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COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

RON J. JONES and SEPPO SAARINEN, trustee of the SAARINEN
TRUST dated September 28, 2017,

Respondents/Cross-Appellants,

vs.

AARON S. WILCOX and AUBREY L. WILCOX, trustees of the “Oh,
The Places You’ll Go Trust” u/a/d October 4, 2017,

Appellants/Cross-Respondents.

CONSOLIDATED REPLY BRIEF OF APPELLANTS AND RESPONSE
BRIEF OF CROSS-RESPONDENTS

Paige B. Spratt, WSBA #44428
Molly J. Henry, WSBA #40818
Lillian K. Hubbard, WSBA #55428
SCHWABE, WILLIAMSON & WYATT, P.C.
700 Washington Street, Suite 701
Vancouver, WA 98660

*Attorneys for Appellants Aaron S. Wilcox and
Aubrey L. Wilcox*

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RESPONSE TO CROSS APPEAL

I. INTRODUCTION

In the absence of a bar to a subsequent suit, such as the running of a statute of limitation, an order of dismissal without prejudice is not an appealable order. *Munden v. Hazelrigg*, 105 Wn.2d 39, 44, 711 P.2d 295 (1985); *Am. States Ins. Co. v. Chun*, 127 Wn.2d 249, 254, 897 P.2d 362 (1995); *Wachovia SBA Lending v. Kraft*, 138 Wn. App. 854, n. 4, 158 P.3d 1271 (2007). There is no bar to a subsequent suit here—Plaintiffs Ron Jones and Seppo Saarinen have already commenced a second lawsuit. Therefore, Plaintiffs’ cross-appeal of the trial court’s order dismissing their first case for failure to join the HOA as an indispensable party should be dismissed as a non-appealable order.

Even if the order of dismissal without prejudice was appealable, which it is not, it is moot. Plaintiffs’ second lawsuit names both the Wilcoxes and the HOA as defendants, Plaintiffs asserted the same claims against the Wilcoxes, and Plaintiffs assert additional claims against the HOA for violation of a fiduciary duty and breach of covenants.¹ In these circumstances, a reversal of the trial court’s order would result in

¹ A courtesy copy of Plaintiffs’ complaint in the second action is included in the Appendix.

procedural mayhem and parallel cases. As Plaintiffs concede, it would not provide any real relief. (Resp. Br. at 27 (“dismissal will have no effect on the ultimate outcome”)) Plaintiffs’ appeal is moot.

Finally, the trial court did not abuse its discretion when it found that the HOA was an indispensable party and dismissed Plaintiffs’ claims without prejudice. Plaintiffs sought a judicial declaration invalidating the HOA’s approval of the Wilcoxes’ addition. The HOA is an indispensable party under RCW 7.24.110 because it has a vested interest in defending its approval of the addition and its decision-making process. *Williams v. Poulsbo Rural Telephone Association*, 87 Wn.2d 636, 643, 555 P.2d 1173, 1178 (1976) (under RCW 7.24.110, “[w]here parties whose rights would be affected and whose interests would be prejudiced are not joined, a declaratory judgment cannot be entered and the case must be either dismissed or remanded”), overruled in part on other grounds by *Chem. Bank v. Wash. Public Power Supply Sys.*, 102 Wn.2d 874, 887–888, 691 P.2d 524, 532 (1984). Because Plaintiffs had already rested their case at trial, joining the HOA was no longer a feasible option. It was proper for the trial court to dismiss the case without prejudice, leaving Plaintiffs the option of re-filing and joining the HOA, which they have done.

II. COUNTERSTATEMENT OF FACTS

The Wilcoxes refer to and hereby incorporate the facts as recited in their opening brief.

III. COUNTERSTATEMENT OF ISSUES

1. Is the order dismissing Plaintiffs' claims without prejudice an appealable order? Answer: No.

2. Is Plaintiffs' appeal moot in light of their second lawsuit? Answer: Yes.

3. Did the trial court abuse its discretion by dismissing Plaintiffs' claims without prejudice where Plaintiffs sought a declaration invalidating the HOA's decision but failed to join the HOA as a party? Answer: No.

IV. ARGUMENT

A. Standard of Review

An order dismissing an action for failure to join an indispensable party is reviewed for abuse of discretion, while any legal conclusions underlying the decision are reviewed de novo. *Gildon v. Simon Prop. Group, Inc.*, 158 Wn.2d 483, 494-494, 145 P.3d 1196 (2006); *Saunders v. Meyers*, 175 Wn. App. 427, 306 P.3d 978 (2013). "A court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons." *Gildon*, 158 Wn.2d at 494

(citing *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006)).

B. The Order Dismissing Plaintiffs' Claims Without Prejudice is Not Appealable.

The trial court's order dismissing Plaintiffs' claims without prejudice does not fall into any of the categories of appealable decisions under RAP 2.2(a) and should be dismissed. *Munden v. Hazelrigg* is dispositive of Plaintiffs' cross-appeal. 105 Wn.2d at 39. In *Munden*, the Supreme Court addressed whether an order dismissing a tenant's counterclaims in an unlawful detainer action was an appealable order. The Court began by noting that RAP 2.2(a)(3) controlled. That rule provides that a party may appeal "[a]ny written decision affecting a substantial right in a civil case which in effect determines the action and prevents final judgment or discontinues the action." *Id.* at 42-43 (citing RAP 2.2(a)(3)). The Court focused on the effect of the dismissal, and whether under the particular circumstances the dismissal would affect a substantial right and determine the action or prevent final judgment. After surveying the cases in which courts have applied RAP 2.2(a)(3) to dismissals without prejudice, the Court found that where the statute of limitations on the tenant's counterclaims had not run, and the filing of a new action was possible, "it is clear that the dismissal is not appealable." *Id.* at 44; *accord*

Chun, 127 Wn.2d at 254 (“A dismissal without prejudice is not appealable under RAP 2.2 unless it is a final judgment or a ‘decision affecting a substantial right in a civil case which in effect determines the action and prevents a final judgment or discontinues the action’”); *Kraft*, 138 Wn. App. 854 at n. 4 (same).

It is similarly clear that Plaintiffs’ appeal of the order dismissing their first action without prejudice is not an appealable order. As demonstrated by Plaintiffs’ subsequent suit, the dismissal was not a final judgment, it did not affect any of Plaintiffs’ substantial rights, and it has not prevented a final judgment. The Court should dismiss Plaintiffs’ cross-appeal as a non-appealable order.

C. Plaintiffs’ Appeal is Rendered Moot By Their Second Lawsuit.

Even if the order of dismissal was an appealable order, which it is not, the question of whether the HOA is an indispensable party is moot. Plaintiffs have already filed a second action asserting the same claims against the Wilcoxes, and asserting new claims against the HOA. (App. 1) All parties have appeared through counsel.

“The central question of all mootness problems is whether changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief.” *City of Sequim v.*

Malkasian, 157 Wn.2d 251, 259, 138 P.3d 943 (2006) (quoting 13A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 3533.3, at 261 (2d ed. 1984)). Here, an order finding that the HOA is not an indispensable party and reversing the dismissal would be purely academic, because Plaintiffs have now made the HOA a party in the second action and asserted new claims against it. Indeed, Plaintiffs concede that the dismissal they now appeal “will have no effect on the ultimate outcome.” (Resp. Br. at 27) Plaintiffs’ actions have mooted their cross appeal.

D. The Trial Court Acted Well Within Its Discretion When it Dismissed Plaintiffs’ Claims For Failure to Join the HOA.

The trial court properly dismissed Plaintiffs’ action without prejudice because the HOA was an indispensable party and because it would suffer irreparable prejudice if it were joined after the close of Plaintiffs’ case at trial. (Sept. 24, 2018 VR at 190-195) Plaintiffs’ arguments that the court lacked authority to dismiss the action overlooks binding case law, and their argument that relief could be provided in the absence of the HOA overlooks their own complaint.

RCW 7.24.110 provides that “[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.” Plaintiffs’ claims in

this case were all aimed at undermining the HOA's prior approval of the Wilcoxes' addition. Plaintiffs alleged that the HOA board failed to properly constitute the Architectural Landscaping Committee ("ALC") and that, as a result, the HOA's "approval of defendants' accessory dwelling unit is void." (CP 315) Plaintiffs went on to plead that, despite the HOA's determination to the contrary, the Wilcoxes' addition "constitutes a second residence" and "blocks valuable views" in violation of the CC&Rs. (CP 315) The complaint included a prayer for "[d]eclaratory judgment that any [HOA] approvals of [the Wilcoxes'] accessory dwelling unit are void for failure to comply with requirements of the Declaration." (CP 317)

In *Williams v. Poulsbo Rural Telephone Association*, 87 Wn.2d at 643, the Washington Supreme Court held that, under RCW 7.24.110, "[w]here parties whose rights would be affected and whose interests would be prejudiced are not joined, a declaratory judgment cannot be entered and the case must be either dismissed or remanded." The defendants in *Williams* raised an argument for the first time on appeal that failure to join indispensable parties left the trial court without jurisdiction to grant the requested relief. *Id.* The *Williams* court observed that "[w]hen a complete determination of a controversy cannot be had without the presence of other parties, a mandatory duty is imposed upon the court to

bring them in.” *Id.* at 1178–81. The court remanded the case with instructions to dismiss without prejudice unless the indispensable parties were joined within 90 days. *Id.* at 1181.

Consistent with the Supreme Court’s holding in *Williams*, the trial court dismissed Plaintiffs’ action without prejudice because it found that the HOA’s interests in enforcing its own covenants would be affected by a declaratory ruling that the HOA’s approval was improper. Indeed, Plaintiffs expressly challenged the HOA’s decision making process and sought to vacate its prior approval of the Wilcoxes’ addition. (CP 315) The Wilcoxes did not participate in the HOA’s decision-making and were not in a position to defend the process on behalf of the HOA. (CP 48) As a result, the trial court found that “the HOA’s interest in enforcing its protective covenants, whether it chooses to do so or not in this particular case, are affected by this declarative action,” and that “the HOA is an indispensable party according to [RCW] 7.24.110.” (Sept. 24, 2019 VR at 192:10-16).

The trial court’s finding was appropriate. Plaintiffs sought to go around the HOA and obtain a declaration invalidating its decision. A ruling on the merits would have directly affected the HOA’s right to interpret its rules as well as its interest in having its decisions upheld. The

HOA's interest in defending its decision would be directly undermined by any ruling in Plaintiffs' favor.²

Neither the "mandatory duty" language in *Williams* nor any other rule of law requires that the court join necessary parties before dismissing the action. In fact, the *Ruston v. City of Tacoma* case cited by Plaintiffs explains that "RCW 7.24.110 requires a party seeking a declaratory judgment to join all persons . . . who have or claim any interest which would be affected as parties to the litigation. Without the joining of necessary parties, the trial court may not have jurisdiction to act." 90 Wn. App. 75, 81–82, 951 P.2d 805, 809 (1998) (emphasis added) (citation and internal quotation marks omitted). *Ruston* is consistent with *Williams*, which similarly held that a trial court lacks authority to enter declaratory relief where all affected parties are not before it. *Williams*, 87 Wn.2d at 643 ("the failure to include an affected party, *i.e.*, an essential party, in the

² It merits noting that the declaratory judgment Plaintiffs sought would impact the HOA far beyond the merits of this case. Plaintiffs sought to show that the HOA's approval was void because "the Architectural Landscaping Committee was not properly constituted." (CP 315) As the president of the HOA Board explained in her declaration, the Board has *never* had sufficient volunteers to constitute the ALC. (CP 2) A declaratory judgment voiding the HOA's approval of the Wilcoxes' addition on that basis would call into question the legality of all prior approvals and the HOA's procedures going forward.

action for declaratory judgment relates directly to the jurisdiction of the trial court”).

None of the cases Plaintiffs cite place an affirmative duty on the trial court to join a party-defendant where it would be prejudicial to do so. It was Plaintiffs’ obligation to join the HOA. Because Plaintiffs chose to artfully plead around the HOA’s prior approval of the addition, rather than naming it directly, the trial court lacked authority to enter the declaratory relief Plaintiffs’ sought and dismissal was appropriate under *Williams*. *See also NW. Animal Rights Network v. State*, 158 Wn. App. 237, 247-248, 242 P.3d 891 (2010) (upholding dismissal for failure to join indispensable parties in action for declaratory relief). *See also* CR 41(b)(3) (“ . . . Unless the court in its dismissal otherwise specifies, a dismissal under this subsection and any dismissal not provided for in this rule, other than dismissal for lack of jurisdiction, for improper venue, or for failure to join a necessary party under rule 19, operates as an adjudication upon the merits.”).

When faced with a plaintiff’s failure to join an indispensable party, trial courts “must determine whether in equity and good conscience the action should proceed or be dismissed.” *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 51, 736 P.2d 665 (1987) (en banc). In so doing, “CR 19(b) directs the court to consider the extent to which an absent party

may be prejudiced and whether the plaintiffs will have an adequate remedy if the action is dismissed.” *Id.* That is precisely what the trial court did. (VR Sept. 24, 2019 at 190-193) The court found that the HOA had an interest in enforcing the CC&Rs and in defending its decision to permit the Wilcoxes’ addition under the CC&Rs, and that given the posture of the case, dismissal without prejudice was the most appropriate way to preserve the parties’ rights.³

The trial court acted soundly within its discretion by dismissing the case without prejudice under CR 41(b)(3). Plaintiffs fail to cite a single case in which a court has added a party to an action after the close of the plaintiff’s case at trial where the absent party did not otherwise participate in the trial. Such a ruling in this case would run contrary to CR 19(b), which requires the court to consider the prejudice to the HOA. Joinder was simply not feasible. Plaintiffs had already tried and rested their case. The HOA no longer had any ability to complete discovery or to examine and cross-examine Plaintiffs’ witnesses who spoke against the HOA’s decision making process. Nor were there any causes of action pending against the HOA, because at that time, Plaintiffs had made an intentional

³ Plaintiffs do not contest that the HOA would have been prejudiced by being brought in after Plaintiffs had already rested their case at trial, depriving the HOA of any opportunity to complete discovery or cross-examine Plaintiffs’ witnesses.

decision not to add the HOA as a party. By dismissing Plaintiffs' claims without prejudice, the court gave Plaintiffs the opportunity (which they have taken advantage of) to file a second lawsuit, at a later date and time, that properly included the HOA as a necessary party. This result is expressly contemplated by CR 41(b)(3).

1. The HOA's Interest in Enforcing and Interpreting the CC&Rs is Not Limited to Consent to Construction.

Plaintiffs seek to undermine the HOA's interest by arguing that its authority is limited to providing consent to construction. (Resp. Br. at 12) That argument overlooks two undisputed facts. First, Plaintiffs lawsuit sought a declaration voiding a decision made by the HOA based in part on the Board's inability to garner sufficient volunteers to form an ALC. (CP 315-317) Second, the CC&Rs vest the HOA with exclusive authority over architectural approvals for compliance with the CC&Rs (CP 341) and the right "to determine all questions arising in connection with [the] Declaration and to construe and interpret" the CC&Rs. (CP 345)

Riss v. Angel, 131 Wn.2d 612, 934 P.2d 669 (1997), stands for the unremarkable proposition that an HOA's otherwise broad discretion is limited by covenants that specify specific minimum sizes and heights. *Id.* at 626-627 ("If covenants include specific restrictions as to some aspect of design or construction, the document manifests the parties' intent that the

specific restriction apply rather an inconsistent standard under a general consent to construction covenant.”) Plaintiffs did not allege any violation of a specific covenant like the minimum size covenant at issue in *Riss*. For example, Plaintiffs do not allege that the Wilcoxes’ home violates the minimum square foot requirements described in § 7.15 of the CC&Rs, or the roof peak elevations laid out in § 7.17. (CP 336-338) Instead, Plaintiffs dispute the HOA’s approval of the Wilcoxes’ improvements as an addition, as opposed to an undefined “ADU,” and disagree with the HOA’s conclusion that the effect on neighboring views was not unreasonable. (CP 315, ¶¶ 18-19) *Riss* says nothing about whether the HOA is a necessary party to a suit seeking to invalidate an HOA’s prior approval of an addition.

Plaintiffs’ point appears to be that the HOA Board did not have authority to approve the Wilcoxes’ addition because the addition “unnecessarily inhibits the view” or otherwise amounted to a prohibited second residence. However, unlike a covenant dictating a precise square footage or the maximum height of a roof, the covenants at issue here require a measure of discretion in their interpretation as to what is “reasonable” and whether an addition without a kitchen that is connected to an existing residence is a “second residence” (it is not). (CP 37) Plaintiffs are expressly challenging the HOA Board’s application of these

covenants and seeking to invalidate the HOA's decision. Under these circumstances, the HOA is an indispensable party under RCW 7.24.110. Plaintiffs' arguments should be—and now are in the second action—addressed to the HOA, not the Wilcoxes.

To be clear, the Wilcoxes have never disputed that Plaintiffs have an independent right to enforce the CC&Rs. That does not, however, deprive the HOA of its own authority and interest in interpreting the CC&Rs that it is obligated to interpret. Plaintiffs utterly fail to explain how their “consent to construction” argument would render the HOA an unnecessary party in these circumstances.

Plaintiffs persist and argue that any injunction they obtained would only be binding between Plaintiffs and the Wilcoxes, and therefore not affect the HOA. (Resp. Br. at 19) Again, this argument ignores the HOA's exclusive duty to enforce and interpret the CC&Rs and its interest in defending its decision-making process. Simply put, the trial court could not render a decision on Plaintiffs' claims without directly and expressly undermining the HOA's prior decision (and arguably every approval the HOA has ever issued without an ALC).

Contrary to Plaintiffs' suggestion otherwise, the trial court did not rule that the HOA's approval was dispositive on the issue of whether the Wilcoxes' addition complied with the CC&Rs. Nor did the trial rule that

Plaintiffs were prohibited from enforcing the CC&Rs themselves. The trial court merely ruled that the HOA was a necessary party to Plaintiffs' action because, in addition to forcing the Wilcoxes to tear down a portion of their home, Plaintiffs sought a declaration voiding the HOA's prior approval. (CP 317) The trial court appropriately found that the HOA had an interest in the enforcement of the covenants and in defending its own decision-making process. (VR Sept. 24, 2019 at 192)

The HOA Board approved the Wilcoxes' addition after evaluating all of the factors under the CC&Rs, including the potential impact on views, and only after denying the Wilcoxes' first two applications in favor of a more "integrated" approach that was decidedly not a second residence but merely an addition. (CP 35-41) The Wilcoxes only proceeded with construction of their addition *after* the HOA Board approved their third request as conforming with the CC&Rs. *Id.* On these facts, the trial court acted well within its discretion when it found that the HOA was an indispensable party.

2. CR 21 Does Not Limit the Trial Court's Ability to Dismiss an Action.

Plaintiffs' reliance on CR 21 is misplaced. They argue that the Civil Rules do not authorize dismissal for failing to join necessary parties because CR 21 provides that "Misjoinder of parties is not ground for

dismissal of an action.” (Resp. Br. at 18) Misjoinder was not the problem. Misjoinder refers to “[t]he improper union of parties in civil case.” BLACK’S LAW DICTIONARY (11th ed. 2019). Here, there was no improper union or misjoinder of parties, but rather an improper failure to bring an action against a necessary party.⁴ CR 21, which deals only with misjoinders, is inapplicable. The trial court’s order was properly entered under CR 19, CR 41(b)(3), and RCW 7.24.110.

While it is true that a court may add new parties even after a case is closed, that may only be done “where it will not be prejudicial to those parties.” *Betchard-Clayton v. King*, 41 Wn. App. 887, 707 P.2d 1361 (1985). So, while the *Betchard-Clayton* court upheld a discretionary post-trial joinder of parties, it did so only upon the trial court’s express finding that those parties “participated in all proceedings [] and at all times material [] had notice of all matters from the inception of the negotiation with the Defendants to the conclusion of [the] trial.” *Id.* at 895. No such

⁴ “This, in the first place, is obviously a rule governing only the joinder of parties plaintiff in the same action. When a question arises as to whether there has been a proper joinder of plaintiffs, the acid test under this rule is: Does their right to relief arise out of the same transaction or a series of transactions? If their right to relief does not arise out of the same transaction or a series of transactions, the rule furnishes no warrant for joinder.” *Williams v. Maslan*, 192 Wn. 616, 620, 74 P.2d 217 (1937).

finding was entered here. There is no evidence that the HOA had any involvement whatsoever in the first suit, or any ability to defend its decision making process.

3. *Wimberly and Saunders Do Not Support Reversal.*

Wimberly v. Caravello, 136 Wn. App. 327, 333–34, 149 P.3d 402 (2006), does not stand for the broad proposition that homeowner associations are never necessary parties to enforce covenants. (Resp. Br. at 16-17) That argument grossly oversimplifies *Wimberly*. The passage cited by Plaintiffs held only that the court’s *jurisdiction* did not turn on the presence or absence of a party. 136 Wn. App. at 334. But *Wimberly* also held that “[i]t is the trial court’s call whether or not to join a party so long as the court can completely resolve the issues without adding parties.” *Id.* The case does not address the present situation: what a trial court should do when it cannot fairly resolve the issues without the presence of the HOA, and where it is too late to add it into the case without significant prejudice.

The *Wimberly* case is also factually distinguishable. The HOA in *Wimberly* “did not preapprove [the defendant’s] design and its individual members were not being sued.” *Id.* at 333–34. The homeowner defendant did not even attempt to obtain board approval like the Wilcoxes did.

Instead, he ignored his neighbors' complaints and proceeded with construction of the addition despite the neighbors' efforts to get him to stop. The HOA did not approve of his actions and had no interest in the result of the litigation. *Id.*

In this case, the HOA *preapproved* the Wilcoxes' design after three rounds of applications. (CP 1-3, 35-41) It made the affirmative decision to allow the addition, as compliant with its interpretation of the CC&Rs that it is tasked with overseeing, and that decision is at the core of Plaintiffs' complaint. (CP 311-317) Unlike *Wimberly*, Plaintiffs sought declaratory relief invalidating the HOA's decision, not just an injunction requiring the Wilcoxes to tear down a portion of their home. These distinctions are dispositive to the indispensable party analysis.⁵

Plaintiffs' citation to *Saunders v. Meyers*, 175 Wn. App. 427, 438, 306 P.3d 978 (2013), is similarly unavailing. (Resp. Br. at 16-17) The

⁵ The trial court specifically considered these distinguishing facts at the hearing: "...[H]ere we have an HOA that made a decision, applied its CC&Rs to a particular permit and decided to -- to grant authority to -- by a particular homeowner to engage in a construction project on his property. They have an interest, I think, in protecting that decision. And they also have an interest, if the court were eventually to determine they were unreasonable and failed to comply with their CC&Rs, to appeal the court's decision if the court decided that. Here, they're foreclosed from doing that" (VR Sept. 24, 2019 at 192-193)

issue in *Saunders* was how to interpret a covenant that the HOA board had *not* already interpreted. *Id.* at 435. The Saunders Board took no action in relation to a tree that one party alleged violated a view covenant, so it was left to the homeowners to try to force the neighbors to trim the tree. *Id.* at 431. That cannot be more distinct from this case, where Plaintiffs sought a declaration invalidating and overriding the HOA’s express approval of the Wilcoxes’ addition, without giving the HOA ability to defend its decision or to appeal an adverse ruling. Because the HOA’s rights and interests form the gravamen of Plaintiff’s case—and because CR 41, RCW 7.24.110, and controlling case law authorize dismissal—the trial court did not abuse its discretion when it dismissed Plaintiffs’ first action, without prejudice, for failure to join the HOA as an indispensable party.

4. Borrowing Reasoning From an Unpublished Decision is Not an Abuse of Discretion.

Plaintiffs take the absurd position that the trial court’s order was error merely because it agreed with reasoning from the unreported decision of *Gurrad v. Klipsun Waters Homeowner’s Ass’n, Inc.*, 1998 Wn. App. LEXIS 1610 (Nov. 20, 1998). GR 14.1(a) states that “[u]npublished opinions of the Court of Appeals have no precedential value and are not binding on any court.” Nothing in the rule prohibits a trial court from

reading the decision and reaching a similar conclusion on its own. The trial court expressly acknowledged that the decision was not precedential:

“...[A]lthough, I agree under JR [sic] 14.1 [Gurrad] is not binding precedent in the court, I appreciate that. However, when I read the rationale -- when I when I read the rationale this morning in [Gurrad] three or four times to make sure I understood it and then listened to the argument of counsel, I think that Ms. Spratt has articulated more effectively than, you know, at least for me, the Court, [Gurrad] did, why the HOA in this situation is an interested party. And it makes sense now to me that the HOA would have an independent interest in defending its own decision to permit this particular structure to be built, so -- and they’re not here to defend that interest...”

(VR Sept. 24, 2019 at 193) The trial court merely agreed with *Gurrad*—it did not follow it as binding precedent.⁶ Plaintiffs fail to cite any authority suggesting that the trial court’s review of the *Gurrad* decision was error.

REPLY IN SUPPORT OF APPEAL

V. INTRODUCTION

The Wilcoxes’ right to fees is governed by the language of the attorney fee provision in the covenants: “[a]ny party who successfully

⁶ Even if the trial court had believed that *Gurrad* was binding—which the record makes clear it did not—any error in relying on it would have been harmless, because the HOA was an indispensable party and dismissal was appropriate.

enforces these CC&R's [sic] shall be entitled to recover their reasonable costs and attorneys fees, *whether a lawsuit was filed or not.*" (CP 30) (emphasis added) No judgment on the merits is required.

Plaintiffs would nevertheless have this Court limit the availability of fees to the "prevailing party" as defined by RCW 4.84.330, which can only occur where a lawsuit has been filed and taken through a final judgment on the merits. Plaintiffs' interpretation would render the final provision of the fee provision meaningless and would frustrate the express intent of the provision to provide for fees whether a lawsuit is filed or not. *Diamond "B" v. Granite Falls Sch. Dist.*, 117 Wn. App. 157, 165, 70 P.3d 966 (2003) ("If we were to adopt the District's interpretation, the definition of "Installer" would be meaningless. We must construe a contract to give meaning to every term.").

Contrary to Plaintiffs' wishful thinking, Washington courts have held that no judgment on the merits is required in order to recover fees under a contractual fee provision that contemplates fees to the successful party. *Hawk v. Branjes*, 97 Wn. App. 776, 778, 986 P.2d 841 (1999); *Walji v. Candyco, Inc.*, 57 Wn. App. 284, 288, 787 P.2d 946 (1990). Nowhere does *Hawk* limit its holding to *voluntary* dismissals. The second section of *Hawk* simply holds that a court retains jurisdiction following a voluntary dismissal. It does not draw any distinction between a voluntary

versus involuntary dismissals for purposes of awarding fees. 97 Wn. App. at 784. In fact, on June 30, 2020, in *Armstrong Marine, Inc. v. Wiley*, Case No. 53163-I-II, this Court cited *Hawk* and held that there is “no compelling reason” not to apply its reasoning equally to voluntary and involuntary dismissals.

The proper reasoning is found in *Walji v. Candyco, Inc.*, which Plaintiffs overlook entirely. The *Walji* Court explained that it was “essential to apply the attorney fee provision” following a dismissal without prejudice because “the case may never be renewed.” 57 Wn. App. at 288-289. Allowing the recovery of fees in these circumstances “will inhibit . . . badly prepared lawsuits and will protect parties from the expense of defending claims which do not result in liability.” *Id.*

This reasoning supports an award of fees to the Wilcoxes. Plaintiffs’ initial lawsuit was badly prepared and was dismissed. The Wilcoxes were successful in the ordinary sense of the word and are entitled to recover the fees they incurred due to Plaintiffs’ mistakes. Plaintiffs’ attempt to distinguish these cases and avoid fees for their ill-fated lawsuit is unpersuasive.

VI. ARGUMENT

A. The Language of the Attorney's Fee Provision is Determinative and Does Not Require a Judgment on the Merits.

Plaintiffs cite to case after case applying the prevailing party definition from RCW 4.84.330 which requires a judgment on the merits, but *Hawk* expressly held that definition does not apply to a bilateral successful party fee provision. *Hawk*, 97 Wn. App. at 780-781. Here, the drafters could not have intended for the statutory definition to apply, because they included language indicating that fees were to be awarded even in the absence of any litigation. In doing so, they implicitly rejected any definition of prevailing party that would require a judgment on the merits.

Plaintiffs provide a lengthy citation to *Day v. Santorsola*, 118 Wn. App. 746, 76 P.3d 1190 (2003), for the general proposition that it can be helpful to look to prevailing party authority in determining whether a party was successful for purposes of an attorney fee provision. (Resp. Br. at 27) But the homeowners in *Day* took their claims through trial. The issue was whether they were the prevailing party where they did not obtain all the relief they requested. The case provides no support for Plaintiffs' contention that the Wilcoxes are not the successful party following an involuntary dismissal without prejudice.

Plaintiffs' assertion that fees are not appropriate because the Wilcoxes did not "enforce" the CC&Rs is yet another attempt to rewrite the CC&Rs to require a decision on the merits. Similar to the CC&Rs in this case, the attorney fee provision at issue in *Hawk* contemplated fees to the party who "employs an attorney to enforce any terms of this agreement and is successful." 97 Wn. App. at 778. The court went on to hold that the defendant was successful under that provision when the case was dismissed without prejudice. *Id.* at 778-779. Plaintiffs give no reason why this Court should interpret the language of the CC&Rs differently. Indeed, the CC&Rs are more accommodating than the provision in *Hawk* and mandate fees even in the absence of an attorney or litigation. (CP 30)

This Court should adhere to the language of the fee provision, follow *Hawk*, and award the Wilcoxes their fees because they successfully enforced the CC&Rs in the first lawsuit by obtaining a dismissal of Plaintiffs' claims. *Hawk*, 97 Wn. App. at 781-782 (homeowners were entitled to attorney's fees under successful party fee provision where plaintiff's dismissed their claims without prejudice); *Walji*, 57 Wn. App. at 288 ("[a]t time of a voluntary dismissal, the defendant has 'prevailed' in the common sense meaning of the word" and is entitled to fees).

B. No Case Limits a “Successful” Party’s Right to Attorney Fees to Voluntary Dismissals.

Plaintiffs simply ignore the vast majority of unhelpful case law holding that a defendant successfully prevails for purposes of attorney fees where the plaintiff recovers nothing. *Hawk*, 97 Wn. App. at 781-782; *Walji*, 57 Wn. App. at 288; *Allahyari v. Carter Subaru*, 78 Wn. App. 518, 523, 897 P.2d 413 (1995); *Marassi v. Lau*, 71 Wn. App. 912, 918, 859 P.2d 605 (1993); *Anderson v. Gold Seal Vineyards Inc.*, 81 Wn.2d 863, 867-68, 505 P.2d 790 (1973). They make a cursory attempt to distinguish *Housing Authority of Seattle v. Bin*, 163 Wn. App. 367, 260 P.3d 900 (2011), on the basis that it is an unlawful detainer action, but fail to explain how that had any bearing on the court’s holding that the defendant prevailed for purposes of attorney fees where the court dismissed the action on procedural grounds.

Plaintiffs’ opposition largely boils down to an attempt to limit the availability of fees following a non-merits-based dismissal to *voluntary* dismissals, as opposed to *involuntary* dismissals—a position that is difficult to square with their alternative argument that there must be a decision on the merits. As explained in the opening brief at 19-23, no case has limited the availability of fees to voluntary dismissals. The focus is on the language and intent of the attorney fee provision at issue. Where the

provision mandates fees to a “successful” party, and makes no reference to a requirement for a judgment, fees are appropriately awarded to a defendant following a dismissal.

Plaintiffs’ attempt to distinguish *Hawk v. Branjes* because it involved a voluntary dismissal versus an involuntary dismissal is entirely unpersuasive. Plaintiffs accurately describe the two holdings in *Hawk*: (1) RCW 4.84.330’s definition of prevailing party does not apply to a bilateral fee provision that contemplates fees to a successful party—so no judgment on the merits is required (Resp. Br. at 29) and (2) the trial court retains jurisdiction following a voluntary dismissal to consider an award of fees under a contractual provision (Resp. Br. at 30). Plaintiffs borrow reasoning from the second holding and attempt to use it to limit the first. As explained in the Wilcoxes’ opening brief (pgs 21-22), the reasoning Plaintiffs cite in support of their argument comes from the court’s analysis of whether it had jurisdiction, after it *already found* under the first subheading that attorney fees were appropriate following a dismissal without prejudice. *Hawk*, 97 Wn. App. at 781-782. Specifically, Plaintiffs quote the following explanation for *Hawk*’s holding that the court retained jurisdiction: “Any other result would permit a party to voluntarily dismiss an action to evade an award of fees under the express terms of a statute or agreement.” *Id.* at 783. Plaintiffs fail to cite the

following sentence, which shows that the court was merely justifying its retention of jurisdiction—not describing why fees should be available for voluntary but not involuntary dismissals: “to hold otherwise would unnecessarily subject the courts to separate actions to recover fees readily ascertainable upon dismissal of the underlying claim.” *Id.*

Just last week, on June 30, 2020, this Court issued an unpublished opinion in *Armstrong Marine, Inc. v. Wiley*, Case No. 53163-I-II, in which it explained that there was no basis to limit this reasoning in *Hawk* to voluntary, versus involuntary dismissals. That case is persuasive and undermines Plaintiffs’ attempt to distinguish *Hawk* on the basis that it involved a voluntary dismissal.

Refusing to award fees to a defendant following the involuntary dismissal of the plaintiffs’ claims would frustrate the intent of the attorney fee provision in the CC&Rs and reward unsuccessful litigants. Plaintiffs assert without any citation that allowing parties to “split fees as of the dismissal order . . . would violate the CCR provision” (Resp. Br. at 30). That argument completely ignores *Walji v. Candyco, Inc.*, 57 Wn. App. at 288. As explained in *Walji*, it is “essential” to allow recovery of fees following dismissal of an initial action to effectuate the intent of the parties. *Id.* at 288-289. The court went on to explain that there is nothing inconsistent with allowing the Wilcoxes to recover the fees they were

forced to incur in defending against Plaintiffs' first unsuccessful action, and then awarding fees a second time to the successful party in any subsequent action. *Id.*

There is no reason to distinguish these authorities on the basis that they involved voluntary versus involuntary dismissals. The Wilcoxes should not be forced to fund Plaintiffs' campaign of unsuccessful litigation. They succeeded in fending off the first suit and should be awarded their fees on that basis.

C. Equity Provides an Alternative Ground to Award the Wilcoxes' Their Attorney Fees for Defunding Plaintiffs' Unsuccessful Suit.

The Wilcoxes are entitled to their fees under the plain language of the CC&Rs. But even if they were not, equity would also support an award of fees. *See, e.g., Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 849, 726 P.2d 8 (1986) (attorney's fees may be awarded when authorized by a contract, statute or recognized ground in equity).

Plaintiffs' argument appears to be that equitable grounds for fees should be limited to situations where the Wilcoxes could prove that the CC&Rs were somehow unenforceable. (Resp. Br. at 25-26) Equity is not so limiting.

Mutuality of remedy is an equitable doctrine that operates in equity much like RCW 4.84.330 operates at law, to make a contractual fee

provision bilateral and prohibit a party who themselves sought attorney fees under a contract from denying the same to a successful defendant if the suit is dismissed. *Mt. Hood Beverage Co. v. Constellation Brands, Inc.*, 149 Wn.2d 98, 121, 63 P.3d 779 (2003); *Kaintz v. PLG, Inc.*, 147 Wn. App. 782, 788-89, 197 P.3d 710 (2008). In the event the Court concludes that the CC&Rs do not mandate attorney fees following an involuntary dismissal, the Court should nevertheless award the Wilcoxes' their fees in equity.

VII. REQUEST FOR ATTORNEY FEES ON APPEAL

In addition to being forced to incur significant attorney fees defending against Plaintiffs' ill-conceived action, the Wilcoxes are now incurring fees defending against an unappealable order that has been mooted by the Plaintiffs' subsequent suit against them. They respectfully submit that they are entitled to their fees and costs on appeal under the Article 8.1 of the CC&Rs (CP 30) and RAP 18.1.

CONCLUSION

Plaintiffs cross appeal an unappealable order. Even if it were appealable, it is moot. Plaintiffs have otherwise failed to show that the trial court abused its discretion when it dismissed their claims without prejudice for failure to join the HOA as an indispensable party. Because the Wilcoxes successfully defeated Plaintiffs' claims and obtained a

dismissal, they are entitled to their attorneys' fees and costs under the CC&Rs. Accordingly, the Court should dismiss Plaintiffs' cross-appeal, reverse the trial court's order denying the Wilcoxes their attorney fees and costs associated with the first action, and award the Wilcoxes their fees and costs on appeal.

Dated: July 6, 2020

SCHWABE, WILLIAMSON & WYATT, P.C.

By: 
Paige B. Spratt, WSBA #44428
Email: pspratt@schwabe.com
Molly J. Henry, WSBA #40818
Email: mhenry@schwabe.com
Lillian K. Hubbard, WSBA #55428
Email: lhubbard@schwabe.com
Attorneys for Appellants, Aaron S.
Wilcox and Aubrey L. Wilcox

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on the 6th day of July, 2020, I arranged for service of the foregoing CONSOLIDATED REPLY BRIEF OF APPELLANTS AND RESPONSE BRIEF OF CROSS-RESPONDENTS to the parties to this action as follows:

Mark A Erikson
Attorney at Law
Erikson & Associates, PLLC
110 W. 13th Street
Vancouver, WA 98660-2904
E-Mail: mark@eriksonlaw.com
kris@eriksonlaw.com

by:

- | | |
|-------------------------------------|--|
| <input type="checkbox"/> | U.S. Postal Service, ordinary first class mail |
| <input type="checkbox"/> | U.S. Postal Service, certified or registered mail, |
| <input type="checkbox"/> | return receipt requested |
| <input type="checkbox"/> | hand delivery |
| <input type="checkbox"/> | facsimile |
| <input checked="" type="checkbox"/> | electronic service |
| <input type="checkbox"/> | other (specify) _____ |



Hillary Poole, Legal Assistant

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APPENDIX

1 3. Plaintiff Saarinen Trust dated September 28, 2017, is the owner of a fee
2 simple interest in Lot 20, Knight's Pointe at Prune Hill, according to the plat thereof filed in
3 Volume "H" of Plats, at page 594, records of Clark County, Washington. *APN 5450085.*

4 4. Plaintiff Seppo Saarinen acquired his property under a *Deed in Lieu of*
5 *Foreclosure* dated February 12, 2007, from Aspen Custom Homes, LLP, filed for record at
6 Clark County Auditor's File No. 4300098.

7 5. Defendant "Oh, The Places You'll Go Trust" u/a/d October 4, 2017, is the
8 owner of a fee simple interest in Lot 19, Knight's Pointe at Prune Hill, according to the plat
9 thereof filed in Volume "H" of Plats, at page 594, records of Clark County, Washington.
10 *APN 5516727.*

11 6. Defendants Aaron S. Wilcox and Aubrey L. Wilcox acquired their property
12 under a *Statutory Warranty Deed* dated July 6, 2015, from David M. Antle and Mary V.
13 Kufeldt-Antle, filed for record at Clark County Auditor's File No. 5190230.

14 7. Defendant Knight's Pointe Homeowners' Association ("HOA") is a
15 Washington Nonprofit Corporation (UBI 601-732-696) composed of owners of property
16 within Knight's Pointe Subdivision.

17 8. Plaintiffs' and defendants Wilcox' properties are located within Knight's
18 Pointe Subdivision, which is governed by a *Declaration of Covenants, Conditions and*
19 *Restrictions* dated May 6, 2005, filed for record at Clark County Auditor's File No. 3984318
20 (the "Declaration").

1 9. The Declaration includes the following provisions which are material to the
2 present proceeding:

3 7.1 Land Use-Building Restriction. . . . Only one single residence
4 may be located on any lot within the planned development. No short platting
or subdivision of lots shall be permitted. . . .

5 7.3 Use of Property. Only single-family residential uses are
6 allowed. . . .

7 7.8 Alterations, Additions, Temporary Structures, Painting. No
8 exterior alterations, painting, or addition shall be made to any building or
structure without the prior written approval of the Architectural Landscape
Committee. . . .

9 7.15 Square Footage Requirements. . . .

10 D. Houses are to be of a size and situated on a lot which
11 will be compatible with adjoining properties and which will not unnecessarily
12 inhibit the views of surrounding property owners; . . .

13 7.18 Roofs. . . . No exterior alteration or addition (whether joined
14 to or detached from any unit or other building) shall be made to any
15 residential unit in Knights Pointe unless prior written consent is received
16 from the Architectural Landscape Committee. . . .

17 7.24 Architectural Control. The owner, purchaser, or occupant of
18 each lot by acceptance of title thereto or by taking possession thereof,
19 covenants and agrees that no building, . . . or other structure of any type . . .
shall be commenced, erected or maintained upon the Properties, nor shall any
20 exterior addition to or change or alteration therein be made until plans an
21 specifications showing the nature, kind, shape, height, materials, soil tests,
location and color of the same shall have been submitted to and approved in
writing as to harmony of external design and location in relation to
surrounding structures and topography, building, setback restrictions, and
finish grade elevations, by the Architectural Landscaping Committee of the
Association. . . .

 7.25(D) The committee shall have the right to reject for any reason
whatsoever, including purely aesthetic grounds, any proposal which it decides
is not suitable or desirable. . . .

1 8.1 Enforcement. The Association, or any owner, . . . shall have
2 the right to enforce, by proceeding at law or equity, all restrictions,
3 conditions, covenants, reservations, liens and charges now or hereafter
4 imposed by the provisions of this Declaration, and to recover damages for
5 violation thereof. Failure by the Association, or by any owner, to enforce any
6 covenant or restriction herein contained shall in no event be deemed a waiver
7 of the right to do so thereafter. Any party who successfully enforces these
8 CC&R's shall be entitled to recover their reasonable costs and attorneys fees,
9 whether a lawsuit was filed or not. . . .

6 8.5 Municipal Ordinances. . . . All Municipal Ordinances must be
7 complied with, except where the CC&R's provide additional protection and
8 standards, and in that case, the additional protections contained in the
9 CC&R's will prevail. . . .

8 8.11 Non-Waiver. Failure or delay to enforce any Covenant,
9 Condition, or Restriction shall not be deemed a waiver of the right to do so.

10 *Declaration at 13, 15, 18, 20-21, 22, 23, 26, 27, and 28.*

11 **10.** The Camas Municipal Code defines an “accessory dwelling unit (ADU)” as
12 “an additional smaller, subordinate dwelling unit on a lot with or in an existing new house.”
13 CMC 18.27.030.

14 **11.** Defendants Wilcox made two applications to the HOA to construct an ADU
15 on their property, which were denied on or about June 14 and August 10, 2016, because the
16 Board of Directors “did not like the appeal of a standalone unit placed on the back of a lot.”

17 **12.** On July 27, 2016, the Knight's Pointe Board of Directors responded to
18 defendants' inquiry as follows:

19 The Knights Pointe Home Owner Association has been founded on the
20 principle of one family in one home on one property since the beginning of
21 the development. The Boards have consistently maintained this approach to
protect the value of the properties within the Association and the result is that
there are no second homes or ADUs within [the subdivision].

1 **FIRST CAUSE OF ACTION**

2 **SPECIFIC PERFORMANCE**

3 **21.** Plaintiffs incorporate the foregoing allegations.

4 **22.** The Declaration was enforceable between original parties.

5 **23.** The Declaration satisfies the statute of frauds.

6 **24.** The Declaration touches and concerns defendants Wilcox' property, plaintiffs'
7 property, and common property owned by defendant HOA.

8 **25.** The original covenanting parties intended to bind successors in interest.

9 **26.** There is horizontal privity of estate between original parties to the
10 Declaration.

11 **27.** There is vertical privity of estate between original parties to the Declaration
12 and parties to the present proceeding.

13 **28.** The Declaration constitutes an enforceable covenant running with plaintiffs'
14 and defendants Wilcox' land.

15 **29.** Defendant HOA approved the Wilcox ADU with knowledge that it strictly
16 violated specific covenants, and unreasonably violated consent to construction covenants,
17 thereby forfeiting any right to balancing the equities.

18 **30.** Defendants Wilcox proceeded with construction despite notice that so doing
19 violated plaintiffs' property rights, and thereby forfeited any right to balancing the equities.

20 **31.** Plaintiffs lack an adequate remedy at law because real estate and views are
21 unique and irreplaceable.

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SECOND CAUSE OF ACTION

BREACH OF COVENANT

- 32. Plaintiffs incorporate the foregoing allegations.
- 33. Defendants owed a duty to plaintiffs not to violate the Declaration.
- 34. Defendants strictly violated specific covenants, and unreasonably violated consent to construction covenants, in breach of said duty.
- 35. Plaintiffs are entitled to a decree declaring that the Wilcox ADU violates the

Declaration.

* * *

THIRD CAUSE OF ACTION

BREACH OF FIDUCIARY DUTY

- 36. Defendant HOA owed a fiduciary duty to the plaintiffs to reasonably enforce consent to construction covenants contained in the Declaration.
- 37. Defendant HOA breached its duty by unreasonably approving the Wilcox HOA without analyzing impacts to views from plaintiffs' properties.
- 38. Defendant owed a fiduciary duty to the plaintiffs to strictly enforce specific covenants contained in the Declaration.
- 39. Defendant HOA breached its duty by approving the Wilcox ADU, which violates specific covenants.
- 40. Defendant HOA's breach proximately caused impacts to plaintiffs' views, and degradation of the neighborhood from multiple residences on individual lots.

1 **WHEREFORE**, plaintiffs pray for judgment of the court as follows:

2 **1.** Declaratory judgment that plaintiffs have contract rights to enforce specific
3 covenants contained in paragraphs 7.1, 7.3 and 7.15(D) of the Declaration, notwithstanding
4 the HOA's architectural and landscaping approvals.

5 **2.** An injunction: (i) ordering demolition of the ADU constructed on defendants
6 Wilcox' property, (ii) enjoining construction of any other ADU thereon, and (iii) enjoining
7 any blockage of views from plaintiffs' properties.

8 **3.** Declaratory judgment that defendant HOA breached its fiduciary duty to the
9 plaintiffs, and invalidating approval of the Wilcox ADU.

10 **4.** Declaratory judgment that HOA approvals of the Wilcox ADU are void for
11 failure to comply with statutory requirements.

12 **5.** Judgment against the defendants in the amount of plaintiffs' attorney fees and
13 costs under Paragraph 8.1 of the Declaration.

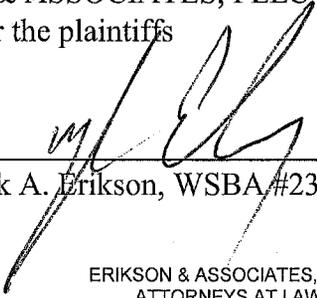
14 **6.** Judgment against the defendants under RCW 4.84.030 in the amount of
15 plaintiffs' costs and disbursements.

16 **7.** Any other remedy which the Court deems equitable and just.

17 **DATED** this 12th day of November, 2019.

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ERIKSON & ASSOCIATES, PLLC
Attorney for the plaintiffs

By: 

Mark A. Erikson, WSBA #23106

ERIKSON & ASSOCIATES, PLLC
ATTORNEYS AT LAW
110 West 13th Street
Vancouver, WA 98660-2904
(360) 696-1012

SCHWABE WILLIAMSON & WYATT, P.C.

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Cross-Appellants
Superior Court Case Number: 18-2-01548-4

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