumer Protection Act, the prevailing party is entitled to court costs and a reasonable attorney's fee"). Conversely, in the instant case, the attorney's fee provision is limited to the cost of collection.

2. Compulsory Counterclaims Arose Out Failure of Product, Not Out of Commercial Credit Agreement.

Atlas contends *Moritzky v. Heberlein* supports its argument that attorney fees are proper for compulsory counterclaims. *Moritzky v. Heberlein*, 40 Wn. App. 181, 697 P.2d 1023 (1985). *Moritzky* is not on point because the basis of the attorney fee provision is the "prevailing party" language under RCW 60.04, a statute not applicable to this case. The courts analysis on whether the claims were compulsory in *Moritzky* has nothing to do with whether attorney fees are proper for compulsory counterclaims. Whether or not the claims were compulsory only determined the prevailing party, not that all compulsory counterclaims entitle one party to attorney fees. On the other hand, here, Atlas fails to cite any statutory basis that provides for recovery of attorney fees and costs for compulsory counterclaims.

Here, the dispute around the UCC warranty for a particular purpose did not arise from the contract which extended credit, but from the UCC Sales Contract. The dispute arose when the products supplied

by Atlas failed. Realm did not pay as the Atlas supplies products were removed as defective. Yes, Atlas brought the initial suit, however the dispute regarding the UCC warranties that are the basis of the counterclaims arose from the defects in the products (i.e., UCC Warranties Breach) of from lawsuit to collect the debt.

3. Payment Bond and Retention Statute Do Not Authorize Attorney Fees and Costs For Defense of Realm's Counterclaims.

Likewise, RCW 39.08 *et. seq.* is limited to the cost of the collection for the materials purchased for a public works project. Collection costs would be allowed under RCW 39.08 *et. seq.* for the collection of the account for materials delivered, but not implied warranty of fitness claims under UCC Sales Contract. RCW 62A.2-315. RCW 39.08.030 requires action brought against the “surety or sureties”. In the case at issue, the bonding company was not a party to the counterclaims. Atlas was not asked to defend against the surety under Public Works Bond Statute RCW 39.08 *et. seq.* Therefore, the analysis done by Atlas that compulsory counterclaims brought by Realm must be covered by the attorney fee provision in the payment bond statute does not apply.

Similarly, the Washington Retainage Lien Statute, RCW 60.28.030, is limited to the cost of the collection for materials delivered.

While the State of Washington defended the retained funds, they were not a party to the counterclaims brought by Realm. Only claims against the retained funds held by the State are appropriate for attorney fees under this statute. These claims would be those of the “Collection Action”. The state did not present any defenses for the retained funds. Thus, Atlas’ compulsory counterclaim argument that the retained fund statute would also provide a basis for receiver of fees and costs for defense of the counterclaims based upon the UCC Sale contract is error.

Neither the retainage nor the payment bond statute is applicable in this matter because no defenses against Realm’s counterclaim were presented by the State or the bonding company as they were not parties to those claims. Further, the State and the bonding company never participated, so any fees associated with defense of the counterclaims based on the UCC Sales Contract is illogical.

Realm agrees there are attorney fee provisions in the bond and retainage statutes are narrowly drafted and would apply to the collection of the outstanding delinquent account for materials delivered, but nothing further.

4. Defenses of UCC Breach of Implied Warranties and Misrepresentation Are Non-Compensable.

Realm is not liable for Lava-Liner's and Pacific Polymer's defense against Realm's counterclaims because misrepresentation and the UCC Sales as codified in Washington in RCW 62A.2 et. seq. does not provide for attorney fees. Attorney fees are not recoverable by law under the Uniform Commercial Code for defense of RCW 62A.2-314, breach of implied warranty of merchantability, or RCW 62A.2-315, breach of implied warranty for a particular purpose.

5. Atlas Properly Segregated Its Time for the Collection Action.

The trial court initially denied Atlas any attorney fees when Atlas refused to segregate its time to those efforts reasonable spent on collection of the delinquent account. (CP 1154-1164). When attorney fees are available on some claims but not other, or for some but not all of the work performed by the attorney, the trial court must take care to segregate the attorney's compensable hours from the non-compensable hours. *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 54 P.3d 665 (2002).

In a case involving multiple claims, the court should award attorney fees only on the claims for which attorney fees are authorized. If the plaintiff recovers on some claims for which attorney fees are

authorized and on some claims for which attorney fees are not authorized, the court should limit the award accordingly. *King County v. Squire Inv. Co.*, 59 Wn. App. 888, 801 P.2d 1022 (1990) (attorney fees available on condemnation claim but not quiet title claim). Once Atlas accepted Judge Ramsdell's ruling that only the fees for the Collection Action would be awarded, Atlas submitted a more reasoned request for fees in the amount of \$58,632.50. (CP 1176). The court awarded \$54,150.00. (CP 1292).

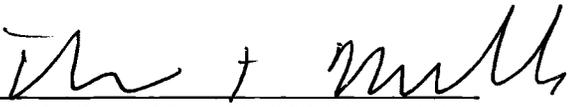
E. Realm Is Entitled To Attorney Fees On Appeal.

Realm also requests an award of fees on appeal, pursuant to RAP 18.1. RAP 18.1(a) authorizes an award of fees if "applicable law grants to a party the right to recover reasonable attorney fees". RCW 4.84.330 is available to a defendant on a contract claim who successfully defends by proving that there is no enforceable contract. *Herzog Aluminum, Inc., v. General Am. Window Corp.*, 39 Wn. App. 188, 692 P.2d 867 (1984). The statute warrants an award of attorney fees on appeal to Realm because Realm proved the attorney fee provision does not apply.

IV. CONCLUSION

This Court should dismiss the appeal for Atlas's failure to assign error, affirm the trial court's judgment in all particulars, and award Realm the attorney's fees and costs incurred in responding to this appeal.

RESPECTFULLY Submitted this 5th day of July, 2011



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CERTIFICATE OF MAILING

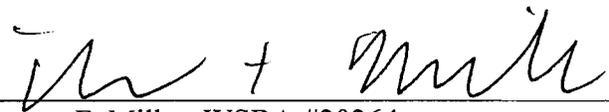
I certify that on the 5th day of July, 2011, I placed in the mails of the United States a duly addressed, stamped envelope containing a copy of the Respondent's Opening Brief to the individuals and parties at the addresses listed below:

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