

No. 38783-2-11

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

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COURT OF APPEALS
STATE OF WASHINGTON
2009 JUN -8 PM 5:00

JUDITH C. GREER, an individual, and STEPHEN CONNOR, an individual,
Appellants;

v.

DONALD B. MOUNTJOY and KATHLEEN L. CONNOR, husband and wife,
Respondents

BRIEF OF APPELLANT JUDITH C. GREER

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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DEPUTY

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I. INTRODUCTION

Plaintiffs Donald B. Mountjoy and Kathleen Connor, husband and wife, sued two corporations based on their contract with those corporations, in Thurston County Superior Court. Several months later, Plaintiffs added Kathleen Connor's sister and President of those corporations, Judith Connor Greer, as a defendant in her individual capacity. After thirteen months of litigation and many thousands of dollars in attorneys' fees incurred by Ms. Greer, Plaintiffs dismissed all of their claims against her. As her request for prevailing party attorneys' fees under the contract was denied by the court below, she seeks reversal and remand for a determination of her reasonable attorneys' fees and expenses.

II. ASSIGNMENTS OF ERROR

The court below erred in denying Judith Greer's motion for attorneys fees on the basis that she was not a party to the March 1999 Agreement and cannot receive rights under it. The issues pertaining to the assignment of error are:

1. Where Judith Greer was an officer and director of the corporations that were parties to the March 1999 Agreement and was

sued for negotiating and enforcing the Agreement on behalf of the corporate parties, is she entitled to the prevailing party attorneys' fees which the Agreement makes available in "any controversy or claim arising out of or relating to this Agreement"?

2. If Plaintiffs requested their attorneys' fees in the Complaint from Defendants Connor and Greer, does this establish the parties' intent that the contract should be interpreted to provide such fees to the prevailing party?

3. If the March 1999 Agreement was central to and "inextricably intertwined" with claims against Defendants Greer and Connor, does the doctrine of equitable estoppel require the award of prevailing party attorneys' fees to defendant Judith Greer?

4. If the Plaintiffs have pleaded in their Complaint that they were entitled to prevailing party attorneys' fees against Defendant Judith Greer, does the doctrine of mutuality of remedies entitle her to recover such fees from Plaintiffs?

III. STATEMENT OF THE CASE

A. The Property On Gull Harbor Division 1.

In 1988, Bayfield, a company founded by Judith Connor Greer

(hereafter, “Ms. Greer”) purchased the Gull Harbor Subdivision in Thurston County. Deposition of Judith C. Greer (hereafter, “Greer Dep.”), Vol. 1 at p. 21:12-16 (May 14, 2007), attached as Exhibit A to the Declaration of Barbara J. Duffy in Support of Motion for Partial Summary Judgment (October 11, 2007) (hereafter, “Duffy Dec.”) CP 331-408. Ms. Greer was, and still is, the President of Bayfield. Defendants’ Supplementary Answers to Plaintiffs’ Interrogatories Nos. 11 and 12, at p. 1 (January 31, 2007) Id., Ex. B, CP 343-344. One of the few tracts of land in Gull Harbor Division 1 that Bayfield did not purchase in 1988 was Tract 10. Id., Ex. A at p. 96:9-13. CP 339.

When Tract 10 came up for sale in 1993, Woodland, a second company founded by Ms. Greer, purchased it. Id., CP 339, Duffy Dec., Ex. A. Ms. Greer also was, and still is, the President of Woodland. Id., Ex. B. Defendants’ Supplementary Answers to Plaintiffs’ Interrogatories Nos. 11 and 12. CP 344. Woodland purchased Tract 10 in an effort to assemble all the lots from the original plat under the ownership of Woodland and Bayfield. Id., Ex. A., Greer Dep., Vol. I at p. 92:11-21, CP 338. After it took ownership of Tract 10, Woodland rented the house on the lot to third

party tenants. Id., J. Greer Dep., Vol. I at p. 107:8-16 CP 340.

B. How the Mountjoys Came to Own of Tract 10 of Gull Harbor Division 1, The Subject of This Dispute.

In August of 1996, the Mountjoys began renting the house on Tract 10 from the Woodland Company while they prepared a house they owned in Thurston County for sale. Id., Ex. D., Deposition of Kathleen L. Connor, Vol. I at p. 8:11-14 (April 25, 2007) K. Connor Dep., CP 349. The Mountjoys began negotiating with Woodland for the purchase of Tract 10 and submitted written proposals to Woodland. Id., Ex. F., CP 365; See House Purchase Proposal (April 10, 1998), and 5829 Gull Harbor Drive Proposal, Id., Ex. G, CP 369.

By March of 1999, an agreement had been reached and Woodland sold Tract 10 and the house on it to the Mountjoys. Id., Ex. H, CP 371-391. Ms. Greer signed the residential purchase and sale agreement as President of Woodland. Id., p. 3 of Exhibit H, CP 373.

As part of the purchase, the Mountjoys entered into an agreement (the “Agreement”) with Woodland and Bayfield. Id., Ex. J., CP 397-408. The Agreement gave the Mountjoys access to water, rights of first refusal to specific tracts owned by Bayfield, but, most

importantly, provided that the Mountjoys relinquished all rights provided under the Gull Harbor Plat to use the streets, drives, paths, community access areas and tidelands in Gull Harbor Division 1 (hereafter, “community access rights”). *Id.*, Ex. J. *Id.*, at ¶¶ 1-5, CP 397-401. The Mountjoys knew that due to Bayfield’s need to preserve control over Gull Harbor Div. I, the only way Woodland would sell Tract 10 was without these community access rights. *Id.*, Ex. D, K. Connor Dep., at 171:21-23; 178:18-20, CP 356, 358.

The Agreement contained the following dispute resolution procedures:

6. Arbitration. *Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration with the rules, then pertaining, of the American Arbitration Association, and judgment upon the award may be entered in any court having jurisdiction thereof. The parties shall have all remedies at law or in equity available to them for the violation or attempted violation of the covenants set forth herein including, but not limited to, recovery of damages for any breach and/or injunctive relief.*

7. Attorneys’ Fees. *If said controversy or claim is referred to an attorney, the losing party shall pay the prevailing party’s reasonable attorneys’ fees and costs, including attorneys’ fees and costs incurred in any appeal.*

(Italics supplied.) *Id.* Ex. J, CP 402.

C. The Mountjoys' Complaint Against Bayfield and Woodland and Amended Complaint Adding Ms. Greer and Stephen Connor Individually.

On June 1, 2006, the Mountjoys filed this action against Woodland and Bayfield only. They asserted that, notwithstanding their relinquishment of community access rights, Defendants Woodland and Bayfield had orally granted them rights in perpetuity to use Bayfield's property. Complaint to Quiet Title and for Declaratory Judgment, CP 11-35; Plaintiffs' First Amended Complaint for Injunctive Relief, Quiet Title and Declaratory Judgment, CP 36-57.

On April 20, 2007 Plaintiffs filed Plaintiffs Donald B. Mountjoy's and Kathleen L. Connor's Motion for Leave to Amend First Amended Complaint to add new claims and add Stephen and Judith as defendants. CP 93-100. Plaintiffs' rationale for adding them as defendants was as follows:

The motion for leave to amend presently before this court adds new theories of relief based on the same predicate facts. These facts are based on the actions of the parties to the purchase and sale of the Mountjoy Property and the force and effect of agreements relating to the same and Defendants' attempt to prevent Plaintiffs from using the streets, drives, paths, easements, and community access areas of the plat and to accessing the beach. Accordingly, Plaintiffs should be granted leave to amend their complaint as the new causes of action are based on the same facts,

involve the same players, and are merely seeking alternative forms of relief.

Id., CP 99. (Italics supplied). Plaintiffs further argued that the individual defendants would not be prejudiced by being added in their personal capacities:

Nor will the proposed inclusion of the additional individual defendants cause prejudice. *These individuals were intimately involved with the transactions that gave rise to the litigation. Moreover, as officers and owners of Defendants Bayfield and Woodland, they have no doubt been kept apprised of the litigation.*

Id., CP 100 (italics supplied). On May 14, 2007 the only defendants at the time, Bayfield and Woodland, filed Defendants' Opposition to Plaintiffs' Motion to Amend. CP 124-133. In her accompanying declaration, CP 119-123, Ms. Greer made it clear that with regard to any contract negotiations in which she was involved relating to the property, "I was acting as an officer and director of Bayfield Resources Company and The Woodland Company, not in my capacity for my personal benefit." CP 120, ¶ 4. She further specified that any conveyances were by Bayfield and/or Woodland, not by herself or Stephen Connor. CP 120-121, ¶ 5. She declared, "*None of the actions alleged by Plaintiffs were taken by myself or Stephen Connor outside of our*

capacities as officers and directors of Bayfield and Woodland.” CP 121, ¶ 6
(italics supplied).

In Defendants’ Opposition to Plaintiffs’ Motion to Amend, CP 124-135, Bayfield and Woodland pointed out the severe financial effects on Defendants Greer and Stephen Connor if they were added as defendants in their individual capacities, noting that, “each of the[m] will need their own counsel, who must review all the pleadings, discovery, and thousands of pages of documents to get up to speed on the facts and allegations of the case.” CP 133.

On May 17, 2007, Plaintiffs filed Plaintiffs’ Donald B. Mountjoy’s and Kathleen L. Connor’s Reply to Defendants’ Opposition to Motion for Leave to Amend Their First Amended Complaint. CP 140-147. Plaintiffs made the overlap between the corporate defendants and the individual defendants clear:

In addition, Plaintiffs seek to formally add individuals that are intimately involved in the transactions at issue, individuals that have already injected themselves in this lawsuit, Judith Connor Greer and Stephen Connor.

CP 141. Plaintiffs further argued that they could assert a claim against Ms. Greer for breach of fiduciary duty because she was Plaintiffs’ sister:

Defendants apparently are asking this Court to ignore that Plaintiffs were buying the subject property *from a company owned and operated by their sister*. Washington courts recognize that *a fiduciary duty may exist between family members and the existence of a fiduciary duty is a question of fact.*”

CP 146 (italics supplied).

At the hearing on Plaintiffs’ Motion to Amend, Plaintiffs’ counsel Thomas F. Peterson, gave the reason for adding defendants Greer and Connor:

Now, more recently, Bayfield and Woodland through its officers, Judith Connor Greer and Stephen Connor, have taken actions to deprive Kathleen Connor and Bruce Mountjoy of their rights to use the beach near their home. They have engaged in a campaign of intimidation.

Stephen Connor, an officer and board member of Woodland and Bayfield, is the central actor in the campaign of intimidation. *The amended complaint adds several new and alternative causes of action based on the same predicate facts. There are no new actors. There is [sic] no new events. It is the same transactions, the same people underlying the amended complaint as underlying the original complaints.*

RP, 5/18/07, 5:15 – 6:3 (italics supplied). When asked to explain the need to add Mr. Connor and Ms. Greer in their individual capacities, Mr. Peterson explained that the corporate actions of which they complained were the actions of Stephen Connor and Ms. Greer:

The people that are doing the things that are

happening in this case are people, and those people are Judith and Stephen, and although they are the officers and owners of Bayfield and Woodland, ultimately if we are going to get complete relief there, i.e., to prevent Bayfield and Woodland from barring our clients' access to the beach and the community access areas, we also need that restriction to apply to the brother and sister who are out there on the property running the heavy equipment and doing the various things to prevent access, building fences and so forth.

RP, 5/18/07, 11:16–12:10.

Judge Hirsch granted Plaintiffs' leave to amend. CP 148–149.

The allegations in Plaintiffs' Second Amended Complaint against Ms.

Greer and Stephen Connor are nearly identical to the allegations against

Bayfield and Woodland. CP 150–179:

(1) First Cause of Action for Injunctive Relief, ¶¶ 4.2 and 4.3, is directed at “*Defendants*,” CP 156;

(2) Second Cause of Action to Quiet Title, ¶ 5.3, seeks a judgment “quieting title to their easement as against the claims of *defendants* ...” *Id.*

(3) Third Cause of Action for Declaratory Relief at ¶ 6.4, alleges that Section 5 of the Agreement (relinquishment of community access rights) is void, “because *defendants* did not amend or alter the Plat

of Gull Harbor Division 1 as required by RCW 58.17.215;” at ¶ 6.6 alleges, “*Defendants* did not have an interest in the property rights that the agreement purports to terminate;” at ¶ 6.8 alleges, “*Defendants* violated the Shoreline Master Program for the Thurston Region by attempting to transfer the Mountjoy Property without access to the beach;” at ¶ 6.9 alleges, “*Defendants’* attempt to grant rights to a stranger to the deed ... does not have any effect under Washington law.”

CP 157;

(3) Fourth Cause of Action, Consumer Protection Act at ¶7.2 alleges, “*Defendants* engaged in an unfair or deceptive act or practice” relating to the real estate purchase and sale transaction.

CP 158;

(4) Fifth Cause of Action for Misrepresentation and Sixth Cause of Action for Reformation Based on Mistake, at ¶¶ 8.2 and 9.2 allege, “*Defendants made a material representation of an existing fact to Plaintiffs that was false,*” that Bayfield owned the Community Access Area. *Id.*

(5) Sixth Cause of Action for Reformation Based on Mistake at ¶ 9.2 alleges, “*Defendants* made a material misrepresentation;” at ¶ 9.3 alleges, “*Defendants* intended for Plaintiffs to act upon the

representation;” at ¶ 9.6 sought reformation based on “*Defendants* misrepresentations.” CP 165.

(6) Seventh and Eighth Causes of Action at ¶¶ 10.1-.5 and 11.1–.5 allege that Defendant Judith Connor Greer breached her fiduciary duty and the implied duty of good faith, all relating to the 1999 real estate transaction on behalf of Bayfield and Woodland. CP 159-160.

(7) Ninth Cause of Action for Rescission Based on Frustration of Purpose, at ¶12.2 alleges that, “[t]he continued amicable relationship of the Plaintiffs and *Defendants* was a basic assumption of *the parties’ agreement* in exchanging the relinquishment of certain rights for personal rights to continued use of all of the streets, drives, paths, easements, and community access areas of the plat and to the beach.” Id.

(8) Tenth Cause of Action, Equitable Remedies, requests that “this court order the Defendant [in the singular but not identified] to protect and maintain the community access areas according to the Plat of Gull Harbor Division No. 1.” CP 161.

(9) An unnumbered Eleventh Cause of Action, Paragraph XIV, requests all of Plaintiffs' attorneys' fees from all defendants:

14.2 Section 7 of the Agreement provides that, in any controversy or claim under the Agreement, the losing party shall pay the prevailing party's reasonable attorneys' fees and costs.

14.3 Plaintiffs are entitled to recover their fees and costs incurred in this action *from defendants*.

Id. (italics supplied), CP 161.¹

D. The Parties' Motions for Summary Judgment Show Ms. Greer's Alleged Liability was Based on the Corporate Defendants' Actions Under the March 1999 Agreement.

Bayfield's, Woodland's and Ms. Greer's Motions for Summary Judgment on Plaintiffs' CPA claims were heard and denied on December 14, 2007. Order Denying Defendants' Motions for Partial Summary Judgment on Plaintiffs' CPA Claims, CP 608-612. At the oral argument regarding the Motion for Partial Summary Judgment on Plaintiffs' CPA Claims, Mr. Peterson laid out the basis for Ms. Greer's

¹ In Plaintiffs' Opposition to Defendant Greer's and Defendants Bayfield Resources Company's and the Woodland Company's Motion for Partial Summary Judgment re: CPA Claims of Dec. 3, 2007, CP 530-555, six months after filing their Second Amended Complaint, Plaintiffs "clarified" that the Sixth Cause of Action for Reformation and the Ninth Cause of Action for Rescission, "relate only to the corporate defendants, Bayfield and Woodland, not Defendant Greer individually." CP 530.

liability, making it explicit that Plaintiffs' claim against her were because of her actions as the President of Bayfield and Woodland:

MR. PETERSON: Well, the party that makes the representations in all of these unfair deceptive acts that we're talking about is Ms. Greer. She is the owner, the principal, the president, the sole officer I guess, with Stephen as an officer now, but basically it's a one-woman operation.

RP, December 14, 2007, 39:20 – 40:11.

Now, specifically referring to Ms. Greer, as I stated before, these are one-person companies, and she's the one that makes the representation. She's negotiated these deals. She's approved the deals. She was present during many of the acts of harassment that have occurred, and the law is as follows - and I quote - "If a corporate officer participates in wrongful conduct or with knowledge approves of the conduct, then the officer, as well as the corporation, is liable for the penalty."

Id. at 52:12-21.

In opposition to Defendants Connor's, Greer's and Bayfield's Motions for Summary Judgment on the CPA Claim, Plaintiffs filed the Declaration of Kathleen Connor. It recited in pertinent part:

Since that time we have been subjected to an unrelenting and *ever-increasing campaign of intimidation and harassment by Judith, Stephen, and their companies. The first thing they did was to purportedly terminate our rights to use the beach and community access areas of our plat.* Then we learned that the Bayfield and Woodland companies were entering into conservation

easement agreements with Capitol Land Trust that included easements over community access areas and appeared to include future easements over waterfront property for which we had first right of refusal. *We filed this lawsuit as a defense measure to maintain our rights.*

Declaration of Kathleen Connor in Opposition to Defendants’
Motions for Summary Judgment on CPA Claims (November 30, 2007)
at 3, ¶ 4, ll. 3 – 11, CP 528.

Defendant Judith Connor Greer filed her Motion for Partial Summary Judgment on the Mountjoys’ Claims for Breach of the Implied Duty of Good Faith and Misrepresentation. CP 613-31. In Plaintiffs’ Opposition to Defendant Greer’s Motion for Partial Summary Judgment Re: Good Faith and Misrepresentation, Plaintiffs asserted that their claim against Ms. Greer was based on three representations at the time Plaintiffs, Bayfield and Woodland signed the Agreement in March 1999: (1) Bayfield owned the community access areas; (2) Bayfield and Woodland would grant Plaintiffs personal easements over the community access areas in exchange for Plaintiffs’ relinquishment of such easements; (3) these easements would be included in the Agreement. CP 644–645. Plaintiffs claimed that not only Bayfield and Woodland, but “in addition, Defendant Greer has an

independent duty of good faith and fair dealing by virtue of her fiduciary relationship with Plaintiffs.” CP 654. “This duty required the parties to cooperate with each other so that each may maintain the full benefit of performance.” *Id.* Both claims related to Ms. Greer’s conduct on behalf of Bayfield and Woodland. *Id.*

Plaintiffs moved for summary judgment against Defendants Bayfield and Woodland on the basis that the March 1999 Agreement between Plaintiffs, Bayfield and Woodland was illegal. When Plaintiffs’ counsel argued his motion, he made it clear that the claims of personal liability against Greer and Connor were for enforcing this contract:

I think it’s important for the court [sic] to know that, despite the 14 files in this case, a lot of it – *basically what it centers around is six words and that is we want to use the beach.* There’s more to it. There’s other property involved beyond the beach, but *it’s at the foundation really a pretty simple thing that we’re trying to protect, a right that we’re trying to protect.*

RP, March 21, 2008, at 34:2–9 (italics supplied). On March 26, 2008 the Court issued its letter opinion. The Court’s core holding was that the March 1999 Agreement between Plaintiffs, Bayfield and Woodland was illegal:

Plaintiffs asked the Court to determine that the purported extinguishment of the community access (in

particular the beach access) for Lot 10 was void, and the Court agrees with that proposition.

March 26, 2008 Letter Opinion, CP 863–865, at 864. However, the Court reserved ruling on the appropriate remedy to give the parties an opportunity to mediate, since the remedies were either rescission or enforcing an agreement the parties never intended. *Id.* On April 24, 2008 the Court signed and entered its Order Granting Plaintiffs’ Motion for Partial Summary Judgment Against Defendants Bayfield Resources Company and The Woodland Company re: Invalidity of Relinquishment Provision. CP 1207–1209, attached as Exhibit C to the Declaration of Thomas F. Peterson in Support of Plaintiffs’ Motion for Summary Judgment on Defendant Stephen Connor’s Counterclaim. CP 1194–1213.

On June 13, 2008 Plaintiffs filed Plaintiffs’ CR 41 Motion for Voluntary Dismissal of the Remaining Claims Against Defendants Bayfield Resources Company, The Woodland Company, and Judith Connor Greer. CP 1226-30. On June 18, 2008 plaintiffs and defendants Greer, Bayfield and Woodland entered into a Stipulation and Order of Dismissal without Prejudice as to all of plaintiffs’ claims

against Judith except for Plaintiffs' Third Cause of Action for Declaratory Judgment. CP 1231-33. It provided:

THE PARTIES HEREBY STIPULATE, pursuant to CR41(a)(1)(A), that all of Plaintiffs' claims against defendants Bayfield Resources Company, The Woodland Company, and Judith Connor Greer, except their Third Cause of Action for Declaratory Judgment, may be dismissed without prejudice *and without costs*.

(Italics supplied.)

The declaratory judgment claim was resolved adversely to Plaintiffs two days later, with no effect on Judith. On June 20, 2008, the Court entered its Order Regarding Remedies on Plaintiffs' Motion for Partial Summary Judgment Against Defendant Bayfield Resources Company and The Woodland Company Re: Relinquishment Provision. CP 1234-38. Because the Court ruled that the relinquishment of community access in the parties' agreement was illegal, it ordered the Agreement amended such that it was inapplicable to heirs, successors and assigns. However, it was further, "ORDERED, ADJUDGED AND DECREED that, except as provided herein, the Agreement remains in full force and effect in accordance with its terms."

Consequently, Plaintiffs' relinquishment of their rights use to the community access area was held to be enforceable.

E. Denial of Judith Greer's Motion for Attorneys' Fees.

Ms. Greer moved for attorneys' fees as the prevailing party. CP 1610-1619. Plaintiffs opposed both Stephen Connor's and Ms. Greer's motions for an award of attorneys' fees on various bases, but primarily on the basis that neither Stephen nor Judith were parties to the March 1999 Agreement. CP 2038-2047.

In their opposition to Defendant Greer's Motion for an Award of Attorneys' Fees, Plaintiffs abandoned their long-standing position that Ms. Greer was the sole person responsible for the corporate Defendants' allegedly wrongful acts. Plaintiffs' Opposition to Defendant Greer's Motion for an Award of Attorneys' Fees, CP 1631-32, 1635 & 1636-1639. Plaintiffs argued that dismissing all of their claims against Defendant Greer did not render her the prevailing party. CP 1639-41. They also argued that since the Stipulation to Dismissal of Claims against her provided that the dismissal would be, "without cost," this was a effectively also a dismissal without attorneys' fees. CP 1639.

The Court entered its letter opinion of November 7, 2008 denying Stephen Connor and Ms. Greer's motions for attorneys' fees. CP 2063-2066. The basis for denying Judith's Motion for Attorneys' Fees was:

Defendant Greer, like Defendant Connor, was named as a party because of her involvement with Defendant Woodland Company and/or Bayfield Resources and with the underlying transaction. However, she, like Defendant Connor, was not a signatory or party to the March, 1999 agreement. As in the case of Connor, the Court lacks authority to award her fees and costs. Accordingly, her request for fees is denied.

CP 2065. The Court's order denying the parties' motions for attorneys' fees was filed on December 24, 2008. CP 2067-2071.

IV. ARGUMENT

A. Summary of Argument.

At issue in this appeal is the denial by the trial court of an award of attorneys' fees to Judith Connor Greer as a substantially prevailing party entitled to attorneys' fees under the March 26, 1999 Agreement. That Agreement provides attorneys' fees to the prevailing party for "[a]ny controversy or claim arising out of or relating to this Agreement ...". Ms. Greer was added as defendant for her actions on behalf of

Bayfield and Woodland in entering into the March 26, 1999 Agreement and enforcing the Plaintiffs' personal relinquishment of community access rights under that Agreement. The ruling by the court below validated her exclusion of Plaintiffs from the community access areas of Gull Harbor Division No. 1. All of these claims were dismissed by Plaintiffs except for their declaratory judgment action.

The March 1999 Agreement entitles Ms. Greer to her attorneys' fees because *McClure v. Davis Wright Tremaine, et al.*, 77 Wash.App. 312, 314-15, 890 P.2d 466 (Div. 1, 1995) holds that dispute resolution terms that apply to "any dispute ... arising out of or in connection with or relating to" an Agreement apply to non-signatories.

Further, equitable estoppel prevents a signing party from avoiding the effect of dispute resolution terms in a dispute with a non-party when the claims are "intimately founded in and intertwined with the underlying contract obligations." *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir.1993), cert. denied, 513 U.S. 869, 115 S.Ct. 190, 130 L.Ed.2d 123 (1994).

Under the doctrine of "mutuality of remedies," *Kaintz v. PLG, Inc.*, 147 Wash.App. 782, 786, 197 P.3d 710 (Div. 1, 2008), since

plaintiffs asserted that they would be entitled to their attorneys' fees against the individual defendants, that relief is equally available when the individual defendants prevail against Plaintiffs.

Finally, the dismissal "without costs" is not a dismissal without attorneys' fees. Judith Greer is, therefore, entitled to her attorneys' fees under the parties' Agreement.

B. Argument.

1. Standard of Review.

In Washington, attorney fees may be awarded when authorized by a contract, a statute, or a recognized ground in equity. *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 106 Wash.2d 826, 849-50, 726 P.2d 8 (1986). Whether a specific statute, contractual provision, or recognized ground in equity authorizes an award of fees is a question of law and is reviewed de novo. *Tradewell Group, Inc. v. Mavis*, 71 Wash.App. 120, 126, 857 P.2d 1053 (1993); *Kaintz v. PLG, Inc.*, 147 Wash.App. 782, 786, 197 P.3d 710 (Div. 1, 2008);

2. Judith Connor Greer is Entitled to Attorneys' Fees as the Prevailing Party.

Plaintiffs voluntarily dismissed nine of their ten claims against Ms. Greer. The only claim they did not dismiss was the declaratory judgment claim, which was resolved adversely to Plaintiffs personally (as distinguished from their heirs and assigns) and did not affect Ms. Greer. CP 1231-33, CP 1234-38. When attorneys' fees are provided by contract to the prevailing party, the general rule is that an award of fees to the defendant is proper following the plaintiffs' voluntary dismissal of its action. *Marassi v. Lau*, 71 Wash.App. 912, 918, 854 P.2d 605 (Div. I 1993); *Walji v. Candyco, Inc.*, 57 Wash.App. 284, 288, 787 P.2d 946 (Div. I 1990). While Ms. Greer voluntarily dismissed two counterclaims against Plaintiffs, trespassing and nuisance, CP 2110-2111, Plaintiffs never filed a motion against Ms. Greer for their fees. As a result the controlling rule is stated in *Marassi* as follows:

In sum, we hold that when several distinct and severable breach of contract claims are at issue, the defendant should be awarded attorney fees for those claims it successfully defends, and the plaintiff should be awarded attorney fees for the claims it prevails upon, and the awards should then be offset.

Id. at 918. Under this rule, defendant Greer should have been awarded attorneys' fees for each of the nine claims she successfully defended.

3. The March 1999 Agreement Entitles Ms. Greer Connor to Her Reasonable Attorneys' Fees.

Under Par. 6 of the Agreement between Plaintiffs, Bayfield and Woodland: “Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration ...”

Under paragraph 7, however, attorneys' fees are available to the prevailing party independent of whether the parties arbitrate:

7. Attorneys' Fees. *If said controversy or claim is referred to an attorney*, the losing party shall pay the prevailing party's reasonable attorneys' fees and costs, including attorneys' fees and costs incurred in any appeal.

(Italics supplied.) CP 402. The fact that Greer and Connor were not signatories to the Agreement does not alter Plaintiff's commitment under paragraphs 6 and 7 to pay the prevailing party's attorneys' fees if “*any* controversy or claim arising out of or relating to this Agreement or the breach thereof” ... is referred to an attorney. (Italics supplied.) In Defendants' Opposition to Plaintiffs' Motion to Amend, CP 124-135, Plaintiffs were plainly put on notice before they added the individual defendants to the case that this would impose substantial attorneys' fees and costs on Ms. Greer and Stephen Connor. CP 133. Plaintiffs plainly understood this reciprocal obligation under the Agreement as

they prayed for their own attorneys' fees and costs from Defendants Greer and Connor in their Second Amended Complaint. CP 167, ¶¶ 14.2 & 14.3.

Such broad prevailing party attorneys' fee language in a contract has been held by Division 1 of the Court of Appeals to extend an arbitration clause in a contract to disputes between parties and non-parties arising out of or related to the contract. *McClure v. Davis Wright Tremaine, et al.*, 77 Wash.App. 312, 314-15, 890 P.2d 466 (Div. 1 1995). In *McClure*, limited partner Charles McClure sued both a signatory to the contract, general partner Donald Lewison, and a non-signatory, the limited partnership's law firm, Davis Wright, for breach of fiduciary duty. The key language in the arbitration clause in *McClure* read:

Any dispute, controversy or claim *arising out of or in connection with, or relating to*, this Agreement or any breach or alleged breach hereof, ..., shall, *upon the request of any party involved*, be submitted to, and settled by, arbitration
...

(Italics supplied.) Davis Wright moved to compel arbitration, which was ordered by the trial court. When McClure moved for reconsideration, the trial court denied the motion and imposed CR 11 sanctions on McClure. The Court of Appeals affirmed. First, the

Court observed that the inclusion of disputes “relating to” the contract expands the reach of the arbitration clause: “An arbitration clause which encompasses any controversy *relating to* a contract is broader than language covering only claims *arising out of* a contract” and includes a claim for breach of fiduciary duty. *Id.* at 315. The *McClure* Court rejected the argument that the additional limitation to “any *party* involved” in the dispute, prohibited arbitration by a non-party:

McClure relies on the portion of the arbitration clause which states that a controversy “upon the request of any party involved, be submitted to, and settled by, arbitration” to support his first argument. He contends that because of this limitation, a nonsignatory such as Davis Wright cannot compel arbitration. We disagree.

Taken in context of the entire sentence, the phrase “any party involved” appears to refer to any party involved in a controversy relating to the Agreement, not simply to parties to the Agreement. Thus, if McClure’s controversy with Davis Wright related to the Agreement, Davis Wright would have the authority to request arbitration even though it was not a signatory to the Agreement.

Id. at 314 -15 (italics supplied).

This analysis applies equally to the alternative dispute resolution provisions here. Paragraph 6 of the Agreement with Plaintiffs provides that, “*any controversy or claim arising out of or relating to this Agreement, or*

the breach thereof, shall be settled by arbitration ...” Under Paragraph 7, even for controversies not submitted to or settled by arbitration, “[I]f said controversy or claim is referred to an attorney, the losing *party* shall pay the prevailing *party*’s reasonable attorneys’ fees and costs, including attorneys’ fees and costs incurred in any appeal.” Under *McClure*, the reference to a “party” extends and expands the clause to parties to the dispute, not just to the contract. Thus, Ms. Greer is entitled to her attorneys’ fees under these dispute resolution provisions.

The McClure Court noted in a footnote that while it might be a more difficult proposition to impose arbitration if a party signing an arbitration agreement sought to compel a non-signing party to arbitrate, “McClure [and Plaintiffs here] is a signatory and, therefore, was on notice that he would be required to arbitrate disputes arising out of the Agreement.” *Id.* at footnote 1. Similarly here, Plaintiffs were signatories to the Agreement and sought their own attorneys fees against Stephen Connor and Ms. Greer. They plainly intended and expected that remedy to be available to them and, conversely, to defendants Connor and Greer.

As the Court of Appeals said in enforcing arbitration between an employee and employer in *Tjart v. Smith Barney, Inc.*, 107 Wash.App. 885, 28 P.3d 823, (Div. 1,2001):

Under Washington law, all contracts, including agreements to arbitrate, are interpreted under the context rule enunciated in *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990)....The “context rule” is the framework for interpreting written contract language which involves determining the intent of the contracting parties by viewing the contract as a whole, including the subject matter and objective of the contract, all circumstances surrounding its formation, *the subsequent acts and conduct of the parties*, statements made by the parties in preliminary negotiations, and usage of trade and course of dealings. The application of the context rule leads the courts to discover the intent of the parties based on their real meeting of the minds, as opposed to insufficient written expression of their intent. Context may not be used, however, to contradict, modify or add to the written terms of an agreement. Nor may context be used for the purpose of importing into writing an intention not expressed therein.

Id. at 895-96 (footnotes omitted, italics supplied). Thus, because Plaintiffs understood the Agreement to provide for such a prevailing party attorneys’ fee award and included that it in their Complaint, defendants Judith Greer and Stephen Connor are equally entitled to their attorneys’ fees.

While it is true that the parties' Agreement did not explicitly say that it would also apply to claims against non-signatories, the McClure Court found that equitable estoppel and/or contract and agency principles can also provide an independent and sufficient basis to subject a signatory to the contract to arbitration by a non-signatory:

Even if this court were to accept McClure's interpretation of the phrase "any party involved," it would not foreclose a decision that the matter was arbitrable. Numerous courts have held that even when it is not explicitly provided for in an arbitration agreement, *some non-signatories can compel arbitration under the doctrine of equitable estoppel or under normal contract and agency principles*. E.g., *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir.1993), cert. denied, 513 U.S. 869, 115 S.Ct. 190, 130 L.Ed.2d 123 (1994) [hereafter, "*Sunkist v. Sunkist*"]; *American Ins. Co. v. Cazort*, 316 Ark. 314, 871 S.W.2d 575, 579 (1994).

Id. at 316 (italics supplied).

In *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir.1993), cert. denied, 513 U.S. 869, 115 S.Ct. 190, 130 L.Ed.2d 123 (1994) [hereafter, "*Sunkist v. Sunkist*"], the 11th Circuit held that where the claims by parties against non-parties are central to and dependent on a contract, equitable estoppel prevents the signing party from avoiding the contract's arbitration clause when a claim is asserted by or against a non-signing party:

This court adopted the reasoning of *Hughes Masonry* [*Co. v. Greater Clark County School Bldg. Corp.*, 659 F.2d 836 (7th Cir.1981)] in *McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co., Inc.*, 741 F.2d 342 (11th Cir.1984). On facts nearly identical to *Hughes Masonry*, this court held that *a party may be estopped from asserting that the lack of a written arbitration agreement precludes arbitration. Id.* at 344. The *McBro* court noted *the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the nonsignatory's obligations and duties in the contract, and decided that the claims were "intimately founded in and intertwined with the underlying contract obligations."* *Id.*

The license agreement at issue here does not specify or make mention of any duties or obligations that Del Monte owes to Sunkist. On this basis, Sunkist attempts to distinguish the instant case from *McBro* and *Hughes*. *Although the nonsignatories were expressly mentioned in the contracts at issue in McBro and Hughes Masonry, and each court took this into account, the reference to a third party was neither a crucial nor dispositive factor in either case. Instead, these decisions rest on the foundation that ultimately, each party must rely on the terms of the written agreement in asserting their claims. The references in the contracts to the nonsignatories merely added further support to the courts' conclusions that the claims against the third parties were "intimately founded in and intertwined with the underlying contract obligation."*

10 F.3d at 757 (italics supplied). When adding Defendants Greer and Connor to this suit, Plaintiffs based their claims on the acts of the corporate defendants, Bayfield and Woodland, which defendants Greer and Connor performed. While they sought to impose both contractual and non-contractual liability, all of said claims were based on alleged

conduct arising out of or in connection with the parties' Agreement. To obtain leave to add Ms. Greer and Mr. Connor, Plaintiffs told the lower court, "These individuals were intimately involved with the transactions that gave rise to the litigation." CP 100. See generally Statement of the Case, Sections C and D at 6–19. As in *Sunkist v. Sunkist*, because of "the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the non-signatories' obligations and duties in the contract," Plaintiffs should be estopped to assert that the lack of a written arbitration and/or attorneys' fee agreement between Plaintiffs and Ms. Greer precludes the award of attorneys' fees. Similarly, Plaintiffs should be estopped to repudiate their own prayer for relief and now retreat behind the distinction between defendant signatory corporations and the individual non-signatory defendants to escape such an award.

Finally, Washington recognizes that the equitable doctrine of "mutuality of remedy" supports an award of attorneys' fees even when a contract containing a prevailing party attorneys' fee provision is invalid or unenforceable. *Park v. Ross Edwards, Inc.*, 41 Wash.App. 833, 706 P.2d 1097 (Div. I 1985); *Kaintz v. PLG, Inc.*, 147 Wash.App. 782,

197 Pl.;2d 710 (Div. I 2008). In *Kaintz*, the Court of Appeals affirmed the award of attorneys' fees under this doctrine when the prevailing party established the contract containing the attorneys' fee provision was unenforceable. From the Plaintiffs' inclusion in the Second Amended Complaint of their own claim for attorneys fees against Judith Greer and Stephen Connor, they established their position that the dispute resolution provisions of paragraphs 6 & 7 of the March 1999 Agreement would apply if they prevailed in their claims against Judith Greer and Stephen Connor. Consequently, mutuality of remedies extends the right to recover attorneys' fees to them as well.

4. Plaintiffs' Claims Against Defendants Greer and Connor Arose Out Of The March 1999 Agreement, And The Agreement Was Central To Those Claims.

It is well established in Washington that where a contract contains an attorneys' fee provision, a litigant is entitled to a fee award if the action "arose out of" the contract and the contract is "central to the dispute." *Seattle-First Nat'l Bank v. Washington Ins. Guar. Ass'n.*, 116 Wn.2d 398, 413, 804 P.2d 1263 (1991); *Tradewell Group, Inc. v. Mavis*, 71 Wn.App. 120, 130, 857 P.2d 1053 (1993) ("an action is on a contract for purposes of a contractual attorney fees provision if the action arose

out of the contract and if the contract is central to the dispute”). This is true for tort and statutory claims, even in the absence of a breach of contract claim, so long as the contract is central to the dispute. *See, e.g., Hill v. Cox*, 110 Wn.App. 394, 411-412, 41 P.3d 495 (2002) (contractual attorneys’ fee provision applied to statutory tort claim); *Brown v. Johnson*, 109 Wn.App. 56, 58-59, 34 P.3d 1233 (2001) (misrepresentation claims); *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn.App. 834, 855-56, 942 P.2d 1072 (1997) (fiduciary duty and negligence claims).

In *Mehlenbacher v. Demont*, 103 Wn.App. 240, 244, 11 P.3d 871 (2000), Division II of the Court of Appeals held that the prevailing party may recover attorneys’ fees in an action to defend or enforce a contract where the contract has an attorneys’ fees provision and the contract is central to the dispute. Similarly, in *Brown v. Johnson*, 109 Wn.App. 56, 58, 34 P.3d 1233 (2001), the Court of Appeals held that if a tort action such as misrepresentation is based on a contract with an attorneys’ fee provision, the prevailing party is entitled to attorneys’ fees provided the action arose out of the contract and the contract is central to the dispute. In reversing the trial court’s refusal to award fees and costs, the court held:

If an action in tort is based on a contract containing an attorney fee provision, the prevailing party is entitled to attorney fees. An action is “on a contract” if a) the action arose out of the contract; and b) the contract is central to the dispute.

Id. at 58.

The allegations in Plaintiffs’ Second Amended Complaint against Ms. Greer and Stephen Connor are nearly identical to the allegations against Bayfield and Woodland. CP 156–162. The allegations: a) arose out of the relinquishment provision of the contract; and b) that contract provision is central to the dispute. See Statement of the Case, Sections C & D at 6–19.

It is beyond dispute that Plaintiffs’ Agreement with Bayfield and Woodland was central to their dispute with Stephen Connor and Ms. Greer. Their singular stated goal was to acquire the beach access which they had relinquished in the Agreement. They failed in all of their claims against Ms. Greer. Whether under the “related to the contract” rule of *McClure v. Davis Wright*, the equitable estoppel doctrine of *Sunkist v. Sunkist*, or the mutuality of remedy rule under *Kaintz v. PLG, Inc.*, Ms. Greer is entitled to the benefit of the attorneys’ fees provision of the March 26, 1999 Agreement.

5. The Language in the Dismissal “Without Costs” Has No Bearing in Judith’s Right to Attorneys’ Fees.

Plaintiffs argued to the court below that Defendant Greer cannot recover her fees because she stipulated to dismissal of their claims “without costs.” Plaintiffs’ Opposition to Defendant Greer’s Motion for an Award of Attorneys’ Fee, 1631-1643. CP 1639. In Washington, attorneys’ fees may be awarded following a stipulated dismissal so long as the parties do not intend the stipulation to specifically preclude them. See, e.g., *Jacobsen v. City of Seattle*, 98 Wn.2d 668, 658 P.2d 653 (1983). In *Jacobsen*, for example, the parties stipulated that the defendant would drop its counterclaims and affirmative defenses if plaintiffs agreed not to ask for recovery of monetary damages or “costs.” *Id.* at 675. The trial court nonetheless permitted the plaintiff to seek an award of attorneys’ fees, and the court of appeals affirmed. As the court noted, the stipulation “refer[red] only to the dismissal of the claim for damages *without costs* and not to the elimination of all costs from the proceedings,” including attorneys’ fees. *Id.* (emphasis added). The stipulation here is identical. The 1999

Agreement itself at paragraph 7 distinguishes “costs” from “attorneys’ fees:”

7. Attorneys’ Fees. If said controversy or claim is referred to an attorney, the losing party shall pay the prevailing party’s *reasonable attorneys’ fees* and costs, including *attorneys’ fees* and costs incurred in any appeal.

(Italics supplied.) *Id.* Ex. J, CP 402. The parties stipulated to the dismissal of Plaintiffs’ claims “without costs,” but did not provide that this stipulation—expressly or implicitly—would preclude Defendant Greer from exercising her contractual right to seek an award of attorneys’ fees. Had the parties intended the stipulation to preclude recovery of attorneys’ fees, the stipulation would have said so expressly. “In the interpretation of contracts every word and phrase must be presumed to have been employed with a purpose and must be given a meaning and effect whenever reasonably possible.” *Ball v. Stokeley Foods*, 37 Wn.2d 79, 83, 221 P.2d 832 (1950). “We must construe a contract to give meaning to every term.” *Diamond B Constructors, Inc. v. Granite Falls School District*, 117 Wash.App. 157, 165, 70 P.3d 966 (2003). “[C]ourts favor the interpretation of a writing which gives effect to all of its provisions over an interpretation which renders some of the

language meaningless or ineffective.” *Mayer v. Pierce County Medical Bureau*, 80 Wash.App. 416, 423, 909 P.2d 1323 (1995). *Allstate Insurance Company v. Houston*, 123 Wash.App. 530, 542, 94 P.3d 358 (Div. II 2004). To disregard the separate usage of the terms “attorneys’ fees” and “costs” in the parties’ contract would be to violate these fundamental rules of contract construction. Where provisions permitting attorneys’ fees to the prevailing party are valid, the court has no authority to disregard them. *Bank of Spokane v. Tucker*, 62 Wash.App. 196, 207, 813 P.2d 619 (1991).

Plaintiffs previously relied on *Roberts v. Bechtel*, 74 Wn. App. 685, 875 P.3d 14 (1994) to argue that dismissal without costs is equivalent to dismissal without attorneys’ fees. CP 1639–1640. In *Roberts*, plaintiff Roberts signed a release of her motor vehicle accident claims against defendant Bechtel, in which she released Bechtel “from any and all claims ... of any kind or nature whatsoever.” *Id.* at 686. In addition, their attorneys signed a stipulation that confirmed “all causes herein, as between Roberts and Bechtel, *have been fully settled and compromised with prejudice and without costs.*” *Id.* at 686 (italics supplied). Plaintiffs Ms. Roberts’ only basis for recovery of her attorneys’ fees was that

defendants Bechtel's defenses were frivolous. In denying the plaintiff's subsequent request for an award of fees, the court focused on the parties' expressed intent to fully settle their dispute. "The language of release is plain and unambiguous; Ms. Roberts released Ms. Bechtel from any and all claims resulting or developing from the accident. The claim of frivolous litigation is a claim arising from the accident." *Id.* at 687.

Here, the situation is far different. Defendant Greer did not intend the stipulation to release Plaintiffs from their obligation to pay attorneys' fees in this matter, and the issue was never addressed. *Cf. Hodge v. Development Services of America*, 65 Wash.App. 576, 828 P.2d 1175 (1992) (parties should specify in CR 68 offers whether "costs" include the recovery of attorneys' fees). In short, "costs" do not include "attorneys' fees" unless the parties so state and Ms. Greer did not release her contractual right or stipulate to prevailing party attorneys' fees.

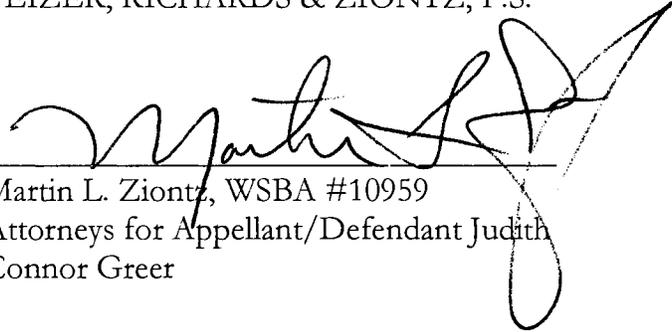
V. CONCLUSION

Plaintiffs should not be allowed to pursue their claims against Ms. Greer for her actions relating to the March 1999 Agreement on

behalf of Bayfield and Woodland, and, then, avoid paying contractual attorneys' fees under that agreement after they have lost those claims. They chose to sue the individual defendants as part of their litigation strategy. Now they must be held responsible for the attorneys' fees that are the consequences of that decision. The decision and order denying Ms. Greer's Motion for Attorneys' Fees should be reversed and the case remanded for a determination of her reasonable attorneys' fees.

DATED this 8th day of June, 2009.

PEIZER, RICHARDS & ZIONTZ, P.S.



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No. 38783-2-11

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

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 JUN -8 PM 5:01

JUDITH C. GREER, an individual, and STEPHEN CONNOR, an individual,
Appellants;

v.

DONALD B. MOUNTJOY and KATHLEEN L. CONNOR, husband and wife,
Respondents

CERTIFICATE OF SERVICE OF
CRAIG H. NIM

~~FILED
COURT OF APPEALS
DIVISION II
09 MAY 29 PM 12:03
STATE OF WASHINGTON
BY _____
DEPUTY~~

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DIVISION II
09 JUN 11 PM 12:38
STATE OF WASHINGTON
BY Craig H. Nim
DEPUTY

I, CRAIG H. NIM, being of adult years, certify under penalty of perjury under the laws of the state of Washington that on the below date I caused a true and correct copy of the following documents:

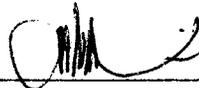
1. Brief of Appellant Judith C. Greer;
2. Brief of Appellant Stephen Connor;
3. Defendants Judith Connor Greer and Stephen Connor's Motion under RAP 9.9;
4. the Verbatim Reports of Procedure of May 18, 2007, December 14, 2007 and March 21, 2008; and
5. this Certificate of Service;

to be delivered by legal messenger to the following counsel of record:

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DATED this 8th day of June, 2009.



Craig H. Nim,
Secretary to attorney Martin L. Ziontz