

FILED  
Court of Appeals  
Division II  
State of Washington  
7/18/2019 3:26 PM

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

NO. 53163-1-II

---

ARMSTRONG MARINE, INC.

Plaintiff/Respondent

vs.

MICHAEL P. WILEY, JR.,

Defendant/Appellant

---

**BRIEF OF APPELLANT**

---

Joseph B. Wolfley  
WOLFLEY LAW OFFICE, P.S.  
713 E First St  
Port Angeles WA 98362  
Phone: (360) 457-2794  
WSBA No. 44782

Attorney for Defendant/Appellant

## TABLE OF CONTENTS

	<u>Pages</u>
A. Identity of Appellant and Clallam County Superior Court's Decision .....	1
B. Assignments of Error and Issues Pertaining Thereto.....	1
C. Statement of the Case .....	3
D. Summary of Argument .....	12
E. Argument.....	13
1. Scope of Review on Appeal.....	13
2. Appellant is the Prevailing Party.....	14
3. Dismissal for Want of Prosecution Does Not Negate the Defense Victory and Award for Attorney's Fees Based upon the Contract.....	21
4. The Agreement Controls the Award of Fees Upon a Mere Demand.....	24
5. Representation of Appellant is a Red Herring.. ..	16
6. The Lien Attaches Once the Award is Granted.....	26
7. No Support to Proposition That "Prevailing" Requires Prevailing on Motions.....	27
8. Respondent's Reasons for Giving Up and Quitting are Not on the Record, nor Controlling.....	28
9. Request for Attorney's Fees, RAP 18.1.....	29
F. Conclusion .....	30



RCW 4.84.330.....9

RCW 59.18.290(2).....16

RCW 60.40.010.....4, 9

**RULES**

CR 41(a)(1).....21

CR 41(b)(2).....21-24

**A. IDENTITY OF APPELLANT AND CLALLAM COUNTY SUPERIOR COURT'S DECISION**

Appellant Michael P. Wiley, Jr. (Appellant) asks this Court to reverse the Order Denying Award of Attorney's Fees and Entry Of Judgment which was entered April 19, 2019, following Appellant's motion. CP 08-10.

**B. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING THERETO**

1. Assignment of Error

The trial court erred in its application of a contractual provision guaranteeing attorney's fees to the prevailing party in "any demand or suit" towards the issue of dismissal for lack of prosecution upon the Court Clerk's motion.

2. Assignment of Error

The trial court erred in failing to consider the contract provision awarding attorney's fees to the prevailing party as controlling.

3. Assignment of Error

The trial court erred in failing to find that Appellant is the prevailing party in this action.

4. Assignment of Error

The trial court erred in failing to recognize that the prevailing party, Appellant, is entitled to attorney's fees under the contract which Respondent sought to enforce.

5. Assignment of Error

The trial court erred in its application of the rule of standing in that Appellant's right to claim fees as the prevailing party was only ripe upon dismissal of Plaintiff's claim.

6. Assignment of Error

The trial court erred when it determined that failure to prevail in motions translates to failure to prevail in the matter generally.

7. Assignment of Error

The trial court erred when it determined that no proceeds were available upon which the lien could attach.

**No. 1:** When a Plaintiff calls it quits and refuses to prosecute its claim, such that it is dismissed by the Court Clerk for lack of prosecution, does that mean that the contract (guaranteeing attorney's fees to the Defendant should the Plaintiff fail to prove its case) may be ignored entirely by the Court?

**No. 2:** Does the Defendant prevail when the Plaintiff gives up and refuses to prosecute the case any further?

**Sub-Issue:** Is it the Defendant's responsibility to compel the Plaintiff to continue prosecuting its case in order to maintain his right to contractually guaranteed attorney's fees should the Plaintiff's case be dismissed for reasons the Plaintiff created alone?

**No. 3:** Does dismissal for lack of prosecution upon a Court Clerk's motion erase Defendant's victory endowed by Plaintiff's failure to prosecute?

**No. 4:** If the contract which a Plaintiff seeks to enforce guarantees attorney's fees should, the Plaintiff fail in proving its case, can the court disregard it in light of a dismissal upon a court's motion?

**No. 5:** Does a Defendant have standing to "prosecute" for attorney's fees awarded to the prevailing party *prior to* a dismissal of a Plaintiff's claim for lack of prosecution?

**No. 6:** Does failure to prevail in motions determine whether a party prevails generally at the end of a case?

**No. 7:** Will an attorney's lien attach to a contractual right to attorney's fees should the Appellant be considered the prevailing party?

## **C. STATEMENT OF THE CASE**

### ***Introduction***

Prior to the lawsuit, Defendant/Appellant Michael P. Wiley, Jr., (Appellant) was a laborer and welder for Armstrong Marine, Inc. (Respondent) in Clallam County, Washington. Respondent is a Clallam County business engaged primarily in the manufacture of aluminum boats. Appellant made an hourly wage as an at-will employee at Armstrong

Marine. The gist of Respondent's claim against Appellant was that he ostensibly breached a non-competition and confidentiality agreement which he entered into during the course of his employment with Respondent, Armstrong Marine. However, the underlying facts, which are disputed, are not the issue on appeal.

Rather, this appeal deals with a unique set of questions regarding dismissal of a lawsuit for lack of prosecution, and a subsequent request for attorney's fees pursuant to A) an attorneys' fee clause which awards fees and costs to the prevailing party "in the event of any demand or suit;" (CP 159, ¶ 12), or B) RCW 60.40.010.

The attorney's lien issue is essentially moot because Appellant's counsel represents the Appellant now. Appellant also ratified the motion rendering it primarily a motion to determine the award of fees for him personally.

The interpretation of a contract and its application following a dismissal for lack of prosecution upon a Court Clerk's motion is an issue of first impression.

### ***The Agreement***

Armstrong Marine, Inc. (hereinafter "Armstrong Marine" or "Plaintiff") drafted a "Confidentiality and Non-Competition Agreement

(hereinafter “Agreement”). CP 156. As a general rule, the Agreement controls matters related to “confidential information” as defined by the Agreement. CP 156. It also generally mandates that the Employee cannot work for another aluminum vessel manufacturer, or related service for 18 months within a 75 mile radius emanating from the work site. CP 157.

The Agreement further contains an attorneys’ fee provision stating:

In the event of any demand or suit in connection with this Agreement, the prevailing party shall be entitled to its reasonable costs and expenses, including reasonable attorney’s fees, in addition to any other relief to which such party might be entitled, regardless of whether injunctive relief is sought. CP 159. (Emphasis added).

In effect, the Agreement meant that the Employee could not work as a welder or laborer for another aluminum boat manufacturing organization anywhere along most of the vast stretch of Washington’s shoreline for 18 months. CP 96.

### ***Facts Underlying Lawsuit***

Cory Armstrong was a partner at Armstrong Marine at the time the subject contract was formed. CP 168. He was against the noncompete agreements that his partner and brother Joshua Armstrong was pressuring employee to sign. CP 169. Cory Armstrong witnessed Joshua Armstrong telling workers to sign the document or risk being fired. CP 169. None of

the employees were given a chance to speak with an attorney before signing these agreements. CP 170.

In August, 2015, Cory Armstrong (a partner at Armstrong Marine, Inc., at the time the subject contract was formed) left the company and started a new company manufacturing aluminum boats in Port Townsend. CP 168.

Eventually, Michael Wiley left Armstrong Marine to work ACI Boats, Inc., the new company formed by Cory Armstrong who was his primary supervisor at Armstrong Marine. CP 171-172. Armstrong Marine filed suit against Mr. Wiley, the Appellant.

***Procedure***

Respondent filed suit for breach of contract on June 14, 2016. CP 182-185. Appellant timely filed an answer to the Complaint which contained a single counterclaim for attorney's fees awarded to the prevailing party, according to the Attorneys' Fee provision, *supra*, p. 5. CP 178.

Defendant Appellant brought a motion for summary judgment of dismissal on August 26, 2016. CP 175-176. The issue before the trial court was whether no consideration was provided at the time Respondent

compelled Appellant to sign the noncompete form. CP 154-155; CP 169-170.

The motion was denied because the Court perceived questions of fact, to wit, there was “an equally reasonable interpretation” that concurrent consideration was contemplated in the formation of the contract, as opposed to strictly past consideration. CP 101, ll. 9-11. “Whether the preamble should be construed that way or as an expression of a contemporaneous pay raise and promotion is a question to be resolved by the fact-finder.” CP 102, ll. 9-11.

On reconsideration, the court confirmed that “the non-competition agreement is ambiguous,” and again denied summary judgment. CP 85-86.

#### ***Discovery & Withdrawal***

At this point, discovery began in earnest, and Defendant complied with much of the Respondent’s requests. CP 64-69. Plaintiff felt the responses and production were incomplete and began requesting updates and highlighting deficiencies. CP 170-173. However, during this time period, there was a breakdown in communication between Defendant and his attorney of record, and the Defense attorney filed a notice of withdrawal on February 21, 2017. CP 82-83.

Subsequently, Plaintiff filed a motion to compel on March 9, 2017 (CP 77-81). Respondent prevailed on that motion on March 17, 2017—though no sanctions were awarded. CP 40-41.

***Lien***

Then, on June 12, 2017, Defense counsel—withdrawn at that time—filed an Attorney’s Claim of Lien, wherein withdrawn Defense Counsel claimed an interest in \$13,560.00 in attorney’s fees against “As regards the dispute between the parties: any settlement recovery not yet disbursed, proceeds of any settlement, or the judgment, if any.” CP 38-39.

***The Plaintiff / Respondent Quit***

Then, Plaintiff never again prosecuted the case. Upon receipt of the ordered discovery, Plaintiff gave up and quit.

The Court Clerk served a Notice of Dismissal for Want of Prosecution which was filed with the Court on January 10, 2019—two and a half years after the filing of the complaint.

Plaintiff did not prosecute the claim any further even after reception of the notice. The Court entered an Order of Dismissal for Want of Prosecution on February 19, 2019.

Subsequently, Defense Counsel, Joseph B. Wolfley, motioned the Court to award attorney fees and enter judgment for the same. CP 30-34.

The motion argues that RCW 4.84.330 mandates:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, **shall be** awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements. (Emphasis added).

The statute defines "prevailing party" as "the party in whose favor final judgment is rendered." *Id.*

The motion argues that the judgment should be entered in favor of Defense Counsel pursuant to RCW 60.40.010. CP 32-33. This is so, it is argued, because "Attorneys have the same right and power over actions to enforce their liens...as their clients for the amount due thereon to them." CP 33.

Plaintiff contended that Defendant was not entitled to attorney's fees because:

- 1) Defendant did not win any of the motions during the prosecution of the case; *See* CP 25, ll. 4-21.

- 2) Defendant did not prosecute the Counterclaim for attorney's fees (awardable to the prevailing party) either after receiving the Court's Notice of Dismissal for Want of Prosecution; CP 25-26, ll. 22-2; CP 26, ll. 11-13;
- 3) Defense Counsel cannot "commandeer" litigation to "satisfy the attorney's interest." CP 27, ll. 15-17, and
- 4) The dismissal by the Clerk is not a "final judgment for either party." CP 28, ll. 12-15.

Defendant replied with counterpoints to Plaintiff's points and authorities. CP 16-23. The bulk of these argument are set forth below.

**NOTE:** On the eve of the hearing, Defendant Michael Wiley contacted Defense Counsel, apologized for failing to communicate, and signed a quick declaration. In that declaration, he acknowledged that Mr. Wolfley represents him in this cause of action, he incorporated Mr. Wolfley's motion as his own, and supported Mr. Wolfley in the motion. CP 11.

In effect, the attachment of the lien issue is rendered moot by this fact because, when Appellant incorporated the motion as his own, he is in effect requesting an award of attorney's fees as the prevailing party.

### *The Court's Denial of Award*

Nevertheless, the Court denied the motion, signing the order prepared by Plaintiff. The Court found:

- 1) Defendant did not “prosecute” his Counterclaim; CP 9, ll. 1-4
- 2) Mr. Wolfley was not party nor counsel of record at the time the motion for an award of attorney’s fees was filed (despite the appearance of Mr. Wiley at the time of the hearing); CP 9, ll. 5-7
- 3) There were no proceeds to which a lien could attach. CP 9, ll. 7-9
- 4) Defendant was not the “prevailing party” because he did not win any of the underlying motions while the case was being prosecuted by Plaintiff;
  - a. “Regardless” the Court reiterated that the issue of “no proceeds received by Defendant...to which [the] attorney’s lien could attach” was the primary issue for the denial of the motion.

Appellant, Mr. Wiley, by and through his attorney of records, Mr. Joseph B. Wolfley, then initiated this appeal. It is contended that the Court erred in its decision as described above.

**D. SUMMARY OF ARGUMENT**

Appellant, Michael P. Wiley, Jr., is the prevailing party. Respondent filed a lawsuit against him to enforce a contract, it compelled him to rack up costs and fees in mounting a defense. Then, without any explanation, Respondent quit, and would not prosecute its claim.

The basis for an award of attorneys' fees is the contract which Respondent sought to enforce against Appellant. By making "any demand" whatsoever (let alone a lawsuit it failed to successfully prosecute) Respondent knowingly and voluntarily invited a mandated award of fees to be entered against it should it fail to successfully prove its claim.

Dismissal for Want of Prosecution does not negate the fact that Appellant prevailed through the basic fact that Respondent failed. Appellant had no standing to argue for an award of attorney's fees *until* Respondent failed.

The attorney's lien only attaches to an award of attorneys' fees to the prevailing party. Thus, a determination of whether Appellant prevailed must be entered first, then that determination kick-starts the right to fees pursuant to the contract. The Attorney's Lien attached specifically to that contractual right to fees.

This Court should overturn the trial court's denial of fees and remand for consideration and an award thereof. The Court should also award attorney's fees on appeal pursuant to RAP 18.1.

## **E. ARGUMENT**

### **1. Scope of Review on Appeal**

Appellant appeals the trial court's interpretation and application of a contractual provision which awards attorney's fees to the prevailing party upon "any demand or suit." Appellant appeals the court's decision on uncontested facts, not the facts themselves. "Because the parties dispute the legal conclusions resulting from the facts, and not the facts themselves, the issues can be decided as a matter of law." See *Wash. Mut. Sav. Bank v. Dep't of Revenue*, 77 Wash.App. 669, 673 n. 1, 893 P.2d 654 (1995).

Further, application of the contract's attorney fee provision, when applied to a dismissal upon a Court Clerk's motion for lack of prosecution, is a matter of law that should be reviewed de novo. *Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.*, 126 Wn.App. 352, 357, 110 P.3d 1145, 1149 (Div. 1 2005).

Appellant relied upon Respondent's guarantee to pay costs and attorney's fees related to the lawsuit Respondent filed against him, to his detriment. Appellant asserts an equitable right to fees based upon the

contract's terms. Equitable estoppel is a ground upon which appellate court reviews de novo. *Blueberry Place*, 126 Wn.App. 352, 357, 110 P.3d 1145, 1149.

## **2. Appellant Is the Prevailing Party.**

If Mr. Michael P. Wiley, Jr., (hereinafter "Appellant") is not the "prevailing party" against Armstrong Marine, Inc., (hereinafter "Respondent") then the issues surrounding the Attorney's Lien are moot.

The basis for awarding Appellant fees is situated in the parties' Agreement. It provides:

In the event of **any demand or suit** in connection with this Agreement, the prevailing party **shall** be entitled to its reasonable costs and expenses, including reasonable attorney's fees, in addition to any other relief to which such party might be entitled, regardless of whether injunctive relief is sought. CP 159. (Emphasis added).

"In all cases where costs and disbursements are not allowed to the plaintiff, the defendant shall be entitled to have judgment in his or her favor for the same." RCW 4.84.060.

The plain language of the Agreement is unequivocal and controlling: any demand of any kind (let alone a lawsuit filed in court) made by Respondent, but which is unsuccessful, mandates an automatic award of attorneys' fees to Appellant.

Thus, where Respondent quit, and thereby was not eligible for an

award of costs or disbursements, then Appellant is so entitled.

There is no case law to suggest that failing in a motion for summary judgment, or a motion to compel automatically translates to a failure to prevail in the case at large.

Contrariwise, “The Supreme Court [has] held that although defendants did not recover on their cross-complaint, then were the ‘prevailing party’ because plaintiffs were denied recovery against them.” *Soper v. Clibborn*, 31 Wn.App. 767, 769, 644 P.2d 738, 739 (Div. 1 1982) (citing *Gile v. Nielsen*, 20 Wn.3d 1, 13, 145 P.12d 288, 294 (1944)).

In *Soper*, a landlord brought an unlawful detainer action against a tenant for nonpayment of rent. 31 Wn.App. at 767, 644 P.2d at 738. The tenant counterclaimed for damages. “The trial court dismissed [the] action because of inadequate notice, and [also] dismissed [the] counterclaim for damages.” *Id.* The tenant—after both the complaint and the counterclaim were dismissed—moved the trial court for attorneys’ fees. *Id.* at 767-768, 644 P.2d at 738. The request was denied, but the trial court did conclude “that attorney’s fees should be awarded (to the) defendant but finds no statutory authority to award same.” 31 Wn.App at 768, 644 P.2d at 738. The tenant appealed. *Id.*

The appellate Court noted “Washington follows the American rule

that neither party can recover attorney's fees unless authorized by statute, contract or recognized ground of equity. *Id.* The Court then reviewed RCW 59.18.290(2) which provides for attorney's fees to the prevailing party. *Soper*, 31 Wn.App. at 768, 644 P.2d 738-739.

The Court made a point of highlighting that the landlord "did bring an unlawful detainer action against" the tenant, even though it was dismissed. 31 Wn.App. at 768, 644 P.2d at 739. "The trial court found that the action was apparently brought in good faith. [The defendant] had to defend himself regardless of the outcome."

"The plain language of the statute suggests that its applicability does not depend on the landlord's ultimate success or failure." *Id.*

The only question facing the court is...may a [tenant] be a "prevailing party"? Considerable authority indicates that the answer is yes.

In addition to *Gile*, above, the Court also relied on *Anderson v. Gold Seal Vineyards, Inc.*, 81 Wn.2d 863, 505 P.2d 790 (1973) to support its conclusion. In *Anderson*, the plaintiff voluntarily dismissed the action, "and the question was, did the defendant prevail?" *Soper*, 31 Wn.App. at 769, 644 P.2d 739. "The court held that the 'prevailing party is a lawsuit is that party in whose favor judgment is entered.'" 31 Wn.App. at 769-770, 644 P.2d at 739 (citing *Anderson*, 81 Wn.2d at 865, 505 P.2d at 790). "The

defendant prevailed by virtue of the voluntary nonsuit, and an award of attorney's fees was proper." *Id.*

The Court looked to Alaska and Nevada law as well for support in its decision. Notably, in the cited *Nevada N. Ry. Co. v. Ninth Judicial Dist. Court*, 51 Nev. 201, 273 P. 177 (1929), "the jury found no cause of action in either the complaint or defendant's counterclaim." *Soper*, 31 Wn.App. at 770, 644 P.2d at 739. Nevertheless, the Nevada trial court "awarded the defendant attorney's fees under a statute which authorized such an award to the 'prevailing party.'" *Id.* The "lack of a valid counterclaim was of no consequence."

In determining the case at hand, the Court determined that the dismissal of the tenant's counterclaim was likewise of no consequence. 31 Wn.App. at 770, 644 P.2d at 740. Because the landlord's claim was likewise dismissed, the tenant "was, therefore, the prevailing party...and was entitled to recover reasonable attorney's fees" pursuant to the statute. *Id.*

In *Andersen v. Gold Seal Vineyards, Inc.*, again, the plaintiff voluntarily dismissed the action in the middle of its prosecution. 81 Wn.2d 863, 864, 505 P.2d 790, 792. The court awarded attorney's fees due to the voluntary nonsuit. *Id.* at 865, 505 P.2d at 792.

The plaintiff appealed. *Id.* “The theory advanced as that there can be no prevailing party unless an affirmative judgment is entered.” *Id.*

The prevailing party in a lawsuit is that party in whose favor judgment is entered. As a general rule where a plaintiff voluntarily dismisses his action, the defendant is entitled to costs. 20 C.J.S. Costs § 68 (1940); 20 Am.Jur.2d Costs § 18 (1965). See also 21 A.L.R.2d 627 Voluntary Dismissal--Conditions (1952). This court has said, by dictum, that the awarding of costs to the defendant, where there is a voluntary nonsuit, is within the discretion of the trial court. *In re Estate of Frye*, 198 Wash. 406, 88 P.2d 576 (1939). [1] It would seem to follow that, if the defendant is awarded costs, he is the prevailing party.

While we find no case in which this court has been asked to decide whether the defendant 'prevails' when an action against him is dismissed on motion of the plaintiff, we have recognized that, where no judgment is entered against a defendant in an action at law, he is entitled to his costs. *Sibbald v. Chehalis Sav. & Loan Ass'n*, 6 Wash.2d 203, 107 P.2d 333 (1940).

*Andersen*, 81 Wn.2d at 865-866, 505 P.2d at 792.

Who is the prevailing party where no affirmative judgment is entered? **We did not state in any of those cases and it is not the law that there can be no prevailing party unless such a judgment is entered.**

We have said that a defendant who obtains a judgment setting aside the verdict in favor of the plaintiff and granting a new trial is the prevailing party and entitled to costs, even though the plaintiff again obtains a verdict in the second trial. *Klock Produce Co. v. Diamond Ice & Storage Co.*, 98 Wash. 676, 168 P. 476 (1917); *Briglio v. Holt &*

*Jeffery*, 91 Wash. 644, 645, 158 P. 347 (1916). We said in the latter case, 'Costs follow as an incident to a judgment.' This statement is in harmony with the definitions found in Black's Law Dictionary (Rev. 4th ed. 1968) at 1352, which cites the case of *Klock Produce Co. v. Diamond Ice & Storage Co.*, *Supra*, as illustrative of the rule stated there, that to be the prevailing party **does not depend upon the degree of success at different stages of the suit, but whether, at the end of the suit, or other proceeding, the party who has made a claim against the other, has successfully maintained it.**

For this rule, the dictionary cites *Bangor & Piscataquis R.R. v. Chamberlain*, 60 Me. 285 (1872).

6 J. Moore, Federal Practice 54.70(4), at 1306 (1966, Supp.1967), states the rule to be that **where there is a dismissal of an action, even where such dismissal is voluntary and without prejudice, the defendant is the prevailing party.**

*Andersen*, 81 Wn.2d at 867, 505 P.2d at 793 (emphasis added).

We think the general rule pertaining to voluntary nonsuits, that the defendant is regarded as having prevailed, should be applied to cases in which service upon the defendant was obtained under RCW 4.28.185(5). Since that statute was enacted to facilitate service upon out-of-state defendants, the legislature must naturally have had in mind that a defendant who 'prevails' is ordinarily one against whom no affirmative judgment is entered. **When an action against such a defendant is dismissed, even though that dismissal be upon the motion of the plaintiff, the judgment which is entered shows that the plaintiff failed to prove his claim.** We think it was the legislative intent that, at such a point, a defendant who has been served outside this state and has been put to expense in answering the complaint and preparing for trial should be

reimbursed by the plaintiff if the court finds that the justice of the case requires it.

In this case, not only did the defendants in the indemnity actions expend funds in preparation for trial, but they were put to the further expense of participation in the trial itself for several days before the motion was made to dismiss. The legislature must have had in mind situations such as this, as well as those in which the defendant might prevail on the merits, when it provided for the taxing and allowance of costs, including attorneys' fees, in the court's discretion, in cases where the foreign defendant prevails.

We hold that the trial court was authorized by RCW 4.28.185(5) to award costs and attorneys' fees to the defendants in both indemnity actions, when they were dismissed on motion of the plaintiffs.

*Andersen*, 81 Wn.2d at 868, 505 P.2d at 793-794 (emphasis added).

Here, the end result must be the same because Respondent guaranteed payment of attorney's fees upon "any demand or suit" of any kind—and it did not prevail in its demand or suit. Respondent brought a lawsuit against Appellant. Respondent forced upon Appellant the expenses of answering the complaint, going through the discovery process, and preparing for trial. Respondent forced Appellant to rely on its contracted promise that if it did not prove its case in court, Appellant would be reimbursed for his costs and attorney's fees.

Rather than face trial, however, Respondent simply quit. It sought to do an end-run around its guarantee to reimburse Appellant by attempting to avoid an affirmative judgment one way or the other.

However, as in *Andersen*, Appellant should be reimbursed by the Respondent for those costs.

After all, Respondent promised to do so in the contract it compelled Appellant to sign, and which it sought to enforce against Appellant.

**3. Dismissal for Want of Prosecution Does Not Negate the Defense Victory and Award for Attorney's Fees Based Upon the Contract.**

Respondent argued below that *Andersen* does not apply to the current matter because “the dismissal there was a voluntary dismissal under CR 41(a)(1), which provides for dismissal ‘upon such terms and conditions as are just,’ rather than under CR 41(b)(2), which provides for dismissal by the Clerk ‘without cost to any party,’ as was the case here.” CP 28, ll. 8-10.

Note that the Court did not invoke this rule in its order. Rather, it based its decision primarily upon the lack of proceeds to attach a lien, and an improper determination that Appellant did not prevail when Respondent gave up prosecuting its claim. CP 8-9.

The rule under which the Court Clerk dismisses an action involuntarily for lack of prosecution states:

(2) Dismissal on Clerk's Motion.

(A) Notice. In all civil cases in which no action of record has occurred during the previous 12 months, the clerk of the superior court shall notify the attorneys of record by mail that the court will dismiss the case for want of prosecution unless, within 30 days following the mailing of such notice, a party takes action of record or files a status report with the court indicating the reason for inactivity and projecting future activity and a case completion date. If the court does not receive such a status report, it shall, on motion of the clerk, dismiss the case without prejudice and without cost to any party. CR 41(b)(2)

The language at issue is “without cost to any party.” Respondent would have the court interpret this as blocking forever an award for attorney’s fees which were guaranteed to the prevailing party in the Agreement. But that is not how this rule reads. It does not bar contractually guaranteed terms. Rather, it bars the court from awarding a single cost to either party on its own motion to dismiss.

Allowable costs are defined in RCW 4.84.010, which include filing fees, service of process, notary fees, reports and records, statutory attorney’s fees (\$200), statutory witness fees, and so forth. These are primarily Plaintiff generated fees.

To the contrary:

In all cases where costs and disbursements are not allowed to the plaintiff, the defendant shall be entitled to have judgment in his or her favor for the same. RCW 4.84.060.

The proposition that the “cost to any party” language is limited in scope to the cost associated with specifically the motion to dismiss from the Clerk is supported by *Vaughn v. Chung*, 119 Wn.2d 273, 830 P.2d 668 (1992).

In *Vaughn*, the trial court dismissed the action for lack of prosecution pursuant to CR 41(b)(2), as here. *Id.* at 275-276, 830 P.2d at 669. The issue before the court was whether the court could vacate such a dismissal. *Id.* at 277, 830 P.2d at 670. In doing so, the court recited the prior iteration of the rule which read:

(2) Dismissal on Clerk's Motion.

(A) Notice. In all civil cases wherein there has been no action of record during the 12 months just past, the clerk of the superior court shall mail notice to the attorneys of record that such case will be dismissed by the court for want of prosecution unless within 30 days following said mailing, action of record is made or an application in writing is made to the court and good cause shown why it should be continued as a pending case. If such application is not made or good cause is not shown, the court shall dismiss each such case without prejudice. The cost of filing such order of dismissal

with the clerk shall not be assessed against either party.

*Vaughn v. Chung*, 119 Wn.2d at 273, 830 P.2d at 670. Notice that the “without cost” language of the current rule is in the singular, as was “the cost of filing” in the older iteration of the rule. This continuation of singular language against limits the scope of the “cost” to the Clerk’s motion.

Thus, the primary focus of the rule is, and always has been, the limited cost of the motion to dismiss by the clerk. In other words, it is not a sanctionable offense beyond dismissal alone.

Further, if one reads subpart (B) following, it notes that the case may be reinstated “without cost, upon motion brought within a reasonable time.” CR 41(b)(2)(B). “Without cost” in this context is equally limited in scope to the cost associated with the reinstatement by a party.

#### **4. The Agreement Controls the Award of Fees Upon a Mere Demand.**

Ultimately, the right to an award of attorney’s fees is controlled by the contract that Respondent sought to enforce against Appellant. The Court Rules do not negate the authority of the contract. Under the Agreement, “any demand or suit” by the Respondent is subject to an award of attorney’s fees should Respondent fail to prove the case—even demand

or suit initiated, but given up.

The court will award reasonable attorney fees if an applicable provision in a contract, lease, or other instrument provides that attorney fees will be paid by the promisor in a suit to enforce the instrument. The court has no authority to disregard it. *Seattle First Nat. Bank v. Mitchell*, 87 Wn.App. 448, 451, 942 P.2d 1022, 1023 (Div. 1 1997) (an contractual fee guarantee “cannot be waived”); *Farm Credit Bank of Spokane v. Tucker*, 62 Wn.App. 196, 813 P.2d 619 (Div. 3 1991); *Singleton v. Frost*, 108 Wn.2d 723, 742 P.2d 1224 (1987).

Here, however, the trial Court disregarded the contractual provision entirely in its decision to deny fees to the prevailing party.

The trial Court erred by determining that Appellant failed to “prosecute” his counterclaim for attorney’s fees after receiving the Notice of Dismissal for Want of Prosecution from the Court Clerk, but *prior to* the dismissal of Plaintiff’s claim. Logically, this does not follow, because Appellant could not legitimately prosecute a claim for attorney’s fees when he had not yet prevailed in defending against Respondent’s case in chief.

Appellant’s contractual counterclaim for attorney’s fees to be awarded to the prevailing party has no standing for consideration until

Respondent's claim concludes one way or the other. Respondent must either prevail or fail before Appellant's contractual right come into play. Appellant's right to an entry of judgment for an award of attorneys' fees is only ripe following the dismissal of Respondent's case.

The Court dismissed Respondent's claim because Respondent quit and no longer prosecuted its claim. However, the trial court erred when it denied Appellant's request for attorney fees when that right was only properly before the court on the day that court denied it.

**5. Representation of Appellant is a Red Herring.**

At the time the court heard the motion for an award of fees, and weeks before it entered its order, it was unequivocally clear that Appellant's counsel represented Appellant—a declaration from Appellant had been filed to ensure clarity on this point.

The representation issue is immaterial to whether Defendant prevailed in his defense. It is a red herring. The court erred when finding that this issue had any bearing on denying the claim for attorney's fees to the prevailing party.

**6. The Lien Attaches Once the Award is Granted.**

The court placed the cart before the horse when it claimed that the lack of proceeds upon which the Attorney's Lien could attach was a reason

to deny the request for attorney's fees. Initially, the court erred in determining that Appellant was not the prevailing party, *supra*. That error meant that no award for attorney fees could be set in place. That factor alone leads to the determination that the filed Attorney's Lien did not attach to anything.

The Court needed to determine first, whether Appellant prevailed, and then, if so, whether Appellant was entitled to an award of attorneys' fees pursuant to the contract that Respondent sought to enforce against him. Finally, if Appellant was entitled to those fees, then the Court could determine whether the Attorney's Lien attached to that award.

*Ergo*, the primary issue here is whether Appellant is the prevailing party. He is the prevailing party as argued above. But, Respondent has not provided any support below to support the notion that losing battles in motion litigation is equivalent to failing to prevail in the cause of action as a whole.

**7. No Support to Proposition That "Prevailing" Requires Prevailing on Motions.**

In its argument against the request for attorney's fees, Respondent argued, and the court "noted," that the fact that Appellant did not prevail on his motion for summary judgment, and where he was compelled to answer interrogatories (without attendant sanction) somehow leads

logically to a determination that he did not “prevail” in the case at large. See CP 9; ll. 9-13. However, no citation to law or authority was provided to support this proposition.

However, as cited above,

We said in the latter case, 'Costs follow as an incident to a judgment.' This statement is in harmony with the definitions found in Black's Law Dictionary (Rev. 4th ed. 1968) at 1352, which cites the case of *Klock Produce Co. v. Diamond Ice & Storage Co.*, *Supra*, as illustrative of the rule stated there, that to be the prevailing party **does not depend upon the degree of success at different stages of the suit, but whether, at the end of the suit, or other proceeding, the party who has made a claim against the other, has successfully maintained it.**

For this rule, the dictionary cites *Bangor & Piscataquis R.R. v. Chamberlain*, 60 Me. 285 (1872).

*Andersen*, 81 Wn.2d at 867, 505 P.2d at 793 (emphasis added).

According to this precedent, therefore, losing on a motion for summary judgment does not mean that, at the end of the suit, Appellant was not the prevailing party when Respondent gave up and quit.

**8. Respondent's Reasons for giving up and quitting are not on the record, nor controlling.**

In its opposition to the request for fees, Respondent did not supply a fact pattern supported by declaration or other evidence.

Rather, its counsel of record couched into its “Points And Authorities” section a story about Respondent’s concerns over Appellant’s ability to pay anything—as though this concern dawned upon Respondent only after receiving all of the discovery and when a decision whether to go to trial was required. Had this ever been a concern, the issue would have been raised prior to suit, or at least the first issue raised in discovery.

At no time did Respondent ever ask Appellant for an accounting of his income, assets, holdings, equity, income from other sources, inheritances, stocks, bonds, income from a spouse, or any other aspect of his personal or family financial status. CP 46-63. At no time did Appellant provide it. CP 64-73.

Thus, there is no evidence on record to support any equitable consideration to excuse Respondent from its guarantee to pay Appellant all his attorney’s fees and costs at the end of the suit it failed to prosecute.

#### **9. Request for Attorney’s Fees, RAP 18.1**

The contract which Respondent sought to enforce against Appellant guaranteed attorney’s fees to the prevailing party. Thus, Appellant requests attorney’s fees in this appeal.

## **G. CONCLUSION**

Respondent brought an action against Appellant, making him rack up fees and costs in order to mount a defense and prepare for trial. A strong effort was made to end the matter early, thus avoiding further costs and mounting fees, by filing summary judgment. Further costs and fees developed in an effort to get more discovery from the Appellant, which never happened anyway because Respondent simply gave up—quit—stopped trying to do anything.

A defendant is not responsible for ensuring that a plaintiff prosecutes his or her case. Here, Respondent was on notice in Appellant's answer that Appellant would seek an award of fees based on the contract should Respondent fail to prove its case. Instead of proving its case on the merits, Respondent simply stopped doing anything further on its case.

Appellant relied on Respondent's guarantee to pay Appellant's attorney's fees in "any demand or suit" it failed to sustain. To deny Appellant the benefit of Respondent's guarantee is to ignore the contract. To determine that Appellant is not the prevailing party is to falsely impose Respondent's duty to prosecute the claim it filed in Superior Court onto Defendant. To deny Appellant's claim for fees once Respondent's claim was dismissed is to ignore the contract yet again.

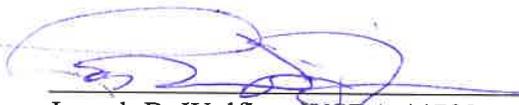
Appellant, therefore, should be awarded his costs and fees both in the underlying matter as well as on appeal to compensate him for the costs and fees the lawsuit against him generated to his detriment.

DATED this 18<sup>th</sup> day of July, 2019.

Respectfully submitted,

WOLFLEY LAW OFFICE, P.S.

By:

  
Joseph B. Wolfley, WSBA 44782  
Attorney for Defendant/Appellant

**WOLFLEY LAW OFFICE, P.S.**

**July 18, 2019 - 3:26 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 53163-1  
**Appellate Court Case Title:** Armstrong Marine, Inc., Respondent v. Michael Wiley, Jr., Appellant  
**Superior Court Case Number:** 16-2-00437-0

**The following documents have been uploaded:**

- 531631\_Briefs\_20190718152312D2308831\_8375.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was COA.53163-1-II.brief.pdf*

**A copy of the uploaded files will be sent to:**

- svg@aol.com
- svg@gibbonslawgroup.com

**Comments:**

---

Sender Name: Kate Gerdtts - Email: Kate@WolfleyLawOffice.com

**Filing on Behalf of:** Joseph Bennett Wolfley - Email: Joseph@WolfleyLawOffice.com (Alternate Email: )

Address:  
713 E 1st St  
PORT ANGELES, WA, 98362  
Phone: (360) 457-2794

**Note: The Filing Id is 20190718152312D2308831**