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DIVISION II

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STATE OF WASHINGTON

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COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION I

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

**Appellants,**

v.

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

**Respondents.**

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COURT OF APPEALS  
STATE OF WASHINGTON  
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REPLY BRIEF OF APPELLANT JUDITH C. GREER

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## I. SUPPLEMENTAL STATEMENT OF THE CASE

Plaintiffs assert that Defendants Bayfield and Woodland are both, “family-run companies.” Respondents’ Brief at 2. As Plaintiffs concede, Defendants Judith C. Greer and Stephen M. Connor and their deceased mother, Velma Connor were the only family members involved in running Bayfield and/or Woodland. CP 2141, 2144 and 2148.

The trial court rejected Plaintiffs’ claims of an oral promise by Defendant Judith Greer that Plaintiffs would have “unfettered rights in the Community Access Areas, so long as the Plaintiffs or their family own Lot 10” (CP 2067-2071). Plaintiffs resurrect this claim to excuse their continuing use of the Community Access Area after Bayfield’s lawful termination of their license. CP 2184-86; CP 2188-89.

Plaintiffs quote from the March 1999 Agreement (the “Agreement”) with Woodland and Bayfield, but understandably omit the companion dispute resolution provision, paragraph 6, providing not only for arbitration of “*any controversy or claim arising out of or relating to this Agreement,*” but also that the parties shall have “*all remedies at law or in*

*equity.*” This language is then incorporated into paragraph 7 regarding attorneys’ fees:

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 ...*

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. In the Brief of Appellant Judith C. Greer (hereafter, “Greer Brief”), paragraphs 6 and 7 are jointly referred to as the “alternative dispute resolution provisions.” Greer Brief at 5, 26 & 27.

Plaintiffs continue to refer to “the alleged assault of their then 15-year old son by Defendant Connor.” Respondents’ Brief at 6-7. The subject of this alleged assault, however, Marlon Mountjoy, never submitted testimony in any form that would support their groundless charge. Plaintiff’s cite to nothing other than the plainly hearsay declaration of Kathleen L. Connor. CP 2117–2121.

Bayfield's attorney addressed aggressive and offensive conduct by Plaintiffs and put them on notice that unless they adhered to basic standards of decency, the license to access Bayfield property, "immediately adjacent to and abutting Grantees' property," would be revoked. CP 2130. Contrary to Plaintiffs' erroneous assertions, Respondents' Brief at 7, access to this designated Bayfield property was necessary to access the beach as the pathway from Plaintiffs' property to the beach crossed Bayfield property. CP 179 (Plat map attached to Plaintiff's Second Amended Complaint). Plaintiffs were given nine (9) months to reform their behavior, which they failed to do, and it was only upon such failure that the second letter was sent by Bayfield's attorney on May 18, 2006. CP 2188-89. Plaintiffs do not dispute that the instructions they received from Defendants Greer and Connor pertain to the access to and protection of Bayfield property and that Plaintiffs' grievances related to Defendant Connor's and Greer's actions on behalf of Bayfield and Woodland:

*If any of these provisions are violated by either you or your family members, Bayfield and Woodland Company will immediately exercise their right to revoke your permission to occupy and use the paths and beachfront areas as set forth in the Agreement.*

CP 2186. See also Defendant Bayfield's and Woodland's Motion for Partial Summary Judgment re: All Claims Except Consumer Protection Act Claim, CP 778-779.

Plaintiffs continue to complain of, "an unrelenting and ever-increasing campaign of intimidation and harassment by Defendants," Respondents' Brief at 8, but they acknowledge that this "campaign" was related to enforcing the termination of beach access and performing Bayfield's and Woodland's legitimate work activities on the property. CP 154-56, Second Amended Complaint, ¶ 3.18, 3.19, ¶ 4.4.

Plaintiffs alleged ten (10) claims in their Second Amended Complaint. Respondents' Brief at 8-9. They reference a Stipulation Clarifying Claims Against Defendants which was not filed, not made part of the record below, and has no Clerk's Paper number or designation. While they allegedly "clarified," i.e., unilaterally dismissed the Second, Third, Sixth, Ninth and Tenth Causes of Action against Judith Greer, this "clarification" did not occur until December 21, 2007, seven (7) months after they were granted leave to file their Second Amended Complaint on May 21, 2007, and after substantial

litigation expense by Defendant Greer in regard to those claims. CP 1610–1619 & CP 1241–1328; Appendix A to Respondents’ Brief, Stipulation Clarifying Claims.

Plaintiffs’ Motion for Partial Summary Judgment on their Third Cause of Action for Declaratory Judgment sought to have the Relinquishment Provision of the March 1999 Agreement declared void. While the trial court granted that motion, Plaintiffs disregard the fundamentally damaging implication of that ruling for their basic quest in their lawsuit to both retain Lot 10 and obtain permanent beach access:

Accordingly, there are two options available as a remedy: either (1) affirm the grant to plaintiffs and include the community access rights or (2) *rescind the transaction and attempt to do equity, given the passage of time and change in value of the property as well as the reliance of plaintiffs on the conveyance.*

\* \* \*

What makes this case perhaps distinguishable from *M.K.K.I. v. Krueger* [135 Wn.App. 647 (Div. III 2006)] is that *Plaintiff and Defendant explicitly bargained for a result [relinquishment of community access rights] that is not legally enforceable.*

CP 864. In fact, in the Court’s June 20, 2008 Order Regarding Remedies regarding the relinquishment provision, the Court ruled that

while unenforceable against Plaintiffs “heirs, successors and assigns,” it was enforceable against Plaintiffs personally:

ORDERED, ADJUDGED AND DECREED that except as provided herein, *the Agreement remains in full force and effect in accordance with its terms.*

CP 1234–38. Any claim by Plaintiffs that this was a victory because of the availability of community access to their heirs, successors, or assigns, is largely foreclosed by Bayfield’s right of first refusal under the March 1999 Agreement:

2.1 Grantees’ Property. Grantees agree not to transfer, sell, assign, convey or otherwise dispose of the Grantees’ Property unless Grantees have first made an offer to sell the Property to Bayfield as described in Section 2.1.1 hereof and Bayfield has declined its rights pursuant to Section 2.1.2 hereof.

CP 397. Plaintiff’s claims of, “their success on their declaratory judgment action,” Respondents’ Brief at 11, plainly do not withstand scrutiny.

Defendant Greer filed and voluntarily dismissed her counter-claim for trespass. Plaintiffs do not dispute that they never sought attorneys’ fees on said counter-claim. Brief of Appellant Judith C, Greer at 23.

## II. ARGUMENT

### A. Plaintiffs' Privity of Contract Analysis Must Be Rejected.

Plaintiffs mistakenly rely on *Touche Valley Grain Growers, Inc. v. Opp & Siebold General Construction, Inc.*, 119 Wn.2d 334, 831 P.2d 724 (1992) for an overbroad statement of privity that one who is not a party to a contract can never claim benefits under it. That is not what *Touche Valley* held. Instead, the more limited holding was as follows:

We further hold that the subrogation waiver protects Opp & Siebold's surety, National Surety Corp., but does not protect the subcontractor and manufacturer, Truss-T Structures, Inc., because Truss-T was not a party to the contract or a beneficiary of it.

*Id.* at 337. Thus, while subcontractor Truss-T was denied the benefit of a waiver of claims negotiated between building owner Touche Valley and general contractor Opp & Siebold, Touche Valley had not sued subcontractor Truss-T nor claimed that Truss-T had directly violated contract provisions or improperly implemented them, as is the case here with Plaintiffs' claims against Defendants Judith C. Greer and Stephen M. Connor. The distinction is critical, as discussed below.

B. Mutuality of Remedies.

Privity does not preclude the extension of contract benefits where the Plaintiff has sued defendants who are non-signatories to a contract on the basis that they violated its terms and should have liability for their actions on behalf of a corporation. As the Court of Appeals stated in *McClure v. Davis Wright Tremaine, et al.*, 77 Wash.App. 312, 316, 890 P.2d 466 (Div. I 1995):

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.

Id. at 316. Similarly, here, where Defendants Greer and Connor are non-signatories but have been sued on claims arising out of the Agreement, they can compel application of the alternative dispute resolution procedures. Such a rule has been adopted in Washington under the mutuality of remedy rule. *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 P.3d 710 (Div. I 2008). In a case where defendant PLG, Inc. took over the business of tenant Draper, the Court of

Appeals affirmed the trial court's award of attorneys' fees to plaintiff

Kaintz notwithstanding that PLG had never signed the lease:

Mutuality of remedy is an equitable principle, recognized in the case law of Washington, that can support the award of attorney fees to the prevailing party in an action brought on a contract. Today we explicitly hold that this equitable principle can support such an award even in circumstances in which the party that prevailed did so by establishing that the contract at issue was unenforceable or inapplicable. Accordingly, we affirm the trial court's order awarding attorney fees herein.

Id. at 711.

Under the mutuality of remedy analysis in a California decision, *Reynolds Metals Company v. Alperson*, 25 Cal.3d 124, 599 P.2d 83 (1979), plaintiff Reynolds supplied aluminum goods and products to Titanium Metallurgical, Inc. (hereafter, "TMI") and its subsidiary, Turner Metals Supply, Inc. When Turner and TMI became insolvent, plaintiff brought suit seeking to hold the shareholders and directors of TMI personally liable for the debts owed Reynolds by Turner and TMI, claiming defendants were, "alter egos" of the two bankrupt companies. The case proceeded to trial and the trial court rejected the alter ego theory and awarded defendants their attorneys' fees under the terms of the contract between Reynold and TMI, even though the shareholders

and directors were not signatories. Relying on California Civil Code Section 717, California's counterpart to RCW 4.84.330, i.e., mutuality of attorneys' fees in contracts, the California Supreme Court held:

Had plaintiff prevailed on its Cause of Action claiming defendants were in fact the alter egos of the corporation ... defendants would have been liable on the notes. Since they would have been liable for attorneys' fees pursuant to the fees provision had plaintiff prevailed, they may recover attorneys' fees pursuant to § 717 now that they have prevailed.

Id. at 129. Mutuality of remedies provides that so long as Plaintiffs have pleaded for their attorneys' fees under the contract in the Second Amended Complaint, CP 161, Defendants are equally entitled to the benefit of attorneys' fees if they prevail.

While Defendants Greer and Connor disclaimed any connection with the March 1999 Agreement, Respondents' Brief at 14, this does not alter the operation of the mutuality of remedy rule that if the Plaintiffs claimed to be entitled to attorneys' fees if they had prevailed, the reciprocal right to attorneys' fees is granted to Defendants

Plaintiffs' Second Amended Complaint brought virtually identical claims against Mr. Connor and Ms. Greer as had been brought against the corporate defendants. Greer Brief at 10–13. Even after

Plaintiffs voluntarily dismissed some of their claims against Mr. Connor and Ms. Greer seven months after they filed the Second Amended Complaint, there was still a substantial overlap in Plaintiffs' claims against the corporate and individual defendants. Respondents' Brief at 9. As Plaintiffs made abundantly clear in their Motion for Leave to Amend First Amended Complaint, CP 93–118, their rationale for adding Mr. Connor and Ms. Greer was the extreme commonality of facts for the corporate and individual defendants and that Mr. Connor and Ms. Greer were the people through whom the corporate defendants acted in entering into and enforcing the Agreement. Greer Brief at 6–10. Plaintiffs vociferously argued that there would be no prejudice to adding Mr. Connor and Ms. Greer in their individual capacities for these same reasons. Id.

Had Plaintiffs prevailed in their claims against Mr. Connor and Ms. Greer, Plaintiffs would have almost certainly prevailed in those same claims against the corporate defendants, because of the near-identical facts and because Mr. Connor and Ms. Greer were at all times acting on behalf of the corporations. Greer Brief at 6–10; Plaintiffs' Motion to Amend, CP 93–118. Absent a ruling that Plaintiffs must pay

Mr. Connor's and Ms. Greer's attorneys' fees, Plaintiffs' multi-defendant litigation strategy would give them what amounts to a cost-free shot at the individual defendants. This is precisely the type of circumstance in which the doctrine of mutuality of remedies should apply – i.e., to prevent an inequitable result when one party would otherwise be entitled to their attorneys' fees if they prevailed but the other party would not be entitled to their attorneys' fees if the outcome were the other way around. "Thus, it is clear that mutuality of remedy exists as a 'well-recognized principle of equity' in Washington." *Kaintz*, 147 Wash.App. at 759.

C. Judicial Estoppel Does Not Apply to Defendants' Claim for Attorneys' Fees.

Plaintiffs' reliance on judicial estoppel is misplaced. In *Ashmore v. Estate of Duff*, 165 Wn.2d 948, 205 P.3d 111 (2009), Respondents' Brief at 14, fn. 1, the court laid out the elements of judicial estoppel: (1) Whether the later position is clearly inconsistent with the earlier position; (2) Whether judicial acceptance of the second position would create a perception that either the first or second court was misled by the parties' position; and (3) Whether the party asserting the

inconsistent position would obtain an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Id.* at 951-52, citing with approval *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007). The *Ashmore* Court reversed the court of appeals imposition of judicial estoppel by a review of these three elements. *Id.* at 950, and it should be rejected here: (1) Defendants Greer and Connor have never taken the position that if Plaintiffs somehow prevailed that they would not be entitled to attorneys' fees; (2) Nothing in the record has been cited by the Plaintiffs to suggest that the trial court was misled by any assertion by Connor or Greer that they would not be entitled to their attorneys' fees if they prevailed; (3) Plaintiffs identify no unfair advantage to Defendants Greer and Connor or unfair detriment to them if estoppel is not granted, given that in their complaint they clearly sought their own attorneys' fees against Connor and Greer. Plainly, judicial estoppel has no application to Defendants Connor and Greer's motion for attorneys' fees.

D. *McClure v. Davis Wright Tremaine Controls.*

Plaintiffs' attempts to distinguish *McClure v Davis Wright Tremaine*, 77 Wn.App. 312, 890 P. 2d 466 (Div.1 1995) must be

rejected. Plaintiffs first argue that Davis Wright was authorized to invoke the arbitration clause of a contract between its client and plaintiff McClure because, “the arbitration clause permitted ‘any party involved’ in a dispute to submit the matter to arbitration.”

Respondents’ Brief at 16. Plaintiffs omitted from their brief any reference to paragraph 6 of the Agreement, because they cannot explain the critical interrelationship between the two alternative dispute resolution provisions, paragraphs 6 & 7:

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...*

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. Just as in *Davis Wright*, then, these dispute resolution provisions apply to the parties to “any controversy or claim” and not just to the signatories to the Agreement. It is the losing party in the controversy or claim, not the Agreement, that is

subjected to prevailing party attorneys' fees. Again, any concern about attempted application of these provisions to a non-signatory are not triggered when the party against whom the dispute resolution provisions will be applied is a signatory. *McClure*, 77 Wn.App. at 315, n.1.

Plaintiffs argue at great length that, “ McClure is further distinguishable based on the presumptions at play in the context of arbitration versus attorneys’ fees.” Respondents’ Brief at 17-18. They ask this Court to disregard the express interrelationship between paragraph 6 of the Agreement and paragraph 7 on attorneys fees. Under paragraphs 6 & 7, any claim or controversy arising out of or relating to the Agreement triggers the rights *of a party to said claim or controversy* to (a) demand arbitration; (b) pursue their remedies at law or equity; and (c) be paid prevailing party attorneys fees, in arbitration, litigation and appeal. “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. Stokely Foods*, 37 Wn. 2d 79, 83, 221 P. 2d 832 (1950). “[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 (Div. 2 1995).

Even though Plaintiffs have not asserted otherwise, paragraph 7 makes it clear that the right to attorneys fees commences prior to and is not dependent upon exercising the right to arbitration: “If said claim or controversy is referred to an attorney, the losing party shall pay the prevailing party’s reasonable attorneys fees and costs....” Of course, such referral and the commencement of attorneys fees and costs would almost always precede a demand for arbitration. In addition, just as Plaintiffs elected to do in this case, a party may elect to proceed to court, not arbitration, but that also does not alter the right to prevailing party attorneys fees.

E. The Context Rule Establishes The Defendants’ Right to Attorneys’ Fees.

Plaintiffs attempt to avoid the consequences of the “context rule” which , “involves determining the intent of the contracting parties by viewing the contract as a whole, including ... the subsequent acts and conduct of the parties ...” *Tjart v. Smith Barney, Inc.*, 107 Wash.App. 885,

895-96, 28 P.3d 823 (Div. 1 2001). Greer Brief at 28. To demonstrate that Plaintiffs believed they were entitled to their attorneys fees and costs from Defendants Connor and Greer, these defendants cited to paragraphs 14.2 and 14.3 of Plaintiffs' Second Amended Complaint in which they sought all of their attorneys fees against all of the defendants, without separately addressing Greer and Connor in any way. Id. Without citation to any motion, brief or declaration in which they notified defendants or the lower court that they were not claiming attorneys fees from defendants Greer and Connor, Plaintiffs respond: "This was not a conscious decision to seek fees against Defendants Greer and Connor, as they assert; it was a mere oversight." Respondents' Brief at 19. To substantiate this dubious notion, they argue that defendants Connor and Greer and the lower court should have known they weren't making such a claim because they didn't alter the attorneys' fee language in paragraphs 14.2 & 14.3 of their Second Amended Complaint. This left paragraph 14.3 to read, "Plaintiffs are entitled to recover their fees and costs incurred in this action from defendants." CP 161. The only reasonable conclusion in this context is that Plaintiffs intended that Defendants Connor and Greer remain

exposed to Plaintiffs' claims for attorneys fees. They did not withdraw such claims even when they executed their Stipulation Clarifying Claims, Appendix A to Respondents' Brief.

Plaintiffs argue without citation to the record, that after obtaining summary judgment that the relinquishment provision did not apply to their heirs and assigns, they moved for fees only against Bayfield and Woodland, and not against Connor and Greer. Respondents' Brief at 19. In making this argument they are in breach of RAP 10.3(a)(6), as their motion for attorneys fees is not part of the record on review. Thus, Plaintiffs are incorrect as to any inference that negates their clearly stated claim in the Second Amended Complaint that paragraph 7 of the Agreement granted them a right to attorneys fees and costs against Connor and Greer. As for any claim that they were the prevailing party on their declaratory judgment claim, it should be recalled that they failed to achieve their primary objective of obtaining access to the beach. CP 1234–38; Greer Brief at 18–19.

Plaintiffs argue that the context rule may not be used to contradict, modify, or add to the written terms of an agreement. Respondents' Brief at 20, citing language quoted from *Tjart v. Smith*

*Barney*, 107 Wn.App at 895-96. Plaintiffs attempt to do just that by disregarding the interrelationship between paragraphs 6 & 7.

F. Agency and Prevailing Party Attorneys' Fees.

Plaintiffs attempt to discount the *McClure* Court's reliance on the agency rules set forth in *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11<sup>th</sup> Cir. 1993) as mere dictum. Respondents' Brief at 20. Plaintiffs are incorrect. In fact, McClure's extension of contractual arbitration rights to non-signatory Davis Wright was also founded on agency principles:

McClure's second argument is equally unpersuasive. Davis Wright characterizes itself as Lewison's agent. McClure does not dispute Davis Wright's contention that agents can enforce arbitration agreements made by their principals.

Id. at 316. The rule that agents may invoke arbitration clauses that apply to their principals is described further in a footnote:

The complaint merely states that because Davis Wright represented Lewison and EMC in other matters, it knew or could have known of Lewison's financial situation. From this assertion, it is possible to characterize the claim as stemming from the law firm's role as Lewison's agent. Other courts have found that agents can avail themselves of an arbitration agreement made by their principals. *E.g., Arnold v. Arnold Corporation-Printed Communications for Business*, 920 F.2d 1269 (6th Cir.1990).

Id., footnote 2. Here, of course, most, if not all, of Plaintiffs' claims against Defendants Greer and Connor are based on their actions as agents on behalf of Bayfield and The Woodland Company. See Greer Brief at 9–10; Plaintiffs' Second Amended Complaint, CP 150–179. Because agents are entitled to enforce dispute resolution provisions in their principals' contracts, *Sunkist* applies to provide that right to Defendant Greer.

G. Defendants Connor and Greer Were Prevailing Parties.

Plaintiffs voluntarily dismissed nine of their ten claims against Ms. Greer in December of 2007 and June of 2008. Stipulation Clarifying Claims, Respondents' Brief, Appendix A; CP 1231-33. 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.

Plaintiff's purported distinction between their dismissal of 9 of their 10 claims against Ms. Greer and the rule that a party only prevails when all claims against it must be rejected. Respondents' Brief at 24. *Marassi* makes it clear that if there are several claims asserted by the parties against each other, the defendant is entitled to attorneys fees on the claims on which she prevails and the plaintiff is entitled to the attorneys fees on the claims on which they prevail. *Marassi*, 71 Wash. App. at 918. Even if Plaintiffs claims of victory on their declaratory judgment claim had merit, they never sought their attorneys fees. None

of the cases they cite suggest that a party's decision not to pursue their fees has any effect on the other party's rights to do so.

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 nearly identical.

Defendant Greer has previously demonstrated that *Roberts v. Bechtel*, 74 Wash.App. 685, 875 P.3d 14 (1994) relied upon both the complete release of all claims and the language of the stipulation to dismiss the case without costs to determine that attorneys fees were not available against defendant Bechtel. Greer Brief at 37-38. Plaintiff's

reliance on the statement in *Roberts*, 74 Wn. App. at 687 that “attorneys fees are considered costs of litigation,” does not address the true issue of whether the stipulation in that case alone, without the release “from any and all claims,” *id.* at 686, is enough to bar a claim for attorneys fees. As the Washington Supreme Court held in *Panorama Village Condominium Owners Ass’n Bd. of Dirs. v. Allstate Ins. Co.*, 144 Wash.2d 130, 26 P.3d 910, (Wash. 2001), attorneys fees and costs of litigation must be treated separately:

It must be noted that there is a difference between an entitlement to collect “reasonable attorney fees” and an entitlement to collect those statutory “costs” enumerated in RCW 4.84.010 “Costs have historically been very narrowly defined, and RCW 4.84.010 limits cost recovery to a narrow range of expenses such as filing fees, witness fees, and service of process expenses.” *Hume v. Am. Disposal Co.*, 124 Wash.2d 656, 674, 880 P.2d 988 (1994) (citing *Nordstrom, Inc. v. Tampourlos*, 107 Wash.2d 735, 743, 733 P.2d 208 (1987)).

Id. at 142.

It will be recalled that attorneys fees and costs were treated separately in the Agreement between Plaintiffs and Defendants Bayfield and Woodland. Greer Brief at 35–37. Besides the bare stipulation dismissing claims “without costs,” there is no evidence of any intent by

defendant Greer to also dismiss her claim for attorneys fees.

Consequently, *Roberts v. Bechtel* provides no authority for Plaintiffs to avoid incurring their obligation for defendant Greer's prevailing party attorneys fees.

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.

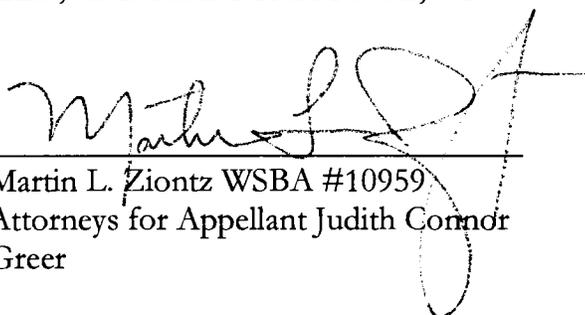
H. Plaintiffs Claim for Fees Under RAP 18.9(a) Should be Rejected.

RAP 18.9(a) allows an award of attorneys fees for filing a frivolous appeal when an appeal is frivolous. An appeal is frivolous if "there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal." *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.

2d 225, 241, 119 P.3d 325 (2005). That contention itself is without merit, as demonstrated by the extensive citation to the record and to relevant case law. The Court should devote no further attention to Plaintiffs hopeful attempt to turn the tables.

RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of August, 2009.

PEIZER, RICHARDS & ZIONTZ, P.S.

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COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION I

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

**Appellants,**

v.

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

**Respondents.**

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STATE OF WASHINGTON  
BY [Signature]  
COURT OF APPEALS  
DIVISION I

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CERTIFICATE OF SERVICE OF CRAIG H. NIM

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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 Reply Brief of Appellant Judith Connor Greer to be filed in the Washington Court of Appeals, Division II and served by legal messenger upon the following counsel of record:

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DATED this 7<sup>th</sup> day of August, 2009.

By:  \_\_\_\_\_  
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