96898-5

Court of Appeals Case No. 76949-9-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

EVERETT HANGAR, LLC, a Washington limited liability company,

Respondent,

v.

KILO SIX OWNERS ASSOCIATION, a Washington nonprofit corporation; KILO SIX LLC, a Washington limited liability company; HISTORIC HANGARS LLC, a Washington limited liability company; HISTORIC FLIGHT FOUNDATION, a Washington nonprofit corporation; and JOHN SESSIONS, an individual,

Petitioners.

ANSWER TO PETITION FOR DISCRETIONARY REVIEW

Warren J. Rheaume
John A. Goldmark
Max B. Hensley
DAVIS WRIGHT TREMAINE LLP
Attorneys for Everett Hangar, LLC

920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
(206) 622-3150 Phone
(206) 757-7700 Fax

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I. INTRODUCTION

Defendants' Petition raises the *exact same* issue they previously appealed to the Court of Appeals and to this Court in their first Petition for Review in this matter. The denial of those appeals and the issuance of the appellate mandate converted the Court of Appeals' first decision—affirming Everett Hangar's status as the prevailing party at trial—into the law of the case, which together with the appellate rules, bar Defendants' seriatim attacks on that settled ruling and further review by this Court.

Everett Hanger and Defendants control neighboring hangars at Everett's Paine Field. After years of conflict between their operations, Everett Hangar brought suit against Defendants —John Sessions and a collection of entities he owns or controls—seeking to enforce its access easement to the Paine Field runways and to prevent Defendants from violating the safety and security provisions of the agreement governing use of their leaseholds. Everett Hangar prevailed after a two-week bench trial, and was awarded its fees and costs pursuant to that agreement.

The arguments Defendants raise in their second Petition have been rejected by the trial court (twice), the Court of Appeals (in three unanimous decisions), and then this Court in denying review of their first Petition. The conclusive appellate decisions confirming Everett Hangar's prevailing party status bar Defendants' attempt to re-litigate that issue.

Even if the Court of Appeals mandate could be re-opened, Defendants' arguments rest on misleading portrayals of the injunctive relief awarded by the trial court and meaningless distinctions among the Defendant entities. As shown by the trial court's subsequent order of contempt enforcing its injunction—also affirmed on appeal—Defendants are barred from violating the injunction won by Everett Hangar because they are all controlled and act through the same person, John Sessions.

Defendants' other arguments are meritless and unworthy of this Court's review. The trial court considered and rejected their objections to the reasonableness of the fee amount, and the Court of Appeals correctly found that substantial evidence supports the trial court's findings.

Defendants cannot establish any of the criteria for discretionary review. The lower decisions do not conflict with decisions of the Supreme Court or Court of Appeals. RAP 13.4(b)(1)-(2). And Defendants' naked assertions about the importance of attorneys' fees, *see* Pet. at 3, do nothing to show how a unanimous, unpublished decision applying the law of the case to end Defendants' serial appeals on the same issue could possibly implicate the type of "substantial public interest" required to warrant Supreme Court review under RAP 13.4(b)(3).

This Court should (again) deny review and put a stop to Defendants' endless appeals.

II. COUNTERSTATEMENT OF ISSUES FOR REVIEW

1. Whether the law of the case bars a party from repeatedly seeking review of the same issue already finally decided by the Court of Appeals.

2. Whether the Court of Appeals correctly held that substantial evidence supports the amount of attorneys' fees awarded to Everett Hangar by the Snohomish County Superior Court.

III. COUNTERSTATEMENT OF THE CASE

Nearly four years ago, the trial court entered judgment in favor of Everett Hangar on its claims for injunctive relief to protect the safety and security of its operations at Paine Field and to preserve its access to the Paine Field runway via an easement over a lot controlled by Defendants. Since that time, Defendants have incessantly tried to avoid that award, despite the fact that the award has been conclusively affirmed by Division One, and the appellate mandate has issued.

A. Everett Hangar's Victory at Trial

Everett Hangar leases property on Paine Field known as Lot 12, on which it owns an aircraft hangar. CP 49-50; CP 865 ¶ 1. The lots on either side of Lot 12—Lot 11 and Lot 13—are leased and operated by entities run by John Sessions. CP 50-51; CP 865 ¶ 1; CP 871-72 ¶¶ 26-27.

Sessions is the managing and sole member of Historic Hangars, LLC ("Historic Hangars"), which leases Lot 11. CP 865 ¶ 4; CP 871 ¶ 26.

He is the President, CEO, and sole board member of the Historic Flight Foundation ("Historic Flight"), which subleases Lot 11 from Historic Hangars. CP 865 ¶ 4; CP 871-72 ¶ 26. Sessions is also the managing and sole member of Kilo Six, LLC ("Kilo Six") which leases vacant Lot 13. CP 865 ¶¶ 1, 4; CP 871 ¶ 26. Sessions is also the controlling board member and President of the Kilo 6 Owners Association (the "Owners Association"), which manages the three lots. CP 865 ¶ 4; CP 872 ¶ 26. As the trial court found, Mr. Sessions "is functionally in control of all four organizations and is charged with the knowledge of, and responsible for, the actions taken or omissions made by each entity." CP 872 ¶ 26.

Everett Hangar sued in Snohomish County Superior Court to remedy two main violations of the Covenants, Conditions, and Restrictions ("CC&Rs") that govern the three lots. First, Everett Hangar enjoys an aircraft easement right over portions of the Lot 11 ramp, which Defendants routinely blocked. CP 875-79 ¶¶ 38-52. Second, Defendants' conduct on Lots 11 and 13 violated the safety and security provisions of the CC&Rs, exposing Everett Hangar to serious threats and threatening airport security. CP 879-82 ¶¶ 53-63; CP 886-89 ¶¶15-26 (finding "the [Historic Flight] environment is wide-open from a security standpoint").

Given Sessions' common ownership of all adjoining lessors, Everett Hangar sued all of those entities to ensure Sessions could not try to

place the blame on the empty chair of another entity he controlled. Although Everett Hangar initially included in the Complaint a request for damages, it elected not to pursue damages at the summary judgment stage and instead went to trial seeking injunctive relief only. CP 1088.

Judge Millie Judge presided over a two-week bench trial. In a detailed 33-page order, she found that Defendants: (1) interfered with Everett Hangar's reasonable use of the easement, and (2) created unreasonable safety and security threats. CP 864-96. The court issued an injunction against future violations of the CC&Rs. CP 861-63. Finally, it found Everett Hangar was the prevailing party, entitled to attorneys' fees, but it did not issue written findings of fact on that award. CP 465-66.

B. Defendants' Fail in Their First Appeals

Defendants appealed. In addition to challenging the injunction obtained by Everett Hangar, they assigned error to the trial court's fee award, Answer Appendix ("App.") 1 at 4, arguing that because certain Defendants prevailed on some claims, that they—not Everett Hangar—were the prevailing party, *id.* at 46-47. The Court of Appeals largely affirmed the trial court, concluding that Defendants "routinely blocked" Everett Hangar's easement. CP 146. It also affirmed that Historic Hangars, Historic Flight, *and* Kilo Six all committed safety and security violations on Lots 11 and 13. CP 153-55.

While it narrowed certain aspects of the injunction Everett Hangar won at trial (and affirmed others), the Court of Appeals fully affirmed the trial court's decision most directly relevant to this Petition: "[T]he trial court awarded Everett Hangar relief on each of these claims [under the CC&R's] and thus properly awarded Everett Hangar attorney fees." Pet. App. B at 28. It then remanded for the trial court to issue specific findings of fact to explain the amount of fees awarded. *Id.* at 29, 31.

Defendants sought reconsideration. They argued that the result of the trial and appeal meant that "[t]hree of the five Defendants—Kilo 6 Owners Association, Kilo Six LLC, and John Sessions" should be considered the prevailing party, thus reversing the fee award, and that the fee award as to Historic Hangar and Historic Flight should be reversed because no party prevailed. App. 2 at 1. The Court of Appeals denied that motion, reaffirming Everett Hangar as the prevailing party. App. 3.

Defendants then filed a Petition for Discretionary Review, once again arguing that three Defendants should be considered the prevailing party, and that there was no prevailing party as to two Defendants. App. 4 at 14. This Court did not accept review. App. 5. After that first Petition was denied, the appellate mandate issued on January 20, 2017—more than two years ago—and the Court of Appeals' affirmance of Everett Hangar's prevailing party status "became the decision terminating review." App. 6.

C. Defendants Ignore the Settled Law of the Case

Despite these conclusive defeats, Defendants raised the prevailing party issue yet again when the case returned to the trial court. The trial judge, applying the law of the case, dismissed that effort to re-litigate the issue: "On remand, Defendants attempt to re-argue their position that Plaintiff is not a prevailing party. That argument was previously rejected by this court, and that decision was upheld by the Court of Appeals. Accordingly, the court will not reconsider the argument here." App. 7 ¶ 38. Defendants also raised specific objections to the amount of the fee award, each of which the trial judge considered and rejected. *Id.* ¶¶ 32-37.

Defendants appealed once more, arguing—yet again—that Everett Hangar was not the prevailing party. And again, the Court of Appeals—as it had done in denying reconsideration, and as the Superior Court had done on remand—declined to revisit its prior decision: "[T]he trial court did not err in applying the law of the case that Everett Hangar is the prevailing party." Pet. App. A at 6. The Court of Appeals thus considered whether its prior decision was "clearly erroneous," the standard for reversing an "identical legal issue" in a subsequent appeal, *id.* at 4, and after evaluating Defendants' arguments, concluded that it was not, *id.* at 9.

The Court of Appeals also considered Defendants' specific objections to the amount of the fee award, and rejected those as well:

> [T]he record shows that the trial court considered Kilo 6's challenges to Everett Hangar's requested fees …. [in] its detailed 10-page findings of fact and conclusions of law …. dismissing Kilo 6's objections to Everett Hangar's fees calculations, the trial court concluded that Everett Hangar requested a fair approximation of those hours its counsel reasonably expended on its successful claims and avoided duplicated effort in its staffing. Substantial evidence supports the trial court's thorough findings and conclusions.

Pet. App. A at 11.

Defendants did not seek reconsideration; this Petition followed.

D. Defendants Are Held in Contempt

During Defendants' second appeal, Everett Hangar was forced to file a contempt motion based on Defendants repeated and flagrant violations of the Court's injunction. The trial court held Defendants in contempt, finding "Defendants violated [the injunction's] express terms" on seven occasions by allowing unauthorized individuals to gain access to Everett Hanger's aircraft operations, and by repeatedly leaving an airport security gate open, unlocked, and unattended. App. 8 ¶¶ 2-3; *see also* App. 9. Because "Defendants have demonstrated their contempt for this Court's lawful order," the trial court sanctioned Historic Flight and Historic Hangars "jointly and severally" for each violation. App. 8 at 4 ¶ 4 & 4 ¶ 1. Defendants appealed, and Division One affirmed. App. 10. The mandate issued on February 8, 2019, terminating review of the contempt findings against Defendants. App. 11.

IV. ARGUMENT

A. Kilo Six's Serial Attacks on Everett Hangar's Prevailing Party Status Have Been Finally Resolved

It is black-letter law that upon termination of the appellate process, the last substantive decision becomes settled law, not subject to further appeal. The Rules of Appellate Procedure are clear: "Upon issuance of the mandate of the appellate court … the action taken or decision made by the appellate court is effective and binding on the parties to the review and governs all subsequent proceedings in the action in any court." RAP 12.2. Thus, with only limited exceptions, "The Supreme Court loses the power to change or modify a decision of the Court of Appeals upon issuance of the mandate of the Court of Appeals." RAP 12.7(b). Defendants' Petition ignores and defies these Appellate Rules and the related law of the case doctrine—both of which both bar Defendants' attempt to seek further review of an issue the Court of Appeals resolved more than two years ago.

1. The Appellate Rules and the Law of the Case Bar Further Review of Issues Already Decided

Applying settled principles of appellate procedure, this Court has long rejected attempts to re-open final decisions and prolong litigation:

> [A]fter a case has been fairly submitted to an appellate court, and the court has regularly determined the issues involved … the appellate court thereafter has no power to reconsider, alter, or modify its decision. To require courts to consider and reconsider cases at the will of litigants would deprive the courts of that stability which is necessary in the administration of justice.

Kosten v. Fleming, 17 Wn.2d 500, 505-06, 136 P.2d 449 (1943) (citation & internal quotation marks omitted). Thus, "[t]here is no basis under Washington law" for an appellant to re-raise issues which were or could have been litigated in a prior appeal. *Shumway v. Payne*, 136 Wn.2d 383, 392-94, 964 P.2d 349 (1998) (issuance of appellate mandate after denial of a petition meant the appellant "no longer has an opportunity to seek discretionary review in this court of the Court of Appeals decision"); *Reeploeg v. Jensen*, 81 Wn. 2d 541, 548, 503 P.2d 99 (1972) ("We hold … that those rules which we have laid down pertaining to the powers of this court after its orders and decisions become final apply with equal force to the decisions and orders of the court of appeals.").

Division 2 faced circumstances remarkably similar to those here in *Mentor v. King*, 112 Wn. App. 1047, 2002 WL 1732564 (2002) (unpublished). Appellants sought review of a trial court decision, reconsideration of the Court of Appeals' decision, and Supreme Court review, all of which they lost. *Id.* at *1-2. Meanwhile, the trial court issued an order to enforce its ruling, which was also appealed. *Id.* When appellants tried re-litigate an argument from the first appeal, the Court of Appeals rejected it, holding appellants were not "entitle[d] … to resurrect this failed argument." *Id.* at *2. Because the first and second appeal had "identical '(1) subject matter; (2) cause of action; (3) persons and parties;

and (4) the quality of the persons for or against whom the claim is made,'" the "First Appeal is Res Judicata as to the Second Appeal." *Id.* (quoting *Rains v. State*, 100 Wn.2d 660, 663, 674 P.2d 165 (1983)).

Division 3 reached the same result in *Inland Foundry Co. v. Spokane County Air Pollution Control Authority*, 106 Wn. App. 1007, 2001 WL 438962 (2001) (unpublished). Again, appellant sought review of a trial court decision, lost, moved for reconsideration, and sought review with the Supreme Court. *Id*. at *1. After subsequent trial court proceedings, appellant attempted to re-litigate its prior appellate defeat. *Id.* at *2. The Court of Appeals soundly rejected this tactic: "If any matter in controversy here either was or could have been adjudicated in the former action, that judgment became res judicata." *Id.* (citing *Globe Constr. Co. v. Yost*, 173 Wash. 528, 529, 23 P.2d 895 (1933)). Thus, matters encompassed in the Court of Appeals' "previous final decision on the merits" were barred from further review. *Id.*

All these outcomes simply enforce the settled law of the case doctrine. For example, in *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 955 P.2d 555 (1997), this Court considered a second appeal. In the first appeal, the Court set forth a test for the recovery of damages under 42 U.S.C. § 1983 and remanded for the trial court to decide whether that standard was met. *Id.* at 651-52. After rulings by the trial court on

remand, Sintra appealed and tried to challenge the test established in the first appeal, but this Court refused to review its prior decision under the law of the case doctrine. *Id.* at 645; *see also State v. Worl*, 129 Wn.2d 416, 426, 918 P.2d 905 (1996) ("law of the case doctrine precludes the Court of Appeals' reconsideration of the … issues it had decided in [the first appeal]"). Similarly, in *Lian v. Stalick*, 115 Wn. App. 590, 62 P.3d 933 (2003), the Court of Appeals found a landlord breached the warranty of habitability and remanded for clarification on damages. After remand, the landlord appealed, once again arguing the trial court erred in finding a warranty breach. *Id.* at 592-94. The Court of Appeals rejected the landlord's attempt to re-argue the issue, holding the law of the case doctrine barred review of its finding from the first appeal. *Id.* at 598-99.

These settled principles compel the same result here. Defendants first made (and lost) their challenge to Everett Hangar's prevailing party status to the trial court. When the Court of Appeals first addressed the "prevailing party" issue, it held the trial court "properly awarded Everett Hangar attorney fees." CP 158-59 (affirming trial court's conclusion at CP 895). Defendants then sought reconsideration—repeating their same arguments on the prevailing party issue. *See generally* App. 2. Division One again rejected Defendants' arguments and declined to reconsider the issue. App. 3. Undeterred, Defendants next filed a Petition for Review to

this Court, repeating their same arguments. *See generally* App. 4. The Supreme Court denied Defendants' Petition for Review. App. 5. This led to the issuance of the appellate mandate, *see* App. 6, and should have finally concluded continued litigation over prevailing party status.

Unfortunately, it did not: Defendants made this same argument again to the trial court on remand. The trial court once again rejected it, holding that the prevailing party issue was already decided and could not be re-considered: "This argument was previously rejected by this court, and that decision was upheld by the Court of Appeals. Accordingly the court will not reconsider the [prevailing party] argument here." CP 27. Finally, Defendants raised the issue to the Court of Appeals yet again. *See generally* App. 13. Division One affirmed its prior decisions, holding that "the trial court did not err in applying the law of the case that Everett Hangar is the prevailing party." Pet. App. A at 6. Now, with their second Petition for review to this Court, Defendants are on their *seventh* effort to re-litigate the already resolved prevailing party issue.

Importantly, the issues raised in Defendants' second Petition are not just similar to those Defendants raised in these previous efforts—they are identical. In fact, the arguments in the second Petition track nearly word-for-word those Defendants fully litigated in the first appeal and this Court declined to hear more than two years ago:

First Petition for Discretionary Review (*denied Jan. 2017*)	**Second Petition for Discretionary Review**
"The trial court and the Court of Appeals were required to award attorneys' fees to Sessions, the Association, and Kilo Six …. [a]nd Everett Hangar cannot be a substantially prevailing party against Historic Hangars and [Historic Flight] ...." App. 4 at 17-18.	"The Court of Appeals failed to award attorneys' fees to three totally prevailing parties in direct contravention of the law established by this Court. The opinion below also misapplies the law determining prevailing parties when both sides win significant issues." Pet. at 18-19.

Compare also App. 4 at 11-13 *with* Pet. at 9-11 (asserting that Kilo Six, the Owners Association, and Sessions were in fact the prevailing parties at trial); App. 4 at 15-17 *with* Pet. at 14-15 (arguing that Everett Hangar did not prevail as to Historic Flight and Historic Hangar).

Defendants raise the same issues here that the Court of Appeals rejected in its first appellate decision. That decision is final, and bars further appeals as to Everett Hangar's prevailing party status. This Court should decline Defendants' request to re-open this settled decision. The appellate rules and law of the case doctrine exist exists precisely for this situation—to preclude unsuccessful parties from re-arguing a previously decided issue *ad nauseum*. It is well past time for this matter to end.

2. There Is No Basis to Ignore the Law of the Case and Reopen the Mandate from the First Appeal

Remarkably, Defendants offer only a passing reason why their second Petition could survive this fatal flaw, suggesting that "even if the

law of the case doctrine were potentially applicable here," the issue should be re-opened because the prior decision was "clearly erroneous" and "manifestly unjust." Pet. at 16 (citation omitted).[1] They cite no cases involving similar circumstances under which Supreme Court review has been granted, and do nothing to show their circumstances meet this exceedingly high bar. That is because they do not.

First, Defendants' claim that some of them wholly escaped the consequences of their loss at trial is wrong. They argue that Sessions, the Owners Association, and Kilo Six "won everything," Pet. at 1, but the Court of Appeals actually found Kilo Six violated the same CC&R provisions on which the injunction against Historic Hangar and Historic Flight was based: "We agree with the trial court's conclusion[] that Kilo Six … breached rules and regulations found in the Snohomish County Code and Paine Field rules [incorporated in the CC&R's]." CP 403-04.

More fundamentally, the injunction won by Everett Hangar shows that Defendants' superficial distinctions between Sessions and the various entities he controls are meaningless here. Although the injunction names Historic Hangars and Historic Flight, it also imposes obligations on each

[1] Defendants also challenge the trial court's finding that Everett Hangar's claims arose from a "common core of facts and the same legal theory." Pet. at 17. But this argument, while couched as an attack on the reasonableness of the fee amount, is simply a back-door attempt to revive the prevailing party issue that has been finally decided.

of "their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them." CP 261 ¶ 1. It is indisputable that *all Defendants*, including Sessions, fall within that category. As Defendants admit, Sessions "is the managing member of Historic Hangars and Kilo Six, the president of [Historic Flight], and a director of the Owners Association," Pet. at 5—all of which act through Sessions, and none of which may violate the injunction.

This is shown by the contempt proceedings that took place after Defendants' first appeal. In an effort to avoid the contempt finding against them, Defendants submitted a declaration by Sessions, in which he claimed he had instructed Historic Flight regarding compliance with the injunction, App. 12. ¶ 5, and that certain evidence of violations of the court's injunction related to work being done on behalf of the Owner's Association and Kilo Six, *id.* ¶ 19. Thus, the very entities and individual Defendants claim "prevailed" at trial are those same entities that were forced to comply with the injunction and were involved in the conduct the trial court found to be in contempt of that injunction.

Finally, the cases cited by Defendants do not show the common-sense conclusion of the trial court and Court of Appeals to be clearly erroneous or manifestly unjust. *Singleton v. Frost*, 108 Wn.2d 723, 726-27, 742 P.2d 1224 (1987), stands for the basic notion that an individual

who sues on a promissory note and wins must receive fees as set forth in the note. Defendants, however, brought no claims against Everett Hangar, much less any on which they prevailed. Instead, Everett Hangar sued four entities owned or controlled by Sessions—all of which had related roles in the ownership and operation of the adjoining lots. The Court of Appeals affirmed the trial court's finding that Sessions' companies violated the CC&Rs, and that those violations occurred under their corporate capacity. Nothing in *Singleton* prevents this practical—and correct—understanding of the parties, their relationship, and the outcome of the trial and appeal.

Nor does the prevailing party decision conflict with *Cornish College of the Arts v. 1000 Virginia Ltd. Partnership*, 158 Wn. App. 203, 242 P.3d 1 (2010), which holds that in cases with "several distinct and severable claims," courts should employ a "proportionality approach" where "each party is awarded attorney fees for the claims on which it succeeds or against which it successfully defends." *Id*. at 232 (citation & internal quotation marks omitted). Nothing in that decision shows the lower courts here lacked discretion to find the claims at issue were *not* "distinct and severable" where they all related to the easement and safety and security violations on which Everett Hangar won its judgment.

McGary v. Westlake Investors, 99 Wn.2d 280, 661 P.2d 971 (1983), also does not pose a conflict. In a declaratory judgment action

interpreting two contract clauses, the Court agreed with plaintiff on one clause, and defendant on another, stating "[u]nder our decision here … there is no prevailing party." *Id.* at 288. Defendants claim *McGary* shows that when both parties "prevail on major issues," no fee award is proper. Pet. at 15. But Defendants did not prevail on any major issue: The trial court and Court of Appeals held that Historic Hangars and Historic Flight violated the easement in the CC&Rs and committed egregious safety and security violations, the only two claims asserted against them. At trial, Sessions argued that Everett Hangar had no permanent easement at all, and that he had no safety and security responsibilities to Everett Hangar. He lost all those arguments, and he and his entities are now subject to a permanent injunction—as shown by the contempt order. Apps. 8 & 9. The trial court and Court of Appeals' determination that Everett Hangar was the prevailing party under those circumstances is a far cry from the kind of "clearly erroneous" and "manifest[ly] [u]njust[]" outcomes required to re-open the settled law of the case. *See Folsom v. County of Spokane*, 111 Wn.2d 256, 264, 759 P.2d 1196 (1988).

B. Defendants' Trivial Gripes with the Fee Amount Do Not Warrant Supreme Court Review

Defendants raise just one argument that the Court of Appeals did not expressly consider and reject in the first appeal, asserting the trial

court improperly awarded fees for unrecoverable work. Pet. at 18. However, they offer no reason why the Supreme Court should review this common complaint by losing litigants, and cannot show the Court of Appeals erred in finding substantial evidence supports the fee award.

This Court reviews a trial court's fee award for a "manifest abuse of discretion." *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 375, 798 P.2d 799 (1990). A trial judge is given "broad discretion in determining the reasonableness of a an award," *Ethridge v. Hwang*, 105 Wn. App. 447, 460, 20 P.3d 958 (2001), and "determination of a fee award should not be an unduly burdensome proceeding for the court," *Steele v. Lundgren*, 96 Wn. App. 773, 786, 982 P.2d 619 (1999). As long as the trial court considered the "relevant facts" and "the reasons given for the award are sufficient for review, a detailed analysis of each expense claimed is not required." *Id.*

Defendants claim that certain fee entries were not recoverable, pointing to a single entry of 8.8 hours (out of the thousands of hours of attorney time covered by the fee award). Pet. at 18. Despite their naked assertion that it is "undisputed" the 8.8 hours in fees were not actually incurred, Defendants point to nothing in the record supporting that claim; the only evidence they cite is their own prior briefing. *See id.* (citing CP 187). After considering that exact claim, the trial court found "there was

no duplication or overbilling warranting any reduction in awarding the fees requested by Everett Hangar." App. 7 ¶ 8. More fundamentally, however, the law merely requires that the total fee award be "a fair approximation of those hours its counsel reasonable expended," Pet. App. A at 11, and Defendants' nit-picking at the award amount does not come close to deserving this Court's review. *See* RAP 13.4(b).

V. CONCLUSION

The Petition for Discretionary Review should be denied.[2]

RESPECTFULLY SUBMITTED this 29th day of March, 2019.

Davis Wright Tremaine LLP
Attorneys for Everett Hangar, LLC

By _____
Warren J. Rheaume, WSBA #13627
John A. Goldmark, WSBA #40980
Max B. Hensley, WSBA #47030

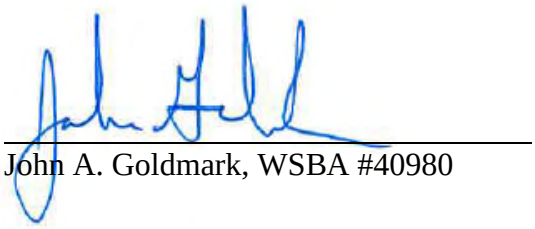
[2] Pursuant to RAP 18.1, Everett Hangar asks that this Court award it attorneys' fees and costs, as set forth in Section 4.2 of the CC&Rs. CP 980.

CERTIFICATE OF SERVICE

I hereby certify that on the date stated below, I caused the foregoing document to be served via Appeals Court Web Filing Portal and email to the last known address of all counsel of record.

I certify under penalty of perjury under the laws of the state of Washington and the United States that the foregoing is true and correct.

DATED March 29, 2019.



John A. Goldmark, WSBA #40980

APPENDICES

App.	Date	Description
1	12/17/2015	Brief of Appellants, *Everett Hangar, LLC v. Kilo 6 Owners Ass'n*, Wash. App. No. 73504-7-I
2	8/29/2016	Appellants' Motion for Reconsideration, *Everett Hangar, LLC v. Kilo 6 Owners Ass'n*, Wash. App. No. 73504-7-I
3	8/31/2016	Order Denying Appellants' Motion for Reconsideration, *Everett Hangar, LLC v. Kilo 6 Owners Ass'n*, Wash. App. No. 73504-7-I
4	9/28/2016	Petition for Review, *Everett Hangar, LLC v. Kilo 6 Owners Ass'n*, Wash. No. 93671-4
5	1/4/2017	Order [Denying Petition for Review], *Everett Hangar, LLC v. Kilo 6 Owners Ass'n*, Wash. No. 93671-4
6	1/20/2017	Mandate, *Everett Hangar, LLC v. Kilo 6 Owners Ass'n*, Wash. App. No. 73504-7-I
7	5/9/2017	Supplemental Findings of Fact and Conclusions of Law re: Attorneys' Fees, *Everett Hangar, LLC v. Kilo 6 Owners Ass'n*, Snohomish Cty. Superior Court No. 14-2-02264-4
8	11/17/2017	Order for Contempt, *Everett Hangar, LLC v. Kilo 6 Owners Ass'n*, Snohomish Cty. Superior Court No. 14-2-02264-4
9	12/13/2017	Order Granting Motion for Reconsideration, *Everett Hangar, LLC v. Kilo 6 Owners Ass'n*, Snohomish Cty. Superior Court No. 14-2-02264-4
10	11/5/2018	Unpublished Opinion [Affirming Contempt Order], *Everett Hangar, LLC v. Kilo 6 Owners Ass'n*, Wash. App. No. 77842-1-I

App.	Date	Description
11	2/8/2019	Mandate, *Everett Hangar, LLC v. Kilo 6 Owners Ass'n*, Wash. App. No. 77842-1-I
12	10/12/2017	Declaration of John T. Sessions in Support of Defendants' Opposition to Plaintiff's Motion for Contempt
13	10/16/2017	Brief of Appellants, *Everett Hangar, LLC v. Kilo 6 Owners Ass'n*, Wash. App. No. 76949-9-I

Appendix 1

Case No. 73504-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

EVERETT HANGAR, LLC, a Washington limited liability company,
Plaintiff-Respondent,

v.

KILO 6 OWNERS ASSOCIATION, a Washington nonprofit corporation; KILO SIX, LLC, a Washington limited liability company; HISTORIC HANGARS, LLC, a Washington limited liability company; HISTORIC FLIGHT FOUNDATION, a Washington nonprofit corporation; and JOHN SESSIONS, an individual
Defendants-Appellants.

BRIEF OF APPELLANTS

HILLIS CLARK MARTIN & PETERSON P.S.
Louis D. Peterson, WSBA #5776
Jake Ewart, WSBA #38655
1221 Second Avenue, Suite 500
Seattle, WA 98101-2925
Telephone: (206) 623-1745

ATTORNEYS FOR DEFENDANTS-APPELLANTS

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I. INTRODUCTION

Defendant-Appellant Historic Flight Foundation (the "***Museum***") operates a public vintage aircraft museum at the Snohomish County Airport ("***Paine Field***"). The Museum was developed in cooperation with Paine Field, and its operations are expressly permitted by its lease with Paine Field, CC&Rs governing the property, and the Snohomish County Code.[1] For more than six years, with Paine Field's involvement and support, the Museum has hosted events inside its hangar and outside on its ramp, including at least two annual air shows sponsored by Paine Field.

The Museum's neighbor, Plaintiff-Respondent ***Everett Hangar***, LLC, has an easement over the Museum's property that permits Everett Hangar to cross part of the Museum's property only in limited circumstances—when "reasonably necessary." The trial court has unreasonably interpreted that easement to dramatically expand its scope, and essentially prohibit the Museum from using its own leased ramp at any time for its own activities. The trial court's interpretation conflicts with the easement language itself, the CC&Rs, the Museum's lease, the parties' conduct over the last six years, the Snohomish County Code, and common sense.

The easement at issue permits the parties to move across their neighbors' properties only "as is reasonably necessary to move aircraft" to and from the nearest taxiway. Everett Hangar's two corporate jets have two exits to the nearest taxiway, including one that does not cross Museum

[1] The Snohomish County Code, Title 15, contains the airport rules for Paine Field. Title 15 of the Code was admitted into evidence as trial exhibit 232.

property. Those jets depart fewer than 1.4 times per week, rarely need the exit nearest the Museum, *and have never, in more than six years at Paine Field, missed a flight*. Nevertheless, Everett Hangar claims the Museum has interfered with Everett Hangar's easement rights by displaying vintage aircraft on the Museum's ramp, and hosting periodic events.

After a bench trial, the Snohomish County Superior Court ruled for Everett Hangar. The trial court held that the easement, which exists only "as is reasonably necessary to move aircraft" to the taxiway, requires that the Museum's property remain unused at all times in case Everett Hangar wants to fly. The court entered findings of fact based in part on exhibits that were neither offered nor admitted. And the court entered an injunction that, for all practical purposes, gave Everett Hangar control over the Museum's exterior ramp 24 hours a day, 7 days a week.

The trial court seriously misinterpreted Everett Hangar's easement rights, and expanded them far beyond what the text of the easement permits—an easement only "as is *reasonably necessary*." The court also acknowledged yet declined to enforce CC&R provisions requiring cooperation among neighbors, and went so far as to endorse Everett Hangar's blanket refusal to share flight information with the Museum—information that could be used to avoid potential conflicts.

The court turned Everett Hangar's right to an easement "as is reasonably necessary" on its head. Under the court's injunction, the Museum can now almost never use *its own leased property*, and Everett Hangar now

has a presumptive right to use the Museum's ramp any time it desires. The court had no legal basis to enter the injunction.

The court's injunction also directed the Museum and other Defendants to take certain safety and security measures not required by the CC&Rs. The injunction ignored CC&R provisions and ordered action neither required nor approved by Paine Field, the entity ultimately responsible for safety and security at the airport.[2] Paine Field—the Museum's landlord—has never complained about the Museum's activities. On the contrary, Paine Field has supported them. There are 500 planes and three other museums at Paine Field. No one else is subject to the restrictions imposed by the trial court on the Museum. The trial court erred as a matter of law in entering injunctive relief, and in doing so improperly rewrote the CC&Rs.

The court also erred in awarding Everett Hangar attorneys' fees and costs as a prevailing party, and in calculating the attorneys' fee award to Everett Hangar. Even though Defendants prevailed on all damages claims and half of the claims for injunctive relief, the trial court improperly determined Everett Hangar was the prevailing party. The *Cornish College* case requires the trial court to engage in a party-by-party and claim-by-claim analysis in determining attorneys' fees. The trial court acknowledged the requirements of *Cornish College*, then refused to apply them, conceding on the record that, if she was "wrong about that," this Court would "let [her] know that, as [it is] quick to do."

[2] Paine Field is not subject to Transportation Security Administration (TSA) security regulations.

This Court should reverse the trial court's rulings against Defendants and remand this case with orders to (1) dismiss all of Everett Hangar's claims with prejudice, and (2) award Defendants their attorneys' fees and costs.

II. ASSIGNMENTS OF ERROR

1. The court erred as a matter of law in finding for Everett Hangar on Counts I-III of its amended complaint, all of which alleged violations of the CC&Rs. (Count I relates to Everett Hangar's easement rights. Count II relates principally to Everett Hangar's safety and security concerns. Count III alleges that the Owner's Association created by the CC&Rs failed to meet its obligations under the CC&Rs.)

2. The court erred as a matter of law in entering injunctive relief.

3. The court erred as a matter of law in fashioning injunctive relief that is overly broad and unsupported by the record.

4. The court erred as a matter of law in awarding attorneys' fees and costs to Everett Hangar.

5. The court erred as a matter of law in calculating the attorneys' fee award to Everett hangar.

6. The court erred as a matter of law in dismissing all claims against Defendant-Appellant John Sessions *without* prejudice, rather than *with* prejudice, after a full bench trial on the merits.

7. The court erred as a matter of law in making findings of fact 25, 28, 45, 46, 47, 48, 52, 55, and 56.[3]

[3] This Court should reverse the trial court even if it accepts all of the trial court's findings of fact. These findings of fact are, nevertheless, unsupported by evidence, and the trial court erred in making them.

8. The court erred as a matter of law in not admitting into evidence documents showing the Museum's current policies and procedures, including training materials (proffered exhibits 264-68, 270).

III. ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Did the court misinterpret and misapply the CC&Rs in holding that Defendants violated obligations under the CC&Rs?

2. Did the court err in ordering injunctive relief where Everett Hangar proved no well-grounded fear of an immediate invasion of a clear legal or equitable right?

3. Did the court err as a matter of law in fashioning injunctive relief that is not narrowly tailored to address the alleged harms, and that is unsupported by the record?

4. Did the court err as a matter of law in determining Everett Hangar was the prevailing party for purposes of making an award of attorneys' fees and costs?

5. Did the court err as a matter of law in assessing Everett Hangar's attorney fee request by failing to apply the proportionality approach required by this Court's decisions, and by failing to deduct fees not reasonably incurred?

6. Did the court err as a matter of law in failing to dismiss all claims against John Sessions *with prejudice*?

7. Did the court make factual findings unsupported by evidence?

8. Did the court err in refusing to admit into evidence documents established by Museum testimony to be its current policies and procedures?

IV. STATEMENT OF THE CASE

A. The Property

The property at issue (the "***Property***") consists of three neighboring lots in the southwest corner of Paine Field. CP 453. The lots are referred to as Lots 11, 12, and 13 in relevant documents, and were described that way during the trial. *Id.* The lots run west to east: Lot 11 is west of Lot 12, and Lot 12 is west of Lot 13. *Id.* Trial Exhibit 271, included as **APPENDIX 1**, is a photograph showing an aerial view of the Property. On that photograph, the Museum hangar is the white-roofed building in the lower left hand corner just south of the "Lot 11 Ramp." The Museum sits on Lot 11, which is 188 feet wide. *E.g.*, Ex. 11 (attached as **APPENDIX 2**) at Ex. D at 2.[4] Everett Hangar is the larger white-roofed building to the east of the Museum, and sits on Lot 12, which is 322 feet wide. *E.g.*, *id.* at Ex. D at 2. The unmarked lot east of Everett Hangar is Lot 13. No structures are built on Lot 13. CP 453.

The northern portions of Lots 11 and 12 are paved areas called "ramps" or "aprons" that are marked on APPENDIX 1. Both hangars open onto those ramps. A grassy drainage area is situated between the Lot 12 ramp and the Kilo 7 taxiway that runs west to east just north of Lots 12 and 13. Planes leaving Everett Hangar have two exits around that drainage area to the Kilo 7 taxiway—one exit to the east, across Everett Hangar's own ramp, and one to the west next to the Museum's ramp. Additional ramp space owned by Paine Field sits north of the Lot 11 ramp and on the west end of the Kilo 7 taxiway, as marked on APPENDIX 1.

[4] All "Ex." citations are to trial exhibits unless otherwise indicated. The CC&Rs governing the Property were trial exhibit 11, and are also included with this brief as APPENDIX 2. All citations to the CC&Rs are to APPENDIX 2 unless otherwise indicated.

B. The Museum

The Museum is a tax-exempt, 501(c)(3) educational foundation. CP 460; RP 785.[5] The Museum has a collection of vintage aircraft from 1927-1957. RP 736-37. Every plane in the Museum's collection is fully operational and still flies. RP 740. The collection ranges from historic bi-planes to World War II aircraft such as the B-25D Mitchell Bomber and the P-51B Mustang. RP 738, 744. The Museum displays its collection both inside its hangar and, on occasion, outside the hangar on the Museum's ramp and the Paine Field ramp.[6] CP 460. The Museum is open from 10:00 a.m. to 5:00 p.m., Tuesday through Sunday, and at other times for special events. *Id.*

The Museum was founded and developed by Defendant-Appellant John Sessions, with support from Paine Field. In 2007, Paine Field leased the entire Property (which now consists of Lots 11-13) to Appellant Kilo Six, LLC for use as the "John T. Sessions Historic Aircraft Foundation," and for the "public display of aircraft, public education, and public meeting uses." Ex. 1 § 1.02. In 2009, Paine Field divided the Property into three separately leased parcels—Lots 11, 12, and 13. CP 454. Paine Field leased Lot 11 for, among other things, a "historic aircraft hangar and museum, public education, and event venue." Ex. 5 § 1.02(a). Those are the purposes for which Lot 11 is now used.

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[5] Unless otherwise indicated, all citations to the report of proceedings are to the bench trial report of proceedings consecutively paginated from February 10-19, 2015.

[6] The court's finding of fact number 46, which finds that, "[e]ven on days when public events are not hosted," the Museum "frequently parks its vintage aircraft within the . . . object free area zones on its Lot 11 ramp" is not supported by evidence in the record. CP 464-65. The Museum uses its ramp, but no evidence shows the Museum frequently parks it planes in what was described at trial as the object free area.

In addition to displaying its vintage aircraft, the Museum hosts a range of educational, charitable, and civic activities, many of which require use of the Museum's ramp. For example, the Museum hosts annual events such as Challenge Air, which offers children and young adults with disabilities their first flying experiences. RP 878-80. The Museum also hosts significant air shows, such as Paine Field Aviation Day and Vintage Aircraft Weekend. Many events, including Aviation Day and Vintage Aircraft Weekend, are sponsored each year by Paine Field, which contributes money, services, fencing, and other support, including security planning. *E.g.*, CP 476; RP 242-44, 248, 765-70, 845, 878-80. Only a handful of these larger events occur each year, and they all occur during the summer flying season. Exs. 205, 274, 275. The Museum also promotes STEM education for students, RP 753, CP 460, and annually flies its planes over Memorial Day services around the state, CP 460.

Aviation Day and Vintage Aircraft Weekend attract thousands of guests each year. RP 775. For a typical event of that size, the Museum has displays on its exterior ramp and, with Paine Field's permission, adjacent Paine Field property. CP 461. With the permission of Kilo Six and Paine Field, the Museum also uses the empty Lot 13 for parking. *Id.* With Paine Field's approval, the Museum erects bicycle fencing, owned and provided by Paine Field, around Lots 11 and 13 (and any Paine Field property being used) to separate Museum guests from adjacent lots and the rest of the airport. CP 461, 476; RP 767, 845-46.

The Museum also uses at least 100 trained volunteers, plus paid employees, to monitor the events. RP 841-44. Volunteers serve, for example, as perimeter security and parking attendants, and they include docents with safety training and background in the history of the planes involved in Museum events. RP 844, 851-53. All volunteers receive training at the Museum. *Id.* Even on regular business days at the Museum, Museum rules require that a volunteer docent accompany all Museum patrons to displays outside the hangar on the Museum's ramp. *See* Ex. 269 at III.[7] If no docents are available, Museum guests are limited to exhibits inside the Museum hangar. *See id.*

Museum events are posted each year on the Museum's website. Exs. 205, 274, 275; RP 256. All major events are scheduled months in advance. *See id.* Many major events, such as Aviation Day and Vintage Aircraft Weekend, have been held on the same weekend each year for several years. *See id.* Over the years, the Museum has made a point of reaching out to Everett Hangar, usually by email, in advance of major events to ensure that Museum activities will not conflict with Everett Hangar activities. Exs. 202-204, 206-214. In responding to those emails,

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[7] The trial court erred in refusing to admit into evidence the Museum's current written policies and procedures, including training materials. RP 848-58; proffered exhibits 264-68, 270 (attached as APPENDICES 4-9). Everett Hangar objected on the basis that the documents were hearsay, but the founder and president of the Museum, John Sessions, testified that the documents represented the Museum's current policies and training materials. RP 848-58. The documents were authenticated by the Museum president as statements made by the Museum, which (through its president) was testifying in the courtroom and subject to cross-examination. The documents were not hearsay, and the court should have admitted them. ER 801. Among other things, they state very clearly that Museum guests are not permitted to access the ramp unless escorted by a Museum docent. *E.g.*, APP. 6 (proffered exhibit 266 (DEF0001033)).

Everett Hangar never identified any potential conflict with scheduled Museum events. *See id.*

C. Everett Hangar

Everett Hangar owns the lease to Lot 12 and the hangar on Lot 12. CP 453. Dean Weidner is the sole manager and member of Everett Hangar LLC. Ex. 2 at 6. He also owns the two corporate jets—a Gulfstream IV and a Learjet 60—that have operated out of Everett Hangar since August 2008. CP 457-58.

Everett Hangar's jets are reserved solely for Mr. Weidner's business and personal use. *Id.* Weidner owns and operates approximately 42,000 apartments in nine states and four provinces. CP 454; RP 57. Weidner employees use Weidner's jets for business travel to those locations. CP 454.

Each year, the Learjet and the Gulfstream make 20-40 flights each from Everett Hangar. Exs. 216-231; *see also* CP 458. Through 2014, the two jets never combined for more than 72 total flights from Everett Hangar in any year.[8] *Id.* Thus, even during its busiest years, Everett Hangar has averaged fewer than 1.4 departures per week. Because each plane requires 30-45 minutes of preflight preparations, Everett Hangar requires approximately one hour per week on its ramp before departures. CP 458.

[8] In the trial court's findings of fact, the court, reviewing Everett Hangar's flight logs, listed its count of flights each year through 2013. CP 458. The court's calculations count a departure as one flight, and an arrival as a second flight. In other words, one round trip flight would count as two flights in the court's calculations. Everett Hangar's two jets combined to make 72 departures in both 2013 and 2014. This is consistent with the court's calculations, which counted 144 total flights (72 multiplied by 2) in 2013. *Id.*

The vast majority of Everett Hangar's flights—90 to 95%—depart around 7:30 a.m. (before the Museum opens) and return between 7:00 p.m. and 11:00 p.m. (after the Museum closes). RP 261. Everett Hangar uses its east exit to Kilo 7 for two-thirds of its departures and 90% of its arrivals. RP 305. Use of the west exit is necessary only when the wind blows from the west at 15 knots or higher—something that occurs at Paine Field *fewer than four days every ten years*. CP 463; RP 623-24, 1035-36; Ex. 283.

Everett Hangar usually positions its plane on its own ramp for departure with the nose facing east and the plane parallel to its own hangar. After finishing preflight activities, it taxis out the east exit (away from the Museum) and turns east onto the Kilo 7 taxiway. A typical departure out the east exit with airplanes on the Museum's Lot 11 ramp is depicted in Ex. 215A. RP 279-83, 300. Accordingly, the trial court's finding of fact number 25, finding that there is "no place for [Everett Hangar] to direct jet blast that isn't potentially harmful," is not supported by the evidence. CP 459. According to Greg Valdez, Everett Hangar's Chief Pilot and Director of Flight Operations, and Norm McCord, Everett Hangar's Director of Maintenance and Chief Mechanic, these operations have been performed safely for over six years—as long as Everett Hangar has been at Paine Field—and have never resulted in injury or damage to anyone or anything. RP 117, 305-06, 308-09, 393, 403-04; CP 458.

Everett Hangar's flights are scheduled well in advance. Thirty to forty percent of Everett Hangar's flights are scheduled the year before. RP 155, 396-97, 402. A yearly schedule is circulated in November or December for

the next year's flights. *Id.* Additional flights are then added over the course of the year. *Id.* Changes to work flights are typically made a couple weeks in advance of the flight. *Id.* Personal flights are typically scheduled with a month's advance notice, and have never been scheduled with less than a week's notice. *Id.* No flight is scheduled with less than two days' notice. *Id.*

D. The Other Parties

Everett Hangar sued four Defendants in addition to the Museum. Defendant-Appellant Kilo Six, LLC is the entity originally formed to develop the Property. CP 454; Ex. 1. Paine Field initially leased the Property to Kilo Six in 2007, and continued to lease the Property to Kilo Six in 2009 when it divided the Property into three lots. *Id.* The lease for Lot 13 remains with Kilo Six. CP 454. The lease for Lot 12 was assigned by Kilo Six to Everett Hangar. CP 455. The lease for Lot 11 was assigned by Kilo Six to Defendant-Appellant Historic Hangars, LLC, which then subleased Lot 11 to the Museum. CP 454. Defendant-Appellant John Sessions is President of the Museum, Managing Member and sole member of Historic Hangars, and Managing Member and sole member of Kilo Six. CP 453.

The fifth and final Defendant-Appellant, Kilo 6 Owners Association, is a nonprofit corporation that has, as its members, the owners of the leases on Lots 11, 12, & 13 (Historic Hangars, Everett Hangar, and Kilo Six). CP 453. John Sessions is President of the Association. *Id.* The Association has certain rights and responsibilities under the CC&Rs and its bylaws. Exs. 3, 11. The operative CC&Rs, included as **APPENDIX 2**, were

recorded by the Declarant, Kilo Six, after the property was trifurcated into Lots 11-13.

E. Everett Hangar's Claims

Everett Hangar alleged breaches of the CC&Rs and Association bylaws by various Defendants, and a breach of fiduciary duty by John Sessions.[9] CP 569-82. Everett Hangar sought damages and injunctive relief. CP 569-82; 1028-39.

Everett Hangar's allegations can be divided into two general categories: (1) operational concerns and (2) safety and security concerns.

1. Alleged Operational Concerns

Everett Hangar's allegations focused largely on one provision of the CC&Rs that grants lot owners an easement (the "***Easement***") over adjacent lots "as is reasonably necessary" in order to move aircraft to and from the owners' lots. Section 12.7 of the CC&Rs provides:

> **Each Owner shall have an ingress and egress easement over and across such portions of the airplane ramps located on any Lot as is reasonably necessary to move aircraft to or from any Building and the adjacent properties on which taxiways, runways and airport facilities are located.**

APP. 2 § 12.7 (emphasis added). Everett Hangar claimed the Museum repeatedly prevented Everett Hangar from using this Easement, and that, "[o]n many occasions, the pilots of jet aircraft operating out of the Lot 12 hangar have been forced to delay flights due to the danger of jet blast injuring patrons of the museum or damaging property . . . thereby interfering with

[9] For purposes of this brief, Defendants will cite Everett Hangar's Amended Complaint for Damages and Injunction unless otherwise indicated. CP 569-82. The court allowed the amended complaint to be filed during trial.

Plaintiff's operational use of Lot 12 and its ingress and egress easement over and across the apron of Lot 11." CP 575.

At trial, Everett Hangar testified that it has *never* missed a flight because of Museum activities. RP 305, 406-07. Accordingly, the trial court's finding of fact number 45, which found that the Museum has "prevented Everett Hangar from using its easement . . . when wind conditions require use of that exit," is not supported by the evidence. CP 464. At most, over six years of operations at Paine Field, Everett Hanger had experienced "on occasion" undocumented delays of 5-10 minutes when Everett Hangar repositioned aircraft to account for Museum activities. RP 171-72. Dean Weidner recalled only 3-5 delays of 10-15 minutes each over a six year period. RP 98. Everett Hangar also testified it was delayed on only one arrival in six years, and that it was delayed because it had to wait for Museum aircraft to depart the Kilo 7 taxiway (which Everett Hangar agrees the Museum was entitled to use for its own flights). RP 271-72. As Everett Hangar's own personnel acknowledged at trial, all Everett Hangar flights have been conducted safely, and none have ever resulted in harm to person or property. RP 305-06, 308-09, 403-04, 406-07. For that reason, finding of fact number 47, which found a "significant risk of jet blast and harm to vintage planes routinely parked on the Lot 11 ramp," is unsupported by evidence. CP 465.

Even though Museum activities had not interfered with Everett Hangar flights, Everett Hangar requested damages and an injunction to deal with the alleged violations.[10] Everett Hangar requested an injunction

> prohibiting Defendants, and all those acting in concert or participation with them, from operating a vintage aircraft museum static aircraft display on the Lot 11 apron, providing uncontrolled or poorly controlled public access to the Lot 11 apron or conducting any other similar operation on the Lot 11 apron inconsistent with the safe and efficient operation of all aircraft, including those operating out of the hangar on Lot 12.

CP 581.

2. Alleged Safety Concerns

Everett Hangar alleged that Museum "patrons frequently walk onto Lot 12's apron and approach Plaintiff's aircraft, mistakenly assuming those aircraft are part of Defendants' static displays."[11] CP 578. This poses "a significant security threat," Everett Hangar claimed, because "criminals—including terrorists—could easily pose as museum patrons and raid a Lot 12 aircraft while it sat on the [ramp] during pre- or post-flight operations." *Id.* According to Everett Hangar, "[t]his could result in theft, destruction of property, assault, abduction, homicide, commandeering, or hijacking." *Id.* Everett Hangar also alleged that the Museum's use of Lot 11 "exposes museum patrons to serious safety risks," and "also exposes Plaintiff to

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[10] Everett Hangar requested damages in its original complaint. CP 1028-39. Its claims for damages were dismissed on summary judgment before the amended complaint was filed. CP 676-78.

[11] The trial court's finding of fact number 56 finds that the Museum made no attempts "to prevent or stop" people from gaining "access into the restricted areas of Lot 12," and cites in support Exs. 41, 62-64. CP 468. There is no evidence in the record to support this finding. Neither the exhibits themselves nor the testimony about them support this finding. RP 178-80, 214-17.

unnecessary liability associated with potential harm to the public or static displays (or other obstructions) situated on the Lot 11 apron." CP 576.

Everett Hangar also alleged that Defendants' use of Kilo Six's empty Lot 13 exposed Everett Hangar and the rest of the airport to security risks. Everett Hangar alleged that Lot 13 was used by Defendants as a parking and event venue for Museum activities, and was secured only by "inadequate 'bicycle fencing.'" CP 576. Everett Hangar alleged that Defendants' "unsecured use of Lot 13 . . . exposes all Everett Hangar pilots and other personnel to safety and security risks," and might endanger Museum patrons who, if they breached the bicycle fencing, could venture too close to Everett Hangar aircraft. *Id.*

In contrast to Everett Hangar's hyperbolic claims, Everett Hangar testified at trial that no person or property had ever been harmed at Everett Hangar by third parties, or by Everett Hangar in the course of its operations. CP 393, 403-04. Everett Hangar also acknowledged that Paine Field sponsors Museum events, participates in the security planning for Museum events, and supplies fencing for Museum events. RP 242-44, 248. Deputies from the Snohomish County Sheriff's Office also provide security at Museum events. RP 244, 248. Everett Hangar recognized that Paine Field is ultimately responsible for safety and security at the airport, and acknowledged it had complained to Paine Field about the Museum's allegedly inadequate security practices. RP 223, 243, 253-54, 566. Paine Field—the parties' landlord and the entity responsible for airport security—has required no additional security measures from the Museum in response

to Everett Hangar's complaints. *Id.* And Paine Field is not subject to TSA security regulations. CP 461; RP 1010.

In addition to the injunction it requested for Lot 11, Everett Hangar asked the court to prohibit Defendants from permitting public access to Lot 13 for any purpose unless and until Everett Hangar erected a tall fence (identical in material and design to Paine Field's perimeter fence) along the interior boundaries of Lot 13. CP 581. Everett Hangar also asked the court to order the Association to approve the construction of security fencing around Lot 12's parking lot, which is outside Paine Field's perimeter fencing south of Everett Hangar's hangar. *Id.*; *see* APP. 1. And Everett Hangar asked the court to order John Sessions to curtail activities on Lots 11 and 13, purportedly in order to stop breaching fiduciary duties to Everett Hangar. CP 581.

F. The Trial Court's Orders

On summary judgment, the court dismissed all of Everett Hangar's damages claims. CP 676-78. Everett Hangar failed to adduce any evidence of damages. *See id.* Only its claims for injunctive relief remained for trial. *See id.*

After a bench trial, the court incongruously concluded that the Easement, which provides for an easement "as is reasonably necessary to move aircraft to or from any building," was unrestricted by time or circumstances. CP 471. The court also concluded that the right "to move aircraft" included the right to move aircraft under jet power, such that the area required "to move aircraft" must encompass the Museum's entire ramp to accommodate jet blast zones of up to 240 feet behind Everett Hangar's

existing planes. CP 471-72. Based on these erroneous conclusions, and because the Museum's ramp is only 188 feet wide, the court held that the Museum and Historic Hangars violated Everett Hangar's easement rights by using "Lot 11's apron and ramp as a public museum and aircraft display." CP 474. The court issued this ruling even though the Museum had used its property in this way for more than six years pursuant to its lease.

The court issued an injunction, included as **APPENDIX 3**,[12] prohibiting Defendants, among other things, from placing anything on their lots that might be closer than 240 feet behind Everett Hangar's Lear jet. App. 3 ¶ 2. For all practical purposes, this requires the Museum ramp to be clear at all times—24 hours a day, 7 days a week—even though Everett Hangar averages fewer than 1.4 departures per week. The injunction would even bar the Museum's own flight activities. *See id.*

The court also incorrectly concluded that the Museum is "wide-open from a security standpoint."[13] CP 476. It concluded the Defendants had violated the CC&Rs and failed to take other security precautions. *Id.* The court faulted the Museum for, among other things, failing to use security cameras and metal detectors, and failing to subject volunteers to criminal background checks or screening against TSA no-fly lists, even

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[12] The court's injunction can be found at CP 449-51. All citations to the injunction are to the copy of the injunction found in the APPENDIX included with this brief.

[13] Two of the trial court's findings of fact in support of this conclusion (findings 57 and 58) rely on five exhibits (Exs. 17, 24, 26, 28, 72) that were not admitted into evidence. CP 468-69, 553-67. In total, the trial court's findings of fact cited eight exhibits (the exhibits listed above, plus Exs. 39, 73, 74) neither offered nor admitted into evidence. CP 453-70, 553-67. The court relied on eight other exhibits (Exs. 15, 18, 22, 29-31, 37, 38) that were not admitted, but which were admitted in at least some form under different exhibit numbers. *See id.*

though the court acknowledged that the Museum is not legally obligated to do any of those things. CP 461, 475-76. The court entered an injunction prohibiting Defendants from (1) permitting anyone to access Lot 12 without Everett Hangar's permission, and (2) propping open any entry point on Lots 11 and 13 without the presence of a security guard. App. 3 ¶¶ 5-6. The court also ordered Defendants to construct a permanent fence around the interior of Lot 13. *Id.* ¶ 7.

The court found for John Sessions on all five counts of Everett Hangar's Amended Complaint. CP 483. The court also found in favor of Defendants on Count IV, which alleged a breach of the Association bylaws. *Id.* The court found in favor of Everett Hangar only on Counts I-III. *Id.* Each of those counts alleged violations of the CC&Rs. CP 578-80.

V. ARGUMENT

Everett Hangar is not entitled to injunctive relief. A permanent injunction is an extraordinary remedy that "should be used sparingly and only in a clear and plain case." *Resident Action Council v. Seattle Housing Auth.*, 177 Wn.2d 417, 445, 327 P.3d 600 (2013) (quotations and citations omitted). Courts cannot enter injunctions to protect plaintiffs from "mere inconveniences." *DeLong v. Parmelee*, 157 Wn. App. 119, 150, 236 P.3d 936 (2010). Here, the court badly misinterpreted and misapplied the CC&Rs and erred as a matter of law when it entered a permanent injunction in favor of Everett Hangar, which did not show a well-grounded fear of an immediate invasion of a clear legal and equitable right. *Hagemann v. Worth*, 56 Wn. App. 85, 87-88, 782 P.2d 1072 (1989). Even

if an injunction were justifiable (it is not), the trial court's injunction is overly broad and inconsistent with the CC&Rs and other relevant authority.

The court also erred in awarding attorneys' fees and costs to Everett Hangar. Everett Hangar was not the prevailing party. Defendants prevailed on all damages claims and half the injunction claims. Even if Everett Hangar had been the prevailing party, the court erred in analyzing and calculating the attorneys' fee award. The Court should reverse the trial court, award Defendants their attorneys' fees and costs on appeal, and remand this case with orders to (a) dismiss Everett Hangar's claims with prejudice, and (b) award Defendants their attorneys' fees and costs.[14]

A. The Museum Has Not Violated Everett Hangar's Ingress and Egress Easement

Easements, like contracts, must be interpreted according to their terms and "properly construed to give effect to the intention of the parties." *Brown v. Voss*, 105 Wn.2d 366, 371, 715 P.2d 514 (1986). Courts should determine intent by considering the "deed as a whole," *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003), and are not permitted to rewrite the document, *see Chaffee v. Chaffee*, 19 Wn.2d 607, 625, 145 P.2d 244 (1943) (courts cannot rewrite contracts). Here, the

[14] Questions of law and conclusions of law are reviewed de novo. *Sloan v. Horizon Credit Union*, 167 Wn. App. 514, 518, 274 P.3d 386 (2012). Findings of fact are reviewed for substantial evidence, which is "a quantum of evidence sufficient to persuade a rational fair-minded person that the premise is true." *Thompson v. Hanson*, 142 Wn. App. 53, 59-60, 174 P.3d 120 (2007). The Court of Appeals can also consider uncontroverted evidence presented to the trial court. *State ex rel. Coyle-Reite v. Reite*, 46 Wn. App. 7, 11, 728 P.2d 625 (1986).

Injunctions are reviewed for abuse of discretion. *Atwood v. Shanks*, 91 Wn. App. 404, 408, 958 P.2d 332 (1998). A trial court abuses its discretion when its decision is "arbitrary, manifestly unreasonable, or based on untenable grounds." *Id.* at 409. A trial court "necessarily abuses its discretion if its ruling is based on an erroneous view of the law." *Id.* The Court also reviews the reasonableness of an attorney fee award under the abuse of discretion standard. *Diamaco, Inc. v. Mettler*, 135 Wn. App. 572, 576, 145 P.3d 399 (2006).

court badly misinterpreted the Easement and essentially rewrote it in a manner inconsistent with its own terms, other portions of the CC&Rs and relevant leases, and the Snohomish County Code.

1. The trial court's interpretation of the Easement is inconsistent with the Easement's own language

a. The Easement applies only on occasions *when its use is reasonably necessary*

The Property was developed for a vintage aircraft museum. The purpose of the Museum is to use its hangar and ramp to display and fly vintage aircraft. Nevertheless, the court concluded that the Easement trumps the Museum's rights to its own ramp, and requires the Museum ramp to be clear 24 hours a day, 7 days a week, in case Everett Hangar decides it (a) wants to fly, and (b) wants to use the west exit, instead of its east exit, to the Kilo 7 taxiway. This is not what the Easement requires, and it makes no sense. The Easement is limited in scope:

> Each Owner shall have an ingress and egress easement over and across such portions of the airplane ramps located on any Lot ***as is reasonably necessary*** to move aircraft to or from any Building and the adjacent properties on which taxiways, runways, and airport facilities are located.

APP. 2 § 12.7 (emphasis added). That language cannot reasonably be read to grant other lot owners the right to demand that neighboring ramps remain clear of aircraft and other items at all times, especially in the context of the whole leases and CC&Rs. The parties were granted primary rights to use their own hangars and ramps, and they did not create an easement so broad that it would eradicate those rights. Rather, the CC&Rs permit the ramps to be used for their intended purposes, and grant only an

easement "as is reasonably necessary" to "move" aircraft over "portions" of the ramps. That language does not grant any lot owner 24/7 control over a neighbor's entire ramp.

Indeed, the CC&Rs provide for several different easements, but only this Easement is limited by a requirement of reasonable necessity. *See* APP. 2. For example, the easement over the Area of Common Responsibility (e.g., parking lots and sidewalks) contains no "reasonably necessary" requirement. *Id.* § 12.4. Neither does the easement for emergency vehicles. *Id.* § 12.6. Those are simply "perpetual, non-exclusive" easements. The "reasonably necessary" language relating to access across neighboring ramps is thus uniquely limiting in the CC&Rs, and must be given effect. *4105 1st Avenue South Investment, LLC v. Green Depot WA Pacific Coast, LLC*, 179 Wn. App. 777, 784, 321 P.3d 254 (2014) ("The court must harmonize and give effect to all the language in a contract.").

The context and text of the Easement make clear that "reasonably necessary" is intended to limit the easement only to ***occasions*** when it is "reasonably necessary" for a neighbor to invoke it to move an aircraft. The trial court disregarded these limitations, and held that the Easement controls the Museum's ramp 24/7. That interpretation of the Easement assumes there are *no* occasions when the Museum may use its own ramp for activities, which is wholly inconsistent with the development of Lot 11 for the Museum's use.

This use of "reasonably necessary" is common and well-developed in the context of easements. For example, a party seeking an easement by

implication must show (1) former unity of title and a subsequent separation (as existed here), (2) a prior quasi-easement between the parcels, and (3) a certain degree of necessity for the continuation of the easement. *Woodward v. Lopez*, 174 Wn. App. 460, 469, 300 P.3d 417 (2013). Absolute necessity is not required, but the test is whether reasonable alternatives are available. *Id.* at 469-70. Courts characterize this as a test of "reasonable necessity." *E.g.*, *id.* at 470.

This analysis is the same when a party "attempts to condemn a private way of necessity (i.e., easement) across neighboring property." *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 3, 282 P.3d 1083 (2012). In that context, an easement must "be reasonably necessary under the facts of the case, ***as distinguished from merely convenient or advantageous***." *Id.* at 7 (emphasis added, quotations and citations omitted). The person claiming an easement has the burden to prove reasonable necessity, "including the absence of alternatives." *Id.* (quotations and citations omitted).

The court erred when it failed to apply the Easement in a manner consistent with this case law and the Easement's own terms. The court misinterpreted the Easement to allow Everett Hangar access across the Museum's ramp whenever and wherever convenient, not whenever and wherever "reasonably necessary."

b. The Easement does not include jet blast

The court mistakenly concluded that, when the parties created an easement to "move" aircraft, they actually granted an easement to "move aircraft under power." CP 472. The court therefore expanded the spatial

scope of the Easement to include jet blast safety zones that, with Everett Hangar's two current planes, extend as far as 240 feet behind the planes. Lot 11 is 188 feet wide. These jet blast zones, which the court purports to write into the Easement, would therefore dramatically expand the physical space necessarily dedicated to the Easement. This is not what the Easement provides. It grants only a right to an easement "as is reasonably necessary to move" aircraft—it says nothing about movement under power or jet blast.

Powered movement is not "reasonably necessary" as a practical matter. Planes can be—and often are—moved without creating jet blast. Everett Hangar testified that it tows its planes from its hangar to its ramp for every flight, and tows its planes to the Kilo 7 taxiway whenever it is preparing both its planes for departure. RP 156, 1206-1210. In those circumstances, one plane is prepared for flight close to the hangar, and the other is prepared on the Kilo 7 taxiway just north of the grassy drainage area above Lot 12. *Id.* Everett Hangar can thus safely "move" its aircraft to the taxiway (and beyond) without producing jet blast when beneficial to do so. *Id.*; RP 375-76 (describing that Everett Hangar could have a plane towed farther than Kilo 7 if necessary).[15]

This is consistent with the Snohomish County Code, which requires pilots to move a plane without power when necessary. For example, the Code requires a pilot "taxiing into areas where people are standing," to "shut the engine down and push the aircraft" or have it guided by two or

[15] Even though Everett Hangar's planes can be towed, Everett Hangar would not often find it necessary to tow its planes across the Museum's ramp. In six years, Everett Hangar has used the west exit, under power, for one third of its departures. It has done so without incident.

more knowledgeable people. Ex. 232 § 15.08.334. Contrary to the court's erroneous ruling, the Code does not place the burden on everyone else at the airport to vacate so aircraft can be operated under power. Indeed, as Everett Hangar acknowledges, responsibility for operating a jet safely rests with the *pilot*, *e.g.*, RP 296-97, and this responsibility is reflected both in the Code, *e.g.*, Ex. 232 § 15.08.322 (no aircraft shall be operated in a manner such that jet blast might harm people or property), and in federal regulations, *e.g.*, 14 C.F.R. §§ 91.3, 91.13 (pilot is responsible for operation of the aircraft, and cannot operate it carelessly or recklessly in a manner that would endanger people or property). This is the scheme under which jet blast is managed at an airport, not by mandating vacant ramps—and certainly not by relying on easements that themselves say nothing about jet blast.

The effect of the court's expansive jet blast addition to the Easement, combined with the court's mistaken conclusion that the Easement right exists at all times regardless of necessity, is that the Museum's entire ramp must be available to Everett Hangar 24/7. This interpretation of "reasonably necessary" turns the Easement on its head. Under the trial court's interpretation, the Museum can almost never use its own ramp. Instead, ramps must be kept clear for potential use by neighbors (no matter how infrequent). The Easement simply does not provide neighbors that level of access and control, and should not be read to supplant the Museum's own primary use of its leased property, which includes the ramp on its lot.

2. The trial court's interpretation of the Easement is inconsistent with the CC&Rs, the leases, and the Snohomish County Code

Not only is the trial court's interpretation of the Easement unsupported by the language of the Easement itself, but it conflicts with other portions of the CC&Rs, the leases, and the Snohomish County Code. *E.g.*, *Knipschield v. C-J Recreation, Inc.*, 74 Wn. App. 212, 215, 872 P.2d 1102 (1994) (contract terms must be construed with reference to the whole contract, and must be given a meaning that is "reasonable and consistent with the purpose of the overall undertaking"). Nothing in those documents limits the use of ramps in the way the trial court's injunction would require.

Under their **leases** with Paine Field, each owner leases its entire lot, including the ramps. *E.g.*, Ex. 5 at Recitals ¶ C, §§ 1.01-.02. The leases describe these lots as the "Premises." *Id.* § 1.01. The Museum's Lot 11 Premises can be used—in their entirety—as a "public education and event venue." *Id.* § 1.02. The Premises can also include, among other things, a "historic aircraft hangar and museum," "associated space for aircraft repair and maintenance," and parking. *Id.* The lease permits the use of the Lot 11 ramp for all these purposes. *Id.*

The **CC&Rs** also describe approved uses for the lots, including the ramps. The CC&Rs, signed by Kilo Six, Everett Hangar, and Paine Field, explain that "the Property, Lots and Buildings located thereon may be used for aviation-related purposes and for any purpose reasonably incident to such purposes." APP. 2 at Ex. C § 2. The CC&Rs explicitly grant the Declarant (Kilo Six) "sole discretion" to determine the proper nature of

those uses: "In any case in which [the CC&Rs] refer[] to the use for which a portion of the Property is developed, the nature of such use shall be as determined in the sole discretion of the Declarant, for so long as it owns any portion of the Property."[16] *Id.* Ex. C at 1. These permitted "aviation-related" uses include the Museum's past uses of the Lot 11 ramp (with Paine Field's participation and support), and do not limit the use of the Lot 11 ramp in the manner the trial court now requires.

Neither Paine Field (the Lot 11 landlord) nor Kilo Six has ever identified the Museum's activities on its own ramp as constituting an improper use under the lease, the CC&Rs, or the Snohomish County Code. To the contrary, Paine Field has sponsored and actively participated in many of the activities Everett Hangar claims violate its easement rights. Kilo Six allows use of its Lot 13 for air show parking. Plainly these events are permissible uses of the Museum's lot, and Paine Field has never asked the Museum to curtail any of its activities. RP 223, 243, 253-54.

The **Snohomish County Code** also permits ramps to be used actively. For example, the Code generally defines a "ramp" or "apron" to be a place used for "parking, maneuvering, loading, unloading and servicing" aircraft. Ex. 232 § 15.08.065. It does not require that ramps be kept vacant.

Given all these permissible uses of the Property (including the ramps) under the CC&Rs, leases, and Snohomish County Code, the trial

[16] Accordingly, the trial court's conclusion in finding of fact number 28 that a car show is a "non-aviation event" is not a conclusion the court is entitled to make and, if properly labeled a finding of fact, is not supported by evidence. CP 460. Kilo Six makes that determination.

court erred when it interpreted the Easement to dramatically narrow the uses of the Property and effectively grant full control and access over ramps to neighboring owners.

3. The CC&Rs require owners to cooperate with one another

The evidence at trial established that the uses of the Museum and Everett Hangar do not conflict. Even if they did, the CC&Rs address this issue by requiring *cooperation* among the owners. The CC&Rs state that their Rules and Regulations were "adopted and are intended to provide for the harmonious operation and co-existence of [the Property's] uses adjacent to one another." APP. 2 at Ex. C § 1. They therefore require that each owner "cooperate and communicate with the other Owners in good faith," and that the Rules and Regulations be "interpreted and applied, in a manner designed to achieve such purpose." *Id.* The court erred by failing to enforce this provision, and explicitly excusing Everett Hangar from complying with it.

Beginning early in their time at Paine Field, John Sessions reached out to Everett Hangar to ensure the Museum's operations did not conflict with Everett Hangar's. Exs. 202-204, 206-214. Sessions emailed Everett Hangar's Chief Pilot, Greg Valdez, about upcoming Museum events and asked Valdez whether Everett Hangar had any scheduled operations. *Id.* Valdez routinely responded, and never identified conflicts. *See id.* This is the process contemplated by the CC&Rs.

Everett Hangar later ceased its cooperation, claiming it could no longer share its flight plans. Everett Hangar claims its flight schedule must remain secret for both privacy and security reasons. RP 98, 227-28. Everett

Hangar also claims it has received warnings from the federal government identifying its planes as potential targets for terrorist activities.[17] CP 466-67.

The court endorsed Everett Hangar's decision not to cooperate, but the court's conclusion is not supported by facts. CP 477. There is *no* evidence in the record that the Museum has ever mishandled flight information provided by Everett Hangar or anyone else. There is *no* evidence that the Museum shared that information with anyone who did not need to know it for operational purposes (whether with innocent third parties, terrorists, or business rivals).

Nor is there evidence in the record that the Museum refused to cooperate when Everett Hangar had a scheduled flight that coincided with an outdoor Museum event. Everett Hangar deceptively relies on one event it staged *after commencing this lawsuit*. Contrary to its claim it cannot reveal its flight schedule, Everett Hangar told the Museum, several days in advance, that it had a flight scheduled at the same time the Museum was hosting an annual Christmas event for children featuring Santa Claus arriving at the Museum in a red airplane. RP 312-14. While Everett Hangar

[17] The trial court's finding of fact number 52, relating to "specific threat information . . . against the two specific planes [Everett Hangar] own[s]" is unsupported by the evidence. CP 466-67. First, the court cited as support two exhibits that were not admitted into evidence. *Id.* (citing Exs. 73-74, which were not admitted (CP 558)). Second, the court erred in admitting other evidence of these alleged threats over Defendants' objections. RP 229-32. The evidence is hearsay, and was used by Everett Hangar and the court for the truth of the matter asserted in that evidence: that Everett Hangar's planes are potential terrorist targets. This evidence should not have been admitted or relied on by the trial court. The court also suggests, in its findings and conclusions, that federal agencies warned Everett Hangar that Everett Hangar's particular planes had been the subject of terrorist threats. CP 466. Even if Everett Hangar's evidence is considered, it does not support this finding. Everett Hangar claims only that Gulfstream and Learjet aircraft, as a general matter, are the subject of federal warnings, not that Everett Hangar's two particular aircraft have been the subject of threats. Ex. 88.

was preparing its jet to depart, John Sessions readied the Museum hangar for the Christmas event by pulling planes out of the hangar and temporarily parking them on the Museum ramp and Paine Field ramp. RP 312-16, 330-33. The planes were parked safely more than 300 feet behind Everett Hangar's jet (well beyond the jet blast zone), which was already positioned for an easterly exit. *Id.* Everett Hangar nevertheless decided to reposition its plane farther to the east before starting the plane's engines and departing out the east exit. *Id.* Everett Hangar cites this as an example of a failure to cooperate. It was no such thing. There is no provision in the CC&Rs or any other document that entitles Everett Hangar to a limitless jet blast zone behind its planes, and in any event it safely made its departure out its east exit.[18] Everett Hangar can cite no other occasion when it can even claim the Museum failed to cooperate with flight plans Everett Hangar shared with the Museum in advance. In fact, before this lawsuit, Everett Hangar had never even departed during a Museum event. *E.g.*, RP 242, 312.

Everett Hangar's refusal to cooperate with the Museum is particularly egregious given the significant advance notice it has of its scheduled flights. Most of its flights are scheduled weeks or months in advance, and no flight is scheduled with less than two days' notice, leaving more than enough time to communicate with the Museum about Everett Hangar's potential needs. Everett Hangar cannot, on the one hand, refuse to cooperate with its neighbor and, on the other hand, complain about its neighbor's alleged lack of cooperation.

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[18] Accordingly, the trial court's finding of fact number 48 is not supported by evidence. CP 465.

Cooperative communication between the parties is both required by the CC&Rs and consistent with common sense. The court erred when it refused to apply the cooperation requirement without legal or factual basis.

4. Defendants have not violated Everett Hangar's Easement rights

Despite Everett Hangar's refusal to communicate, Defendants have done nothing to interfere with Everett Hangar's Easement right to move planes across the Museum's ramp "as is reasonably necessary." Using its two available exits to the Kilo 7 taxiway, Everett Hangar has *never*, on any occasion, been unable to fly as scheduled because of Museum activities. At most, Everett Hangar claims it has had to modify its operations to account for Museum activities, and, in so doing, has had only a few ("on occasion") undocumented delays of 5-10 minutes.[19] Because Everett Hangar has never failed to depart as planned, Everett Hangar has never been denied use of its easement across the Museum ramp when its use was "reasonably necessary." Everett Hangar has shown no clear legal or equitable right to anything it does not already have, and it can show no well-grounded fear of an invasion of any right. The trial court had no legal basis to rule for Everett Hangar or enter an injunction.

5. The trial court's injunction is arbitrary, and unsupported by the facts

Even if the trial court had a legal basis to enter an injunction, the form of its injunction is arbitrary, overly broad, and unsupported by the

[19] As Greg Valdez testified, part of a pilot's job is identifying surrounding activities and accounting for them, including positioning a plane in a different (even less preferred) way, in planning for a departure. RP 296-97, 300-02. If Everett Hangar is not properly accounting for activities around its hangar, it cannot complain that those activities are causing minor delays a couple times a year.

facts. *King v. Riveland*, 125 Wn.2d 500, 520, 886 P.2d 160 (1994) ("injunctions should be narrowly tailored to remedy the specific harms shown"); *Atwood v. Shanks*, 91 Wn. App. at 408-409 (a court abuses its discretion in entering an injunction when its decision is "arbitrary, manifestly unreasonable, or based on untenable grounds"). This Court should vacate the trial court's injunction.

The **Order Granting Permanent Injunction**, included in the attached **APPENDIX 3,** has seven paragraphs, the first four of which relate to the Easement. Together, they wrongfully prohibit the Museum from using its own ramp for almost any purpose at any time, including, as described in more detail below, for its own flights, contrary to the lease, the CC&Rs, and the Snohomish County Code. This is not an injunction "narrowly tailored to remedy the specific harms shown." *King*, 125 Wn.2d at 520. Everett Hangar flies approximately 1.4 times every week. Ninety to ninety-five percent of those flights depart and arrive when the Museum is closed. These are not neighbors who are experiencing significant conflicts. They certainly are not experiencing conflicts sufficient to justify a permanent, 24/7 ban on the Museum's use of its ramp. The trial court's injunction thus creates far more hardship for the Museum than could possibly be justified. *E.g.*, *Holmes Harbor Water Co., Inc. v. Page*, 8 Wn. App. 600, 603, 508 P.2d 628 (1973) (listing a number of factors courts should consider in entering an injunction, including the relative hardship to the defendants). In addition to this general defect, each of the first four paragraphs of the trial court's injunction has its own, specific defects.

Paragraph 1 of the trial court's injunction prohibits Defendants from placing any items—including aircraft—within a certain defined "Object Free Area" on the "portion of the Lot 11 ramp that provides access to the Kilo 7 taxi lane." APP. 3 ¶ 1. This paragraph makes no exceptions. It does not permit the Museum to place planes within that area for maintenance, pre-flight preparations, flights themselves, or arrivals and post-flight activities. This is plainly inconsistent with the CC&Rs, leases, and Snohomish County Code, and effectively prevents the Museum from operating any of its own flights.

Paragraph 2 essentially renders the first paragraph superfluous. The second paragraph prohibits Defendants from placing any items—including aircraft—"within the jet blast zone of any aircraft on the ramps of Lot 11 or Lot 12." APP. 3 ¶ 2. Because Everett Hangar's jets have jet blast zones exceeding 200 feet, and because Lot 11 is less than 188 feet wide, this effectively requires the Museum to clear its ramp at all times.[20]

Paragraph 2 places no limit on the property included within its scope. For example, the Paine Field ramp might be within the jet blast zone of an Everett Hangar jet using the west exit. Paine Field property is not subject to the CC&Rs—which provide an easement only over the Lot 11

[20] This paragraph is ambiguous as to timing. The trial court, in its findings and conclusions, explains that it finds no temporal limitation on the Easement. CP 471. Accordingly, Defendants read the second paragraph of the trial court's injunction to prohibit the placement of any items, at any time, within the jet blast zone of any plane that might depart from Everett Hangar. The injunction itself, however, states that items cannot be placed within the jet blast zones only of "aircraft *on the ramps* of Lot 11 or Lot 12." APP. 3 ¶ 2 (emphasis added). This might be interpreted to permit certain activity when aircraft *are not* on the ramps of Lot 11 or Lot 12. Even if this is the proper interpretation, the practical effect is the same. The Museum cannot use its ramp for any purpose and hope that Everett Hangar will not move a jet to its ramp without advance notice.

and 12 ramps—and Paine Field was not a party to the lawsuit. The court has no legal basis to prohibit Paine Field property from being used in any lawful manner Paine Field desires, or to prohibit the Museum from using the Paine Field ramp with Paine Field's permission. Also, because the second paragraph is not limited to the Lot 11 ramp, it includes other property on Lot 11, such as the hangar. Everett Hangar has never even argued that the Museum cannot use its hangar in any manner it sees fit, and if the hangar door is open, items inside the hangar may be within the jet blast zones for either of Everett Hangar's planes using the west exit to Kilo 7. The second paragraph also includes Lot 13. Everett Hangar did not ask that the use of Lot 13 be curtailed to accommodate jet blast.

Paragraph 2, like the first, also makes no provision for Museum flights or maintenance, and, literally read, even prohibits the Museum from placing items on Lot 11 within any jet blast safety zone for a *Museum* aircraft (not just an Everett Hangar aircraft). This effectively prohibits the Museum from operating its own flights. None of this is justified by the CC&Rs, leases, or Snohomish County Code.

Paragraph 3 prohibits Defendants "from blocking Everett Hangar's access to the west or east exits to Kilo 7 taxi lane in any manner." APP. 3 ¶ 3. Again, this impermissibly fails to account for the Museum's own flights, which could, on occasion, coincide with Everett Hangar flights and require Everett Hangar to wait for some period of time before departing.

Paragraph 4, which prohibits Defendants from allowing people (except trained flight personnel) to stand within the jet blast zone of aircraft

moving to or from the Kilo 7 taxiway, explicitly includes Paine Field property within its scope. APP. 3 ¶ 4. Again, the Easement, which relates only to the Lot 11 and 12 ramps, does not apply to Paine Field property, regardless of whether it is under the temporary control of the Museum. Paragraph 4 also does not distinguish between Everett Hangar jets and any other jets. The court has no basis to prohibit Defendants from using their own planes in any manner they conclude is safe. The flight activity of Museum planes was not an issue in this lawsuit.

For all these reasons, the trial court's injunction, as it relates to the Easement, is arbitrary, overly broad, and unsupported by the record. It should be vacated.

B. Defendants Have Not Violated Any CC&R Obligations with Respect to Safety and Security

1. Everett Hangar has no clear legal or equitable right to require its neighbors to employ any particular safety or security measures

The CC&Rs are clear: each lot owner is solely responsible for safety and security on that owner's lot. Under § 4.5 of the CC&Rs, the "Association *may, but shall not be obligated to*, maintain or support certain activities within the Property designed to enhance the safety of the Property." APP. 2 § 4.5 (emphasis added). On the other hand, that section goes on to say, in bold, capital letters, that lot owners must take responsibility for safety and security on their own lots:

> **NEITHER THE ASSOCIATION, DECLARANT, NOR ANY SUCCESSOR DECLARANT SHALL IN ANY WAY BE CONSIDERED INSURERS OR GUARANTORS OF SECURITY OR SAFETY WITHIN THE PROPERTY, NOR SHALL ANY OF THEM BE**

HELD LIABLE FOR ANY LOSS OR DAMAGE BY REASON OF FAILURE TO PROVIDE ADEQUATE SECURITY OR INEFFECTIVENESS OF SECURITY OR SAFETY MEASURES UNDERTAKEN. NO REPRESENTATION OR WARRANTY IS MADE THAT ANY SAFETY MEASURE OR SECURITY SYSTEM CANNOT BE COMPROMISED OR CIRCUMVENTED, NOR THAT ANY SUCH SYSTEMS OR MEASURES UNDERTAKEN WILL IN ALL CASES PREVENT LOSS OR PROVIDE THE DETECTION OR PROTECTION FOR WHICH THEY ARE DESIGNED OR INTENDED. EACH OWNER ACKNOWLEDGES, UNDERSTANDS AND COVENANTS TO INFORM ITS TENANTS THAT THE ASSOCIATION, ITS BOARD OF DIRECTORS AND COMMITTEES, DECLARANT, AND ANY SUCCESSOR DECLARANT ARE NOT INSURERS AND THAT EACH PERSON USING THE PROPERTY ASSUMES ALL RISKS FOR LOSS OR DAMAGE TO PERSONS; TO THE AREA OF COMMON RESPONSIBILITY, THE IMPROVEMENTS THEREON AND THE CONTENTS THEREOF; AND TO PARCELS, THE IMPROVEMENTS THEREON AND THE CONTENTS THEREOF, RESULTING FROM ACTS OF THIRD PARTIES.

Id. This section highlights the limited effectiveness of security measures, and assigns lot owners responsibility for safety and security on their own lots.

The trial court wholly ignored this provision in the CC&Rs. It is not cited or quoted anywhere in the trial court's findings and conclusions. *See* CP 452-84. Instead, the court cited two other provisions of the CC&Rs that in any event do not support the court's conclusions. CP 475. First, the court cited § 5 of the CC&R Rules and Regulations which, like § 4.5 of the CC&Rs, merely *authorizes*—and does not require—the Association to address security on the Property. APP. 2 at Ex. C § 5.

Second, the court cited a provision in the Rules and Regulations relating to "Noxious Activities," which prohibits any activity

> which emits foul or obnoxious odors, fumes, dust, smoke, or pollution outside the Lot or which creates noise, unreasonable risk of fire or explosion, or other conditions which tend to disturb the peace or threaten the safety of the occupants and invitees of other Lots.

Id. at Ex. C § 3(i). From this provision, which relates to matters like fire and fumes, the court interpreted a broad right for any owner to demand that its neighbors prevent any condition or activity that might "threaten the safety" of people on other lots. CP 475. This provision provides no such general right.

First, the provision plainly relates to a narrow category of physical conditions comparable to pollution or fire. The trial court's much broader interpretation violates the well-established rule that a "general term used in conjunction with specific terms will be deemed to include only those things that are in the same class or nature as the specific ones." *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 716, 334 P.3d 116 (2014). The "Noxious Activities" provision therefore applies only to conditions such as fire or pollution.

The trial court's broad interpretation of the "Noxious Activities" provision also renders the warnings in § 4.5 of the CC&Rs—carefully drafted in bold, capital lettering—meaningless. Properly interpreted, the "Noxious Activities" provision—which relates only to a narrow category of physical conditions—does not conflict with § 4.5. But even if the trial court's broad reading of the "Noxious Activities" provision were

supportable, the more specific contract provision relating to safety and security (§ 4.5) would control over the more general provision (the "Noxious Activities" provision, as interpreted by the trial court). *Wright v. Safeco Ins. Co. of Am.*, 124 Wn. App. 263, 277, 109 P.3d 1 (2004) (specific contract provisions control over more general contract provisions). In other words, because § 4.5 specifically places responsibility for safety and security with lot owners, the general "Noxious Activities" provision cannot undo the effect of § 4.5.

Without the "Noxious Activities" provision, neither Everett Hangar nor the court can identify any provision in the CC&Rs that obligates any Defendant to undertake the safety and security measures demanded by Everett Hangar and the trial court. Perhaps for that reason, the court also suggested that Defendants violated the Snohomish County Code and Paine Field regulations. CP 475. But Everett Hangar alleged only violations of the CC&Rs—and for good reason. CP 578-80. Everett Hangar is not the entity charged with enforcing the Snohomish County Code and Paine Field regulations at the airport: Paine Field is. As Everett Hangar admits, it made Paine Field aware of its complaints about Museum activities, and Paine Field has required no additional security measures from Defendants. There are 500 planes and three other museums at Paine Field. RP 762-64, 1011. No one else is subject to the restrictions imposed by the trial court on the Museum. The court erred as a matter of law by inserting itself where Paine Field would not. It had no legal basis under the CC&Rs to do so,

particularly not when no harm has ever come to people or property at Everett Hangar.

2. The trial court's injunction is overly broad, arbitrary, and without legal basis

Even if the court had properly found that Defendants violated some duty to promote safety and security under the CC&Rs, the court's injunction is wholly inappropriate. Paragraphs 5-7 of the trial court's injunction relate to safety and security. None is justifiable.

Paragraph 5 prohibits "Defendants" from "allowing, permitting or suffering" any person (including Defendants' own agents) from accessing Lot 12 from Defendants' properties without Everett Hangar's permission. APP. 3 ¶ 5. This is overly broad. *King*, 125 Wn.2d at 520 (injunctions must be narrowly tailored). First, it flatly contradicts other easements in the CC&Rs, including owners' rights to use Lot 12's ramp *as is reasonably necessary* for airplane movement, and owners' easement rights over Areas of Common Responsibility on Lot 12 (including the Declarant's ongoing right to establish new easements over the Areas of Common Responsibility). APP. 2 §§ 12.4, 12.7. The court has no legal basis to disregard those easements over Lot 12.

Second, Paragraph 5 is impermissibly vague. CR 65(d). Even though the Museum uses volunteers, fencing provided by Paine Field, and other security measures (including deputies from the sheriff's office), the court has concluded that the Museum is "wide-open from a security standpoint." Given that expansive conclusion, if a Museum patron violates Museum rules, crosses a Paine Field-provided security fence, and accesses Lot 12, the court

may well find that the Museum "allowed" that access to occur in violation of the injunction. This provision would thus hold Defendants responsible for trespasses by third parties, in clear conflict with § 4.5 of the CC&Rs. The injunction is thus impermissibly vague because it does not impose specific requirements over which Defendants have full control.

Paragraph 6 prohibits "Defendants" from "propping open any security gate, door or entry point of the Premises of Lots 11 or 13 unless a security guard is immediately present at the gate at all times." APP. 3 ¶ 6. This injunction is arbitrary, overly broad, and unsupported by the record. There is no evidence, anywhere in the record, that any door has ever been "propped open" at any time on Lot 11, or that such an occurrence resulted in any violation of Everett Hangar's rights. With respect to Lot 13, the court bases this injunction on a Paine Field sign on the Lot 13 gate that reads, "Gates must remain locked and closed at all times." CP 475. This is a requirement that Paine Field, not Everett Hangar, is charged with enforcing, and Paine Field has not insisted that Defendants make any changes to their use of the Lot 13 gate.[21] *E.g.*, CP 253-54.

Paragraph 7 requires "Defendants" to construct a permanent security fence along the interior of Lot 13 until the court grants permission to remove it. APP. 3 ¶ 7. The trial court is usurping Paine Field's authority. The court itself acknowledged in its findings and conclusions that the

[21] If the Lot 13 gate really were required to be closed at all times, it would be a fence, not a gate. Paine Field permits this gate to be opened, and in fact approves Lot 13's use as a parking lot by helping plan Museum events and providing the bicycle fencing around Lot 13. The trial court's finding of fact number 55, finding that the Lot 13 gate had been "illegally" propped open on occasion, is unsupported by evidence. CP 468.

Lot 11, 12, and 13 lease agreements require Paine Field's approval for "any alteration of the appearance of the premises."[22] CP 480; *e.g.*, Ex. 7 § 1.02(b). The court also held, "There is no evidence that Snohomish County has or would approve additional fencing on Lots 11, 12, or 13." CP 480. For that reason, the court rejected Everett Hangar's request for a fence on Lot 12. *Id.* Nevertheless, the court inexplicably ordered a fence on Lot 13. Paine Field has already installed a permanent security fence on the exterior of Lot 13, *see* APP. 1, and has supplied the waist-high bicycle fencing that surrounds the interior of Lot 13. The court has no legal basis to insist that Paine Field—which is not a party to this action—permit an additional permanent fence on Paine Field property that Paine Field has not requested or approved.[23]

The required fence is also not narrowly tailored to remedy specific harms alleged by Everett Hangar. *King*, 125 Wn.2d at 520. Everett Hangar complains that Lot 13 was unmonitored at various times when it was in use, and Paragraph 6 of the trial court's injunction would require Lot 13 to be monitored if open. Although not required by Paine Field (as discussed above), monitoring guests is at least consistent with the Museum's policies when using its own lot (policies the court has not ordered modified). An additional fence, which has not been approved by Paine Field and which

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[22] There is good reason for this: Paine Field, which itself has contracted to use Lot 13 for airport events in the past, Exs. 238-39, may not want tall, permanent fencing along the interior of Lot 13, where it might impede aircraft movement or parking, for example.

[23] The CC&Rs also leave to the Association's "sole discretion" any changes to the exterior portions of the lots. APP. 2 § 10.2. The court has no legal basis to order the Association to construct a fence around Lot 13 irrespective of the uses to which Lot 13 may be put.

may limit the use of Lot 13 in ways not contemplated by the trial court, is broader than necessary. The court erred in ordering it.

C. The Trial Court Erred in Ruling for Everett Hangar on Count III of its Amended Complaint

In Count III of its amended complaint, Everett Hangar alleged that the Association has a duty to keep common areas safe, and complains that "Neither John Sessions, nor the Association he controls, have built or cooperated in building any kind of security barrier between Lots 11 and 12, or taken any other step to keep safe and secure the area common to the Lots or the easements across their aprons." CP 580. Count III alleged that John Sessions, Kilo Six, and the Association violated the CCRs. CP 579-80. The court erroneously held that, as to Count III, Everett Hangar was entitled to judgment against the Association "and its member organizations, Historic Hangars, LLC and Kilo Six, LLC." CP 478.

First, Everett Hangar did not allege Count III against Historic Hangars, so the court erred in holding that Historic Hangars violated it. CP 579.

Second, the court concluded that the *Association* failed to keep common areas safe and "enforce the CC&Rs." CP 478. The Association is a separate legal entity from its member entities, and the court had no legal basis to hold "its member organizations," Historic Hangars and Kilo Six, liable for alleged Association liabilities. *See, e.g., Truckweld Equip. Co. v. Olson*, 26 Wn. App. 638, 644, 618 P.2d 1017, 1021 (1980) (for purposes of piercing the corporate veil, an independent legal entity is separate from its members or owners).

Third, the Association itself violated no duty. As discussed above, the Association has no affirmative duty to undertake any particular actions to improve safety and security on the Property. The court erred in finding for Everett Hangar on Count III.

D. The Trial Court Should Have Dismissed All Claims Against John Sessions With Prejudice

After a full trial, the court found no violations by John Sessions, but nevertheless dismissed all claims against John Sessions *without* prejudice. CP 483. The court should have dismissed all claims against John Sessions *with* prejudice, as is appropriate after a trial on the merits. *Lawrence v. Dep't of Health*, 133 Wn. App. 665, 679, 138 P.3d 124 (2006).

E. The Trial Court Erred in Awarding Attorneys' Fees and Costs to Everett Hangar

For all the reasons described above, the court should have dismissed all of Everett Hangar's claims with prejudice and awarded Defendants their attorneys' fees and costs. Even if this Court were to affirm the trial court in whole or in part on the substantive issues, the trial court still erred in awarding attorneys' fees to Everett Hangar.

1. All parties prevailed on major issues, so Everett Hangar should not have been awarded fees

When Everett Hangar filed its complaint in February 2014, it sued for damages and injunctive relief and alleged five legal claims against five Defendants. CP 1028-39. It requested a jury trial on the damages issues. CP 1038. On summary judgment, the court dismissed Everett Hangar's damages claims with prejudice because Everett Hangar could provide no

evidence of actual damages. CP 676-78. Half the complaint was gone at that point.

With half the case already dismissed, Everett Hangar sought only injunctive relief at trial pursuant to its five claims against the five Defendants. After trial, the court found against only certain Defendants on only three of five claims, and the court granted only half the injunctive relief requested by Everett Hangar. CP 483, 449-51, 581. The court granted certain relief with respect to the use of Lot 11, and ordered a fence built around Lot 13. *See* APP. 3. The court did not enter relief with respect to John Sessions (who prevailed on all claims against him), and did not order a fence around Lot 12 (the most important issue to Everett Hangar in this lawsuit (*e.g.*, RP 100-01)). *Id.*

The claims won and lost by Everett Hangar are summarized in the chart below. A check mark indicates that the court found for Everett Hangar, at least in part, against the listed Defendant. An "x" indicates that the court found for the listed Defendant.

	Kilo 6 Owners Ass'n	Kilo Six, LLC	Historic Hangers, LLC	Historic Flight Foundation	John Sessions
Count I: Violation of Easement			✓	✓	✗
Count II: Violation of CC&R re Lot 11 Activities			✓	✓	✗

	Kilo 6 Owners Ass'n	Kilo Six, LLC	Historic Hangers, LLC	Historic Flight Foundation	John Sessions
Count III: Violation of CC&R re Safety & Security of Lots	✓[24]	25	26		✗
Count IV: Violation of Ass'n Bylaws	✗	✗			✗
Count V: Breach of Fiduciary Duty					✗

The requested relief awarded and denied is summarized in the next chart. Again, a check mark indicates that the court awarded the relief, at least in part, and an "x" indicates the court denied the relief requested by Everett Hangar.

Relief Requested	Awarded?
Prohibiting displays and other activity on Lot 11 (original and amended complaint)	✓
Damages (original complaint)	✗
Injunction against John Sessions prohibiting him from breaching fiduciary duties (amended complaint)	✗
Injunction prohibiting Defendants from blocking construction of fence around Lot 12 (amended complaint)	✗
Injunction prohibiting use of Lot 13 until new fence erected around interior with northern boundary of fence limited to northern edge of Everett Hangar's hangar (amended complaint)	✓[27]

[24] As explained above, the court erred in finding against the Association on Count III for reasons different from the errors made in finding against Defendants on Counts I and II. As with Counts I and II, however, for purposes of analyzing attorneys' fees, Defendants will assume judgment against the Association on Count III.

[25] For reasons that are unclear, the court found against Kilo Six on Count III even though the only duties alleged to have been breached belonged to the Association.

[26] For reasons that are unclear, the court found against Historic Hangars, LLC on Count III even though Everett Hangar did not allege Count III against Historic Hangars, and even though the only duties alleged to have been breached belonged to the Association.

[27] Despite Everett Hangar's request, the court did not diminish the usable space on Lot 13 by limiting the northern boundary of the ordered fence to the northern boundary of Everett Hangar's hangar. CP 451, 581.

As these charts show, Defendants successfully defended against major claims and most of the relief requested by Everett Hangar. Defendants incurred substantial fees and expenses defending against these claims, but they are less than half the amount Everett Hangar requested. Through trial, Defendants incurred approximately $360,083 in total fees, compared with the $819,053.57 requested by Everett Hangar.[28] CP 97, 391.

Under well-established Washington law, applied in case after case, attorneys' fees and costs should not be awarded in cases where all parties prevail on major issues.[29] Here, John Sessions prevailed on *all* claims against him. He is entitled to his reasonable attorneys' fees and costs. Everett Hangar prevailed on, at most, half the claims it alleged against the various other Defendants. Defendants prevailed on the rest. Everett Hangar was also awarded less than half the relief it requested, having been awarded only some of its requested injunctive relief and none of its requested damages. Under longstanding Washington law, there is no prevailing party

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[28] Everett Hangar's initial fee request also included some post-trial entries. CP 147-216.

[29] *Am. Nursery Prods., Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 235, 797 P.2d 477 (1990) (declining to award fees on appeal in contract case because both parties prevailed on major issues); *McGary v. Westlake Investors*, 99 Wn.2d 280, 288, 661 P.2d 971 (1983) (same, in case involving breach of lease); *Marassi v. Lau*, 71 Wn. App. 912, 916, 859 P.2d 605 (1993) ("[I]f both parties prevail on major issues, an attorney fee award is not appropriate."), *abrogated on other grounds by Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 490, 200 P.3d 683 (2009); *Sardam v. Morford*, 51 Wn. App. 908, 911-12, 756 P.2d 174 (1988) (affirming trial court's determination that neither party in lease dispute was prevailing party despite entry of money judgment in plaintiff's favor); *Tallman v. Durussel*, 44 Wn. App. 181, 189, 721 P.2d 985 (1986) (no prevailing party on appeal where each party prevailed on a major issue in dispute regarding promissory note); *Puget Sound Serv. Corp. v. Bush*, 45 Wn. App. 312, 320-21, 724 P.2d 1127 (1986) (declining to award fees on appeal in contract dispute because both parties prevailed on major issues and vacating the trial court's award of fees for the same reason); *Rowe v. Floyd*, 29 Wn. App. 532, 535-36, 629 P.2d 925 (1981) (affirming trial court's determination that no party was entitled to award of fees where judgment granted relief to both parties in real estate contract dispute).

in this action besides John Sessions, against whom Everett Hangar obtained no relief. The court should have ordered each other party to bear its own fees and expenses, and should have found that John Sessions was a prevailing party entitled to all his reasonable fees.

2. The trial court failed to apply the proportionality rule in awarding fees

Even if the court permissibly awarded attorneys' fees to parties other than John Sessions, the court was required to apply the proportionality approach to award fees and costs. *Cornish Coll. v. 1000 Vir. Ltd. P'ship*, 158 Wn. App. 203, 232, 242 P.3d 1 (2010). Application of the proportionality approach is mandatory. *See id.* at 234 (remanding for application of proportionality approach). Under the proportionality approach, each party is awarded attorneys' fees for those theories or claims upon which it prevails or against which it successfully defends, and the awards are then offset. *Id.* at 233-34; *see also Transpac Develop., Inc. v. Oh*, 132 Wn. App. 212, 130 P.3d 892 (2006) (reversing attorney fee award because court abused its discretion by failing to apply proportionality rule). Here, the court expressly declined to apply the proportionality rule, stating on the record that, if she was "wrong about that," this Court would "let [her] know that, as [it is] quick to do." RP 34-35 (June 6, 2015). This Court should reverse. The trial court should have applied the proportionality rule as required.

3. The trial court failed to scrutinize Everett Hangar's fee request and awarded unreasonable fees

The court awarded *every penny* of Everett Hangar's initial $819,053.57 fee request.[30] CP 53-54. In doing so, it abdicated its duty to take an active role in assessing the reasonableness of the fee request, and to exclude all wasteful or duplicative hours and all hours pertaining to unsuccessful theories or claims. *Mahler v. Szucs*, 135 Wn.2d 398, 434-35, 957 P.2d 632 (1998). The court also failed to justify its decision with required findings and conclusions. *Id.* at 435. For that reason alone, the Court should remand this matter to the trial court. *Id.*

Everett Hangar's fee request included 1,847.46 hours spent by six attorneys and three staff members. CP 144-45. Everett Hangar thus requested fees for nearly 800 hours more than Appellants for three times the number of lawyers. CP 76, 95-96. The request was flatly unreasonable. It also failed to subtract the hours spent on certain unsuccessful theories or claims, such as Count IV (violation of association bylaws); damages; unawarded, but requested, injunctive relief; and all claims against John Sessions.[31] The time sheets provided by Everett Hanger's attorneys were not sufficiently detailed to determine the precise number of hours spent on these unsuccessful claims and requests for relief, *see* CP 147-216, but the court was required to account for them.

This case could have, and should have, been handled much more efficiently, and the court was obligated to reduce hours that were not

[30] Everett Hangar also made a supplemental fee request. CP 48-51. The court did deny some of the requested fees in that case, but failed to apply the proportionality approach and, as discussed above, should not have awarded fees to Everett Hangar at all. CP 5.

[31] Everett Hangar purportedly subtracted time spent on its unsuccessful Count V. *E.g.*, CP 398-400.

reasonably spent. *E.g.*, *Mahler*, 135 Wn.2d at 434. These would include, for example, time spent on discovery motions that were never filed, *e.g.* CP 181-88, hours spent preparing for and taking a document custodian deposition that resulted in no discovery motions or requests, *e.g.*, CP 180-84, or hours allegedly spent defending or attending depositions that the attorney did not attend, CP 188 (Rheaume entry incorrectly suggesting he defended McCord deposition), CP 199 (Rheaume entry incorrectly suggesting he attended Schultz deposition). CP 98. They also include the hundreds of hours of Everett Hangar's expensive senior lawyer spent doing tasks that could have been delegated to others. *See* CP 76.

In sum, the court did not meet its obligation to scrutinize Everett Hangar's fee request and reduce it as required by longstanding case law. If the Court concludes that an award of attorneys' fees to Everett Hanger was appropriate, it should remand and order the court to enter findings and conclusions justifying any fee award to Everett Hangar, making appropriate deductions and using proportionality analyses. *Mahler*, 135 Wn.2d at 435.

VI. REQUEST FOR ATTORNEYS' FEES AND COSTS

Pursuant to RAP 18.1, Defendants ask that they be awarded attorneys' fees and costs as provided by § 4.2 of the CC&Rs or § 9.03 of the parties' leases with Paine Field. Ex. 5 § 9.03; APP. 2 § 4.2. As discussed above, the court erroneously awarded Everett Hangar attorneys' fees and costs pursuant to § 4.2 of the CC&Rs.

VII. CONCLUSION

The trial court misinterpreted and misapplied the Easement, wrongfully transferring control of the Museum's ramp to Everett Hangar. The trial court turned the Easement's limitation of reasonable necessity on its head, and essentially barred the Museum from using its own leased property. The court further ordered Defendants to take security measures neither required by the CC&Rs nor mandated or approved by Paine Field. The court therefore erred as a matter of law in finding for Everett Hangar and entering injunctive relief. Even if injunctive relief were appropriate, the court entered an injunction that was arbitrary, overly broad, vague, and unsupported by the record. The Court should reverse the trial court's injunctive relief and findings against Defendants.

The trial court also erred in awarding attorneys' fees and costs to Everett Hangar, and erred in analyzing and calculating that award. The Court should reverse and remand with instructions to (1) dismiss all of Everett Hangar's claims with prejudice, and (2) award Defendants their reasonable attorneys' fees and costs.

RESPECTFULLY SUBMITTED this 17th day of December, 2015.

HILLIS CLARK MARTIN & PETERSON P.S.

By _____
Louis D. Peterson, WSBA #5776
Jake Ewart, WSBA #38655

Attorneys for Defendants-Appellants
Kilo 6 Owners Association, Kilo Six, LLC, Historic Hangars, LLC, Historic Flight Foundation, and John Sessions

ND: 19813.008 4815-9299-2298v9

CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused a copy of the Brief of Appellants, with Appendix, to be served via legal messenger and email to the last known address of all counsel of record.

I certify under penalty of perjury under the laws of the state of Washington and the United States that the foregoing is true and correct.

DATED this 17th day of December, 2015, at Seattle, Washington.

Suzanne Powers

Appendix 2

No. 73504-7-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

EVERETT HANGAR, LLC, a Washington limited liability company, Plaintiff / Respondent, v. KILO 6 OWNERS ASSOCIATION, a Washington nonprofit corporation; KILO SIX, LLC, a Washington limited liability company; HISTORIC HANGARS, LLC, a Washington limited liability company; HISTORIC FLIGHT FOUNDATION, a Washington nonprofit corporation; and JOHN SESSIONS, an individual, Defendants / Appellants.	**APPELLANTS' MOTION FOR RECONSIDERATION**

I. INTRODUCTION AND RELIEF SOUGHT

The Court of Appeals erred when it affirmed the trial court's award of attorneys' fees to Plaintiff, Everett Hangar, LLC. Three of the five Defendants—Kilo 6 Owners Association, Kilo Six, LLC, and John Sessions—have now prevailed on all claims asserted against them. They are prevailing parties and entitled to an award of their attorneys' fees. The remaining two Defendants—Historic Hangars, LLC and Historic Flight Foundation—have prevailed on all damages claims and on most of the equitable claims asserted against them. Under the governing law,

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Tel: (206) 623-1745 Fax: (206) 623-7789

Everett Hangar is not the prevailing party. This Court should reconsider and reverse the award of attorneys' fees to Everett Hangar.

The trial court based its award of attorneys' fees on its mistaken conclusion that Everett Hangar had "prevailed on the majority of its claims brought in its Amended Complaint." CP 483. That conclusion was incorrect even before this appeal. In the trial court, Everett Hangar lost its damages claims against all Defendants, lost all of Counts IV and V, and lost all Counts (I through V) against John Sessions.

In affirming an award of fees to Everett Hangar, this Court mistakenly recited that the trial court had awarded Everett Hangar relief on Counts I through IV of its complaint. *Everett Hangar, LLC v. Kilo 6 Owners Ass'n*, No. 73504-7-I, slip op. at 28 (Wash. Ct. App. August 8, 2016) (hereinafter, "Slip op."). In fact, the trial court had already dismissed Count IV (and Count V) of the complaint. And this Court has now dismissed Count III and the core relief sought under Counts I and II. In affirming the attorneys' fees award, this Court did not properly consider the factors relevant to the determination of who is a prevailing party.

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Tel: (206) 623-1745 Fax: (206) 623-7789

Following this Court's decision on appeal, the disposition of Everett Hangar's claims against each Defendant is illustrated by this table:

	Kilo 6 Owners Ass'n	Kilo Six, LLC	Historic Hangers, LLC	Historic Flight Foundation	John Sessions
Damages for Counts I, II, III, IV and V	X Dismissed on SJ	X Dismissed on SJ	X Dismissed on SJ	X Dismissed on SJ	X Dismissed on SJ
Count I: Violation of Access Easement			✓X Dismissed in part on appeal	✓X Dismissed in part on appeal	X Dismissed at trial
Count II: Violation of CC&Rs			✓X Dismissed in part on appeal	✓X Dismissed in part on appeal	X Dismissed at trial
Count III: Association Violation of CC&Rs	X Dismissed on appeal	X Dismissed on appeal	X Dismissed on appeal		X Dismissed at trial
Count IV: Violation of Ass'n Bylaws	X Dismissed at trial	X Dismissed at trial			X Dismissed at trial
Count V: Breach of Fiduciary Duty					X Dismissed at trial

✓ = *Relief for Plaintiff* X = *Relief for Defendant* = *no claim asserted*

As shown in the table, Everett Hangar sued five Defendants. Each Defendant is entitled to an independent assessment of whether Plaintiff or that Defendant is the prevailing party. Defendants Kilo 6 Owners Association, Kilo Six, LLC, and John Sessions have prevailed on

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all claims asserted against them. They are unquestionably entitled to their attorneys' fees as prevailing parties at trial and on appeal.

As to the claims asserted against the remaining Defendants—Historic Hangars, LLC and Historic Flight Foundation—Everett Hangar prevailed on a few issues and Defendants prevailed on most issues. Because Everett Hangar and these Defendants each prevailed on major issues, attorneys' fees and costs should not be awarded to any of them.

II. IDENTITY OF MOVING PARTIES

The moving parties are Appellants Kilo 6 Owners Association (the "Association"), Kilo Six, LLC ("Kilo Six"), Historic Hangars, LLC ("Historic Hangars"), Historic Flight Foundation (the "Foundation"), and John Sessions ("Sessions"), all of whom were Defendants below.

III. ISSUE FOR RECONSIDERATION

Should the Court reconsider the portion of its decision affirming an award of attorneys' fees to Everett Hangar when three Defendants prevailed on all claims against them and the other two Defendants prevailed on major issues?

IV. FACTS RELEVANT TO MOTION

Everett Hangar obtained only a small fraction of its requested relief in this action. In its original Complaint, Everett Hangar alleged five Counts and sought both injunctive relief and damages:

> A. Enter a permanent injunction prohibiting Defendants, and all those acting in concert or participation with them, from operating a vintage aircraft museum static aircraft display on the Lot 11 apron, providing uncontrolled or poorly controlled public access to the Lot 11 apron or

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conducting any other similar operation on the Lot 11 apron inconsistent with the safe and efficient operation of all aircraft, including those operating out of the hangar on Lot 12;

B. *Award actual damages suffered by Plaintiff as a result of each breach of the easement, CC&Rs and Association Bylaws, and any profits of Defendants that are attributable to such breaches and are not taken into account in computing the actual damages;*

D[sic]. Award Plaintiff's costs, including attorneys' fees, pursuant to Sec. 4.2 of the CC&Rs;

E. Award prejudgment and post-judgment interest on applicable amounts; and

F. Award such other and further relief as this Court may deem just and proper.

CP 1038-39 (emphasis added). Upon Defendants' motion for summary judgment, the trial court dismissed all damages claims, leaving for trial only the injunctive relief sought in paragraph A of the Complaint. CP 676-78.

After Everett Hangar rested its case at trial, the trial court granted Everett Hangar leave to amend its Complaint. CP 569-82. In its Amended Complaint for Damages and Injunction, Everett Hangar sought the following relief:

A. Enter a permanent injunction prohibiting Defendants, and all those acting in concert or participation with them, from operating a vintage aircraft museum static aircraft display on the Lot 11 apron, providing uncontrolled or poorly controlled public access to the Lot 11 apron or conducting any other similar operation on the Lot 11 apron inconsistent with the safe and efficient operation of all aircraft, including those operating out of the hangar on Lot 12;

B. Enjoin Defendant John Sessions from breaching his fiduciary duties to Plaintiff by (a) controlling

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the Association for his own benefit, the detriment of Plaintiff, or (b) allowing activities on Lot 11 or Lot 13 that expose Plaintiff and its operations to unreasonable safety and security risks.

Enter a permanent injunction prohibiting Defendants and their agents, employees, officers and contractors are enjoined [sic] from permitting public access to Lot 13 for vehicle parking or any other purpose unless and until it first erects, at its expense, a fence identical in design and material to the existing Paine Field perimeter fencing, around the perimeter of that portion of Lot 13 to be used for public access, which shall connect at both ends to the Paine Field perimeter fencing. The northern boundary of the newly-erected security fence shall not extend further north than a line defined by the north wall of the Lot 12 hangar.

C. Enjoin Defendants from refusing to allow Everett Hangar to construct security fencing and a secured gate, at Everett Hangar's expense, identical in design and material to the existing Paine Field perimeter fencing, around the Lot 12 parking lot;

D. Award Plaintiff's costs, including attorneys' fees, pursuant to Sec. 4.2 of the CC&Rs:

E. Award prejudgment and post-judgment interest on applicable amounts; and

F. Award such other and further relief as this Court may deem just and proper.

CP 581.

After trial, the trial court dismissed Counts I through V against Sessions, dismissed all of Counts IV and V, and refused to order the relief sought in paragraphs B (1st subparagraph) and C. CP 483, 449-51. Everett Hangar did not appeal these decisions. The trial court's decision left only the following portions of the relief sought by Everett Hangar intact:

A. Enter a permanent injunction prohibiting Defendants, and all those acting in concert or participation with them, from operating a vintage aircraft museum static

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aircraft display on the Lot 11 apron, providing uncontrolled or poorly controlled public access to the Lot 11 apron or conducting any other similar operation on the Lot 11 apron inconsistent with the safe and efficient operation of all aircraft, including those operating out of the hangar on Lot 12;

B. ~~Enjoin Defendant John Sessions from breaching his fiduciary duties to Plaintiff by (a) controlling the Association for his own benefit, the detriment of Plaintiff, or (b) allowing activities on Lot 11 or Lot 13 that expose Plaintiff and its operations to unreasonable safety and security risks.~~

Enter a permanent injunction prohibiting Defendants and their agents, employees, officers and contractors are enjoined [sic] from permitting public access to Lot 13 for vehicle parking or any other purpose unless and until it first erects, at its expense, a fence identical in design and material to the existing Paine Field perimeter fencing, around the perimeter of that portion of Lot 13 to be used for public access, which shall connect at both ends to the Paine Field perimeter fencing. ~~The northern boundary of the newly-erected security fence shall not extend further north than a line defined by the north wall of the Lot 12 hangar.~~

C. ~~Enjoin Defendants from refusing to allow Everett Hangar to construct security fencing and a secured gate, at Everett Hangar's expense, identical in design and material to the existing Paine Field perimeter fencing, around the Lot 12 parking lot;~~

D. Award Plaintiff's costs, including attorneys' fees, pursuant to Sec. 4.2 of the CC&Rs:

E. Award prejudgment and post-judgment interest on applicable amounts; and

F. Award such other and further relief as this Court may deem just and proper.

After this Court's decision on appeal, nearly all of Everett Hangar's requested relief has been denied. Counts III, IV, and V have now been dismissed entirely. CP 483 (dismissing Counts IV and V);

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Slip op. at 25-26 (dismissing Count III). Consequently, all claims against three of the five Defendants—the Association, Kilo Six, and Sessions—have now been dismissed.[1] *See* CP 483 (relief under Counts I and II was awarded against only Historic Hangars and the Foundation). Everett Hangar is left with only partial relief on two of its five claims, and against only two of the five Defendants. *Id.*; Slip op. at 18, 25-27 (reversing most of the injunctive relief granted under Counts I and II, dismissing Count III, and dismissing Counts I through V against Sessions with prejudice).

After this Court's decision on appeal, the remaining relief sought in the Amended Complaint is as follows:

> A. Enter a permanent injunction prohibiting ~~Defendants~~ [*now, only Defendants Historic Hangars and the Foundation*], and all those acting in concert or participation with them, from ~~operating a vintage aircraft museum static aircraft display on the Lot 11 apron~~, providing uncontrolled or poorly controlled public access to the ~~Lot 11 apron~~ [*now, only the object free area on the Lot 11 apron*]~~or conducting any other similar operation on the Lot 11 apron inconsistent with the safe and efficient operation of all aircraft, including those operating out of the hangar on Lot 12~~;
>
> B. ~~Enjoin Defendant John Sessions from breaching his fiduciary duties to Plaintiff by (a) controlling the Association for his own benefit, the detriment of Plaintiff, or (b) allowing activities on Lot 11 or Lot 13 that expose Plaintiff and its operations to unreasonable safety and security risks.~~
>
> ~~Enter a permanent injunction prohibiting Defendants and their agents, employees, officers and contractors are enjoined [sic] from permitting public access~~

[1] On pages 22 and 30 of the Court's opinion, the Court suggests that Kilo Six is liable for certain breaches. However, this Court has affirmed relief for Everett Hangar under only Counts I or II, for which Everett Hangar received relief against only Historic Hangars and the Foundation. CP 483.

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999 Third Avenue, Suite 4600
Seattle, Washington 98104
Tel: (206) 623-1745 Fax: (206) 623-7789

~~to Lot 13 for vehicle parking or any other purpose unless and until it first erects, at its expense, a fence identical in design and material to the existing Paine Field perimeter fencing, around the perimeter of that portion of Lot 13 to be used for public access, which shall connect at both ends to the Paine Field perimeter fencing. The northern boundary of the newly-erected security fence shall not extend further north than a line defined by the north wall of the Lot 12 hangar.~~

C. ~~Enjoin Defendants from refusing to allow Everett Hangar to construct security fencing and a secured gate, at Everett Hangar's expense, identical in design and material to the existing Paine Field perimeter fencing, around the Lot 12 parking lot;~~

D. Award Plaintiff's costs, including attorneys' fees, pursuant to Sec. 4.2 of the CC&Rs:

E. Award prejudgment and post-judgment interest on applicable amounts; and

F. Award such other and further relief as this Court may deem just and proper.

Everett Hangar has lost almost all of the injunctive relief it requested, and all of its damages claims.

This conclusion is confirmed by an examination of how well Everett Hangar fared under each of the five Counts of its Amended Complaint against each Defendant. The following table (which also appears in the introduction) shows which Counts Everett Hangar asserted against which Defendants, and indicates where Everett Hangar received any relief against any of the Defendants. A check mark ("✓") indicates Everett Hangar received relief. An "X" indicates that the listed Defendant received relief. A shaded box (with no mark) indicates Everett Hangar did not assert the indicated Count against the listed Defendant.

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Seattle, Washington 98104
Tel: (206) 623-1745 Fax: (206) 623-7789

	Kilo 6 Owners Ass'n	Kilo Six, LLC	Historic Hangers, LLC	Historic Flight Foundation	John Sessions
Damages for Counts I, II, III, IV and V	**X** Dismissed on SJ	**X** Dismissed on SJ	**X** Dismissed on SJ	**X** Dismissed on SJ	**X** Dismissed on SJ
Count I: Violation of Access Easement			✓**X** Dismissed in part on appeal	✓**X** Dismissed in part on appeal	**X** Dismissed at trial
Count II: Violation of CC&Rs			✓**X** Dismissed in part on appeal	✓**X** Dismissed in part on appeal	**X** Dismissed at trial
Count III: Association Violation of CC&Rs	**X** Dismissed on appeal	**X** Dismissed on appeal	**X** Dismissed on appeal		**X** Dismissed at trial
Count IV: Violation of Ass'n Bylaws	**X** Dismissed at trial	**X** Dismissed at trial			**X** Dismissed at trial
Count V: Breach of Fiduciary Duty					**X** Dismissed at trial

✓ = *Relief for Plaintiff* *X = Relief for Defendant* = *no claim asserted*

As this chart makes clear, Defendants successfully defended against almost all of the claims asserted by Everett Hangar. The only relief partially won by Everett Hangar falls within Counts I and II against only Historic Hangars and the Foundation. And after this Court's decision on appeal, Everett Hangar has lost the core relief sought under these Counts, too. Historic Hangars and the Foundation are now prohibited only from blocking the object free area necessary to move aircraft across Lot 11 and

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999 Third Avenue, Suite 4600
Seattle, Washington 98104
Tel: (206) 623-1745 Fax: (206) 623-7789

from propping open entrances to Lots 11 and 13 without appropriate monitors. This is only a fraction of the relief Everett Hangar requested in the trial court. Defendants have prevailed on Everett Hangar's claims (1) for damages, (2) for a jet blast easement, (3) for a fence around the Lot 12 parking lot,[2] (4) for a fence around the airport side of Lot 13, (5) for a prohibition of museum displays on any portion of the Lot 11 ramp, (6) for the right to block Defendants' easement access across the Lot 12 ramp, and (7) for breaches of fiduciary duty.

Nevertheless, on the issue of attorney fees, this Court stated, "Everett Hangar brought claims I through IV of its complaint under the CC&Rs or the Association bylaws. The CC&R fee provision applies only to these claims. Here, the trial court awarded Everett Hangar relief *on each of these claims* and thus *properly awarded Everett Hangar attorney fees*." Slip op. at 28 (emphasis added). This statement is plainly wrong. The trial court dismissed all of Count IV. CP 483. This Court dismissed all of Count III. Slip op. at 25-26. And this Court reversed much of the injunctive relief granted to Everett Hangar under Counts I and II. Slip op. at 16-18, 24-25.

V. GROUNDS FOR RELIEF AND ARGUMENT

With regard to the issue of attorneys' fees, this Court erred in two respects. First, the Court erred when it denied attorneys' fees to the Association, Kilo Six, and Sessions. Slip op. at 30. Those Defendants

[2] Everett Hangar considered the Lot 12 fence the most important relief it requested, and it was the issue that started this litigation. RP 100-01.

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999 Third Avenue, Suite 4600
Seattle, Washington 98104
Tel: (206) 623-1745 Fax: (206) 623-7789

prevailed on all claims asserted against them, and they are entitled to their attorneys' fees incurred in the trial court and on appeal.[3] Second, the Court erred when it held that the trial court properly awarded attorneys' fees to Everett Hangar. Slip. op. at 28. Everett Hangar is not entitled to attorneys' fees because it has lost all of its claims against three Defendants and most of the relief it sought against the only two remaining Defendants, Historic Hangars and the Foundation.

A. THE COURT SHOULD AWARD THE ASSOCIATION, KILO SIX, AND SESSIONS THEIR ATTORNEYS' FEES AT TRIAL AND ON APPEAL BECAUSE THEY PREVAILED ON ALL CLAIMS.

In cases where a plaintiff asserts claims against multiple defendants, a court abuses its discretion if it fails to consider each defendant separately in determining whether any party is a prevailing party for purposes of awarding attorneys' fees. *Cornish Coll. of the Arts v. 1000 Virginia Ltd. P'ship*, 158 Wn. App. 203, 233, 242 P.3d 1 (2010). A defendant prevails by successfully defending against the plaintiff's claims. *Id.* at 231. For example, in *Cornish College* the plaintiff tenant leased property from Virginia Limited Partnership, whose general partner was Virginia-Terry, LLC, whose managing member was Donn Etherington, Jr. *Id.* at 210-11. The plaintiff sued Virginia Limited

[3] Counts I-V all arise from the CC&Rs, and must all be included in the attorneys' fee analysis. Counts I-IV indisputably arise out of the Association bylaws and the CC&Rs, which contain the applicable attorneys' fee provision. Slip op. at 28. In its opinion, the Court suggests Count V does not also arise from the bylaws and CC&Rs, and therefore is not included in the attorneys' fee analysis. *Id.* This is not accurate. Count V alleges breaches of fiduciary duties by Sessions in his role as a director of the Association. Any fiduciary duties owed by Sessions could arise only from the CC&Rs and bylaws, which establish the Association and its duties.

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999 Third Avenue, Suite 4600
Seattle, Washington 98104
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and Etherington for specific performance of a contractual option to purchase the leased property and for wrongful eviction. *Id.* at 214. Virginia Limited and Etherington asserted various counterclaims for breach of the lease, tortious interference with economic relations, and slander of title. *Id.* The trial court dismissed the counterclaims, granted the plaintiff's claim for specific performance against Virginia Limited, dismissed the plaintiff's claim for specific performance against Etherington, and awarded the plaintiff its attorneys' fees jointly and severally against Virginia Limited and Etherington. *Id.*

Etherington appealed the award of fees against him, and the Court of Appeals reversed. *Id.* at 230-33. The court held that the trial court abused its discretion by failing to consider the defendants separately. *Id.* at 233. The court made clear that, in multiparty litigation, a court must determine who is a prevailing party on a party-by-party basis:

> Without piercing the corporate veil, the trial court cannot simply disregard the liability implications of the business structures of Virginia Limited and Virginia–Terry, LLC. Thus, the trial court was compelled to evaluate not only which party substantially prevailed, but also *against whom* that party prevailed. If Virginia Limited and Etherington are not evaluated individually in determining who is the substantially prevailing party, then Etherington would be liable for the full amount of Cornish's attorney fees and costs even if he were not found liable on any of Cornish's claims. This cannot be the correct result, particularly where all of Cornish's claims against Etherington were resolved prior to trial. The trial court abused its discretion in failing to consider Virginia Limited and Etherington separately when determining which party substantially prevailed.

Id. at 232-33 (emphasis in original). This Court must engage in the same party-by-party analysis here.

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999 Third Avenue, Suite 4600
Seattle, Washington 98104
Tel: (206) 623-1745 Fax: (206) 623-7789

However, neither this Court nor the trial court engaged in the party-by-party analysis required by *Cornish College*. 158 Wn. App. at 233. Instead, the various Defendants and the claims asserted against them have been conflated, and Everett Hangar was awarded its attorneys' fees without analysis. Slip op. at 28.

The Association, Kilo Six, and Sessions prevailed on all of the claims asserted against them. The trial court found no basis to hold Sessions personally liable for any of Counts I through V, dismissing those claims against him *without* prejudice. CP 479, 483. This Court affirmed the dismissal of all claims against Sessions *with* prejudice. Slip op. at 26-27. Sessions therefore wholly prevailed on every claim asserted against him, and he is a prevailing party as a matter of law.

Everett Hangar asserted only two Counts against the Association and Kilo Six: Counts III and IV. CP 579-80. The trial court dismissed Count IV in its entirety, but awarded some injunctive relief against the Association and Kilo Six under Count III. CP 483. On appeal, this Court reversed the trial court's determination of liability under Count III. Slip op. at 25-26. Consequently, all claims against the Association and Kilo Six have now been dismissed in their entirety. Like Sessions, the Association and Kilo Six are also prevailing parties as a matter of law.

The Court should order the trial court to determine an appropriate award of attorneys' fees to the Association, Kilo Six, and Sessions for fees incurred in proceedings before the trial court. The Court should also award the Association, Kilo Six, and Sessions their attorneys' fees on appeal.

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999 Third Avenue, Suite 4600
Seattle, Washington 98104
Tel: (206) 623-1745 Fax: (206) 623-7789

B. THE COURT SHOULD REVERSE THE AWARD OF FEES TO EVERETT HANGAR BECAUSE DEFENDANTS HISTORIC HANGARS AND THE FOUNDATION PREVAILED ON MAJOR ISSUES.

When both parties prevail on major issues, neither is a substantially prevailing party, and no award of attorneys' fees is appropriate. *McGary v. Westlake Investors*, 99 Wn.2d 280, 288, 661 P.2d 971 (1983). In *McGary*, commercial tenants brought a declaratory judgment action to determine lease rights regarding rent increases and parking. *Id.* at 281. The trial court entered judgment for the landlord and awarded the landlord its attorneys' fees. *Id.* at 281-82. The Court of Appeals affirmed, and the Supreme Court accepted review. *Id.* at 282. The Supreme Court affirmed on the issue of rent but reversed on the issue of parking. *Id.* at 286-88. Because both parties prevailed on major issues, the Supreme Court held that neither party substantially prevailed, reversed trial court's award of attorneys' fees, and declined to award attorneys' fees to either party. *Id.* at 288.

The Court of Appeals applied this principle more recently in *Seashore Villa Association v. Hugglund Family Limited Partnership*, 163 Wn. App. 531, 260 P.3d 906 (2011), *review denied*, 173 Wn.2d 1036 (2012). In *Seashore*, an association of mobile home tenants brought an action against their landlord seeking injunctive and declaratory relief. 163 Wn. App. at 536-37. The parties disputed who was responsible for maintaining carports and sheds built on the mobile home lots, and whether the landlord could remove the carports and sheds. *Id.* The landlord also brought a separate action seeking a declaration that a letter it had sent to

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999 Third Avenue, Suite 4600
Seattle, Washington 98104
Tel: (206) 623-1745 Fax: (206) 623-7789

the tenants asking them to accept ownership and responsibility for the carports and sheds did not violate the Manufactured/Mobile Home Landlord-Tenant Act (MHLTA). *Id.* at 537. The actions were tried together and then consolidated for appeal. *Id.* at 537-38. The trial court entered judgment for the tenants in both cases, and issued a permanent injunction enjoining the landlord from (1) transferring responsibility for maintaining the carports or sheds to the tenants, or (2) removing the carports or sheds. *Id.* The trial court awarded the tenants their attorneys' fees. *Id.* at 538.

On appeal, the Court of Appeals reversed half of the injunctive relief and the fee award. The court reversed the injunction prohibiting the landlord from removing the carports or sheds. *Id.* at 546-47. But the court affirmed the determination that the landlord's letter violated the MHLTA and affirmed the injunction prohibiting the landlord from transferring responsibility for maintaining the carports and sheds to the tenants. *Id.* at 547. The court determined that both parties prevailed on major issues: the tenants on the issue of the MHLTA violation and responsibility for maintaining the carports and sheds (half of the injunctive relief), and the landlord on its right to remove carports and sheds from the tenants' properties (the other half of the injunctive relief). *Id.* The court therefore held that neither party substantially prevailed, reversed the trial court's award of fees, and denied both parties' requests for fees on appeal. *Id.*

Seashore represents a decades-old line of cases holding that when both parties prevail on major issues, neither party substantially prevails.

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999 Third Avenue, Suite 4600
Seattle, Washington 98104
Tel: (206) 623-1745 Fax: (206) 623-7789

E.g., *Hertz v. Riebe*, 86 Wn. App. 102, 105-07, 936 P.2d 24 (1997) (affirming trial court's determination that neither party substantially prevailed in lawsuit between prospective buyer and seller of real estate where prospective buyer was entitled to rescind purchase and sale agreement and recover earnest money deposit and seller was entitled to recover rent and other damages); *Wesche v. Martin*, 64 Wn. App. 1, 13, 822 P.2d 812 (1992) (neither party substantially prevailed in action to enforce promissory notes where plaintiff prevailed on the issue of whether the notes bore interest and defendants prevailed on the issue of whether plaintiff was a holder-in-due course); *Puget Sound Serv. Corp. v. Bush*, 45 Wn. App. 312, 320-21, 724 P.2d 1127 (1986) (neither party substantially prevailed where plaintiff seller of real estate prevailed on burden of proof issue and defendant prospective buyer of real estate prevailed on election of remedies issue); *Rowe v. Floyd*, 29 Wn. App. 532, 535-36, 629 P.2d 925 (1981) (affirming trial court's determination that there was no substantially prevailing party where plaintiff sought forfeiture of real estate contract for failure to make $20,000 payment and defendant defeated request for forfeiture and reduced amount owed to plaintiff to $16,475).

As in *Seashore* and the related cases, Everett Hangar, Historic Hangars, and the Foundation each prevailed in part on Counts I and II. Although Everett Hangar has retained some relief after appeal, Historic Hangars and the Foundation have prevailed on all claims for damages, prevailed on Everett Hangar's request for a jet blast easement (thereby

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Tel: (206) 623-1745 Fax: (206) 623-7789

preserving Historic Hangars' and the Foundation's ability to use the Lot 11 apron), prevailed on the injunction barring them from using their easements across Lot 12 without Everett Hangar's express advance permission, and prevailed on Everett Hangar's request for a fence enclosing Lot 13. CP 677; Slip op. at 16-18, 24-25.

Because Historic Hangars and the Foundation prevailed on most of relief requested by Everett Hangar, none of these parties is entitled to an award of their fees incurred in the trial court proceedings or on appeal. Under Washington law, Historic Hangars and the Foundation are *not* required to prevail on *all* claims to avoid a fee award. If they had prevailed on all claims, they themselves would be entitled to fees (as are the Association, Kilo Six, and Sessions). Instead, there is a middle ground where parties must bear their own fees when the plaintiff and defendants each prevail on major issues. This is such a case.

VI. CONCLUSION

The Association, Kilo Six, and Sessions prevailed on all claims asserted against them. They are unequivocally prevailing parties entitled to an award of their attorneys' fees incurred before the trial court and on appeal. With regard to Counts I and II, Everett Hangar, Historic Hangars and the Foundation each prevailed in part, and none of them is a prevailing party entitled to attorneys' fees.

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Tel: (206) 623-1745 Fax: (206) 623-7789

The Court should grant this motion for reconsideration, reverse the award of attorneys' fees to Everett Hangar, and award attorneys' fees to the Association, Kilo Six, and Sessions.

Respectfully submitted this 29th day of August 2016.

HILLIS CLARK MARTIN & PETERSON P.S.

By _____

Louis D. Peterson, WSBA #5776
Jake Ewart, WSBA #38655

Attorneys for Defendants / Appellants
Kilo 6 Owners Association, Kilo Six, LLC, Historic Hangars, LLC, Historic Flight Foundation, and John Sessions

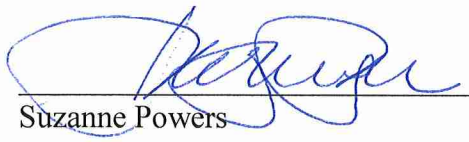
HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Tel: (206) 623-1745 Fax: (206) 623-7789

CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused a copy of this motion to be served via legal messenger and email to the last known address of all counsel of record.

I certify under penalty of perjury under the laws of the state of Washington and the United States that the foregoing is true and correct.

DATED this 29th day of August, 2016, at Seattle, Washington.



Suzanne Powers

ND: 19813.008 4841-7511-2502v7

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Tel: (206) 623-1745 Fax: (206) 623-7789

Appendix 3

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

EVERETT HANGAR, LLC, a Washington limited liability company, Respondent, v. KILO 6 OWNERS ASSOCIATION, a Washington nonprofit corporation; KILO SIX, LLC, a Washington limited liability company; HISTORIC HANGARS, LLC, a Washington limited liability company; HISTORIC FLIGHT FOUNDATION, a Washington nonprofit corporation; and JOHN SESSIONS, an individual, Appellants.	No. 73504-7-I ORDER DENYING APPELLANTS' MOTION FOR RECONSIDERATION

The appellants, Kilo 6 Owners Association, Kilo Six LLC, Historic Hangars LLC, Historic Flight Foundation, and John Sessions, having filed a motion for reconsideration herein, and the hearing panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 31st day of AUGUST, 2016.

FOR THE COURT:

Leach, J.

Judge

Appendix 4

Court of Appeals Case No. 73504-7-I

SUPREME COURT
OF THE STATE OF WASHINGTON

EVERETT HANGAR, LLC, a Washington limited liability company,
Respondent,

v.

KILO 6 OWNERS ASSOCIATION, a Washington nonprofit corporation; KILO SIX, LLC, a Washington limited liability company; HISTORIC HANGARS, LLC, a Washington limited liability company; HISTORIC FLIGHT FOUNDATION, a Washington nonprofit corporation; and JOHN SESSIONS, an individual
Petitioners.

PETITION FOR REVIEW

HILLIS CLARK MARTIN & PETERSON P.S.
Louis D. Peterson, WSBA #5776
Jake Ewart, WSBA #38655
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745

ATTORNEYS FOR PETITIONERS

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Singleton v. Frost,
108 Wn.2d 723, 742 P.2d 1224 (1987) 1, 11, 12, 14

RULES

RAP 13.4 ..... 4, 11, 17, 18

I. INTRODUCTION

The Court of Appeals failed to comply with binding Supreme Court authority mandating the award of attorneys' fees to prevailing parties when a contract provides for fees. Plaintiff sued five Defendants. Three Defendants have successfully defeated every claim asserted against them. They are prevailing parties entitled to attorneys' fees. The Court of Appeals failed to award them their fees, and they seek review to correct this error.

When a contract provides for attorneys' fees to the prevailing party, a party who prevails on every claim is unquestionably entitled to an award of its fees. That is black letter law, and the law as enunciated by this Court. *Singleton v. Frost*, 108 Wn.2d 723, 742 P.2d 1224 (1987). This is an issue of substantial public interest to parties engaged in litigation.

Here, three of the five Defendants—John Sessions, Kilo 6 Owners Association, and Kilo Six, LLC—have won everything. On summary judgment, they defeated all damages claims. At trial, they defeated some of Plaintiff's equitable claims. On appeal, they defeated the rest

of Plaintiff's claims. After appeal, none of Plaintiff's claims against them survived:

	Defendant	**Result**
Count I	Sessions	Dismissed
Count II	Sessions	Dismissed
Count III	Sessions The Association Kilo Six	Dismissed
Count IV	Sessions The Association Kilo Six	Dismissed
Count V	Sessions	Dismissed

Inexplicably, the Court of Appeals failed to award attorneys' fees to these prevailing Defendants, and it affirmed the trial court's award of attorneys' fees to Plaintiff. This is clear error, directly contrary to Supreme Court authority, and should be reversed.

The Court of Appeals also failed to follow this Court's attorneys' fees precedent with regard to the other two Defendants—Historic Hangars, LLC and Historic Flight Foundation. These two Defendants defeated all damages claims on summary judgment. They defeated some of Plaintiff's equitable claims at trial. On appeal, they defeated most, but not all, of Plaintiff's remaining claims. In these circumstances, where both plaintiff and defendants win significant issues, neither side is the prevailing party

entitled to attorneys' fees. That is the law as enunciated by this Court. *McGary v. Westlake Investors*, 99 Wn.2d 280, 661 P.2d 971 (1983).

The following table shows the dismissal of almost all of the relief sought against these Defendants.

	Defendant	**Relief**
Count I	Historic Hangars The Foundation	~~Damages~~ ~~Jet Blast Easement~~ Movement Easement
Count II	Historic Hangars The Foundation	~~Damages~~ ~~No Access to Lot 12~~ ~~Lot 12 Fence~~ ~~Lot 13 Fence~~ Gate Monitors[1]

The Court of Appeals incorrectly affirmed the award of attorneys' fees to Plaintiff, directly contrary to binding Supreme Court authority. No attorneys' fees should have been awarded under these circumstances. This Court should accept review and reverse the Court of Appeals.

II. IDENTITIES OF PETITIONERS

Petitioners/Defendants Kilo 6 Owners Association (the "Association"), Kilo Six, LLC ("Kilo Six"), Historic Hangars, LLC ("Historic Hangars"), Historic Flight Foundation (the "Foundation"), and John Sessions ask this Court to accept review of the Court of Appeals decision terminating review.

[1] The trial court granted this relief, but Everett Hangar did not request it.

III. CITATION TO COURT OF APPEALS DECISION

The Court of Appeals affirmed in part and reversed in part the judgment entered by the trial court. *Everett Hangar, LLC v. Kilo 6 Owners Ass'n*, No. 73504-7-I (Wash. Ct. App. August 8, 2016) (hereinafter, "Slip. op."). A copy of the decision is attached as Appendix A.

Defendants moved for reconsideration, which the Court of Appeals denied. A copy of the order denying reconsideration is attached as Appendix B.

IV. ISSUES PRESENTED FOR REVIEW

Should this Court accept review under RAP 13.4(b)(1), (2), and (4) because the Court of Appeals failed to award attorneys' fees as directed by this Court's precedent and Court of Appeals precedent, and because awards of attorneys' fees are important to the disposition of many civil cases throughout our state?

V. STATEMENT OF THE CASE

A. Summary of Dispute

This case is a dispute among the owners of three neighboring lots along the Kilo 7 taxiway at Paine Field. Plaintiff, Everett Hangar, operates a corporate jet hangar located next to a vintage aircraft museum. Everett Hangar sued five parties—its neighboring owners, the museum, an owners association, and one individual—in an attempt to shut down the museum

activities on the museum's ramp, and to severely limit other activities, such as public air shows sponsored by Paine Field. But Everett Hangar's effort has failed. After the Court of Appeals decision, Defendants may continue to use their properties for their intended purposes.

Snohomish County is the ground lessor of each of the lots at issue, which run west to east and are described as Lots 11, 12, and 13. Historic Hangars is the ground lessee for the western lot (Lot 11). Historic Hangars leases Lot 11 to the Foundation, a non-profit corporation that operates the museum out of the hangar on Lot 11.

Everett Hangar is the ground lessee of Lot 12 (the middle lot, immediately east of Lot 11). Everett Hangar is owned by Dean Weidner, who operates two private jets out of the hangar on Lot 12. Dean Weidner, the Chief Executive Officer of Weidner Investment Services, uses the jets for business and personal purposes.

Kilo Six is the ground lessee for Lot 13 (immediately east of Lot 12). Lot 13 does not have a hangar built on it, and Kilo Six permits the Foundation to use Lot 13 for parking for guests attending events hosted by the Foundation. John Sessions is the managing member of Historic Hangars and Kilo Six, and is president of the Foundation.

All three lots are governed by the amended and restated ground leasehold declaration of covenants, conditions, and restrictions

(the "CC&Rs"), which created the Kilo 6 Owners Association. All three lots are encumbered by the same mutual easement:

> **12.7 Ingress and Egress Easement for Aircraft.** Each Owner shall have an ingress and egress easement over and across such portions of the airplane ramps located on any Lot as is reasonably necessary to move aircraft to or from any building and the adjacent properties on which taxiways, runways, and airport facilities are located.

The scope of this easement was the central issue of this lawsuit.

Everett Hangar commenced this lawsuit against Sessions, the Association, Kilo Six, Historic Hangars, and the Foundation, seeking damages and injunctive relief relating to the easement and other aspects of the Foundation's use of Lots 11 and 13. The CC&Rs provide for attorneys' fees to the prevailing party.

B. After the Court of Appeals Decision, Three Defendants Have Totally Prevailed, and the Other Two Defendants Have Prevailed on Major Issues.

The trial court awarded Everett Hangar only a small fraction of the relief it requested.[2] The trial court dismissed all claims for damages on summary judgment. After trial, the court dismissed all claims against Sessions, dismissed Count IV, and granted only limited injunctive relief under Counts I through III against Historic Hangars, the Foundation, and the Association.

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[2] *See* CP 676-78 (summary judgment) and CP 483 (conclusions of law).

Defendants appealed, and the Court of Appeals reversed most of the relief granted to Everett Hangar.[3] Counts III, IV, and V have now been dismissed entirely. Consequently, all claims against three of the five Defendants—the Association, Kilo Six, and Sessions—have now been dismissed.[4] Everett Hangar is left with only partial relief on two of its five claims, and against only two of five Defendants.

During the trial, Everett Hangar was allowed to amend its complaint to reflect the relief it sought. Everett Hangar's lack of success in this case is best illustrated by reviewing the relief it requested in its Amended Complaint. CP 580-81. The following strike-outs reflect the disposition of its claims for relief after the Court of Appeals decision:

> Plaintiff respectfully requests the Court:
>
> A. Enter a permanent injunction prohibiting ~~Defendants~~ [*now, only Defendants Historic Hangars and the Foundation*], and all those acting in concert or participation with them, from ~~operating a vintage aircraft museum static aircraft display on the Lot 11 apron~~, providing uncontrolled or poorly controlled public access to the ~~Lot 11 apron~~ [*now, only the object free area on the Lot 11 apron*]~~or conducting any other similar operation on the Lot 11 apron inconsistent with the safe and efficient~~

[3] *See* Slip op. at 18, 25-27 (reversing most of the injunctive relief under Counts I and II, dismissing County III, and dismissing Counts I through V against Sessions with prejudice).

[4] On pages 22 and 30 of its decision, the Court of Appeals suggested that Kilo Six was liable for certain breaches. However, the Court of Appeals affirmed relief for Everett Hangar under only Counts I or II, for which Everett Hangar received relief against only Historic Hangars and the Foundation. CP 483.

~~operation of all aircraft, including those operating out of the hangar on Lot 12;~~

B. ~~Enjoin Defendant John Sessions from breaching his fiduciary duties to Plaintiff by (a) controlling the Association for his own benefit, the detriment of Plaintiff, or (b) allowing activities on Lot 11 or Lot 13 that expose Plaintiff and its operations to unreasonable safety and security risks.~~

~~Enter a permanent injunction prohibiting Defendants and their agents, employees, officers and contractors are enjoined [sic] from permitting public access to Lot 13 for vehicle parking or any other purpose unless and until it first erects, at its expense, a fence identical in design and material to the existing Paine Field perimeter fencing, around the perimeter of that portion of Lot 13 to be used for public access, which shall connect at both ends to the Paine Field perimeter fencing. The northern boundary of the newly-erected security fence shall not extend further north than a line defined by the north wall of the Lot 12 hangar.~~

C. ~~Enjoin Defendants from refusing to allow Everett Hangar to construct security fencing and a secured gate, at Everett Hangar's expense, identical in design and material to the existing Paine Field perimeter fencing, around the Lot 12 parking lot;~~

D. Award Plaintiff's costs, including attorneys' fees, pursuant to Sec. 4.2 of the CC&Rs:

E. Award prejudgment and post-judgment interest on applicable amounts; and

F. Award such other and further relief as this Court may deem just and proper.

Everett Hangar has lost all of its damages claims and almost all of the injunctive relief it requested.

This conclusion is confirmed by an examination of how well Everett Hangar fared under each of the five Counts of its Amended Complaint against each Defendant. The following table shows which Counts Everett Hangar asserted against which Defendants, and indicates where Everett Hangar received any relief against any of the Defendants. A check mark ("✓") indicates Everett Hangar received some relief. An "X" indicates that the listed Defendant received relief. A shaded box (with no mark) indicates Everett Hangar did not assert the indicated Count against the listed Defendant.

	Defendants Who Prevailed on All Claims			**Defendants Who Prevailed on Most Claims**	
	Sessions	The Association	Kilo Six	Historic Hangers	The Foundation
Damages (All Counts)	X Dismissed on SJ	X Dismissed on SJ	X Dismissed on SJ	X Dismissed on SJ	X Dismissed on SJ
Count I (Injunctive Relief)	X Dismissed at trial			✓X Dismissed in part on appeal	✓X Dismissed in part on appeal
Count II (Injunctive Relief)	X Dismissed at trial			✓X Dismissed in part on appeal	✓X Dismissed in part on appeal
Count III (Injunctive Relief)	X Dismissed at trial	X Dismissed on appeal	X Dismissed on appeal	X Dismissed on appeal	
Count IV (Injunctive Relief)	X Dismissed at trial	X Dismissed at trial	X Dismissed at trial		
Count V (Injunctive Relief)	X Dismissed at trial				

✓ = Relief for Plaintiff X = Relief for Defendant = no claim asserted

As this chart makes clear, Defendants successfully defended against almost all of the claims asserted by Everett Hangar. The only relief partially won by Everett Hangar falls within Counts I and II against only Historic Hangars and the Foundation. And after the Court of Appeals decision, Everett Hangar has lost the core relief sought under these Counts, too. Historic Hangars and the Foundation are now prohibited only from blocking the area necessary to move aircraft across Lot 11, and from propping open entrances to Lots 11 and 13 without appropriate monitors. This is only a small fraction of the relief Everett Hangar requested in the trial court. Defendants have prevailed on Everett Hangar's claims (1) for damages, (2) for a jet blast easement, (3) for a fence around the Lot 12 parking lot, (4) for a fence around the airport side of Lot 13, (5) for a prohibition of museum displays on any portion of the Lot 11 ramp, (6) for the right to block Defendants' easement access across the Lot 12 ramp, and (7) for breaches of fiduciary duty.

Nevertheless, on the issue of attorneys' fees, the Court of Appeals stated, "Everett Hangar brought claims I through IV of its complaint under the CC&Rs or the Association bylaws. The CC&R fee provision applies only to these claims. Here, the trial court awarded Everett Hangar relief *on each of these claims* and thus *properly awarded Everett Hangar attorney fees*." Slip op. at 28 (emphasis added). This statement is plainly wrong.

The trial court dismissed all of Count IV. CP 483. The Court of Appeals dismissed all of Count III. Slip op. at 25-26. And the Court of Appeals reversed most of the injunctive relief granted to Everett Hangar under Counts I and II. Slip op. at 16-18, 24-25.

VI. ARGUMENT

This Court should accept review under RAP 13.4(b)(1) because the Court of Appeals decision conflicts with this Court's holdings in *Singleton v. Frost*, 108 Wn.2d 723, 742 P.2d 1224 (1987), and *McGary v. Westlake Investors*, 99 Wn.2d 280, 661 P.2d 971 (1983). This Court should also accept review under RAP 13.4(b)(2) because the Court of Appeals decision conflicts with *Cornish College of the Arts v. 1000 Virginia Limited Partnership*, 158 Wn. App. 203, 242 P.3d 1 (2010), and *Seashore Villa Association v. Hugglund Family Limited Partnership*, 163 Wn. App. 531, 260 P.3d 906 (2011), *review denied*, 173 Wn.2d 1036 (2012). Finally, this Court should accept review under RAP 13.4(b)(4) because awards of attorneys' fees are important to the disposition of many civil cases throughout the state.

A. The Court of Appeals Decision Conflicts with *Singleton* and *Cornish College*. The Three Prevailing Defendants Are Entitled to Their Attorneys' Fees.

It is well settled that, in an action regarding a contract with a prevailing party fee provision, a court must award attorneys' fees to a

party who prevails. *Singleton v. Frost*, 108 Wn.2d 723, 742 P.2d 1224 (1987). In *Singleton*, two creditors sued to recover unpaid debts owed under promissory notes. *Id.* at 725. Both notes contained fee provisions. *Id.* at 726. The trial court found the debtors liable under both promissory notes, but awarded reasonable attorneys' fees to only one of the creditors (Singleton). *Id.* The trial court declined to award reasonable fees to the other creditor (Schontz). *Id.* at 725-26. Schontz appealed the denial of his request for fees, which the Court of Appeals affirmed. *Id.* at 726. The Court of Appeals also denied his request for fees on appeal. *Id.* at 727. This Court accepted review of the issue of whether the trial court had discretion to deny Schontz reasonable fees where an award of fees was required by contract. *Id.* at 727. The Court reversed and held that an award of reasonable fees under the contract was mandatory. The Court stated:

> We hold that the trial court has discretion regarding the amount of attorney's fees which are reasonable, but that where a contract provides for an award of reasonable attorney's fees to the prevailing party, such an award must be made.

Singleton, 108 Wn.2d at 727 (emphasis added) . A court abuses its discretion if it denies entirely an award of reasonable fees to a wholly prevailing party. *Id.* at 731.

It is equally well established that a defendant prevails by successfully defending against the plaintiff's claims. *Cornish Coll. of the*

Arts v. 1000 Virginia Ltd. P'ship, 158 Wn. App. 203, 231, 242 P.3d 1 (2010). A court abuses its discretion if, in cases where a plaintiff asserts claims against multiple defendants, the court fails to consider each defendant separately when determining whether any party is a prevailing party. *Id.* at 233. In *Cornish College* the plaintiff tenant leased property from Virginia Limited Partnership, whose general partner was Virginia-Terry, LLC, whose managing member was Donn Etherington, Jr. *Id.* at 210-11. The plaintiff sued Virginia Limited and Etherington for specific performance of a contractual option to purchase the leased property and for wrongful eviction. *Id.* at 214. The trial court granted the plaintiff's claim for specific performance against Virginia Limited, dismissed the plaintiff's claim for specific performance against Etherington, and awarded the plaintiff its attorneys' fees jointly and severally against Virginia Limited and Etherington. *Id.* Etherington appealed the award of fees against him; the Court of Appeals reversed and awarded Etherington the fees he incurred defending against the plaintiff's claim. *Id.* at 230-34. The Court of Appeals held that the trial court abused its discretion by failing to consider the defendants separately. *Id.* at 233. The court made clear that, in multiparty litigation, a court must determine who is a prevailing party on a party-by-party basis. *Id.* at 232-33.

Here, the trial court and the Court of Appeals did not engage in the requisite party-by-party analysis. Three parties prevailed on all claims: Sessions, the Association, and Kilo Six. Because they wholly prevailed on every claim asserted against them, they are prevailing parties as a matter of law.

Despite the fact that Sessions, the Association, and Kilo Six are undisputedly prevailing parties, both the trial court and the Court of Appeals denied any award of attorneys' fees to them, CP 483 and Slip op. at 30, in direct contradiction to this Court's holding in *Singleton* and the Court of Appeals decision in *Cornish College*. Those cases require courts to award reasonable attorneys' fees to the prevailing party if the contract so provides. *Singleton*, 108 Wn.2d at 727; *Cornish College*, 158 Wn. App. at 234.

Because Sessions, the Association, and Kilo Six prevailed on all claims asserted against them, they are entitled to their attorneys' fees incurred in the trial court and on appeal. This Court should accept review under RAP 13.4(b)(1) and (2) because the Court of Appeals decision conflicts with *Singleton* and *Cornish College*.

B. The Court of Appeals Decision Also Conflicts with *McGary* and *Seashore*. No Attorneys' Fees Should Be Awarded to the Plaintiff or the Other Two Defendants, None of Whom Was a Prevailing Party.

It is also well settled that, where both the plaintiff and the defendant prevail on major issues, neither is a substantially prevailing party and no award of attorneys' fees is appropriate. *McGary v. Westlake Investors*, 99 Wn.2d 280, 288, 661 P.2d 971 (1983). In *McGary*, commercial tenants brought a declaratory judgment action to determine lease rights regarding rent increases and parking. *Id.* at 281. The trial court entered judgment for the landlord and awarded the landlord its attorneys' fees. *Id.* at 281-82. The Court of Appeals affirmed, and the Supreme Court accepted review. *Id.* at 282. The Supreme Court affirmed on the issue of rent but reversed on the issue of parking. *Id.* at 286-88. Because both parties had now prevailed on major issues after appeal, the Supreme Court held that neither party had substantially prevailed. *Id.* at 288. The Court reversed the trial court's award of attorneys' fees, and declined to award attorneys' fees to either party. *Id.*.

The Court of Appeals applied this principle more recently in *Seashore Villa Association v. Hugglund Family Limited Partnership*, 163 Wn. App. 531, 260 P.3d 906 (2011). There, an association of mobile home tenants brought an action against their landlord seeking injunctive

and declaratory relief. 163 Wn. App. at 536-37. The parties disputed who was responsible for maintaining carports and sheds built on the mobile home lots, and whether the landlord could remove the carports and sheds. *Id.* The landlord also brought a separate declaratory judgment to determine whether a letter it had sent to the tenants violated the Manufactured/ Mobile Home Landlord-Tenant Act (MHLTA). *Id.* at 537. The trial court enjoined the landlord from transferring responsibility for maintaining the carports and sheds to the tenants, enjoined the landlord from removing the carports and sheds, and awarded attorneys' fees to the tenants. *Id.* at 538. On appeal, the Court of Appeals reversed half of the injunctive relief and therefore reversed the award of attorneys' fees because both parties had ultimately prevailed on major issues. *Id.* at 546-47.

Here, the Court of Appeals erred when it held that the trial court properly awarded attorneys' fees to Everett Hangar as a substantially prevailing party. Slip. op. at 28. Although Everett Hangar has retained some limited relief after appeal, Historic Hangars and the Foundation have prevailed on most issues. They have prevailed on all claims for damages, prevailed on Everett Hangar's request for a jet blast easement (thereby preserving Historic Hangars' and the Foundation's ability to use the Lot 11 apron), prevailed on the injunction barring them from using their

easements across Lot 12 without Everett Hangar's express advance permission, and prevailed on Everett Hangar's request for a fence enclosing Lot 13. CP 677; Slip op. at 16-18, 24-25.

Because Historic Hangars and the Foundation prevailed on most of the relief requested by Everett Hangar, none of these parties is entitled to an award of their fees incurred in the trial court proceedings or on appeal. Under this Court's precedent, Historic Hangars and the Foundation are *not* required to prevail on *all* claims to avoid a fee award. If they had prevailed on all claims, they themselves would be entitled to fees—as are Sessions, the Association, and Kilo Six. Instead, under *McGary*, there is a middle ground where parties must bear their own fees when the plaintiff and defendants each prevail on major issues. *McGary*, 99 Wn.2d at 288. This is such a case. The Court of Appeals erred in failing to apply the *McGary* principle here. This Court should accept review under RAP 13.4(b)(1) and (2) because the Court of Appeals decision conflicts with *McGary* and *Seashore*.

VII. CONCLUSION

The Court of Appeals decision conflicts with this Court's precedent and Court of Appeals precedent. The trial court and the Court of Appeals were required to award attorneys' fees to Sessions, the Association, and Kilo Six because those Defendants prevailed on all

claims. And Everett Hangar cannot be a substantially prevailing party against Historic Hangars and the Foundation because those two Defendants prevailed on most issues. This Court should accept review under RAP 13.4(b)(1), (2), and (4) to correct these errors and to ensure consistent application of these fundamental principles.

RESPECTFULLY SUBMITTED this 28th day of September, 2016.

HILLIS CLARK MARTIN & PETERSON P.S.

By _____
Louis D. Peterson, WSBA #5776
Jake Ewart, WSBA #38655

Attorneys for Petitioners
Kilo 6 Owners Association, Kilo Six, LLC, Historic Hangars, LLC, Historic Flight Foundation, and John Sessions

CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused a copy of this document to be served via email and U.S. Mail to the last known address of all counsel of record.

I certify under penalty of perjury under the laws of the state of Washington and the United States that the foregoing is true and correct.

DATED this 28th day of September, 2016, at Seattle, Washington.

Suzanne Powers

ND: 19813.008 4832-8779-9352v7

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

EVERETT HANGAR, LLC, a Washington limited liability company, Respondent, v. KILO 6 OWNERS ASSOCIATION, a Washington nonprofit corporation; KILO SIX, LLC, a Washington limited liability company; HISTORIC HANGARS, LLC, a Washington limited liability company; HISTORIC FLIGHT FOUNDATION, a Washington nonprofit corporation; and JOHN SESSIONS, an individual, Appellants.	No. 73504-7-I DIVISION ONE UNPUBLISHED OPINION FILED: August 8, 2016

LEACH, J. — Kilo 6 Owners Association, Kilo Six LLC, Historic Hangars LLC, Historic Flight Foundation (collectively "Defendants"), and John Sessions appeal a trial court order granting a permanent injunction to Everett Hangar LLC and awarding it attorney fees. The record supports some, but not all, of the injunctive relief the trial court granted. It does not support the trial court's dismissal of Everett Hangar's claims against Sessions without prejudice instead of with prejudice. Finally, the trial court did not make adequate findings and conclusions to permit review of its fee award. Thus, we affirm in part, reverse in

part, and remand for further proceedings consistent with this opinion. Because no party substantially prevails on appeal, we deny each party's request for attorney fees and costs on appeal

FACTS

This case arises out of a dispute between Everett Hangar and the Foundation, which occupy adjacent lots at the Snohomish County Airport (Paine Field).

In 2007, Snohomish County (County) leased (initial land lease) Sector 7 of Paine Field to Kilo Six LLC for use for "storage of aircraft, maintenance and restoration of aircraft, and with specific reference to the facility of the John T. Sessions Historic Aircraft Foundation, additional uses of food preparation, food service, public display of aircraft, public education, and public meeting uses." The lease authorized Kilo Six to build leasable hangars on what later became "Lot 11" and "Lot 12" and an historical aircraft foundation building on "Lot 13." Because Kilo Six intended to develop this land into three separate parcels with three separate buildings occupied by three different users, Kilo Six executed a declaration of covenants, conditions, and restrictions (initial CC&Rs) to create a general operation plan for the leased property.

In January 2008, Kilo Six and Weidner Investment Services Inc. (Weidner) entered into a purchase agreement for an aircraft hangar that Kilo Six was

constructing on property that is now Lot 12. Weidner is a property management firm that operates a Learjet 60 and a Gulfstream IV, private jets its employees use to fly to its properties across the United States and Canada. Dean Weidner, Weidner's CEO (chief executive officer), also uses the jets for personal flights. It transferred its contractual rights under the purchase agreement to its wholly owned subsidiary, Everett Hangar. The sale closed in July 2008, and Everett Hangar took possession of the property.

In January 2009, the County agreed to a binding site plan that subdivided Sector 7 into three adjacent parcels running west to east: Lot 11, Lot 12, and Lot 13. To facilitate separate ownership and operation of each lot, Kilo Six and Snohomish County also separated the initial land lease into three separate leases, one for each lot. Kilo Six then assigned Lot 11 to Historic Hangars, Lot 12 to Everett Hangar, and retained Lot 13.

Lots 11 and 12 have the same general configuration: a hangar on the southern part of the lot and a section of a Paine Field aircraft ramp to the north, used for aircraft takeoff and landing. Lot 13 remains vacant. The lease for each lot describes the "intended use" of Lot 11 as "aircraft hangar for business or private use, including historic aircraft hangar and museum, public education and event venue, with associated space for aircraft repair and maintenance, office, meeting room, lounge, and parking."

John Sessions is the managing member of Kilo Six and Historic Hangars and is the president of the Foundation. The parties initially understood that Sessions would construct a flight museum on Lot 13. The 2008 economic downturn caused Sessions to place the museum on Lot 11. Sessions's failure to inform Everett Hangar of this change became a source of most of the tension that produced this lawsuit. In August 2009, Historic Hangars subleased Lot 11 to the Foundation. On Lot 11, the Foundation displays and operates vintage planes, hosts classes, and puts on several events throughout the year.

Also in August 2009, Kilo Six, Everett Hangar, and Snohomish County signed the amended and restated ground leasehold declaration of covenants, conditions, and restrictions for Kilo 6 Hangars (CC&Rs). The CC&Rs govern the leasehold owners' use of the three lots and created the Kilo 6 Owners Association (Association) to organize the lots and enforce the provisions of the CC&Rs. Sessions is the president of the Association, and Everett Hangar is an owner-member. The CC&Rs grant each lot leasehold owner an easement over portions of aircraft ramps on any lot to move aircraft. They also require the parties to cooperate with each other. And they authorize a party to seek damages, injunctive relief, and attorney fees and costs for another owner's violation of the terms of the CC&Rs or Association rules. The initial rules and regulations," attached as an appendix to the CC&Rs, state that the lots "may be

used for aviation-related purposes and for any purpose reasonably incident to such purposes." They also contain prohibitions against noxious activities and authorize the board of directors of Kilo Six LLC to adopt safety and security measures.

The Foundation facilities on Lot 11 are open from 10:00 a.m. to 5:00 p.m. Tuesday through Sunday. The Foundation displays aircraft on its ramp, as well as on the Paine Field ramp with the airport's permission. During some of its public events, the Foundation blocks the entire Lot 11 ramp and sets up vendor booths and tents on it. The Foundation also uses Lot 13 for volunteer parking. A chain link fence encloses Lot 13, except on the side of the lot facing the airport. There, the Foundation sets up bicycle fencing, freestanding fencing with sections that can be linked together, during larger events. The fencing has an entrance gate that can be locked. A sign on the gate reads, "Gates must be closed and locked at all times."

Everett Hangar operates on-demand business flights for Weidner's employees and personal flights for Dean Weidner out of Lot 12. It follows its preset flight schedule only 30 percent of the time. Everett Hangar's two jets conduct over 100 arrivals and departures every year. Everett Hangar also intends to sublet the second bay of its hangar, adjacent to the one it currently uses, to another company. Everett Hangar can move aircraft from Lot 12 to the

airport runway over two routes. One includes use of its easement over the aircraft ramp on Lot 11 easement. Weather conditions can dictate which route it uses.

Everett Hangar filed this lawsuit, asking for damages and injunctive relief. It alleged that Sessions, Historic Hangars, and the Foundation violated the aircraft ramp easement in the CC&Rs with the Foundation's frequent parking of its aircraft on the Lot 11 ramp and other activities on the ramp during its events. Everett Hangar claims these actions either directly obstructed its easement or caused objects to be within the jet blast zone of its planes. Everett Hangar also alleged violations of safety and security provisions in the CC&Rs and violations of the Association bylaws for failure to enforce the CC&Rs against John Sessions, Kilo Six, and the Association. Finally, it alleged that Sessions breached his fiduciary duty as the director of the Association.

The Defendants moved for summary judgment, and the trial court granted it in part, dismissing Everett Hangar's damage claims but allowing its claims for injunctive relief and against Sessions to go to trial.

At the close of trial, the court concluded that the Foundation and Historic Hangars infringed on Everett Hangar's right to use the easement over Lot 11; that Kilo Six, Historic Hangars, and the Foundation's use of Lot 11 and Lot 13 violated the safety and security provisions in the CC&Rs and the initial rules; and

that the Association, plus its member organizations Historic Hangars and Kilo Six, failed to enforce the CC&Rs. It concluded that Defendants did not violate the Association bylaws and that Sessions was not personally liable for the actions of the Defendants. It denied relief on this basis, dismissing all claims against him without prejudice. Finally, it concluded that injunctive relief was necessary to protect Everett Hangar's easement rights and to mitigate safety and security concerns. It deemed Everett Hangar the prevailing party and awarded it attorney fees and costs under the provision of the CC&Rs.

In its order granting an injunction, the trial court enjoined the Association, Kilo Six, Historic Hangars, the Foundation, and "ITS OFFICERS, AGENTS, EMPLOYEES, INVITEES, AND GUESTS" from placing objects on the Lot 11 ramp that would interfere with any aircraft's object free area and within the jet blast safety zone of aircraft on Lot 11 or Lot 12. It enjoined the Defendants from blocking the western or eastern exits to the Kilo 7 taxi lane or allowing any person except trained flight personnel to enter and remain on the ramp to Lot 11 and Paine Field while an aircraft is moving toward or returning from the Kilo 7 taxi lane. It further enjoined the Defendants from allowing or permitting any person to enter Lot 12 from its properties without express permission of Everett Hangar and from propping open security gates or entry points on Lots 11 or 13 unless a security guard is present at the gate. Finally, it required the Defendants to build

a permanent security fence along the Lot 13 boundary, similar to the fence surrounding Paine Field, to remain until the trial court deemed it unnecessary.

In a separate order, the trial court awarded Everett Hangar $819,053.57 in fees plus statutory costs.

STANDARD OF REVIEW

This court reviews a trial court's injunction and its decision about the terms of the injunction for abuse of discretion.[1] A trial court abuses its discretion if it bases its order on untenable grounds or makes a manifestly unreasonable or arbitrary decision.[2] This court reviews findings of fact for substantial evidence and conclusions of law de novo.[3] This court reviews de novo the initial determination of the legal basis for an attorney fee award and reviews for abuse of discretion a trial court's decision to award attorney fees and the reasonableness of the fees' amount.[4]

ANALYSIS

The Defendants challenge the provisions of the trial court's injunction protecting aircraft easement rights on three grounds: (1) the aircraft easement does not provide Everett Hangar with the rights that the injunction protects; (2)

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[1] Kucera v. Dep't of Transp., 140 Wn.2d 200, 209, 995 P.2d 63 (2000).
[2] Kucera, 140 Wn.2d at 209.
[3] Sunnyside Valley Irrig. Dist. v. Dickie, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003).
[4] Cook v. Brateng, 180 Wn. App. 368, 375, 321 P.3d 1255 (2014).

the Foundation did not violate Everett Hangar's easement rights; and (3) the terms of the injunction are arbitrary, overly broad, and not supported by the evidence. The Defendants make similar challenges to the injunction provisions protecting rights to safety and security under the CC&Rs. Finally, the Defendants challenge the trial court's fee award on three grounds: (1) no party should have been awarded attorney fees because each prevailed on major issues, (2) the trial court did not use the proportionality rule to calculate fees, and (3) the trial court awarded an unreasonable amount. We address the Defendants' claims in this order.

"A party seeking an injunction must show (1) a clear legal or equitable right, (2) a well-grounded fear of immediate invasion of that right, and (3) actual and substantial injury as a result."[5] On review, this court presumes the trial court correctly ordered injunctive relief, absent an affirmative showing of error.[6] The trial court may use its broad discretion to fashion injunctive relief to fit the particular facts, circumstances, and equities of the case.[7]

Injunction Based on Easement Violation

The CC&Rs grant each lot leasehold owner an ingress and egress easement for aircraft. The Defendants claim that the trial court misinterpreted

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[5] Resident Action Council v. Seattle Hous. Auth., 177 Wn.2d 417, 445-46, 327 P.3d 600 (2013).

[6] Resident Action Council, 177 Wn.2d at 446.

[7] Brown v. Voss, 105 Wn.2d 366, 372-73, 715 P.2d 514 (1986).

this easement and improperly required the Foundation to clear its ramp of objects within the object free area and the jet blast safety zone of any aircraft on Lot 11 or Lot 12, preventing people from entering those zones on Lot 11, and mandating that the Foundation not block Everett Hangar's exit to the west or east in any manner.

When asked to enforce an easement, a court determines and then enforces the intent of the parties who created it.[8] Interpretation of an easement presents a mixed question of fact and law.[9] The original parties' intent is a question of fact, and the legal consequences of the intent is a question of law.[10] A court looks to the plain language of the document creating an easement, considering it as a whole, to determine and give effect to the intention of the parties who created it.[11] Only when an easement's language is ambiguous or silent on a particular issue may a court consider other evidence to show the intentions of the original parties, the surrounding circumstances at the time the parties created the easement, and the practical construction disclosed by parties' conduct or admissions.[12]

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[8] Zobrist v. Culp, 95 Wn.2d 556, 560, 627 P.2d 1308 (1981).

[9] Sunnyside Valley, 149 Wn.2d at 880.

[10] Sunnyside Valley, 149 Wn.2d at 880.

[11] City of Seattle v. Nazarenus, 60 Wn.2d 657, 665, 374 P.2d 1014 (1962); Sunnyside Valley, 149 Wn.2d at 880.

[12] Colwell v. Etzell, 119 Wn. App. 432, 439, 81 P.3d 895 (2003) (quoting Rupert v. Gunter, 31 Wn. App. 27, 31, 640 P.2d 36 (1982)); Nazarenus, 60 Wn.2d at 665.

Here, the CC&Rs grant each owner an easement for movement of aircraft over parts of the aircraft ramps on any lot:

> **12.7 Ingress and Egress Easement for Aircraft.** Each Owner shall have an ingress and egress easement over and across such portions of the airplane ramps located on any Lot as is reasonably necessary to move aircraft to or from any Building and the adjacent properties on which taxiways, runways and airport facilities are located.

Spatial or Temporal Limitation

The Defendants contend that the words "reasonably necessary" show the parties' intent to limit the easement to certain times and circumstances. As a result, they claim that Everett Hangar does not have an around-the-clock access to its easement over the Lot 11 ramp. Everett Hangar contends that these words limit the part of the ramp over which it has an easement but do not limit the time or circumstances when it can use its easement.

The language of the easement and the CC&Rs as a whole support the trial court's conclusion that the term "reasonably necessary" only spatially limits the easement. The easement states that it is for ingress and egress across portions of a ramp as is reasonably necessary to move aircraft to the airport's runway. No words in the easement limit when the aircraft movement can occur. As the trial court concluded, "[N]o evidence . . . show[ed] the parties meant to or agreed to limit their easement rights only to when the Foundation or some licensee or guest was not throwing an event on Lot 11."

The Defendants argue that "reasonably necessary" language must limit the time when the aircraft can be moved because the CC&Rs grant other "perpetual, non-exclusive" easements. But the Defendants do not satisfactorily explain how this difference in language leads to the conclusion that the words "reasonably necessary" limit this easement as to time and circumstance. And elsewhere in the CC&Rs, when the parties wished to limit the time for exercising easement rights granted by the CC&Rs, they did so. The easement for right of entry provides that "entry into any portion of a Lot not generally open to the public shall only be authorized during reasonable hours" after consent from or reasonable notice to the owner. This shows that the parties knew how to temporally limit an easement.

The Defendants next contend that a temporal limitation in the easement would prevent a party from using the other's ramp when another route to the runway was available. It asserts that "[t]he parties were granted primary rights to use their own hangars and ramps, and they did not create an easement so broad that it would eradicate those rights." It contends that because the CC&Rs expressly permit the Foundation's activities on the ramp, the parties could not have intended the broad limitation on those activities created by the trial court's interpretation of the easement.

The CC&Rs incorporate initial rules and regulations that permit use of the property for "aviation-related purposes and for any purpose reasonably incident to such purposes." They also give Kilo Six express discretion to determine the nature of "the use for which a portion of the Property is developed." While language in the CC&Rs may reflect an intent to allow the Foundation to use its ramp for its activities and aircraft display, the owner of a servient estate "retains the use of an easement so long as that use does not materially interfere with the use by the holder of the easement. That principle is well established."[13] Thus, the CC&Rs do not affirmatively allow the Foundation to use its ramp in a manner that materially interferes with Everett Hangar's easement over the relevant portion of the Lot 11 ramp.

And the Defendants' argument that its lease and the Snohomish County Code permit the Foundation to use its ramp in the manner it does fails for the same reason—these rights must yield to Everett Hangar's right to use its easement in the manner intended by the parties to the CC&Rs.[14]

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[13] Veach v. Culp, 92 Wn.2d 570, 575, 599 P.2d 526 (1979).

[14] The Lot 11 lease requires that the Foundation "use the Premises," defined as including the Lot 11 ramp, "only for the following uses: aircraft hangar for business or private use, including historical aircraft hangar and museum, public education and event venue, with associated space for aircraft repair and maintenance, office, meeting room, lounge, and parking." And the section of Snohomish County Code (SCC) defining "ramp" reflects active use of a ramp "for the parking, maneuvering, loading, unloading and servicing of aircraft while they are on the ground" and does not require that a party keep its ramp vacant. SCC 15.08.065.

The Defendants ask the court to consider the meaning given "reasonably necessary" in other contexts involving easements. For example, when deciding if an easement by implication exists, a court can consider the degree of necessity for the easement.[15] But the absence of necessity is not conclusive.[16] In addition, the test of necessity is whether the party claiming an implied easement can reasonably create a substitute.[17] The trial court found that the area needed to move aircraft from Everett Hangar's property included taxiways to the east and west, depending upon the speed and direction of the wind. Substantial evidence supports this finding. Defendants do not identify any alternative taxiway to the west.

Defendants also point to the showing required to condemn a private way of necessity. A party attempting to condemn an easement over adjacent property must show that the easement is reasonably necessary rather than just convenient or advantageous.[18] But again, the Defendants do not identify any alternative western access to the taxiway. Notably, Defendants do not cite any implied easement case or private way of necessity case where a court found an easement reasonably necessary but limited the time or circumstances when it could be used. For each, courts have looked only at the availability of alternative

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[15] Woodward v. Lopez, 174 Wn. App. 460, 469-70, 300 P.3d 417 (2013).
[16] Woodward, 174 Wn. App. at 469.
[17] Woodward, 174 Wn. App. at 469-70.
[18] Ruvalcaba v. Kwang Ho Baek, 175 Wn.2d 1, 7, 282 P.3d 1083 (2012).

routes. Additionally, Defendants do not cite any case that looked to the law of implied easements or the law of a private way of necessity as authority to limit the time or circumstance for using an express easement.

The Defendants also support their position with language in the rules and regulations requiring lot owners to cooperate. The rules and regulations state that they were "intended to provide for the harmonious operation and co-existence of [aviation-related] uses adjacent to one another. Each Owner shall cooperate and communicate with the other Owners in good faith, and these Rules and Regulations shall be interpreted and applied, in a manner designed to achieve such purpose." But this language provides no support for the contention that the parties intended for the Everett Hangar's easement rights to exist only when the Foundation was not using its ramp for exhibition purposes.

The Foundation also claims that Everett Hangar failed to prove that the Defendants violated its easement rights because Everett Hangar has never failed to fly a plane as scheduled. But substantial evidence showed that Defendants routinely blocked Everett Hangar's access over the Lot 11 ramp and by this action prevented Everett Hangar from using best practices to fly aircraft. Because Everett Hangar had the right to cross relevant portions of the Lot 11 ramp at any time, the Foundation's blocking of the ramp violated Everett Hangar's aircraft easement right and provided justification for injunctive relief.

Inclusion of a Jet Blast Zone

The Defendants also claim that the trial court improperly expanded the aircraft easement by deciding that it must include a jet blast zone for safety reasons. Everett Hangar responds that the easement language permitting it to "move" its aircraft must mean under the aircraft's own power. We agree with the Defendants.

The trial court made no finding that the parties intended to include a jet blast zone. Instead, it made two pertinent conclusions of law:

> 4. The Court concludes that within the context of aircraft movement, the easement must include the jet blast zone and object free areas for safety. These areas are established aircraft movement safety zones within which non-aviation activities must be restricted to protect people and property from damage, injury, and even death. With respect to the Lear Jet 60, that area is 240 feet behind the aircraft and up to 45 feet in width, and with respect to the Gulfstream IV, that area is a minimum 200 feet behind the aircraft and 35 feet in width.
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> . . . .
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> 6. Best practices dictate that aircraft are almost never towed out on to the taxi lane or stopped out on the taxi lane. Best practices provide that aircraft should be operating under their own power upon leaving and returning to the ramp. Towing of aircraft should only be conducted over the shortest distance possible. It is unreasonable to expect Plaintiff to tow its aircraft out onto the taxi lane of Kilo 7 to avoid jet blast to the [Foundation's] vintage aircraft. It is entitled to reasonable use of its easement across Lot 11.

The easement language does not mention a jet blast zone. The trial record contains no direct evidence about the parties' intent concerning jet blast.

But the size of Lot 11, the size of the jet blast zones, the past practices of Everett Hangar, and the impact of a jet blast zone on operations on Lot 11 show that the parties did not intend to include a jet blast zone as part of the easement.

Testimony shows that jet blast zones change depending on variables including the size of the aircraft engines, wind patterns, and the position of the plane. For Everett Hangar's Learjet 60, the jet blast zone can be 240 feet long and 45 feet wide. Lot 11 is 188 feet wide. Thus, the trial court's injunction protecting the jet blast zone would require the Foundation to keep its entire ramp clear at all times. In addition, the Foundation would need to keep its hangar bay doors closed to protect the property and persons inside whenever the Learjet 60 used the Lot 11 ramp under power because the plane's jet blast would sweep into the Foundation's hangar as the plane turned if the doors were open.

Everett Hangar's own witnesses testified that it tows one of its planes to the Kilo 7 taxiway whenever it is preparing both its planes for departure. It also tows its planes from the hangar to the Lot 12 ramp for every flight. This undermines the purported safety justification for including a jet blast zone in the easement.

Finally, the Snohomish County Code prohibits the operation of an aircraft in a manner that might allow jet blast to harm people or property.[19] Including the jet blast zone in the easement across Lot 11 appears inconsistent with this requirement, given the size of the Lot 11 ramp and the potential danger for the contents and occupants of the Lot 11 hangar.

At the time the parties created the easement, they contemplated similar aircraft operations on Lots 11 and 12. Nothing suggests that they intended to prefer the operations on Lot 12 over those on Lot 11. Including a jet blast zone in the easement would do that because of the turn required to move a plane from the Lot 11 ramp to the taxiway when no similar turn is required to cross Lot 12.

The trial court erred when it decided that the aircraft easement must include a jet blast zone.

Additional Terms of the Injunction: Easement

The Defendants also claim that the injunction's requirement that the Foundation not place anything in the object free areas and that it not block Everett Hangar's east or west access to the Kilo 7 taxiway are arbitrary, overly broad, and not supported by the facts because those terms could be interpreted to exclude the Foundation from servicing its own planes on the Lot 11 ramp. The

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[19] "No aircraft engines shall be operated in such a manner that persons, property or other aircraft might be injured or damaged by propeller slipstream or jet blast from said aircraft." SMC 15.08.322.

injunction's language does not specifically account for this situation. But as the occupant of the servient estate, the Foundation has clear parameters: it may use encumbered portions of its ramp so long as that use does not materially interfere with Everett Hangar's ingress and egress across the ramp.[20] Thus, the trial court did not abuse its discretion when it fashioned these challenged injunction terms.

Injunction Terms Based on Breaches of Safety and Security

The Defendants contend that Everett Hangar does not have a right to the injunctive relief ordered by the trial court relating to the safety and security of Lot 12. They claim that the Foundation has no legal obligation to implement certain safety and security measures. They also claim that Everett Hangar cannot enforce safety and security provisions contained in airport regulations and Snohomish County Code. Finally, Defendants claim that the challenged acts and omissions did not violate safety and security provisions in the CC&Rs.

The trial court enjoined Defendants from allowing or permitting anyone to go onto Lot 12 without Everett Hangar's advance, express permission and from propping open the gate on the premises of Lot 11 or Lot 13 without a security guard present at all times. And it required Defendants to build a permanent security fence around Lot 13, similar to Paine Field's perimeter fence. The trial court found that Kilo Six, Historic Hangars, and the Foundation breached the

[20] See Veach, 92 Wn.2d at 575.

CC&Rs requiring perimeter security and that the Association failed to enforce the security provisions against Lot 11 and Lot 13 owners. The trial court also based its decision on Snohomish County Code provisions and Paine Field's rules and regulations.

The Defendants first argue that the trial court read certain CC&Rs provisions out of context to create a legal obligation for Defendants. The trial court wrote, "First, the CC&Rs, under the section titled 'Safety and Security,' provide: 'Because of the nature of the anticipated use of the Property as an aircraft hangar facility for working aircraft, safety and security are of particular concern.'"

The Defendants correctly note that the remaining language in that provision is permissive and does not require adoption of specific safety measures:

> For this reason, the Board is authorized to adopt safety and security rules and guidelines, to direct the Association to install fences, gates, signage, or other physical security measures on the facility, and to take any other measures reasonably necessary to ensure that safe and secure storage and operation of the aircraft located and stored on the Property.

We agree that this permissive language does not entitle Everett Hangar to the relief the trial court ordered.

The trial court also stated, "The CC&Rs also specifically prohibit any activities or other conditions on the property 'which tend to disturb the peace or

threaten the safety of the occupants and invitees of other Lots.'" But the full text of that provision reads,

> *Noxious Activities.* Any activity which emits foul or obnoxious odors, fumes, dust, smoke, or pollution outside the Lot or which creates noise, unreasonable risk of fire or explosion, or other conditions which tend to disturb the peace or threaten the safety of the occupants and invitees of other Lots.

The Defendants assert that this provision does not address the type of trespass or perimeter breach alleged by Everett Hangar. Defendants invoke the principle of ejusdem generis, that "a general term used in conjunction with specific terms will be deemed to include only those things that are in the same class or nature as the specific ones."[21] Everett Hangar contends that this rule of interpretation applies "'only to the extent that the general terms suggest items similar to those designated by the specific terms.'"[22] It argues this rule does not apply here because the specific "noxious activities" listed range from health hazards to safety threats. But "'specific terms modify or restrict the application of general terms where both are used in sequence.'"[23] Because the words "other conditions" are used in a sequence to describe prohibited activities that produce "pollution," "noise," and "unreasonable risk of fire or explosion," we agree with the

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[21] Viking Bank v. Firgrove Commons 3, LLC, 183 Wn. App. 706, 716, 334 P.3d 116 (2014).

[22] Lombardo v. Pierson, 121 Wn.2d 577, 583 n.4, 852 P.2d 308 (1993).

[23] Lombardo, 121 Wn.2d at 583 n.4 (quoting Dean v. McFarland, 81 Wn.2d 215, 221, 500 P.2d 1244 (1972)).

Defendants that "the provision plainly relates to a narrow category of physical conditions comparable to pollution or fire" not alleged here.

The Defendants next contend that the trial court did not have authority in this case to enforce safety and security provisions contained in airport regulations and Snohomish County Code because Everett Hangar had no ability to sue under those provisions. The Defendants acknowledge their security obligations but argue that the agreements with Everett Hangar do not create those obligations and thus Everett Hangar cannot enforce them.

We disagree. The CC&Rs § 13.6 provides, "Every Owner and occupant of any Lot shall comply with the Governing Documents and other covenants applicable to its Lot. Failure to comply shall be grounds for an action . . . by any aggrieved Lot Owner(s) . . . for . . . injunctive relief."

While the definition of "governing documents" in the CC&Rs does not include the lot leases, each lot lease contains covenants applicable to that lot that require the lot owners to comply with airport and county security regulations to ensure that employees and invitees have proper identification in restricted areas. We conclude that § 13.6 permits Everett Hangar's action to enforce these covenants.

And we agree with the trial court's conclusions that Kilo Six, Historic Hangars, and the Foundation breached rules and regulations found in the

Snohomish County Code and Paine Field rules. The Snohomish County Code defines "restricted area" to include "ramp areas, and necessary rights-of-way" and requires that the airport manager approve people to enter restricted areas and that those people wear proper identification.[24] Paine Field driving regulations require that all areas within the security fence and not open to the general public remain secure. And the Paine Field Airport Certification Manual limits access onto carrier aprons and explains standards for perimeter security fencing at the airport.

Substantial evidence supports the trial court's finding that the Foundation breached these safety and security regulations when its invitees gained unrestricted access to the Lot 11 ramp and, in turn, to Lot 12 property, as well as when it allowed the gate on Lot 13 to remain open.

The Defendants contend that the CC&Rs § 4.5 directly absolves the Association of responsibility for safety and security measures and places the responsibility on owners to ensure safety of their own lot. That provision states, in part,

> The Association may, but shall not be obligated to, maintain or support certain activities within the Property designed to enhance the safety of the Property. NEITHER THE ASSOCIATION, DECLARANT, NOR ANY SUCCESSOR DECLARANT SHALL IN ANY WAY BE CONSIDERED INSURERS OR GUARANTORS OF SECURITY OR SAFETY WITHIN THE

[24] SCC 15.08.066, .210.

> PROPERTY, NOR SHALL ANY OF THEM BE HELD LIABLE FOR ANY LOSS OR DAMAGE BY REASON OF FAILURE TO PROVIDE ADEQUATE SECURITY OR INEFFECTIVENESS OF SECURITY OR SAFETY MEASURES UNDERTAKEN.

But, as Everett Hangar notes, this provision applies only to the Association and declarant and does not prevent it from suing Historic Hangars and Kilo Six as lot owners for breach of the CC&Rs. More significantly, it does not limit any action for injunctive relief, only liability for monetary damages.

Because the CC&Rs provide Everett Hangar grounds to assert an alleged breach of safety and security based on noncompliance with provisions of Snohomish County Code and Paine Field regulations, we conclude that Everett Hangar has an equitable right to the relief the trial court awarded.

Terms of Injunction: Safety and Security

The Defendants argue that the injunctive relief the trial court granted to remedy Kilo Six, Historic Hangars, and the Foundation's safety and security breaches was overly broad, arbitrary, and without legal basis. Also, they claim that the trial court failed to fit the injunction to the facts, circumstances, and equities of this case.[25]

Defendants first claim that enjoining the Foundation and other defendants from "allowing, permitting, or suffering" any person to enter Lot 12 without advance, express permission directly contradicts the Foundation's own

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[25] See Brown, 105 Wn.2d at 372.

easements over Lot 12. We agree. The trial court cannot fashion relief for Everett Hangar that relieves Everett Hangar's lot from encumbrances created by the CC&Rs. The aircraft easement encumbering Lot 12 does not require advance, express permission before each or any use.

The Defendants also claim that the injunction's requirements that they not prop open the gates or doors on Lot 11 or Lot 13 without security guards and that they build a security fence along the perimeter of Lot 13 are arbitrary and unsupported by the record. We conclude that the trial court properly fashioned relief in requiring the Foundation to provide security at open gates because the Foundation had a duty to limit access to its airside operations and those of its neighbors. But because the alterations to the premises require Paine Field's approval under the lot leases and because the trial court concluded that "[t]here is no evidence that Snohomish County has or would approve additional fencing on Lots 11, 12, or 13," we conclude that the trial court acted arbitrarily when it required the Foundation and other defendants to build a fence on Lot 13.

The trial court abused its discretion when it required advance, express permission and when it required construction of a perimeter fence.

Count III Violation

The Defendants challenge the trial court's conclusion that "the Kilo Six Owners Association has failed to maintain the common areas, including security

fences between and around the lots to prevent unauthorized access to Lot 12 due to the activities conducted on Lots 11 and 13." The Defendants claim that the permissive language of the CC&Rs does not impose on the Association an enforceable duty under the CC&Rs to maintain safety and security. Because the pertinent language about the Association's duties is permissive rather than mandatory and reflects an intent for each owner to be responsible for its own lot's security, we agree.

The Defendants also assert that because Everett Hangar did not bring this claim against Historic Hangars, the trial court erroneously imputed liability to Historic Hangars. We agree. Finally, since the relief sought in count III was premised on the Association's breach of duties it owed to Everett Hangar, the trial court had no legal basis to impose liability on Kilo Six, as an Association member, for the alleged breaches.

Dismissal without Prejudice

Sessions claims that the trial court improperly dismissed Everett Hangar's claims against him "without prejudice." A trial court properly dismisses a case with prejudice after an adjudication on the merits, "while a dismissal 'without prejudice' means that the existing rights of the parties are not affected by the dismissal."[26] Because the trial court decided the merits of the claims brought

[26] Parker v. Theubet, 1 Wn. App. 285, 291, 461 P.2d 9 (1969) (citing Maib v. Md. Cas. Co., 17 Wn.2d 47, 135 P.2d 71 (1943)).

against Sessions, the trial court erred when it dismissed the case "without prejudice."

Attorney Fees at Trial

The Defendants make a number of challenges to the trial court's attorney fee decision. They claim that the trial court should not have awarded any party attorney fees and costs because all parties prevailed on major issues at trial. And they argue that even if the trial court properly awarded Everett Hangar attorney fees, the court erred when it did not apply a proportionality approach. Finally, they claim that the trial court did not properly scrutinize Everett Hangar's fee request and awarded an unreasonable amount.

The only basis any party cites to support an attorney fee award is the CC&Rs provision that "[i]n any action to enforce the provisions of this Declaration or Association rules, the prevailing party shall be entitled to recover all costs, including, without limitation, reasonable attorneys' fees and court costs, reasonably incurred in such action." Generally, a party prevails when it receives an affirmative judgment in its favor.[27] But a defendant can also recover fees and costs as a prevailing party if it successfully defends against a plaintiff's claims.[28]

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[27] Marassi v. Lau, 71 Wn. App. 912, 915, 859 P.2d 605 (1993), abrogated on other grounds by Wachovia SBA Lending, Inc. v. Kraft, 165 Wn.2d 481, 200 P.3d 683 (2009).

[28] Cornish Coll. of the Arts v. 1000 Va. Ltd. P'ship, 158 Wn. App. 203, 231-32, 242 P.3d 1 (2010).

In contract disputes where "'several distinct and severable claims'" are at issue, the difficulty in deciding which party prevailed requires a court to apply a proportionality approach, where "each party is awarded attorney fees for the claims on which it succeeds or against which it successfully defends and the awards are then offset."[29]

Everett Hangar brought claims I through IV of its complaint under the CC&Rs or the Association bylaws. The CC&R fee provision applies only to these claims. Here, the trial court awarded Everett Hangar relief on each of these claims and thus properly awarded Everett Hangar attorney fees.

The Defendants assert that the trial court did not scrutinize Everett Hangar's fee request when it awarded Everett Hangar its full fees and failed to justify its award with findings and conclusions. A trial court "'must take an *active* role in assessing the reasonableness of fee awards'" and must support an attorney fee award with findings and conclusions.[30] This requirement allows an appellate court to see from the record if a trial court thought services were reasonable or essential to the outcome or, alternatively, duplicative or

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[29] Cornish Coll., 158 Wn. App. at 231-32 (citing Marassi, 71 Wn. App. at 918).

[30] Berryman v. Metcalf, 177 Wn. App. 644, 657-58, 312 P.3d 745 (2013) (quoting Mahler v. Szucs, 135 Wn.2d 398, 434-35, 957 P.2d 632 (1998), abrogated on other grounds by Matsyuk v. State Farm Fire & Cas. Co., 173 Wn.2d 643, 663, 272 P.3d 802 (2012)), review denied, 179 Wn.2d 1026 (2014).

unnecessary.[31] Here, the trial court failed to enter findings and conclusions to support its order awarding attorney fees and costs. At the hearing about fees, the trial court did state,

> In this particular case I did take a close look at the team and what they were doing. I didn't find a lot of duplication, I didn't find that there were too many people working on the case. I find that this is a very fact-dependent case. . . . . And for those reasons I find that the work that was done was appropriate. The attorneys' fees that have been charged are reasonable, the rates are reasonable, and I'm going to award them as requested.

But the record "must do more than give lip service to the word 'reasonable.' [It] must show how the court resolved disputed issues of fact and the conclusions must explain the court's analysis."[32] When a trial court fails to address specific objections that time billed was duplicative or unnecessary, this failure constitutes reversible error.[33] In the trial court, the Defendants opposed Everett Hangar's attorney fees request. They asserted that it sought fees "for wasteful or unsuccessful theories, for insufficiently documented time, and for matters not strictly related to the litigation." Because the trial court's comments at the hearing fail to explain these specific objections, the trial court erred when it did not issue findings and conclusions to explain its award for costs and fees.

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[31] Berryman, 177 Wn. App. at 657-58 (quoting Mahler, 135 Wn.2d at 435).
[32] Berryman, 177 Wn. App. at 658.
[33] Berryman, 177 Wn. App. at 658-59.

Attorney Fees on Appeal

Both parties ask for fees and costs on appeal under RAP 18.1 and § 4.2 of the CC&Rs. Because no party substantially prevails on appeal, we decline to award fees and costs.[34]

CONCLUSION

The trial court properly concluded that the parties intended to limit the aircraft easement to area but not time and properly exercised its discretion to fashion injunctive relief on this basis. The trial court abused its discretion to the extent it provided injunctive relief based on its conclusion that the aircraft easement included a jet blast safety zone. The trial court properly concluded that the Foundation, Kilo Six, and Historic Hangars violated county and airport safety and security provisions enforceable by Everett Hangar under the CC&Rs. Thus, the trial court properly exercised its discretion to fashion relief on this basis, but, as previously noted, some of that relief was overly broad or arbitrary. This includes injunction provisions impairing the Foundation's aircraft easement over Lot 12 and the requirement that the Foundation build a fence around Lot 13. The trial court erred when it did not dismiss the claims against Sessions with prejudice and further erred when it decided that the Association and its member organizations Historic Hangars and Kilo Six violated the bylaws as alleged in

[34] Peterson v. Koester, 122 Wn. App. 351, 364, 92 P.3d 780 (2004).

count III of Everett Hangar's complaint. Finally, we remand the issue of attorney fees for recalculation and entry of findings and conclusions, and we decline to award attorney fees and costs on appeal as no party substantially prevailed. Thus, we affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

Leach, J.

WE CONCUR:

Dwyer, J.

Appelwick, J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

EVERETT HANGAR, LLC, a Washington limited liability company, Respondent, v. KILO 6 OWNERS ASSOCIATION, a Washington nonprofit corporation; KILO SIX, LLC, a Washington limited liability company; HISTORIC HANGARS, LLC, a Washington limited liability company; HISTORIC FLIGHT FOUNDATION, a Washington nonprofit corporation; and JOHN SESSIONS, an individual, Appellants.	No. 73504-7-I ORDER DENYING APPELLANTS' MOTION FOR RECONSIDERATION

The appellants, Kilo 6 Owners Association, Kilo Six LLC, Historic Hangars LLC, Historic Flight Foundation, and John Sessions, having filed a motion for reconsideration herein, and the hearing panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 31st day of AUGUST, 2016.

FOR THE COURT:

Leach, J.

Judge

Appendix 5

THE SUPREME COURT OF WASHINGTON

EVERETT HANGAR, LLC, Respondent, v. KILO 6 OWNERS ASSOCIATION, et al., Petitioners. _____	)	No. 93671-4 **O R D E R** Court of Appeals No. 73504-7-I

Department II of the Court, composed of Chief Justice Madsen and Justices Owens, Stephens, González and Yu, considered at its January 3, 2017, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington, this 4th day of January, 2017.

For the Court

Madsen, C.J.
CHIEF JUSTICE

Appendix 6

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

EVERETT HANGAR, LLC, a Washington limited liability company, Respondent, v. KILO 6 OWNERS ASSOCIATION, a Washington nonprofit corporation; KILO SIX, LLC, a Washington limited liability company; HISTORIC HANGARS, LLC a Washington limited liability company; HISTORIC FLIGHT FOUNDATION, a Washington nonprofit corporation; and JOHN SESSIONS, an individual, Appellants.	No. 73504-7-I MANDATE Snohomish Superior Court No. 14-2-02264-4

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for Snohomish County.

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division I, filed on August 8, 2016, became the decision terminating review of this court in the above entitled case on January 20, 2017. Orders denying motions for reconsideration were entered on August 31, 2016. An order denying a petition for review was entered in the Supreme Court on January 4, 2017. This case is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the decision.

c: Louis David Peterson
Michael Jacob Ewart
Warren Joseph Rheaume
John Goldmark
Hon. Millie D. Judge

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 20th day of January, 2017.

RICHARD D. JOHNSON
Court Administrator/Clerk of the Court of Appeals,
State of Washington, Division I.

Appendix 7

The Honorable Millie M. Judge

SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF SNOHOMISH

EVERETT HANGAR, LLC, a Washington limited liability company, Plaintiff, v. KILO 6 OWNERS ASSOCIATION, a Washington nonprofit corporation; KILO SIX, LLC, a Washington limited liability company; HISTORIC HANGARS, LLC, a Washington limited liability company; HISTORIC FLIGHT FOUNDATION, a Washington nonprofit corporation; and JOHN SESSIONS, an individual; Defendants.	Case No. 14-2-02264-4 ~~[PROPOSED]~~ SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: ATTORNEYS' FEES

THIS MATTER came before the Court for a bench trial beginning February 10, 2015. Plaintiff Everett Hangar, LLC ("Plaintiff" or "Everett Hangar") was represented by Warren J. Rheaume and John A. Goldmark. Defendants were represented by Louis D. Peterson and Jake Ewart. The Court issued its Findings of Fact, Conclusions of law and Order Granting Injunctive Relief; and Dismissing John Sessions, an Individual, on May 19, 2015, finding that Everett Hangar was the prevailing party. On July 6, 2015, the Court awarded Everett Hangar $819,053.57 in attorneys' fees plus statutory costs. The Court awarded Everett Hangar a portion of the supplemental attorneys' fees it requested for work occurring post-trial in the amount of $44,126.00 on July 31, 2015. The Judgment also included an award of $490.00 in statutory costs, for a total of $863,669.57 in attorneys' fees and costs due Everett Hangar.

Davis Wright Tremaine LLP
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Suite 2200 · 1201 Third Avenue
Seattle, Washington 98101-3045
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Defendants appealed on various grounds. On August 8, 2016, the Washington State Court of Appeals affirmed in part and reversed in part, remanding the issue of attorneys' fees for "entry of findings and conclusions" consistent with the opinion. *Everett Hangar, LLC v. KILO 6 Owners Ass'n*, No. 73504-7-I, 2016 Wash. App. LEXIS 1884, at *31 (Wash. Ct. App. Aug. 8, 2016), *review denied*, 187 Wn.2d 1007 (Wash. Jan. 4, 2017) (No. 93671-4). Defendants sought, and were denied, review by the Washington State Supreme Court. *Id.*

Having reviewed the parties' submissions, evidence regarding attorneys' fees and the Court of Appeal's decision, the Court makes the following Supplemental Findings of Fact and Conclusions of Law Regarding Attorneys' Fees:

I. FINDINGS OF FACT[1]

A. The Number of Hours Expended by Everett Hangar Through Trial Was Reasonable.

1. The Court closely analyzed the invoices and accompanying spreadsheet submitted by counsel for Everett Hangar for fees incurred through and after trial, determining whether the entries were too general or related to time spent on issues not relevant to this case.

2. Four attorneys and one paralegal for Everett Hangar's counsel, Davis Wright Tremaine, LLC ("DWT") performed the bulk of the work done on this matter. As reflected in the billing records submitted with its attorneys' fees motion, Partner Warren J. Rheaume directed litigation strategy, interfaced with Everett Hangar throughout the litigation, supervised the drafting of pleadings and briefs, and represented Everett Hangar at depositions, hearings, and trial. Work by other attorneys, such as a partner experienced in land use, was reasonable and the impact on the overall award is negligible.

3. The billing invoices and narratives submitted show that Everett Hangar's attorneys and staff apportioned the work among themselves to appropriately match the task to the experience of the team member. For example, Conner Peretti and Tom Wyrwich—the more junior attorneys—provided first-line research and drafting support. Generally, Mr.

[1] Any Finding of Fact more appropriately labeled a Conclusion of Law shall be so considered.

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(206) 622-3150 · Fax: (206) 757-7700

Goldmark, the senior associate, would review and revise those drafts and consult with Mr. Rheaume, the partner on the case, regarding strategy and finalization of the draft. Mr. Rheaume was the main point of contact with the client, directed the overall strategy of the case, and, of course, participated fully in the trial, along with Mr. Goldmark and Ericka Mitterndorfer, the case paralegal. This team structure accounted for the complexities of this case and the issues involved without unreasonable work duplication (e.g., more senior team members redoing tasks) or poor project management (e.g., more senior attorneys handling work capable of completion by a junior attorney or paralegal).

4. Everett Hangar also excluded time dedicated to its unsuccessful fiduciary duty claim. Based on the trial proceedings and its review of all of the case's time entries, Everett Hangar concluded that 90% of the case was devoted to issues besides Everett Hangar's fiduciary duty claim. The Court finds this is not an unreasonable approximation. If anything, less than 10% of the case was devoted to claims on which Everett Hangar did not prevail, though the Court will not diverge upward from Everett Hangar's own allocations.

5. Where an express allocation among claims could be made by reviewing the entry, Everett Hangar did so. For example, a clearly easement-related entry has a 100% allocation, while an entry clearly related to the fiduciary duty claim has a 0% allocation. Where an entry could not be readily subdivided, or related to multiple claims, Everett Hangar applied a fixed allocation based on the approximation that it spent 90% of the case on the contract-related claims. Entries with privileged attorney-client or work product information were not included in the fee calculation, removed from the fee spreadsheet, and redacted from the invoices. Non-privileged entries with 0% allocations were also redacted from the invoices so as to only show those entries for which Everett Hangar seeks at least some portion. The Court finds that this is a reasonable approach given the problems with allocating fees after partial success on various claims and addresses the Defendants' concerns that Everett Hangar requested fees for unsuccessful claims.

6. After allocating fees according to the above procedure, Everett Hangar

Davis Wright Tremaine LLP
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Suite 2200 · 1201 Third Avenue
Seattle, Washington 98101-3045
(206) 622-3150 · Fax: (206) 757-7700

requested $819,053.57 (1,847.46 hours) of the $882,541.50 (2,003.30 hours) in fees that Everett Hangar paid its attorneys.

7. The hours DWT spent in deposition and trial preparation were particularly justified because Everett Hangar had three fact witnesses, all of whom were lay people who had never before been deposed or testified at trial, and all of whom testified at trial. Preparing such witnesses to testify at trial, sometimes at length, required commensurate preparation.

8. The Court finds there was no duplication or overbilling warranting any reduction in awarding the fees requested by Everett Hangar. Nor were there too many attorneys or paralegals working on the case. The case was very fact-dependent and complicated, involving issues unique to aviation, flight operations, and airport safety and security. It required the help of experts to aid the trier of fact with aviation and airport procedures.

B. The Number of Hours Expended Post-Trial by Everett Hangar Warranted Only a Partial Award.

9. There was an extraordinary amount of post-trial work required by Everett Hangar's attorneys because of the activities of Defendants, including responding to Defendants' request for a stay, the filing of a supersedeas bond in the Court of Appeals and before this Court, responding to Defendants' alternate security requests, and requesting fees over Defendants' objections. The Court finds that this volume of work warranted a supplemental fee award post-trial.

10. Everett Hangar moved for $73,465.00 in fees covering the post-trial period from May 27 to July 23, 2015.

11. Everett Hangar excluded from the calculations any time not directly related to this lawsuit, including time covered by the Original Fees Motion, time spent evaluating the appeal filed by Defendants and time spent on any other activity.

12. Defendants objected to some entries as too vague. For instance, Defendants objected to an entry for $804 for a "status telephone conference" between Everett Hangar's

Davis Wright Tremaine LLP
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Suite 2200 · 1201 Third Avenue
Seattle, Washington 98101-3045
(206) 622-3150 · Fax: (206) 757-7700

attorneys and Everett Hangar's principal, Dean Weidner. While the entry does not contain specific information about what was discussed on the call, the content is clear enough from reviewing surrounding entries, which relate to supersedeas bond and fee motion issues. The other allegedly vague entries highlighted by Defendants are also clear when read in context.

13. Defendants also objected to time spent preparing for a possible contempt action, though Everett Hangar filed no such action. Defendants also objected to time Everett Hangar's attorneys spent communicating with the airport following the trial, to time spent compiling its supplemental fees request and to time spent drafting its cost bill.

14. After a careful review of DWT's invoices, and in light of Defendants' objections, the Court finds the request for $73,465.00 in fees was excessive in light of the nature of the work performed, the Court accordingly reduced the award where work was duplicative or clerical/administrative in nature. As a result, the Court found the following hours and fees reasonable, for a total of $44,126.00:

a. Warren Rheaume – 48.6 hours – $32,562.00

b. John Goldmark – 10.4 hours – $4,108.00

c. Tom Wyrwich – 17.8 hours – $5,785.00

d. Conner Peretti – 5.4 hours – $1,593.00

e. Ericka Mitterndorfer – 0.3 hours – $78.00

C. DWT's Rates Were Reasonable.

15. The rates charged by DWT were reasonable and customary for the Puget Sound area.

16. DWT's Controller, Peter Gowell, provided a declaration regarding DWT's rates dated May 28, 2015. Mr. Gowell is responsible for setting DWT's rates, relying on annual survey data independently compiled by one the large, leading accounting firms. The comparison Mr. Gowell provided showed that DWT's rates were generally at the midpoint of the range of rates of 14 other firms of similar size with either headquarters or branch offices in Seattle. Mr. Gowell's declaration showed that DWT carefully assesses, on a yearly basis, the

Davis Wright Tremaine LLP
LAW OFFICES
Suite 2200 · 1201 Third Avenue
Seattle, Washington 98101-3045
(206) 622-3150 · Fax: (206) 757-7700

reasonableness of its fees relative to its market position.

17. The Court has become familiar with the rates charged by attorneys from around the state, including King, Thurston and Snohomish Counties, and finds DWT's rates are not unreasonable, even if they exceed those of smaller firms in less populated counties.

18. DWT's rates are commensurate with the skill and experience of its attorneys and are appropriate given the size of DWT and that it is headquartered in Seattle. These rates are common within the community. While rates in Snohomish County are generally lower, it is not unreasonable to adhere to DWT's rates, especially where Defendants' attorneys are also from Seattle.

II. CONCLUSIONS OF LAW[2]

A. Everett Hangar's First Fee Request Was Reasonable.

20. Washington follows the lodestar method to determine the reasonableness of attorneys' fees awards. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 334, 858 P.2d 1054 (1993). This approach requires two steps: (1) calculating the "lodestar" by multiplying reasonable hourly rates by a reasonable amount of time spent obtaining relief, and (2) adjusting the lodestar up or down based on risk and success. *Id.*

21. To determine if the number of hours expended is reasonable, "the attorneys must provide reasonable documentation of the work performed." *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983). It must include: (1) the number of hours worked; (2) the type of work performed; and (3) the category of attorney who performed the work. *Id.* The lodestar "must be limited to hours reasonably expended." *Berryman v. Metcalf*, 177 Wn. App. 644, 662, 312 P.3d 745 (2013). "The total hours an attorney has recorded for work in a case is to be discounted for hours spent on 'unsuccessful claims, duplicated effort, or otherwise unproductive time.'" *Id.* (quoting *Bowers*, 100 Wn.2d at 597).

22. The Court finds that Everett Hangar has provided sufficiently detailed billing

[2] Any Conclusion of Law more appropriately labeled a Finding of Fact shall be so considered.

Davis Wright Tremaine LLP
LAW OFFICES
Suite 2200 · 1201 Third Avenue
Seattle, Washington 98101-3045
(206) 622-3150 · Fax: (206) 757-7700

records to determine the nature of the work performed. Where particular entries, read in isolation, may not reveal the exact nature of the work, the surrounding entries provide sufficient context to avoid impermissible vagueness.

23. The process DWT undertook in requesting fees only for time related to its successful claims adequately accounts for the "discount" required by *Berryman* for "hours spent on 'unsuccessful claims.'" *See supra* ¶¶ 4-5; *Berryman*, 177 Wn. App. at 662 (quoting *Bowers,* 100 Wn.2d at 597). The Court's review of the billings and DWT's allocations confirm that DWT sufficiently avoided requesting fees for the pursuit of its unsuccessful claims. Awarding all of Everett Hangar's *requested* fees through trial thus does not reimburse Everett Hangar for every dollar spent on attorneys' fees. Instead, Everett Hangar requests a fair approximation of only those hours reasonably expended on its successful claims.

24. The Court also finds that DWT avoided "duplicated effort" in its staffing. *Berryman*, 177 Wn. App. at 662 (quoting *Bowers,* 100 Wn.2d at 597). Everett Hangar's attorneys and staff apportioned the work among themselves to match the task to the experience of the team member. *See supra* ¶¶ 2-3. Mr. Rheaume handled communications with the client. While this took considerable time, this was a factually complex case and nothing suggests that time spent keeping Everett Hangar's representatives apprised was duplicative or unproductive. Less-senior attorneys handled tasks commensurate with their experience levels, as did DWT's paralegal. While more than four attorneys billed at least some time on the case, no evidence suggests their work was duplicative or unproductive. Indeed, consulting with a partner experienced in land use on a discrete issue, as here, would likely be more efficient than tasking a junior associate with researching the matter from scratch instead.

25. While Defendants' counsel devoted fewer hours to the matter than Everett Hangar's, this does not warrant awarding Everett Hangar less in fees for several reasons.

26. First, Defendants' main point of contact—and their main witness—John Sessions, is an experienced attorney. It takes considerably less time to prepare such a witness for deposition and trial and to keep him informed of the process and legal strategy for the case.

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By contrast, Chief Pilot Greg Valdez and Everett Hangar's counsel spent significant time working together throughout the case and preparing Mr. Valdez for his deposition and extensive trial testimony. Mr. Valdez is a sophisticated lay person and pilot, but not an attorney, and his preparation and involvement in the case leading up to trial took time, but resulted in cogent testimony that the Court found particularly credible and persuasive.

27. Second, better outcomes often require more work. Defendants have argued that the difference between the number of hours spent by each side stands as proof Everett Hangar's hour total is unreasonable. However, the difference says nothing more than that the prevailing party here approached the case differently than the Defendants. This is not unusual in litigation.

28. Third, Everett Hangar had the burden of proof as plaintiff, as well as the burden of persuasion, which required more extensive discovery, marshalling of the facts and evidence, and trial preparation.

29. Fourth, Everett Hangar had three fact witnesses, all of whom are lay people who had never been deposed or testified at trial, and all of whom testified at trial. These witnesses required considerably more preparation relative to Defendants' one fact witness, Mr. Sessions, an experienced attorney.

30. Defendants have objected to recovery for hours spent on unfiled discovery motions and taking a document custodian deposition that did not result in a motion. But parties will often conduct research or pursue litigation strategies that they abandon for any number of reasons, but which served a strategic purpose when undertaken. That does not make it "unproductive" time. *Berryman*, 177 Wn. App. at 662. The law does not require that the Court engage in parsing every avenue taken over several years of litigation in order to grant fee recovery only for those paths that, in retrospect, were significant or fruitful. For instance, an unfiled discovery motion may have been necessary until a deal was struck with opposing counsel. Similarly, a document custodian deposition does not have to result in a motion to be worthwhile in pursuit of a client's interests in the case. The case law does not support Defendants' request for such a granular analysis of a years-long litigation.

Davis Wright Tremaine LLP
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Suite 2200 · 1201 Third Avenue
Seattle, Washington 98101-3045
(206) 622-3150 · Fax: (206) 757-7700

31. In light of the above, the Court's award of $819,053.57 for Everett Hangar's first request for fees is reasonable.

B. Everett Hangar's Supplemental Fee Request Warranted a Reduced Award.

32. Everett Hangar also sought $73,465.00 in supplemental fees for post-trial work, covering the period May 27 to July 23, 2015.

33. Everett Hangar excluded from the calculations any time not directly related to this lawsuit, including time covered by the Original Fees Motion, time spent evaluating the appeal filed by Defendants and time spent on any other activity. These exclusions prevented any double counting from the previous motion for fees.

34. Defendants objected to some entries as too vague. For instance, Defendants objected to an entry for $804 for a "status telephone conference" between Everett Hangar's attorneys and Everett Hangar's principal, Dean Weidner. While the entry does not contain specific information about what was discussed on the call, the content is clear enough from reviewing surrounding entries, which relate to supersedeas bond and fee motion issues. The other allegedly vague entries highlighted by Defendants are also clear when read in context.

which information is privileged,

35. Defendants also objected to time spent preparing for a possible contempt action, though Everett Hangar filed no such action. Defendants also objected to time Everett Hangar's attorneys spent communicating with the airport following the trial, to time spent compiling its supplemental fees request and to time spent drafting its cost bill.

36. After a careful review of DWT's invoices, and in light of Defendants' objections, the request for $73,465.00 in fees was excessive in light of the nature of the work performed. The Court's analysis revealed that a portion of the request was for "duplicated effort." *Berryman*, 177 Wn. App. at 662 (quoting *Bowers,* 100 Wn.2d at 597). There was also work performed that was too clerical or administrative in nature to warrant an award of attorneys' fees. As a result, the Court reduced the award where work was duplicative or clerical/administrative in nature. As a result, the Court found the following hours and fees reasonable, for a total of $44,126.00:

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Suite 2200 · 1201 Third Avenue
Seattle, Washington 98101-3045
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a. Warren Rheaume: 48.6 hours – $32,562.00

b. John Goldmark: 10.4 hours – $4,108.00

c. Tom Wyrwich: 17.8 hours – $5,785.00

d. Conner Peretti: 5.4 hours – $1,593.00

e. Ericka Mitterndorfer: 0.3 hours – $78.00

37. In light of the above, the Court's award of $863,669.57 in attorneys' fees and costs due Everett Hangar, as summarized below, is reasonable:

a. First fee award: $819,053.57

b. Suppl. fee award: $44,126.00

c. Costs: $490.00

d. Total: **$863,669.57**

38. On remand, Defendants attempt to re-argue their position that Plaintiff is not a prevailing party. This argument was previously rejected by this court, and that decision was upheld by the Court of Appeals. Accordingly, the court will not reconsider the argument here.

39. Plaintiff has presented these (draft) Findings of Fact + Conclusions of Law. This court has reviewed each of them and finds they are consistent with the evidence presented and the applicable law. Accordingly, the Court adopts these Findings + Conclusions, as edited by me, as my own, and enters this Order accordingly.

Davis Wright Tremaine LLP
LAW OFFICES
Suite 2200 · 1201 Third Avenue
Seattle, Washington 98101-3045
(206) 622-3150 · Fax: (206) 757-7700

SO ORDERED this 9th day of ~~April~~ May, 2017

Millie M. Judge
Judge, Snohomish County Superior Court

Presented by:

DAVIS WRIGHT TREMAINE LLP
Attorneys for Plaintiff

By _____

Warren J. Rheaume, WSBA #13627
John A. Goldmark, WSBA #40980
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
Tel: (206) 757-8265; Fax: (206) 757-7265
Email: warrenrheaume@dwt.com
Email: johngoldmark@dwt.com

Approved as to form, notice of presentation waived:

HILLIS CLARK MARTIN & PATERSON P.S.
Attorneys for Defendants

By _____

Louis D. Peterson, WSBA #5776
Jake Ewart, WSBA #38655
Hillis Clark Martin & Peterson P.S.
1221 Second Avenue, Suite 500
Seattle, Washington 98101-2925
Tel: (206) 623-1745 Fax: (206) 623-7789
Email: lou.peterson@hcmp.com;
jake.ewart@hcmp.com

Davis Wright Tremaine LLP
LAW OFFICES
Suite 2200 · 1201 Third Avenue
Seattle, Washington 98101-3045
(206) 622-3150 · Fax: (206) 757-7700

Appendix 8

The Honorable Millie M. Judge

SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF SNOHOMISH

EVERETT HANGAR, LLC, a Washington limited liability company, Plaintiff, v. KILO 6 OWNERS ASSOCIATION, a Washington nonprofit corporation; KILO SIX, LLC, a Washington limited liability company; HISTORIC HANGARS, LLC, a Washington limited liability company; HISTORIC FLIGHT FOUNDATION, a Washington nonprofit corporation; and JOHN SESSIONS, an individual; Defendants.	Case No. 14-2-02264-4 **ORDER FOR CONTEMPT**

THIS MATTER came before the motion of Plaintiff's Motion for Contempt. The court has considered:

- Plaintiff's Motion for Contempt and the accompanying Declaration of Greg Valdez, Declaration of Jeff Wood, and Declaration of Jeff A. Kohlman in support of the motion;
- Defendants' Opposition to Plaintiff's Motion for Contempt, and the accompanying Declaration of Jeff Ewart in Support of Defendants' Opposition to Plaintiff's Motion for Contempt; and
- Reply in support of Plaintiff's Motion for Contempt and accompanying Declaration of Tom Wyrwich;

- Documents, photograph, and videos submitted in conjunction with each Declaration as attached exhibits.

Based on the foregoing and being otherwise fully informed, the court finds as follows:

1. As to Paragraph Nos. 1 and 2 of the Amended Order Granting Permanent Injunction ("the Injunction"), the Plaintiff has not met its burden of proof to demonstrate that Historic Hangars, LLC and Historic Flight Foundation ("the Defendants") have violated its terms by placing objects in the Object Free Area ("OFA") and/or blocked access to Kilo 7 taxi lane. The Injunction specifies: "*For all Everett Hangar aircraft using Lot 11 for access to Kilo 7, the OFA shall be determined by reference to the applicable circular or other applicable FAA guideline.*" (Injunction at p. 2)

It is clear from the evidence provided and arguments of counsel that there still exists a dispute as to the exact location of the OFA. At trial, the evidence revealed that the painted lines near the ramps of Lots 11 and 12 purporting to identify the OFA were incorrectly drawn. Accordingly, Defendants are not entitled to use those painted lines as evidence they are in compliance with the Injunction. In order to ensure future compliance and lessen the disputes between the parties, the Court finds that the parties should be ordered to meet and confer within the next 30 days to determine the exact location of the OFA with regard to Everett Hangar's aircraft. The parties should consult with Paine Field officials, as necessary, and take whatever steps are necessary to paint new OFA lines on the appropriate areas of the ramps in front of Lots 11 and/or 12.

2. As to Paragraph No. 4 of the Injunction, the Court finds by a preponderance of the evidence that the Defendants violated its express terms on July 15, 2017, August 10, 2017, August 18, 2017 and September 1, 2017, as follows:

a. On July 15, 2017, the Defendants' flight museum ("the Museum") hosted a barbecue on the airside of Lot 11, during which dozens of individuals were walking out on the Lot 11 ramps, viewing vintage aircraft. While some Museum personnel were visible on the ramp wearing yellow vests during this event, one Museum guest was

allowed to walk unescorted by security from Lot 11 over onto the corner of the hangar belonging to Everett Hangar, on the Lot 12 ramp.

b. On August 10, 2017, a man walked unescorted from Defendants' Lot 11 directly onto the Lot 12 ramp without permission, and entered inside of the open hangar belonging to Everett Hangar. Afterward, he was seen by Plaintiff's staff returning to the Museum on Lot 11.

c. On August 18, 2017, a man walked unescorted from Defendants' Lot 11 directly onto Everett Hangar's Lot 12 ramp without permission, and continued out to the Everett Hangar Learjet on the ramp. The man identified himself as a Museum guest but had no security escort and was not wearing a visitor badge. He repeatedly sought entry into the aircraft. He was finally turned away by Everett Hangar's pilots and returned to the museum.

d. On September 1, 2017, Defendants' concede that one of their guests entered into Lot 13, the unimproved parking lot next to Plaintiff's Lot 12, and walked past the bicycle fencing enclosing Lot 13 onto the airside of Lot 12, and traversed Everett Hangar's ramp, using it as a shortcut to reach the Museum on Lot 11.

The Defendants have an affirmative duty to prevent their invitees, guests, members of the public, personnel and volunteers from entering onto Lot 12 without permission. Although Defendants referenced some steps they have taken to prevent violations, they are plainly insufficient. Each of these incidents constitutes a clear violation of the terms of the Injunction.

3. As to Paragraph No. 5 of the Injunction, the Court finds that the Defendants violated its express terms on July 15, 2017, August 10, 2017 and September 11, 2017. On each of these occasions, the gate for Lot 13 parking lot was left open to the public, unlocked, and no gate attendant was immediately present. Defendants presented no evidence to rebut these facts. Each of these incidents constitutes a clear violation of the terms of the Injunction.

4. Through their actions and/or failures to act in accordance with the terms of the Injunction, the Defendants have demonstrated their contempt for this Court's lawful order, and the Court finds said contempt has been ongoing, and is likely to continue in the future without the imposition of sanctions pursuant to Chapter 7.21 RCW *et seq*.

NOW THEREFORE,

IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. Sanctions are imposed jointly and severally against the Defendants in the amount of $5,000 per violation. The court finds that the Injunction was violated on seven (7) separate occasions. Accordingly, the Court imposes the sum of $35,000.00 against the Defendants, jointly and severally. Payment shall be made to the Clerk of the Snohomish County Superior Court within 60 days. If further actions constituting contempt of the Injunction are found, the Court may consider additional sanctions and/or may make changes to the Injunction.

3. The parties are ordered to meet and confer within the next 60 days to determine the exact location of the OFA with regard to Everett Hangar's aircraft. The parties should consult with Paine Field officials, as necessary, and take whatever steps are necessary to paint new OFA lines on the appropriate areas of the ramps in front of Lots 11 and/or 12 as soon as practicable.

4. Everett Hangar is awarded its costs and reasonable attorney's fees in having to bring this motion, in an amount to be determined upon further submittals.

SO ORDERED this 17th day of November, 2017.

Judge Millie M. Judge
Snohomish County Superior Court

Appendix 9

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

EVERETT HANGAR, LLC, a Washington limited liability company,

Plaintiff,

vs.

KILO 6 OWNERS ASSOCIATION, a Washington nonprofit corporation; KILO SIX, LLC, a Washington limited liability company; HISTORIC HANGARS, LLC, a Washington limited liability company; HISTORIC FLIGHT FOUNDATION, a Washington nonprofit CORPORATION; and JOHN SESSIONS, an individual,

Defendants.

No. 14-2-02264-4

[PROPOSED] ORDER GRANTING MOTION FOR RECONSIDERATION

This matter comes before the Court on the Motion for Reconsideration filed on November 30, 2017 by Defendants Historic Flight Foundation and Historic Hangars, LLC (the "Motion for Reconsideration"). The Court has considered the Motion for Reconsideration, Everett Hangar's response, and Defendants' reply, and has considered the other papers and pleadings on file.

Being fully advised, it is hereby ORDERED that the Motion for Reconsideration is GRANTED. It is further ORDERED that the Court's Order of Contempt, filed November 20,

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, WA 98104
Tel: (206) 623-1745
Fax: (206) 623-7789

2017, is hereby modified to impose a reduced sanction of $2,000 per violation against Defendants Historic Flight Foundation and Historic Hangars, LLC. The total sanction imposed is therefore reduced to $14,000, payable to the Clerk of the Snohomish County Superior Court within 60 days of November 20, 2017. The Court's Order of Contempt is otherwise unchanged.

DONE THIS 13th day of December, 2017.

HON. MILLIE D. JUDGE
SNOHOMISH COUNTY SUPERIOR COURT JUDGE

Presented by:

HILLIS CLARK MARTIN & PETERSON P.S.

By _____
Louis D. Peterson, WSBA #5776
Jake Ewart, WSBA #38655
Hillis Clark Martin & Peterson P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789
Email: lou.peterson@hcmp.com;
jake.ewart@hcmp.com

Attorneys for Defendants
Kilo 6 Owners Association, Kilo Six, LLC,
Historic Hangars, LLC, Historic Flight Foundation, and
John Sessions

ND: 19813.008 4811-2468-7447v1

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, WA 98104
Tel: (206) 623-1745
Fax: (206) 623-7789

Appendix 10

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

EVERETT HANGAR, LLC, a Washington limited liability company, Respondent, v. KILO 6 OWNERS ASSOCIATION, a Washington nonprofit corporation; KILO SIX, LLC, a Washington limited liability company; HISTORIC HANGARS, LLC, a Washington limited liability company; HISTORIC FLIGHT FOUNDATION, a Washington nonprofit corporation; and JOHN SESSIONS, an individual, Appellants.	No. 77842-1-I DIVISION ONE UNPUBLISHED OPINION FILED: November 5, 2018

LEACH, J. — Historic Hangars LLC and Historic Flight Foundation (collectively the Museum) challenge the trial court's order finding the Museum in contempt. The Museum claims that the trial court must implicitly find that it intended to disobey a court order before finding it in contempt, which the trial court did not do. But a defendant who intentionally acts contrary to a court order, with actual or constructive knowledge of the order's existence and effect, intentionally disobeys that order. The Museum does not contest its knowledge of the order's existence and effect nor does it claim that its intentional acts did not violate the trial court's order. We affirm.

BACKGROUND

This lawsuit involves neighboring lots 11, 12, and 13 at the Snohomish County Airport (Paine Field) in Everett. Snohomish County (County) owns the underlying land and leases it to each party, individually. The lessees of lots 11 and 12 own the hangars constructed on them. In May 2007, Kilo Six LLC leased the area now comprising lots 11, 12, and 13. It assigned its interest in lot 11 to Historic Hangars LLC, which subleased lot 11 to the Historic Flight Foundation (the Foundation). The Foundation holds public and private events on the exterior lot 11 ramp and the Paine Field ramp and uses lot 13, with Kilo Six's permission, for public parking and events.

John Sessions is the managing and sole member of Historic Hangars and Kilo Six. He is also the president, chief executive officer, sole director, and sole member of the board of directors of the Foundation.

Everett Hangar LLC, a subsidiary of Weidner Investment Services Inc., leases lot 12 and owns the aircraft hangar on it. Weidner conducts its flight operations on lot 12.

Kilo Six still owns the leasehold interest in lot 13.

To facilitate separate ownership and operation of the three lots, the County agreed to execute covenants, conditions. and restrictions (the CC&Rs). The CC&Rs provide for an easement to each lot for aircraft movement. Sessions is the president, treasurer, and controlling owner and director of the Kilo 6

Owners Association (Association), which is created by the CC&Rs and enforces them. The CC&Rs apply to all lessees and sublessees of lots 11, 12, and 13.

The frequency of Everett Hangar's flight operations and the Museum's events lead to "constant conflicts" between Everett Hangar and the Museum, including "a dozen serious incidents caused by these conflicts in the past six years." In February 2015, Everett Hangar sought injunctive relief to protect its easement rights to the Kilo 7 taxiway providing access from its hangar to the airport runway and to address and mitigate safety and security concerns created by the Museum's activities on lots 11 and 13.

After a bench trial, the trial court concluded that the CC&Rs provided Everett Hangar an express easement right for movement of its airplanes and a recognized safety and security right. It granted Everett Hangar an injunction, finding that defendants, the Association, Kilo Six, Historic Hangars, and the Foundation, violated those rights.

The defendants appealed. In an unpublished opinion, this court reversed a portion of the trial court's injunctive relief and remanded to the trial court to enter additional findings of fact about its attorney fees award to Everett Hangar.[1] On remand, the trial court entered an amended injunction and the supplemental findings.

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[1] Everett Hangar, LLC v. Kilo 6 Owners Ass'n, No. 73504-7-I, slip op. at 30-31 (Wash. Ct. App. Aug. 8, 2016) (unpublished), http://www.courts.wa.gov/opinions/pdf/735047.pdf, review denied, 187 Wn.2d 1007 (2017).

The amended permanent injunction enjoined only the Museum from specific activities. It prohibited the Museum from placing, parking, or maintaining any objects within a specified area or blocking Everett Hangar's access to the west or east exits to the Kilo 7 taxiway. It also barred the Museum from allowing people to enter described areas at specific times or access lot 12 unless permitted by the CC&Rs or Everett Hangar. It further enjoined the Museum from propping open any security gate, door, or entry point on lots 11 or 13 without a security guard immediately present at all times.

In October 2017, Everett Hangar asked the court to find the Museum in contempt, claiming that it committed multiple violations of the amended injunction. The trial court found a total of seven violations of the injunction. It imposed sanctions of $5,000 per violation. At the Museum's request, the trial court reconsidered and reduced its sanctions award to the statutorily authorized maximum of $2,000 per incident. The Museum appeals the trial court's contempt order.

STANDARD OF REVIEW

An appellate court reviews contempt rulings for an abuse of discretion.[2] A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons.[3]

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[2] Moreman v. Butcher, 126 Wn.2d 36, 40, 891 P.2d 725 (1995).
[3] Moreman, 126 Wn.2d at 40.

ANALYSIS

Contempt Order

The Museum correctly notes that the contempt statute requires that a party must intentionally disobey a court's order to be in contempt. It claims that the record does not show that the Museum intentionally disobeyed the amended permanent injunction and the trial court abused its discretion by finding the Museum in contempt. We disagree.

First, the Museum claims that the contempt statute requires that Everett Hangar prove the Museum intentionally disobeyed the trial court's injunction. RCW 7.21.010(1)(b) states, "'Contempt of court' means intentional . . . [d]isobedience of any lawful judgment, decree, order, or process of the court." In In re Structured Settlement Payment Rights of Rapid Settlements, Ltd.,[4] Division Three of this court confirmed that RCW 7.21.010(1)(b) requires that an individual must act intentionally to be found in contempt of court. But, in affirming the trial court's contempt order, it held that the trial court was not required to make an express written finding that defendants' violations of the injunction were intentional.[5] The court explained the challenged contempt order satisfied the statutory requirement of intentional disobedience because the defendants' "acts and omissions identified by the contempt order as violations were supported by evidence that established their

[4] 189 Wn. App. 584, 604-05, 359 P.3d 823 (2015).
[5] Rapid Settlements, 189 Wn. App. at 605.

inherently intentional character."[6] It held that the trial court's implicit finding that defendants' acts and omissions were intentional satisfied the statute.[7] Further, although chapter 7.21 RCW does not define "intentional," the contempt statute requires that a defendant must have actual or constructive knowledge of the "existence and substantive effect of the court's order or judgment."[8]

Second, the Museum claims that the court's findings do not show the "inherently intentional character" of the Museum's conduct. The Museum does not challenge the trial court's findings; it claims only that the court did not implicitly find that it intentionally violated the injunction. Because we treat unchallenged findings of fact as true on appeal, we accept the trial court's findings.[9] The trial court found that the Museum violated paragraphs 4 and 5 of the injunction. Paragraph 4 prohibits the Museum from

> allowing, permitting or suffering any person, including an officer, agent, employee, invitee and guest of each of them, to enter upon or gain access to Lot 12 from its properties, except to the extent permitted by the applicable Covenants, Conditions and Restrictions for Kilo 6 Hangars, or by other agreement with the Plaintiff.

The trial court found the Museum violated paragraph 4 of the injunction on four occasions:

> a. On July 15, 2017, the Defendants' flight museum ("the Museum") hosted a barbecue on the airside of Lot 11, during which

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[6] Rapid Settlements, 189 Wn. App. at 605.
[7] Rapid Settlements, 189 Wn. App. at 605.
[8] In re Estates of Smaldino, 151 Wn. App. 356, 365, 212 P.3d 579 (2009) (citing In re Koome, 82 Wn.2d 816, 821, 514 P.2d 520 (1973)).
[9] Davis v. Dep't of Labor & Indus., 94 Wn.2d 119, 123, 615 P.2d 1279 (1980).

> dozens of individuals were walking out on the Lot 11 ramps, viewing vintage aircraft. While some Museum personnel were visible on the ramp wearing yellow vests during this event, one Museum guest was allowed to walk unescorted by security from Lot 11 over onto the corner of the hangar belonging to Everett Hangar, on the Lot 12 ramp.
>
> b. On August 10, 2017, a man walked unescorted from Defendants' Lot 11 directly onto the Lot 12 ramp without permission, and entered inside of the open hangar belonging to Everett Hangar. Afterward, he was seen by Plaintiff's staff returning to the Museum on Lot 11.
>
> c. On August 18, 2017, a man walked unescorted from Defendants' Lot 11 directly onto Everett Hangar's Lot 12 ramp without permission, and continued out to the Everett Hangar Learjet on the ramp. The man identified himself as a Museum guest but had no security escort and was not wearing a visitor badge. He repeatedly sought entry into the aircraft. He was finally turned away by Everett Hangar's pilots and returned to the [M]useum.
>
> d. On September 1, 2017, Defendants concede that one of their guests entered into Lot 13, the unimproved parking lot next to Plaintiff's Lot 12, and walked past the bicycle fencing enclosing Lot 13 onto the airside of Lot 12, and traversed Everett Hangar's ramp, using it as a shortcut to reach the Museum on Lot 11.

The trial court also found that the Museum committed three violations of paragraph 5 of the injunction. Paragraph 5 bars defendants from "propping open any security gate, door or entry point on the Premises of Lots 11 or 13 unless a security guard is immediately present at the gate at all times." The trial court found "on July 15, 2017, August 10, 2017 and September 11, 2017 . . . , the gate for Lot 13 parking lot was left open to the public, unlocked, and no gate attendant was immediately present. Defendants presented no evidence to rebut these facts."

The Museum contends that because it adopted policies and procedures to ensure compliance with the injunction, it intended to comply and could not have intentionally violated the injunction. It explained that the Museum does not permit its guests to access the lot 11 airside ramp unless escorted by a properly trained Museum guide. And the Museum trains its guides to prohibit access to the ramp without escort and to keep guests off the neighboring lot 12 airside ramp. It also posts signs on doors to airside spaces stating, "Escort Required." But the Museum presented no evidence that it monitored compliance with this training during its events.

And the Museum does not contest that it had knowledge of the existence and effect of the injunction. In fact, it claims that it implemented policies to comply with the injunction. It also makes no claim that it did not intend its challenged acts. For example, it makes no claim that it accidentally left a gate unlocked, that third parties unlocked a gate and left it unattended by a security guard, or that the unauthorized individuals found on lot 12 were not its guests. Because the Museum had the required knowledge and the trial court found that on seven separate occasions it violated two provisions of the injunction, the trial court implicitly found the Museum intentionally disobeyed its order. This satisfies RCW 7.21.010(1)(b)'s requirement that an entity must act intentionally to be found in contempt of a court order. The trial court did not abuse its discretion by finding the Museum in contempt of the injunction.

Attorney Fees

Both the Museum and Everett Hangar request attorney fees on appeal under the CC&Rs and RAP 18.1. RAP 18.1(a) allows a reviewing court to award a party reasonable attorney fees if applicable law grants a party the right to recover them. Here, the CC&Rs state, "In any action to enforce the provisions of this Declaration or Association rules, the prevailing party shall be entitled to recover all costs, including, without limitation, reasonable attorneys' fees and court costs, reasonably incurred in such action." Because the injunction arose from alleged violations of the CC&Rs, we award Everett Hanger attorney fees on appeal as the substantially prevailing party, subject to its compliance with RAP 18.1(d).

CONCLUSION

The Museum does not contest that it had knowledge of the existence and effect of the amended permanent injunction. Nor does it challenge the trial court's findings that it violated the injunction on seven separate occasions. Implicit in the trial court's unchallenged findings is the Museum's intentional

disobedience of the amended injunction. The trial court did not abuse its discretion by finding the Museum in contempt of this injunction. We affirm.

Leach, J.

WE CONCUR:

Dwyer, J.

Cox, J.

Appendix 11

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

EVERETT HANGAR, LLC, a Washington limited liability company, Respondent, v. KILO 6 OWNERS ASSOCIATION, a Washington nonprofit corporation; KILO SIX, LLC, a Washington limited liability company; HISTORIC FLIGHT FOUNDATION, a Washington nonprofit corporation; and JOHN SESSIONS, an individual, Appellants.	)	No. 77842-1-I MANDATE Snohomish County Superior Court No. 14-2-02264-4

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for Snohomish County.

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division I, filed on November 5, 2018, became the decision terminating review of this court in the above entitled case on February 8, 2019. This case is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the decision.

Pursuant to a Commissioner's ruling entered on November 28, 2018, attorney fees of $23,395.50 are awarded in favor of judgment creditor Everett Hangar, LLC against judgment debtor Historic Flight Foundation.

c: Michael Ewart
John Goldmark
Max Hensley
Louis Peterson
Warren Rheaume
Hon. Millie Judge

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 8th day of February, 2019.

RICHARD D. JOHNSON
Court Administrator/Clerk of the Court of Appeals,
State of Washington, Division I.

Appendix 12

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

EVERETT HANGAR, LLC, a Washington limited liability company,

Plaintiff,

vs.

KILO 6 OWNERS ASSOCIATION, a Washington nonprofit corporation; KILO SIX, LLC, a Washington limited liability company; HISTORIC HANGARS, LLC, a Washington limited liability company; HISTORIC FLIGHT FOUNDATION, a Washington nonprofit CORPORATION; and JOHN SESSIONS, an individual,

Defendants.

No. 14-2-02264-4

DECLARATION OF JOHN T. SESSIONS IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR CONTEMPT

Pursuant to RCW 9A.72.085, the undersigned hereby declares that:

1. I am the sole member of Historic Hangars, LLC and President of the Historic Flight Foundation, both of which are defendants in this action. I have personal knowledge of the facts set forth in this declaration and am fully competent to testify in this matter.

2. Paine Field has painted two sets of dashed lines on and around Lots 11 and 12. The Foundation understands the lines mark the Object Free Area ("OFA").

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, WA 98104
Tel: (206) 623-1745
Fax: (206) 623-7789

3. Attached as **Exhibit A** is a true and correct copy of a photograph taken from the Lot 11 ramp looking toward Everett Hangar's hangar. Everett Hangar's hangar is in the background. This photograph accurately depicts one of the dashed lines painted by Paine Field across the Lot 11 ramp. The wing tip of a Foundation aircraft is seen in the upper right hand corner of the photograph.

4. Attached as **Exhibit B** is a true and correct copy of a photograph taken from the Lot 11 ramp facing east toward the Lot 12 ramp. The photograph accurately depicts the second dashed line painted by Paine Field along the northern boundary of Lots 11 and 12. That dashed line also contains the painted warning "Object Free Area Keep Clear."

5. I have instructed all Foundation staff and volunteers to park aircraft only outside the OFA when they are parked on the Lot 11 ramp, unless the aircraft is being used at that time for flight operations.

6. Since March 21, 2017, I have not seen a Foundation aircraft parked within the OFA on Lot 11 as that OFA is demarcated by Paine Field's dashed lines.

7. Since March 21, 2017, Everett Hangar has not informed me or the Foundation that it has any concerns about the placement of Foundation aircraft on Lot 11.

8. The Foundation does not permit its guests to access the Lot 11 ramp unescorted. Foundation policy requires that any guest be escorted onto the Lot 11 ramp only by properly trained and credentialed Foundation staff or volunteers (the Foundation refers to these volunteers as "docents"). Foundation policy also requires Foundation staff and volunteers to keep themselves and Foundation guests off the Lot 12 ramp unless they are there for proper purposes in connection with ongoing flight operations.

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, WA 98104
Tel: (206) 623-1745
Fax: (206) 623-7789

9. All Foundation docents are trained to prohibit access to the Lot 11 ramp without an escort, and to prohibit access to the Lot 12 ramp. Attached as **Exhibit C** is a true and correct copy of excerpts from training materials used by the Foundation to train all Foundation docents.

10. The Foundation has two pedestrian access doors to the Lot 11 ramp. Both are posted with signs saying "Escort Required." Attached as **Exhibit D** is a true and correct copy of a photograph of that sign as posted on one of the Foundation's doors. The sign on the other Foundation door is identical in substance.

11. Before filing its Motion for Contempt, Everett Hangar did not alert me or the Foundation to any of the alleged violations described in Everett Hangar's motion. Because the Foundation was not notified of these alleged violations even remotely contemporaneously, it is impossible to investigate the alleged incidents effectively.

12. I cannot identify the people depicted in the videos attached as Exhibits A-1 through A-5 of the Valdez Declaration, or in the photograph attached as Exhibit G to the Valdez Declaration.

13. I recognize the person depicted in Exhibit A-6 to the Valdez Declaration as a visiting pilot participating in Vintage Aircraft Weekend.

14. In recent months, there has been increased activity around Kilo 7. Since August, Boeing has parked a B-52 for painting across the Kilo 7 taxiway, opposite the Foundation and Everett Hangar. Crews of people have been involved in painting that B-52. Boeing has also constructed a temporary building across the Kilo 7 taxiway. The presence of

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, WA 98104
Tel: (206) 623-1745
Fax: (206) 623-7789

that building has also resulted in increased activity around Lots 11 and 12, including more people unaffiliated with either the Foundation or Everett Hangar.

15. Attached as **Exhibit E** is a true and correct copy of a photograph showing a crew of painters painting the B-52 while it was parked across the Kilo 7 taxiway from Everett Hangar and the Foundation. The photograph shows the Everett Hangar and Foundation hangars in the background.

16. Attached as **Exhibit F** is a true and correct copy of another photograph showing a crew of painters painting the B-52 while it was parked across the Kilo 7 taxiway from Everett Hangar and the Foundation. The photograph shows the Foundation's DC-3 in the background.

17. Attached as **Exhibit G** is a true and correct copy of another photograph showing the B-52 while it was parked across the Kilo 7 taxiway from Everett Hangar and the Foundation. The photograph shows the Everett Hangar and Foundation hangars in the background, and also shows Boeing's temporary building in the background.

18. The Foundation does not permit the Lot 13 gate to be opened without an attendant immediately present. Foundation policy requires that a gate monitor be immediately present at the gate whenever the Lot 13 gate is opened. This policy applies to all Foundation staff and volunteers.

19. The video attached as Exhibit A-7 to the Valdez Declaration shows a landscaping worker, hired by the Kilo 6 Owners Association for the benefit of Lots 11, 12,

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, WA 98104
Tel: (206) 623-1745
Fax: (206) 623-7789

and 13, performing standard landscaping maintenance in and around Lot 13. A crew of three, along with their truck and trailer, periodically visits the property for this purpose.

20. The video attached as Exhibit A-8 to the Valdez Declaration shows four pilots and crew members returning from an airshow to retrieve their cars.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 12th day of October, 2017, at Williston, North Dakota.

John T. Sessions

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ND: 19813.008 4851-6659-1313v1

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, WA 98104
Tel: (206) 623-1745
Fax: (206) 623-7789

Appendix 13

Case No. 76949-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

EVERETT HANGAR, LLC, a Washington limited liability company,
Plaintiff-Respondent,

v.

KILO 6 OWNERS ASSOCIATION, a Washington nonprofit corporation; KILO SIX, LLC, a Washington limited liability company; HISTORIC HANGARS, LLC, a Washington limited liability company; HISTORIC FLIGHT FOUNDATION, a Washington nonprofit corporation; and JOHN SESSIONS, an individual
Defendants-Appellants.

BRIEF OF APPELLANTS

HILLIS CLARK MARTIN & PETERSON P.S.
Louis D. Peterson, WSBA #5776
Jake Ewart, WSBA #38655
999 Third Avenue, Suite 4600
Seattle, WA 98104
Telephone: (206) 623-1745

ATTORNEYS FOR DEFENDANTS-APPELLANTS

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I. INTRODUCTION

The trial court has twice failed to comply with binding Supreme Court authority mandating the award of attorneys' fees to prevailing parties when a contract provides for fees. Plaintiff, Everett Hangar, sued five defendants. Three defendants have successfully defeated *every claim* asserted against them. They are prevailing parties entitled to attorneys' fees. The trial court failed to award them their fees, and defendants appeal to correct this error.

When a contract provides for attorneys' fees to the prevailing party, a party who prevails on every claim is unquestionably entitled to an award of its fees. That is black letter law, and the law as enunciated by the Supreme Court. *Singleton v. Frost*, 108 Wn.2d 723, 742 P.2d 1224 (1987).

Here, three of the five defendants—John Sessions, Kilo 6 Owners Association (the "Owners Association"), and Kilo Six, LLC—have won everything. On summary judgment, they defeated all damages claims. At trial, they defeated some of Everett Hangar's equitable claims. On appeal,

they defeated the rest of Everett Hangar's claims. After appeal, none of Everett Hangar's claims against them survived:

	Defendant	**Result**
Count I	Sessions	Dismissed
Count II	Sessions	Dismissed
Count III	Sessions The Association Kilo Six	Dismissed
Count IV	Sessions The Association Kilo Six	Dismissed
Count V	Sessions	Dismissed

The trial court failed to award attorneys' fees to these prevailing defendants after trial and again after remand for redetermination of fees. It has simply reaffirmed its first award of attorneys' fees to Everett Hangar without doing the required analysis. This is clear error, directly contrary to Supreme Court authority, and should be reversed.

The trial court also failed to follow Supreme Court attorneys' fees precedent with regard to the other two defendants—Historic Hangars, LLC and Historic Flight Foundation. These two defendants defeated all damages claims on summary judgment. They defeated some of Everett Hangar's equitable claims at trial. On appeal, they defeated most, but not all, of Everett Hangar's remaining claims. In these circumstances, where

both plaintiff and defendants win significant issues, neither side is the prevailing party entitled to attorneys' fees. That is the law as enunciated by the Supreme Court. *McGary v. Westlake Investors*, 99 Wn.2d 280, 661 P.2d 971 (1983).

The following table shows the dismissal of almost all of the relief sought against these defendants.

	Defendant	**Relief**
Count I	Historic Hangars The Foundation	~~Damages~~ ~~Jet Blast Easement~~ Movement Easement
Count II	Historic Hangars The Foundation	~~Damages~~ ~~No Access to Lot 12~~ ~~Lot 12 Fence~~ ~~Lot 13 Fence~~ Gate Monitors[1]

The trial court incorrectly reaffirmed its award of attorneys' fees to Everett Hangar, directly contrary to binding Supreme Court authority. No attorneys' fees should have been awarded under these circumstances. This Court should reverse the trial court's award of attorneys' fees to Everett Hangar, and should award attorneys' fees to the three defendants who prevailed on all claims.

[1] The trial court granted this relief, but Everett Hangar did not request it.

II. ASSIGNMENTS OF ERROR

1. The trial court erred as a matter of law in failing to reassess the identification of prevailing parties on remand.

2. The trial court erred as a matter of law in declining to find the entirely prevailing defendants—John Sessions, the Owners Association, and Kilo Six—to be prevailing parties, and erred in declining to award those defendants their attorneys' fees and costs.

3. The trial court erred as a matter of law in finding Everett Hangar to be a prevailing party and awarding Everett Hangar attorneys' fees and costs.

4. The trial court erred as a matter of law calculating the attorneys' fees it awarded Everett Hangar, including by failing to exclude fees not recoverable under Washington law, and by failing to offset the award with awards to all defendants under this Court's proportionality approach.

III. ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Did the trial court err as a matter of law in failing to reassess its identification of prevailing parties after this Court reversed on appeal much of the relief awarded to Everett Hangar?

2. Did the trial court err as a matter of law in declining to find the three entirely prevailing defendants—John Sessions, the Owners

Association, and Kilo Six—to be prevailing parties entitled to attorneys' fees and costs?

3. Did the trial court err as a matter of law in finding Everett Hangar to be a prevailing party entitled to attorneys' fees and costs when it lost most of its claims and was granted only a small fraction of its requested relief?

4. Did the trial court err as a matter of law in assessing Everett Hangar's attorneys' fee request by failing to apply the proportionality approach required by this Court's decisions, and by failing to deduct fees not reasonably incurred and not reasonably awarded under Washington law?

IV. STATEMENT OF THE CASE

A. Everett Hangar Was Awarded Attorneys' Fees as the Prevailing Party After Trial.

This is a dispute among the owners of three neighboring lots (Lots 11, 12, and 13) running west to east along the Kilo 7 taxiway at Paine Field.[2] Everett Hangar operates a corporate jet hangar located on Lot 12, which sits between Lots 11 and 13. The Historic Flight Foundation (the "Foundation") operates a vintage aircraft museum to Everett Hangar's west on Lot 11. Kilo Six, LLC, owns Lot 13, immediately to Everett Hangar's

[2] The Court also described the facts of the underlying dispute in its previous decision, *Everett Hangar, LLC v. Kilo 6 Owners Ass'n*, 195 Wn. App. 1034 (Aug. 8, 2016).

east. Everett Hangar sued five parties—its neighbors (Kilo Six and the Foundation), Historic Hangars (the Foundation's landlord on Lot 11), the Owners Association, and John Sessions (the Foundation's president)—in an attempt to shut down Foundation activities on the Foundation's airside ramp, including public aviation festivals sponsored by Paine Field. *See* CP 933-1086 (Complaint); 897-910 (Amended Complaint).

The dispute focused on this easement encumbering all three lots:

> **12.7 Ingress and Egress Easement for Aircraft.** Each Owner shall have an ingress and egress easement over and across such portions of the airplane ramps located on any Lot as is reasonably necessary to move aircraft to or from any building and the adjacent properties on which taxiways, runways, and airport facilities are located.

CP 935.

On summary judgment, the trial court dismissed all of Everett Hangar's claims for damages. Dkt. No. 41.[3] Then, after a bench trial, the trial court entered a permanent injunction awarding Everett Hangar only a portion of the relief it requested. CP 861-63. The trial court dismissed all claims against Sessions, dismissed Counts IV and V (of a five-count complaint), and granted only limited injunctive relief under Counts I through III against Historic Hangars, the Foundation, Kilo Six, and the Owners Association. *Id.*; CP 864-96 (Findings of Fact and Conclusions of Law).

[3] Docket number 41 is the trial court's Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment. Pursuant to RAP 9.6, defendants are supplementing the Clerk's Papers to add this order.

The most significant relief awarded by the trial court was the jet blast easement included as Paragraph 2 in the original permanent injunction. CP 862. That easement prohibited the Foundation from placing anything on its property that might be within 240 feet of Everett Hangar's Lear Jet if it moved across Foundation property to the taxiway. *Id.* That prohibition applied 24 hours a day, 7 days a week, and, given the width of the Foundation's ramp (approximately 188 feet), effectively required the Foundation to clear its airside property at all times regardless of Everett Hangar's flight schedule. *See id.*

The trial court concluded that Everett Hangar was the sole prevailing party at trial, and awarded Everett Hangar $863,669.57 in attorneys' fees and costs. CP 415-17; 895. Defendants appealed the trial court's permanent injunction, including the jet blast easement, and the attorneys' fee award. CP 816-60 (Notice of Appeal).

B. After the First Appeal, Three Defendants Totally Prevailed and the Other Two Defendants Prevailed on Most Issues.

On appeal, this Court reversed the jet blast easement and most of the other key relief the trial court granted to Everett Hangar.[4] This Court also dismissed Count III, and affirmed dismissal of Counts IV and V.

[4] *See Everett Hangar*, 195 Wn. App. 1034, at *7, 9-10 (reversing most of the injunctive relief under Counts I and II, dismissing Count III, and dismissing Counts I through V against Sessions with prejudice).

Accordingly, all claims against three of the five defendants—John Sessions, the Owners Association, and Kilo Six—have been dismissed. Everett Hangar is left with only greatly diminished relief on two of its five claims, and against only two of five defendants.

Everett Hangar's lack of success can be illustrated in several ways. For example, the Court can compare the relief Everett Hangar requested in its Amended Complaint, which was filed *during trial* after Everett Hangar rested, with the relief it ultimately obtained. The relief requested by Everett Hangar in the Amended Complaint is set forth below, with strike-outs reflecting relief denied Everett Hangar after appeal:

> Plaintiff respectfully requests the Court:
>
> A. Enter a permanent injunction prohibiting ~~Defendants~~ [*now, only Defendants Historic Hangars and the Foundation*], and all those acting in concert or participation with them, from ~~operating a vintage aircraft museum static aircraft display on the Lot 11 apron,~~ providing uncontrolled or poorly controlled public access to the ~~Lot 11 apron~~ [*now, only the object free area on the Lot 11 apron*]~~or conducting any other similar operation on the Lot 11 apron inconsistent with the safe and efficient operation of all aircraft, including those operating out of the hangar on Lot 12~~;
>
> B. ~~Enjoin Defendant John Sessions from breaching his fiduciary duties to Plaintiff by (a) controlling the Association for his own benefit, the detriment of Plaintiff, or (b) allowing activities on Lot 11 or Lot 13 that expose Plaintiff and its operations to unreasonable safety and security risks.~~
>
> ~~Enter a permanent injunction prohibiting Defendants and their agents, employees, officers and contractors are enjoined [sic] from permitting public access to Lot 13 for~~

~~vehicle parking or any other purpose unless and until it first erects, at its expense, a fence identical in design and material to the existing Paine Field perimeter fencing, around the perimeter of that portion of Lot 13 to be used for public access, which shall connect at both ends to the Paine Field perimeter fencing. The northern boundary of the newly-erected security fence shall not extend further north than a line defined by the north wall of the Lot 12 hangar.~~

C. ~~Enjoin Defendants from refusing to allow Everett Hangar to construct security fencing and a secured gate, at Everett Hangar's expense, identical in design and material to the existing Paine Field perimeter fencing, around the Lot 12 parking lot;~~

D. Award Plaintiff's costs, including attorneys' fees, pursuant to Sec. 4.2 of the CC&Rs:

E. Award prejudgment and post-judgment interest on applicable amounts; and

F. Award such other and further relief as this Court may deem just and proper.

The Court can also analyze Everett Hangar's lack of success on a claim-by-claim, defendant-by-defendant basis. The following table shows which counts Everett Hangar asserted against which defendants, and indicates where Everett Hangar received any relief against any of the defendants. A check mark ("✓") indicates Everett Hangar received some relief. An "X" indicates that the listed defendant received relief. A shaded box (with no mark) indicates Everett Hangar did not assert the indicated count against the listed defendant.

	Defendants Who Prevailed on All Claims			**Defendants Who Prevailed on Most Claims**	
	Sessions	The Association	Kilo Six	Historic Hangers	The Foundation
Damages (All Counts)	X Dismissed on SJ	X Dismissed on SJ	X Dismissed on SJ	X Dismissed on SJ	X Dismissed on SJ
Count I (Injunctive Relief)	X Dismissed at trial			✓X Dismissed in part on appeal	✓X Dismissed in part on appeal
Count II (Injunctive Relief)	X Dismissed at trial			✓X Dismissed in part on appeal	✓X Dismissed in part on appeal
Count III (Injunctive Relief)	X Dismissed at trial	X Dismissed on appeal	X Dismissed on appeal	X Dismissed on appeal	
Count IV (Injunctive Relief)	X Dismissed at trial	X Dismissed at trial	X Dismissed at trial		
Count V (Injunctive Relief)	X Dismissed at trial				

✓ = Relief for Plaintiff *X = Relief for Defendant* *= no claim asserted*

As this chart makes clear, defendants successfully defended against almost all of the claims asserted by Everett Hangar. The only relief partially won by Everett Hangar falls within Counts I and II against only Historic Hangars and the Foundation. And after the Court of Appeals decision, Everett Hangar has lost the core relief sought under these Counts, too. Historic Hangars and the Foundation are now prohibited only from blocking the area necessary to move aircraft across Lot 11, and from propping open entrances to Lots 11 and 13 without appropriate monitors.

This is only a small fraction of the relief Everett Hangar requested in the trial court. Defendants have prevailed on Everett Hangar's claims (1) for damages, (2) for a jet blast easement, (3) for a fence around the Lot 12 parking lot, (4) for a fence around the airport side of Lot 13, (5) for a prohibition of museum displays on any portion of the Lot 11 ramp, (6) for the right to block defendants' easement access across the Lot 12 ramp, and (7) for breaches of fiduciary duty.

The relief lost by Everett Hangar on appeal can be illustrated by comparing the trial court's original injunction with the amended injunction it entered on March 21, 2017, after remand. A redlined copy of the injunction entered by the trial court—showing the necessary changes to that order after appeal—is at Clerk's Papers 242-45. Even on its "successful" claims, Everett Hangar lost most of the relief it had been awarded in the trial court, including the jet blast easement.

C. This Court Remanded the Issue of Attorneys' Fees to the Trial Court.

Even though this Court reversed most of the substantive relief awarded to Everett Hangar, the Court did not reverse the trial court's attorneys' fee award outright. In addressing attorneys' fees, this Court mistakenly concluded that Everett Hangar had won much more than it had:

> Everett Hangar brought ***claims I through IV*** of its complaint under the CC&Rs or the Association bylaws. The CC&R fee provision applies only to these claims.

> Here, the trial court awarded Everett Hangar relief ***on each of these claims*** and thus properly awarded Everett Hangar attorney fees.

Everett Hangar, 195 Wn. App. 1034, at *11 (emphasis added). Even at the time those sentences were written, they were inaccurate. The trial court had previously dismissed Count IV in its entirety, along with Count V. On appeal, this Court dismissed Count III. Everett Hangar had not been awarded relief under "claims I through IV;" it had retained relief under only claims I and II against only two of the five defendants, and the relief it had been awarded had been curtailed dramatically.

Still, this Court vacated the award of attorneys' fees and remanded it for "recalculation and entry of findings and conclusions" in support. *Everett Hangar*, 195 Wn. App. 1034, at *11. This Court held that the trial court had not entered the necessary findings and conclusions in connection with its original $863,669.57 award, and had not adequately considered defendants' "specific objections." *Id.* The Court emphasized that trial courts must take an *active* role in assessing the reasonableness of fee awards, and explained that, when "a trial court fails to address specific objections that time billed was duplicative or unnecessary, this failure constitutes reversible error."[5] *Id.*

[5] Defendants petitioned the Supreme Court for review of the attorneys' fee issue, but the Supreme Court did not accept review. *Everett Hangar, LLC v. Kilo 6 Owners Ass'n*, 187 Wn.2d 1007 (Jan. 4, 2017). Review was denied without explanation, but the

D. On Remand, the Trial Court Did Not Change its Attorneys' Fees Award.

On remand, Everett Hangar presented the trial court with draft findings and conclusions resulting in the same $863,669.57 award the trial court had made before the appeal. CP 246-59. The defendants again made specific objections to the request. CP 171-245.

In supplemental briefing, the defendants pointed out that, under Washington law, the trial court could and should revisit the decision to award attorneys' fees to Everett Hangar in light of the appeal results. CP 171-89. Defendants argued that Everett Hangar was not a prevailing party after the appeal, and that the only parties entitled to recover all their attorneys' fees were the three entirely prevailing defendants. *Id.* Defendants also argued that, even if the Court were to award fees to Everett Hangar, the award should be much smaller to reflect the lack of success after appeal, and that any award to Everett Hangar should be offset by an award to the defendants. *Id.*; *accord* CP 482-85. The defendants also raised specific objections to the fees requested by Everett Hangar, listing objections to time spent on unproductive, unsubstantiated, irrelevant, and administrative tasks, including (as an extreme example) time billed for depositions the billing attorney *did not even attend.* CP 185-89.

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denial was unsurprising since, after this Court's vacation of the trial court's attorneys' fee award, there was no longer an existing fee award for the Supreme Court to review.

In response, Everett Hangar did not rebut the defendants' specific objections to the fees it requested; it focused instead on whether the trial court was entitled to reassess whether Everett Hangar was a prevailing party. CP 165-69. Everett Hangar argued that, under the Law of the Case doctrine, the trial court could not reassess whether Everett Hangar was a prevailing party, or whether other parties had also prevailed. *See id.*

The trial court made only minor edits to Everett Hangar's draft findings and conclusions and signed them. CP 89-99. None of the trial court's edits reduced the amount of fees awarded to Everett Hangar, even in light of the appeal results. *See id.* The trial court did not address the defendants' specific objections to time entries submitted by Everett Hangar. *See id.* The trial court concluded that the "case law does not support Defendants' request for such a granular analysis of a years-long litigation." CP 96. In so doing, the trial court did not even deduct the time charged by an Everett Hangar attorney for attending depositions he did not actually attend. *See* CP 89-99. The trial court also explicitly declined to "reconsider" its conclusions that Everett Hangar was a prevailing party, and that Everett Hangar was the *only* prevailing party. CP 98.

V. ARGUMENT

Washington law does not permit the trial court to award attorneys' fees only to Everett Hangar. Three of the defendants prevailed entirely on

all claims alleged against them. They are unquestionably prevailing parties entitled to their attorneys' fees. The other two defendants prevailed on most issues, including major issues. With respect to Everett Hangar's claims against those two defendants, there is no prevailing party under Washington law. Even if an award to Everett Hangar were appropriate, it would still need to be reduced to account for unsuccessful theories and claims and other unrecoverable time, and it must be offset, under this Court's proportionality approach, against awards to the defendants based on claims they successfully defended. The trial court did none of these things. This Court should reverse the trial court's attorneys' fee award again.

A. On Remand, The Trial Court Should Have Reassessed Whether Everett Hangar Is the Prevailing Party.

The trial court concluded that it was not entitled to reassess whether Everett Hangar is still a prevailing party after appeal. CP 98. The trial court also declined to consider whether any other parties were prevailing parties after appeal. *Id.* This was error.

When an award of attorneys' fees has been remanded for entry of findings and conclusions to support the award, the trial court retains total discretion in awarding, denying, and calculating attorneys' fees. *Deep Water Brewing, LLC v. Fairway Res., Ltd.*, 170 Wn. App. 1, 7-10, 282 P.3d 146 (2012). The trial court need not confine its review to "a mere

explanation of its prior award" unless limited to doing so by specific "restrictive language" in the Court of Appeals decision. *Id.* at 9. Here, this Court remanded for "recalculation and entry of findings and conclusions," and did not limit the trial court's discretion in any way. *Everett Hangar*, 195 Wn. App. 1034, at *11. The trial court therefore had all the same discretion on remand that it had when it originally awarded attorneys' fees in July 2015. The trial court erred in failing even to consider exercising that discretion.

B. The Trial Court's Award Conflicts with *Singleton* and *Cornish College*. The Three Prevailing Defendants Are Entitled to Their Attorneys' Fees.

Only three parties entirely prevailed in this action: John Sessions, the Owners Association, and Kilo Six. Under well-established Washington law, each is entitled to its attorneys' fees and costs as a prevailing party, and the trial court erred in failing to award them their fees.

It is well settled that, in an action involving a contract with a prevailing party fee provision, a court must award attorneys' fees to a party who prevails. *Singleton v. Frost*, 108 Wn.2d 723, 742 P.2d 1224 (1987). In *Singleton*, two creditors sued to recover unpaid debts owed under promissory notes. *Id.* at 725. Both notes contained fee provisions. *Id.* at 726. The trial court found the debtors liable under both promissory notes, but awarded reasonable attorneys' fees to only one of the creditors

(Singleton). *Id.* The trial court declined to award reasonable fees to the other creditor (Schontz). *Id.* at 725-26. The Supreme Court reversed and held that an award of reasonable fees under the contract was mandatory. The Court stated:

> We hold that the trial court has discretion regarding the amount of attorney's fees which are reasonable, but that *where a contract provides for an award of reasonable attorney's fees to the prevailing party, such an award must be made.*

Id. at 727 (emphasis added). A court abuses its discretion if it denies entirely an award of reasonable fees to a wholly prevailing party. *Id.* at 731.

It is equally well established that a defendant prevails by successfully defending against the plaintiff's claims. *Cornish Coll. of the Arts v. 1000 Virginia Ltd. P'ship*, 158 Wn. App. 203, 231, 242 P.3d 1 (2010). A court abuses its discretion if, in cases where a plaintiff asserts claims against multiple defendants, the court fails to consider each defendant separately when determining whether any defendant is a prevailing party. *Id.* at 233.

In *Cornish College*, the plaintiff tenant leased property from Virginia Limited Partnership, which was controlled by Donn Etherington, Jr. *Id.* at 210-11. The plaintiff sued both Virginia Limited and Etherington for specific performance of a contractual option to purchase the leased

property and for wrongful eviction. *Id.* at 214. The trial court granted the plaintiff's claim for specific performance against Virginia Limited, dismissed the plaintiff's claim for specific performance against Etherington, and awarded the plaintiff its attorneys' fees jointly and severally against Virginia Limited and Etherington. *Id.*

Etherington—an entirely prevailing defendant—appealed the award of fees against him. This Court reversed the attorneys' fee award against him and affirmatively awarded him the fees he incurred defending against the plaintiff's claim. *Id.* at 230-34. This Court held that the trial court abused its discretion by failing to consider the defendants separately, and made clear that, in multiparty litigation, a court must determine who is a prevailing party on a *party-by-party basis*. *Id.* at 232-33.

Here, the trial court was required to engage in a similar party-by-party analysis. It declined to do so. Only three parties prevailed on all claims: John Sessions, the Owners Association, and Kilo Six. Because they wholly prevailed on every claim asserted against them, they are prevailing parties as a matter of law. The Court should remand the issue of attorneys' fees once again and order the trial court to award the three entirely successful defendants their attorneys' fees and costs. *Singleton*, 108 Wn.2d at 727; *Cornish College*, 158 Wn. App. at 234.

C. The Trial Court's Decision Also Conflicts with *McGary* and *Seashore Villa*. No Attorneys' Fees Should Be Awarded to Everett Hangar or the Other Two Defendants, None of Which Is a Prevailing Party.

The trial court also erred in awarding attorneys' fees to Everett Hangar, which obtained only a small fraction of the relief it requested at trial. Where both the plaintiff and the defendant prevail on major issues, neither is a substantially prevailing party and no award of attorneys' fees is appropriate. *McGary v. Westlake Investors*, 99 Wn.2d 280, 288, 661 P.2d 971 (1983).

In *McGary*, commercial tenants brought a declaratory judgment action to determine lease rights regarding rent increases and parking. *Id.* at 281. The trial court entered judgment for the landlord and awarded the landlord its attorneys' fees. *Id.* at 281-82. This Court affirmed, and the Supreme Court accepted review. *Id.* at 282. The Supreme Court affirmed on the issue of rent but reversed on the issue of parking. *Id.* at 286-88. Because both parties had now prevailed on major issues after appeal, the Supreme Court held that neither party had substantially prevailed. *Id.* at 288. The Court reversed the trial court's award of attorneys' fees, and declined to award attorneys' fees to either party. *Id.*

That approach was also applied in *Seashore Villa Association v. Hugglund Family Limited Partnership*, 163 Wn. App. 531, 260 P.3d 906 (2011). There, an association of mobile home tenants brought an action

against their landlord seeking injunctive and declaratory relief. 163 Wn. App. at 536-37. The parties disputed who was responsible for maintaining carports and sheds built on the mobile home lots, and whether the landlord could remove the carports and sheds. *Id.* The landlord also brought a separate declaratory judgment claim to determine whether a letter it had sent to the tenants violated the Manufactured/Mobile Home Landlord-Tenant Act (MHLTA). *Id.* at 537. The trial court enjoined the landlord from transferring responsibility for maintaining the carports and sheds to the tenants, enjoined the landlord from removing the carports and sheds, and awarded attorneys' fees to the tenants. *Id.* at 538. On appeal, this Court reversed half of the injunctive relief and accordingly reversed the award of attorneys' fees because both parties had ultimately prevailed on major issues. *Id.* at 546-47.

Here, Everett Hangar has retained limited relief against two defendants—Historic Hangars and the Foundation—but these defendants have prevailed on most issues. They have prevailed on all claims for damages, prevailed on Everett Hangar's request for a jet blast easement (thereby preserving Historic Hangars' and the Foundation's ability to use the Lot 11 airside property), prevailed on the injunction barring them from using their easements across Lot 12 without Everett Hangar's express advance permission, and prevailed on Everett Hangar's requests for fences

enclosing both Lot 13 and the Lot 12 parking lot. Dkt. No. 41; *Everett Hangar*, 195 Wn. App. 1034, *7, 9-10.

Under these circumstances, the trial court erred in awarding Everett Hangar its attorneys' fees. Under *McGary* and *Seashore Villa*, the parties must bear their own fees when the plaintiff and defendants each prevail on major issues. *McGary*, 99 Wn.2d at 288; *Seashore Villa*, 163 Wn. App. at 546-47. With respect to Everett Hangar's claims against Historic Hangars and the Foundation in Counts I and II, the Court should find there is no prevailing party, and reverse the trial court's award of attorneys' fees to Everett Hangar.

D. Even if Everett Hangar Were Entitled to an Award of Attorneys' Fees, the Award Should Be Significantly Reduced and Offset by an Award to the Defendants.

Even if the Court were to affirm any fee award to Everett Hangar, Everett Hangar cannot be awarded fees incurred in connection with unsuccessful theories and claims. *E.g.*, *Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998), *abrogated on other grounds by Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 663, 272 P.3d 802 (2012); *Berryman v. Metcalf*, 177 Wn. App. 644, 662, 312 P.3d 745 (2013). Everett Hangar bears the burden of proving that its requested fees were not associated with unsuccessful theories and claims. *Mahler*, 135 Wn.2d at 434.

In its attorneys' fee request, Everett Hangar excluded only time spent on its unsuccessful breach of fiduciary duty claim (Count V) against John Sessions. *See, e.g.*, CP 91; 554-55. Everett Hangar concluded that it spent 10% of the case on that claim. *See id.* Apart from that deduction, neither Everett Hangar nor the trial court made any deduction for the other unsuccessful theories and claims advanced by Everett Hangar, including Counts III and IV, which were dismissed entirely, or the jet blast easement, which was a focus of the trial and entirely overturned on appeal.[6] *See* CP 89-99. Everett Hangar is not entitled to fees for these unsuccessful theories and claims, and must prove that any fees it requests are not connected to its unsuccessful claims. Everett Hangar has not met that burden, and the trial court has not held Everett Hangar to it.

In addition, under this Court's proportionality approach, all of *the defendants* are entitled to an award of their attorneys' fees for the claims against which they successfully defended. *Cornish College*, 158 Wn. App. at 233-34. In *Cornish College*, this Court applied the "proportionality approach" to award fees to opposing parties, and then offset the awards, where different parties prevailed on distinct and severable claims—circumstances that often make "determination of the prevailing party . . .

[6] The trial court did make deductions for certain post-trial fees requested by Everett Hangar, but those did not relate to unsuccessful theories or claims at trial. CP 92-93; 97-98.

subjective and difficult to assess." *Id.* at 232-34. The Court applies the proportionality approach to prevent a situation—like the one here—where a party is found to be "substantially prevailing" simply because it was the only party to obtain affirmative relief, no matter how unsuccessful that party was on all its other claims. *See Marassi v. Lau*, 71 Wn. App. 912, 916-17, 859 P.2d 605 (1993), *abrogated on other grounds by Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 200 P.3d 683 (2009) (where defendant successfully defended against the majority of plaintiff's claims, the "net affirmative judgment rule or 'substantially prevailing' standard does not obtain a fair or just result").

The trial court refused to apply the proportionality approach in making its initial award and on remand. It also failed to reduce Everett Hangar's award to account for unsuccessful theories and claims. This was error. If the Court concludes that Everett Hangar is entitled to any fee award as a prevailing party, it should reverse and remand with instructions to reduce Everett Hangar's fee award for unsuccessful claims, and to apply the proportionality approach required by this Court's decision in *Cornish College*.

E. The Trial Court Erred in Failing to Exclude Time Spent on Unsuccessful Claims, Duplicated Effort, and Otherwise Unproductive Time.

In making its award of attorneys' fees to Everett Hangar, the trial court also failed entirely to scrutinize Everett Hangar's fee request to exclude time spent on unsuccessful claims, duplicated effort, and otherwise unproductive activities, all of which are unrecoverable under Washington law. *Berryman*, 177 Wn. App. at 662. Everett Hangar "bears the burden of proving the reasonableness of the fees," and the trial court is tasked with assessing the fee request and ensuring the fees awarded are reasonable. *Mahler*, 135 Wn.2d at 434. As this Court explained in its previous opinion in this case, the trial court must take an "*active* role in assessing the reasonableness of fee awards" and must "do more than give lip service to the word 'reasonable'"—it "must show how the court resolved disputed issues of fact and the conclusions must explain the court's analysis." *Everett Hangar*, 195 Wn. App. 1034, at *11 (emphasis in original).

In the trial court, defendants made specific objections to a great many of Everett Hangar's requested fees, including:

- Approximately 71.8 hours drafting the complaint, which amounts to almost two weeks of full time work for an attorney;[7]

[7] CP 576 (entries 3-4, 8-9), CP 578 (entries 7-9, 12), CP 579 (entries 1, 3-7, 9-15), CP 580 (all entries), CP 581 (entries 2-3, 5-7, 9, 11, 13), CP 582 (entries 2, 4-10).

- Approximately 27.9 hours in connection with meetings with the Airport, which was not a party, and did not serve as a witness;[8]
- Approximately 7.3 hours spent before trial on Everett Hangar's unsuccessful fence proposal, including attending a pre-litigation meeting with John Sessions regarding the fence proposal;[9]
- Approximately 15.4 hours spent interviewing and communicating with an individual named Roger Collins, who was neither a party nor a witness;[10]
- Approximately 76.6 hours researching and drafting two preliminary injunction motions that *were never filed*, and drafting related demand letters;[11]
- Approximately 12.7 hours spent researching and preparing a summary judgment motion that *was never filed*;[12]

[8] CP 605 (entries 2-3, 6-7), CP 606 (entries 5-6), CP 617 (entries 1-2), CP 618 (entries 3-4).

[9] CP 577 (entries 12-15), CP 578 (entries 1-2), CP 579 (entry 2), CP 582 (entry 11).

[10] CP 583 (entry 13), CP 584 (entries 1-3, 10-14), CP 586 (entry 9), CP 587 (entry 1).

[11] CP 587 (entries 2-7, 9-12), CP 588 (entries 1, 5, 7-8, 10-13), CP 589 (entries 1-2, 6-9), CP 590 (entries 2-4, 11), CP 591 (entries 1, 4), CP 592 (entries 4, 7, 10), CP 593 (entries 1, 7), CP 594 (entries 1, 5, 7-8), CP 599 (entry 12), CP 600 (entries 1, 3-5, 8), CP 642 (entries 12-14), CP 643 (entries 1-8, 12).

[12] CP 597 (entries 13-14), CP 598 (entry 6), CP 599 (entries 3-5, 11), CP 601 (entry 13).

- Approximately 34 hours researching and drafting a motion to compel discovery that *was never filed*;[13]
- Approximately 189.1 hours researching and drafting Everett Hangar's opposition to defendants' summary judgment motion, incurred over 17 days (amounting to more than 11 hours per day for 17 days to draft the opposition brief);[14]
- Approximately 12.5 hours preparing for and taking a document custodian deposition that resulted in no additional discovery and no discovery motion;[15]
- Approximately 8.8 hours recorded by an attorney for attending depositions he did not actually attend;[16]
- Approximately 11.5 hours drafting and revising an expert report that should have been drafted by the expert, and that should be considered unrecoverable costs (*e.g.*, *Wagner v. Foote*, 128 Wn.2d 408, 417-18, 908 P.2d 884 (1996) (reversing trial court's award of expert fees as part of costs in contract dispute between shareholders));[17]

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[13] CP 609 (entries 6, 8, 10), CP 610 (entries 8-9), CP 611 (entries 2, 6), CP 613 (entries 7, 10), CP 614 (entries 4, 10), CP 616 (entries 2-3).

[14] CP 618 (entries 5-9, 11), CP 619 (entries 1, 4-11), CP 620 (entries 1, 3-5, 7-8), CP 621 (entries 3-7, 10-12), CP 622 (entries 1-7, 10).

[15] CP 612 (entries 1, 5, 7).

[16] CP 616 (entry 9), CP 627 (entry 7); CP 507.

[17] CP 600 (entry 11), CP 608 (entry 2), CP 610 (entry 6).

- 5.4 hours allocated to a paralegal's attendance at a summary judgment hearing along with two attorneys;[18]
- and hours spent on administrative tasks (including arranging deposition rooms and court reporters, securing "trial war room space," testing technology equipment, arranging lunches for trial, and preparing binders for trial) that are not properly included in a fee award.[19]

None of these requests is reasonable under Washington law, and they generally display a lack of "billing judgment." *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 156, 859 P.2d 1210 (1993). Fee requests must be reasonable in relation to the issues in dispute. *Id.* at 150. Yet the trial court failed to exclude *any* of them—even fee requests for administrative tasks the trial court excluded in other contexts. *See* CP 97 (excluding fees for clerical and administrative tasks in post-trial fee request). The trial court (adopting Everett Hangar's proffered findings of fact and conclusions of law) offered only this explanation:

> Defendants have objected to recovery for hours spent on unfiled discovery motions and taking a document custodian deposition that did not result in a motion. But parties will often conduct research or pursue litigation strategies that they abandon for any number of reasons, but which served a strategic purpose when undertaken. That does not make

[18] CP 625 (entry 5).

[19] CP 609 (entries 3, 11), CP 613 (entry 5), CP 614 (entry 7), CP 619 (entry 11), CP 623 (entry 3), CP 624 (entry 5), CP 625 (entries 4-5), CP 628 (entries 6-7), CP 629 (entries 3, 9), CP 632 (entry 8).

> it "unproductive" time. *Berryman*, 177 Wn. App. at 662. The law does not require that the Court engage in parsing every avenue taken over several years of litigation in order to grant fee recovery only for those paths that, in retrospect, were significant or fruitful. For instance, an unfiled discovery motion may have been necessary until a deal was struck with opposing counsel. Similarly, a document custodian deposition does not have to result in a motion to be worthwhile in pursuit of a client's interests in the case. The case law does not support Defendants' request for such a granular analysis of a years-long litigation.

CP 96.

That analysis does not confront and resolve defendants' specific objections to Everett Hangar's fee request (nor does it even acknowledge most of them), and it does not reflect an understanding of the law. As this Court made clear in remanding attorneys' fees, the trial court is not permitted to take at face value the reasonableness of a fee request. *Everett Hangar*, 195 Wn. App. 1034, at *11. For example, it is not permitted to assume—without supporting evidence in the record—that a motion to compel was headed off only by a last minute deal struck with opposing counsel. Nor is it permitted simply to assume that it is appropriate to charge the defendants with paying for Everett Hangar's nearly 77 hours drafting preliminary injunction motions *that were never filed.* And the trial court certainly cannot permit an attorney to bill his opponent for depositions he never attended.

The trial court only minimally edited Everett Hangar's proposed findings of fact and conclusions of law, refused to reassess prevailing parties, and failed even to consider the defendants' specific objections to Everett Hangar's fee request. The trial court did not take the "*active* role" in this process required by the Court, and its fee award should be reversed again.

VI. REQUEST FOR ATTORNEYS' FEES AND COSTS

Pursuant to RAP 18.1, defendants ask that they be awarded attorneys' fees and costs as provided by § 4.2 of the CC&Rs. CP 980.

VII. CONCLUSION

The trial court has now twice abdicated its responsibility to fashion an attorneys' fee award that is consistent with Washington law. The trial court has twice failed to make a party-by-party prevailing party assessment, and has twice failed to take an active role in assessing the reasonableness of Everett Hangar's attorneys' fee request.

The Court should reverse the trial court again because Everett Hangar is not a prevailing party entitled to its attorneys' fees. The Court should award attorneys' fees to the defendants who prevailed on all claims.

If the Court were to conclude that any award of attorneys' fees to Everett Hangar is appropriate, the Court should require the trial court to apply a proportionality approach that reflects Everett Hangar's actual

success in prosecuting its claims, and the defendants' actual successes in defeating them.

RESPECTFULLY SUBMITTED this 16th day of October, 2017.

HILLIS CLARK MARTIN & PETERSON P.S.

By _____
Louis D. Peterson, WSBA #5776
Jake Ewart, WSBA #38655

Attorneys for Defendants-Appellants
Kilo 6 Owners Association, Kilo Six, LLC, Historic Hangars, LLC, Historic Flight Foundation, and John Sessions

ND: 19813.008 4831-0673-0313v3

CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused a copy of this document to be served via email to the last known address of all counsel of record.

I certify under penalty of perjury under the laws of the state of Washington and the United States that the foregoing is true and correct.

DATED this 16th day of October, 2017, at Seattle, Washington.

Angie Perkins

DAVIS WRIGHT TREMAINE LLP

March 29, 2019 - 4:52 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	96898-5
Appellate Court Case Title:	Everett Hangar, LLC v. Kilo 6 Owners Association, et al.
Superior Court Case Number:	14-2-02264-4

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