

FILED  
Court of Appeals  
Division II  
State of Washington  
5/7/2020 1:55 PM  
No. 54324-9-II

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

---

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

Appellants,

vs.

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

Respondents.

---

APPELLANTS’ OPENING BRIEF

---

Paige B. Spratt, WSBA #44428  
Molly J. Henry, WSBA #40818  
Lillian K. Hubbard, WSBA #55428  
SCHWABE, WILLIAMSON & WYATT, P.C.  
1420 5th Avenue, Suite 3400  
Seattle, WA 98101-4010  
Facsimile: 206-292-0460

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

## TABLE OF CONTENTS

	<b>Page</b>
I. INTRODUCTION .....	1
II. ASSIGNMENT OF ERROR .....	3
III. ISSUE PRESENTED.....	3
IV. STATEMENT OF THE CASE.....	4
A. The HOA Has Exclusive Jurisdiction and Authority to Approve Additions.....	4
B. The Wilcoxes’ Addition was Approved by the HOA Board and Permitted by the City of Camas. ....	7
C. Procedural History .....	9
V. ARGUMENT.....	11
A. Standard of Review.....	11
B. The Wilcoxes are Entitled to Fees Under the CC&Rs.....	12
1. The attorney’s fee provision in the CC&Rs is mandatory. ....	12
2. The Wilcoxes were “successful” in defending Plaintiffs’ claims. ....	14
3. Fees are available following an involuntary dismissal.....	19
C. The Mutuality of Remedies Doctrine also Supports an Award of Fees. ....	23
D. Request for Fees on Appeal Pursuant to RAP 18.1. ....	24
VI. CONCLUSION.....	25

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Allahyari v. Carter Subaru</i> , 78 Wn. App. 518, 897 P.2d 413 (1995).....	16, 18, 20
<i>Andersen v. Gold Seal Vineyards Inc.</i> , 81 Wn.2d 863, 505 P.2d 790 (1973).....	16, 18, 19, 20
<i>Boules v. Gull Industries, Inc.</i> , 133 Wn. App. 85, 134 P.3d 1195 (2006).....	2, 11, 13
<i>Briglio v. Holt &amp; Jeffery</i> , 91 Wash. 644, 158 P. 347 (1916).....	19
<i>CRST Van Expedited Inc. v. EEOC</i> , 136 S. Ct. 1642, 194 L. Ed. 2d 707 (2016).....	18, 20
<i>Dep’t of Ecology v. State Fin. Comm.</i> , 116 Wn.2d 246, 804 P.2d 1241 (1991).....	13
<i>Ethridge v. Hwang</i> , 105 Wn. App. 447, 20 P.3d 958 (2001).....	11
<i>Fisher Props., Inc. v. Arden-Mayfair, Inc.</i> , 106 Wn.2d 826, 726 P.2d 8 (1986).....	11
<i>Gray v. Briggs</i> , 1998 U.S. Dist. LEXIS 10057 (S.D.N.Y. July 7, 1998).....	20
<i>Halme v. Walsh</i> , 192 Wn. App. 893, 370 P.3d 42 (2016).....	12
<i>Hawk v. Branjes</i> , 97 Wn. App. 776, 986 P.2d 841 (1999).....	<i>passim</i>
<i>Hayfield v. Ruffier</i> , 187 Wn. App. 914, 351 P.3d 231 (2015).....	13
<i>Hous. Auth. of City of Seattle v. Bin</i> , 163 Wn. App. 367, 260 P.3d 900 (2011).....	18, 19, 20, 23

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<i>Kaintz v. PLG, Inc.</i> , 147 Wn. App. 782, 197 P.3d 710 (2008) .....	<i>passim</i>
<i>Klock Produce Co. v. Diamond Ice &amp; Storage Co.</i> , 98 Wash. 676, 168 P. 476 (1917).....	19
<i>Marassi v. Lau</i> , 71 Wn. App. 912, 859 P.2d 605 (1993) .....	16
<i>Mt. Hood Beverage Co. v. Constellation Brands, Inc.</i> , 149 Wn.2d 98, 63 P.3d 779 (2003).....	24
<i>Public Util. Dist. No. 1 v. Wash. Public Power Supply Sys.</i> , 104 Wn.2d 353, 705 P.2d 1195 (1985).....	13
<i>SE Boise Boat &amp; RV Storage, LLC v. Graham</i> , 2020 Wash. App. LEXIS 1075 (April 20, 2020) .....	23
<i>Singleton v. Frost</i> , 108 Wn.2d 732, 742 P.2d 1224 (1987).....	2, 13
<i>Walji v. Candco, Inc.</i> , 57 Wn. App. 284, 787 P.2d 946 (1990) .....	<i>passim</i>
<i>Wilkinson v. Chiwawa Cmtys. Ass’n</i> , 180 Wn.2d 241, 327 P.3d 614 (2014).....	12
 <b>Statutes</b>	
RCW 4.28.330 .....	15
RCW 4.84.250 .....	16
RCW 7.24.110 .....	10
 <b>Other Authorities</b>	
BLACK’S LAW DICTIONARY (11th ed. 2019).....	12, 21
CR 41(a)(1)(B).....	14, 15
RAP 18.1.....	24, 25

## I. INTRODUCTION

This appeal asks whether a defendant is “successful” for purposes of a contractual attorney’s fee provision where, following the close of the plaintiffs’ case at trial, the court dismisses plaintiffs’ claims without prejudice for failure to join an indispensable party.

Plaintiffs Ron Jones and Seppo Saarinen (collectively “Plaintiffs”) and defendants Aaron and Aubrey Wilcox (collectively “Wilcoxes”) are members of the Knight’s Point Homeowners’ Association (“HOA”). Plaintiffs filed suit under the HOA’s Covenants, Conditions & Restrictions (“CC&Rs”) seeking to force the Wilcoxes to tear down an HOA-approved addition to their family home and for declaratory relief that the HOA board’s prior approval of the addition was invalid. Following the close of Plaintiffs’ case at trial, the court dismissed Plaintiffs’ claims for failure to name the HOA as an indispensable party.

The Wilcoxes filed a petition for attorney’s fees and costs under a provision of the CC&Rs that provides “[a]ny party who successfully enforces these CCR’s [sic] shall be entitled to recover their reasonable costs and attorney’s fees, whether a lawsuit is filed or not.” (CP 30) The trial court denied the Wilcoxes’ petition and suggested that fees would be

available to the “prevailing” party following judgment on the merits, should the Plaintiffs decide to refile. (CP 470)

The trial court’s refusal to reimburse the Wilcoxes the reasonable attorney’s fees and costs they incurred to successfully defend against Plaintiffs’ claims in this case violates the unambiguous terms of the CC&Rs, overlooks binding Washington case law, and offends basic concepts of fairness. The fee provision made an award of attorney’s fees mandatory, “whether a lawsuit [was] filed or not.” (CP 30) The trial court’s discretion was limited to determining the amount of reasonable fees—it was error to deny them outright. *Singleton v. Frost*, 108 Wn.2d 732, 727, 742 P.2d 1224 (1987) (“where a contract provides for an award of reasonable attorney’s fees to the prevailing party, such an award **must be made**”) (emphasis added); *Boules v. Gull Industries, Inc.*, 133 Wn. App. 85, 134 P.3d 1195 (2006) (where contract provides that prevailing party “shall be” entitled to recover reasonable fees and costs, trial court erred by awarding only nominal fees).

The trial court’s error was based on a misapplication of *Hawk v. Branjes*, 97 Wn. App. 776, 986 P.2d 841 (1999). *Hawk* held that a party seeking attorney’s fees under a “successful party” fee provision in a contract was entitled to fees following a voluntary dismissal. If a defendant is “successful” following a voluntary dismissal, then it

necessarily follows that the defendant is successful following an *involuntary* dismissal. Plaintiffs' attempt to distinguish *Hawk* on the basis that it involved a voluntary dismissal—rather than involuntary—is illogical.

Finally, the equitable doctrine of mutuality of remedies also supports an award of reasonable attorney fees and costs. *Kaintz v. PLG, Inc.*, 147 Wn. App. 782, 788-789, 197 P.3d 710 (2008). The Wilcoxes were forced to incur attorney's fees through trial to defend against Plaintiffs' flawed claims and were successful under any ordinary understanding of the word. In addition to forcing the Wilcoxes to tear down a portion of their family home, Plaintiffs themselves sought an award of attorney fees under the CC&Rs. (CP 317) Had Plaintiffs succeeded, they would have been entitled to fees. (CP 317) They were not, so equity dictates that the Wilcoxes recover their fees.

## **II. ASSIGNMENT OF ERROR**

1. The trial court erred in denying the Wilcoxes' petition for attorney's fees and costs where they were the "successful" party under the governing CC&Rs.

## **III. ISSUE PRESENTED**

Did the trial court err as a matter of law when it denied the Wilcoxes' petition for attorney's fees and costs where the CC&Rs called

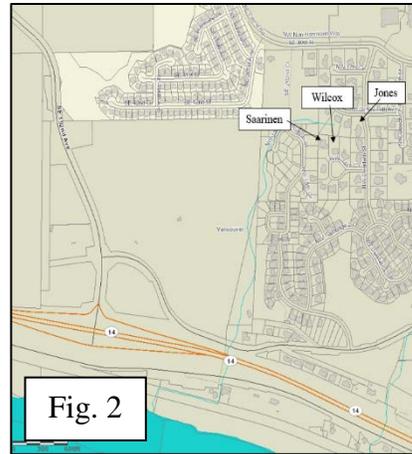
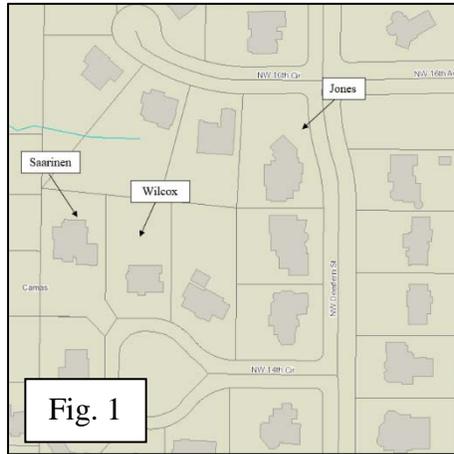
for fees to the successful party and where the court dismissed all of Plaintiffs' claims for failure to join an indispensable party? If so, should the Court reverse and remand to the trial court for entry of an award of fees and costs to the Wilcoxes?

#### **IV. STATEMENT OF THE CASE**

The Knight's Point Homeowner's Association ("HOA") is located in Camas, Clark County, Washington and is made up of 36 homes. (CP 1, 312 at ¶ 7) This lawsuit involves 3 of the 36 homes within the HOA.

##### **A. The HOA Has Exclusive Jurisdiction and Authority to Approve Additions.**

Plaintiff Jones owns the home located at 1447 NW Deerfern Street, Camas, Washington 98607, and Plaintiff Saarinen owns the home located at 5215 NW 14th Circle, Camas, Washington 98607. (CP 311-312) The Wilcoxes own the home located at 5209 NW 14th Circle, Camas, Washington 98607. (CP 312) Figures 1 and 2 show the locations of each parties' respective home and the relation of the homes to the Columbia River and State Highway 14:



(CP 47)

All of the homes are within the Knight's Pointe Subdivision, within the jurisdiction of the HOA, and subject to the HOA's CC&Rs, which were recorded in 2005. (CP 312) The CC&Rs require owners to obtain consent from the HOA prior to completing any addition to their homes, and gives the HOA exclusive authority to determine whether a proposed plan meets the standards of the CC&Rs:

7.24 Architectural Control. The owner, purchaser, or occupant of each lot by acceptance of title thereto or by taking possession thereof, covenants and agrees that no building, fence, wall, swimming pool, rookeries, or other structure of any type or landscaping shall be commenced, erected or maintained upon the Properties, nor shall any exterior addition to or change or alteration therein be made until the plans and specifications showing the nature, kind, shape, height, materials, soil tests, locate 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 elevation, by the Architectural Landscape Committee of the Association.

7.25(A) All plans shall also comply with all city, state, county, and/or location regulations. Complete plans and specification of all proposed buildings, structures and exterior alterations together with detailed plans showing the proposed location of same on the particular building site shall be submitted for approval in accordance with the time lines herein below set forth. One set of plans shall always remain on the job site and one shall remain with the Homeowners Association. **Approval shall be by the Architectural Landscape Committee. The jurisdiction and authority shall be exclusively that of the Homeowners Association, acting through its Board of Directors, or by an Architectural Landscape Committee composed of not less than three (3) nor more than five (5) representatives appointed by the Board.**

(CP 26-27) (emphasis added) The CC&Rs go on to provide that “[a]ny party who successfully 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)

The HOA Board is made up of four members appointed pursuant to the HOA’s CC&Rs and Bylaws. (CP 1) At the time of the events at issue, the Board consisted of Aaron Wilcox, Richard Ying, Quoc Le, and Coleen Swettman. Ms. Swettman served as the HOA Board President. *Id.*

Since approximately 2012, the HOA has been unable to marshal sufficient volunteers to create a three-person Architectural Landscape Committee (“ALC”) pursuant to Article 7.25(A) of the CC&Rs. (CP 2)

Indeed, since the Wilcoxes moved to the neighborhood, only Defendant Aubrey Wilcox has regularly volunteered to serve on the ALC. (CP 47) As the sole member of the ALC committee, Ms. Wilcox's duties include obtaining quotes for neighborhood signage and presenting the quotes to the HOA Board for approval. *Id.*

In the absence of sufficient volunteers for the ALC, and pursuant to Article 7.25(A), the HOA Board has reviewed all proposals submitted by members under Article 7.24 and made all determinations since at least 2012. (CP 2)

**B. The Wilcoxes' Addition was Approved by the HOA Board and Permitted by the City of Camas.**

On June 14, 2016, the Wilcoxes applied to the HOA Board for approval for an addition to their home. The planned addition would create an additional bedroom, bathroom, and living space for guests, as well as more space for the Wilcoxes' growing family. (CP 3, 48, 51, 53-57) The HOA Board denied the Wilcoxes' application because it was concerned the addition would result in a second residence that could be rented. (CP 3, 48, 53-57) The Wilcoxes went back to the books and re-submitted amended plans in mid-2016, which were again denied because the HOA Board wanted to see a more integrated approach. (CP 3, 48)

The Wilcoxes submitted a third application to the HOA Board on August 5, 2017, which included all necessary materials, including photos showing the potential impact to Jones' view, the architectural plans that were going to be submitted to the City of Camas for approval, and a description of the project with potential impacts for the HOA Board's consideration. (CP 3, 48, 60-81) This time, the proposed design connected the addition to the existing structure of the Wilcoxes' home by a portico. (CP 60-81) After completing an internal review process, the HOA Board determined that the addition satisfied the CC&Rs and approved the Wilcoxes' third application for an addition. (CP 3, 52, 83)

On December 17, 2017, the Wilcoxes obtained a building permit from the City of Camas. (CP 52, 84) They commenced construction of their addition in January 2018. (CP 52) On January 26, 2018, Aaron Wilcox sent an email to Plaintiff Saarinen describing the addition and specifically telling him "We have received HOA board and city approval for an addition on the Northwest side of our house." (CP 85-86)

On June 19, 2018, Plaintiff Jones approached HOA president Ms. Swettman regarding the HOA's approval of the Wilcoxes' addition. (CP 3) Ms. Swettman explained to Jones that the Wilcoxes' addition had been approved and followed up with an email to Jones detailing the HOA's approval process. (CP 42-44)

By the time Plaintiffs filed their lawsuit in July 2018, construction was 75% complete. (CP 52) The Wilcoxes' anticipated that in order to complete the project, they would spend nearly \$300,000 in the planning, design, and construction of the addition to the back of their home. *Id.*

**C. Procedural History**

Plaintiffs filed suit against the Wilcoxes on July 24, 2018, alleging that the addition violated the CC&Rs. (CP 311) Plaintiffs sought injunctive relief requiring the Wilcoxes to remove the addition to their home, a declaration "that any Association approvals of defendants' accessory dwelling unit are void for failure to comply with the requirements of the Declaration," and attorney's fees under the CC&Rs. (CP 317) Nowhere in their complaint did Plaintiffs disclose that the HOA had already approved the addition as being compliant with the CC&Rs. (CP 311) And, despite seeking a declaration invalidating any HOA approval of the addition, Plaintiffs intentionally chose not to name the HOA as a party. *Id.*

The case proceeded through discovery, dispositive motion practice, and motions in limine. (CP 88, 101, 108, 123) Trial commenced on September 23, 2019, and Plaintiffs presented their case to the court. (CP 196) After Plaintiffs rested, the Wilcoxes moved for a directed verdict on the grounds that Plaintiffs failed to name the HOA as a necessary party.

(CP 200; Sept. 23, 2018 VR at 168)<sup>1</sup> The court adjourned to consider the motion. (Sept. 23, 2018 VR at 174) Following further argument of counsel on September 24, 2018, the court found that the HOA was a necessary party under RCW 7.24.110 and dismissed Plaintiffs' claims without prejudice. (Sept. 24, 2018 VR at 190-195) Plaintiffs moved for reconsideration of the dismissal and the court denied the motion. (CP 472)

The Wilcoxes filed a petition for attorney's fees and costs under the CC&Rs, citing *Hawk v. Branjes*, 97 Wn. App. 776, 778, 986 P.2d 841 (1999), for the proposition that no judgment on the merits is required for an award of fees where the contract directs that the "successful" party receive its fees. (CP 207) The trial court distinguished *Hawk* on the grounds that it involved a voluntary dismissal, whereas the court had dismissed Plaintiffs' claims involuntarily. (CP 469) The court suggested that because Plaintiffs gave "every indication" they would re-file

---

<sup>1</sup> The Wilcoxes first raised the necessity of joining the HOA before trial, after the court indicated that its plan at trial would be to first "look[ ] at the HOA board's decision" to determine if it followed the proper process, to which counsel for the Wilcoxes responded: "I guess my only concern, Your Honor, and this is just something that I hadn't planned to brief, but it would be is the HOA board, then, a necessary party? I think we raised that in our motion for summary judgment. . . . it might seem that HOA board would be a necessary party to the action if we're looking at whether or not their decision was reasonable." (Aug. 30, 2018 VR 15:6-16:8)

following dismissal, there may be an opportunity for the Wilcoxes to recover their fees as the “prevailing party” following “a decision on the merits” in a potential second action. (CP 470) Accordingly, the trial court denied the Wilcoxes’ petition. (CP 469-470)

On November 14, 2019, Plaintiffs filed a second lawsuit against the Wilcoxes, this time naming the HOA as a defendant. Clark County Case No. 19-2-03402-06. The second case is stayed pending the outcome of Plaintiffs’ cross-appeal.

## V. ARGUMENT

### A. Standard of Review

Attorney’s fees may be awarded when authorized by a contract, a statute, or a recognized ground in equity. *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 849-50, 726 P.2d 8 (1986). A trial court decision refusing to award attorney fees is an issue of law, which this Court reviews de novo. *Kaintz v. PLG, Inc.*, 147 Wn. App. 782, 785-86, 197 P.3d 710 (2008); *Boules v. Gull Industries, Inc.*, 133 Wn. App. 85, 88, 134 P.3d 1195 (2006) (“A trial court decision awarding or refusing to award attorney fees is an issue of law, which we review de novo.”); *Ethridge v. Hwang*, 105 Wn. App. 447, 460, 20 P.3d 958 (2001).

**B. The Wilcoxes are Entitled to Fees Under the CC&Rs.**

Article 8.1 of the CC&Rs provides, in pertinent part:

. . . Any party who successfully 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 26)

Courts interpret CC&Rs like contracts. *Halme v. Walsh*, 192 Wn. App. 893, 908, 370 P.3d 42 (2016) (“we apply the rules of contract interpretation in determining the meaning of a restrictive covenant”) (citing *Wilkinson v. Chiwawa Cmty. Ass’n*, 180 Wn.2d 241, 249, 327 P.3d 614 (2014)). The primary objective is to determine the drafter’s intent. *Id.* In so doing, courts will apply the “ordinary and common use” of the language used and “will not construe a term in such a way as to defeat the plain and obvious meaning.” *Id.*

1. The attorney’s fee provision in the CC&Rs is mandatory.

Article 8.1 of the CC&Rs uses the words “shall be entitled to” to describe the circumstances under which attorney’s fees are contemplated. (CP 30) “Shall” is defined as “has a duty to; more broadly, is required to.” BLACK’S LAW DICTIONARY (11th ed. 2019). “Entitled” is defined as “grant[ing] a legal right to.” *Id.* Together, these words show a clear and

unambiguous intent to make an award of fees mandatory. *See, e.g., Dep't of Ecology v. State Fin. Comm.*, 116 Wn.2d 246, 252, 804 P.2d 1241 (1991) (“The use of the word “shall” in a statute generally imposes a mandatory duty.”); *Public Util. Dist. No. 1 v. Wash. Public Power Supply Sys.*, 104 Wn.2d 353, 383, 705 P.2d 1195 (1985) (“use of the word “shall” is imperative and operates to create a duty”); *Hayfield v. Ruffier*, 187 Wn. App. 914, 920, 351 P.3d 231 (2015) (“The phrase ‘is entitled to’ [in statute] makes an award of attorney fees to the prevailing party mandatory rather than permissive.”).

Where a contract mandates attorney’s fees, a trial court lacks discretion to deny them outright. In *Singleton v. Frost*, the Washington Supreme Court held that while a trial court has the discretionary power to limit an award of attorney’s fees to a reasonable sum, “this power does not extend to allow the complete denial of attorney’s fees where the contract provides for their award.” 108 Wn.2d 723, 730, 742 P.2d 1224 (1987). Where the contract or provision providing for an award of attorney’s fees uses the term “shall,” a denial of an award “is not within the ambit of broad trial court discretion.” *Id.*; *see also Boules*, 133 Wn. App. at 90 (“The language of the agreement—‘shall be entitled to recover from the other(s) their reasonable attorney’s fees and reasonable costs incurred

(whether or not statutory)’—mandates the award of reasonable attorney fees and costs.”).

The CC&Rs mandate an award of attorney’s fees to the successful party. As set forth below, the Wilcoxes were the successful party. The trial court lacked discretion to refuse to enforce the CC&Rs and should be reversed.

2. The Wilcoxes were “successful” in defending Plaintiffs’ claims.

The Wilcoxes were successful for purposes of recovering their attorney’s fees because, after being dragged through months of discovery, motion practice, and trial, they obtained a dismissal of all of Plaintiffs’ claims against them. No judgment on the merits was required. The Wilcoxes were successful in the ordinary, common understanding of the word.

*Hawk v. Branjes*, 97 Wn. App. 776, 986 P.2d 841 (1999), is directly on point. In *Hawk*, a landlord sued a tenant for breach of a commercial lease. The defendant was served and appeared through counsel. Before the tenant answered, however, the landlord voluntarily dismissed its complaint pursuant to CR 41(a)(1)(B). *Id.* at 778. The tenant requested attorney’s fees pursuant to a provision in the lease that provided “[i]n the event either party employs an attorney to enforce any

terms of this agreement and is successful, the other party agrees to pay a reasonable attorney's fee. . . ." *Id.* The trial court granted the motion and the landlord appealed, arguing that fees were inappropriate because, under RCW 4.28.330, a "prevailing party" for purposes of attorney's fees is defined as one "in whose favor final judgment is rendered." The landlord contended that since the voluntary dismissal was without prejudice, the tenant could not be the prevailing party. *Id.*

The court of appeals upheld the award of fees, explaining that the "issue here is not the statutory definition of prevailing party, but rather the intent of the parties with regard to the attorneys' fee provision in the lease agreement." *Id.* at 779. RCW 4.28.330 only applies to unilateral fee provisions, and makes them bilateral. It does not create an independent right to fees, and it does not apply "where, as here, the agreement already contains a bilateral attorneys' fee provision." *Id.* at 780. The use of the term "successful party" in the contract rather than "prevailing party" was a clear indication that the parties did not intend to incorporate the statutory definition of prevailing party. *Id.* at 781. As a result, the court followed the "general rule" and found that where the landlord's claims were dismissed, the tenant prevailed and was entitled to fees under the language of the lease. *Id.* at 781-782.

The same result was reached in *Walji v. Candco, Inc.*, 57 Wn. App. 284, 288, 787 P.2d 946 (1990), where the court explained that “[a]t the time of a voluntary dismissal, the defendant has “prevailed” in the common sense meaning of the word.” The court went on to explain that “[s]ince the case may never be renewed, it is essential to apply the attorney fee provision of the lease at the time of dismissal to effectuate the intent of the parties.” *Id.* at 288-289. If the plaintiff decides to refile, then the same fee provision may again come into play and the plaintiff may then benefit. *Id.* at 289. “There would be no inconsistency in such a result.” *Id.*<sup>2</sup> According to the court, this “interpretation will inhibit frivolous or badly prepared lawsuits and will protect parties from the expense of defending claims which do not result in liability.” *Id.*

Like the *Hawk* lease, Article 8.1 contains a bilateral fee provision that provides that “[a]ny party who successfully enforces these CC&R’s

---

<sup>2</sup> See also *Allahyari v. Carter Subaru*, 78 Wn. App. 518, 523, 897 P.2d 413 (1995) (following *Walji* and explaining that “[w]here the plaintiff recovers nothing, the defendant is the prevailing party. When a plaintiff voluntarily dismisses its entire action, as here, the plaintiff recovers nothing. Therefore, for purposes of a fee award under RCW 4.84.250, the defendant under such circumstances is the prevailing party.”); *Marassi v. Lau*, 71 Wn. App. 912, 918, 859 P.2d 605 (1993) (“In general, if a plaintiff voluntarily dismisses its entire action under CR 41, the defendant is considered to be the prevailing party for purposes of attorney fees under RCW 4.84.330.”); *Andersen v. Gold Seal Vineyards Inc.*, 81 Wn.2d 863, 867-68, 505 P.2d 790 (1973).

shall be entitled to recover their reasonable costs and attorney fees,” but then goes even further than the clause in *Hawk* by stating that fees are available “whether a lawsuit was filed or not.” (CP 30) Because the CC&Rs expressly contemplate an award of fees even without a lawsuit, the drafters could not have intended to require an adjudication on the merits or a statutory “prevailing party” before fees would be awarded. The drafters implicitly *rejected* this statutory definition of prevailing party and instead chose to allow a successful party to recover its fees even in the absence of lawsuit.

Denying fees following an involuntary dismissal would defeat the intent of the CC&Rs. It was Plaintiffs’ own fault that their lawsuit was dismissed and did not result in liability, based on their strategic decision to not sue the HOA. Moreover, it was entirely up to Plaintiffs whether they chose to refile or not following the court’s dismissal. Plaintiffs could have just as easily decided against refiling after seeing how their case played out after the first trial. If that were the case, the Wilcoxes would have been without any mechanism to recover fees incurred through trial—despite the clear intent of the CC&Rs to award fees regardless of whether litigation is ever filed. *Walji*, 57 Wn. App. at 288-289 (“[s]ince the case may never be renewed, it is essential to apply the attorney fee provision of the lease at the time of dismissal to effectuate the intent of the parties.”).

The Wilcoxes were successful in the first trial and are entitled to their fees. In the unlikely event that Plaintiffs succeed in their second lawsuit, then presumably Plaintiffs would be entitled to fees for that second suit. As the *Walji* Court explained, there is nothing inconsistent with awarding fees to one successful party in one action, and a different successful party in a successive action. *Id.*

The “general rule” followed in *Hawk* and *Walji* is the unremarkable proposition that a defendant prevails when, at the end of the case, the plaintiff takes nothing. *Anderson*, 81 Wn.2d at 867 (“it is not the law that there can be no prevailing party unless such a judgment is entered”); *Allahyari*, 78 Wn. App. at 523; *Hous. Auth. of City of Seattle v. Bin*, 163 Wn. App. 367, 260 P.3d 900 (2011) (“[defendant] obtained an order dismissing the unlawful detainer action. By any measure, [defendant] prevailed in this action. . . .”); *see also CRST Van Expedited Inc. v. EEOC*, 136 S. Ct. 1642, 1651, 194 L. Ed. 2d 707 (2016) (“Common sense undermines the notion that a defendant cannot ‘prevail’ unless the relevant disposition is on the merits. Plaintiffs and defendants come to court with different objectives.”). The Court should find that the Wilcoxes prevailed and are entitled to their fees.

3. Fees are available following an involuntary dismissal.

Plaintiffs will undoubtedly attempt to distinguish *Hawk* and *Walji* by pointing out that those cases involved voluntary dismissals, as opposed to involuntary dismissals, but that is a meaningless distinction. If a defendant prevails when a plaintiff chooses to dismiss its claims, then it is axiomatic that a defendant prevails when it wins a motion resulting in the *involuntary* dismissal of a plaintiff's case. No case limits the general rule that a defendant prevails when a plaintiff takes nothing to cases in which the plaintiff voluntarily dismisses its own case. To the contrary, courts have expansively found defendants to be the prevailing party following dismissals of a plaintiff's claims. *Bin*, 163 Wn. App. at 377 (tenant prevailed for purposes of attorney's fees following involuntary dismissal of housing authority's unlawful detainer action on procedural grounds); *Anderson*, 81 Wn.2d at 867 (explaining 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") (citing *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)). The *Anderson* Court went on to explain that "where there is a dismissal of

an action, *even where such dismissal is voluntary and without prejudice*, the defendant is the prevailing party.” *Id.* (emphasis added). The emphasized language is prefaced with the phrase “even where,” indicating one circumstance in which a dismissal renders a defendant the prevailing party. It in no way *limits* the circumstances in which a defendant can prevail to voluntary dismissals. *See, e.g., Gray v. Briggs*, 1998 U.S. Dist. LEXIS 10057 at \* 14 (S.D.N.Y. July 7, 1998) (“The phrase beginning ‘even where’ suggests that the Court found that a denial of standing would be particularly unjust and arbitrary where the misrepresentations and termination were causally linked. It does not suggest, however, that such circumstances represented the only case where a denial of standing would be unjust.”) It is the dismissal itself that makes the defendant prevail—whether it is voluntary or involuntary is not dispositive.

No Washington case holds that a bilateral attorney’s fee provision may only be invoked by the defendant following a dismissal on the merits. There are no opinions providing a detailed analysis of whether a defendant “prevails” when it obtains an involuntary dismissal of the plaintiff’s claims against it because it is self-evident. *Anderson*, 81 Wn.2d at 867 (“it is not the law that there can be no prevailing party unless such a judgment is entered”); *Allahyari*, 78 Wn. App. at 523; *Hous. Auth. of City of Seattle v. Bin*, 163 Wn. App. at 377; *CRST Van Expedited Inc.*, 136 S. Ct. at 1651.

To “prevail” means to “obtain the relief sought in an action.” BLACK’S LAW DICTIONARY (11th ed. 2019). The Wilcoxes sought a dismissal of Plaintiffs’ claims, and they obtained that relief.

Plaintiffs’ argument improperly conflates two entirely separate analyses from the *Hawk* opinion. The *Hawk* Court addressed (1) whether the defendant was successful and prevailed following a dismissal without prejudice as opposed to a judgment on the merits (97 Wn. App. at 779-782 (discussion under subheading 1)); and separately (2) whether the court retained jurisdiction to hear a fee petition following a voluntary dismissal (*id.* at 782-784 (discussion under subheading 2)). Plaintiffs argued to the trial court that *Hawk* only applied to voluntary dismissals “because the logic of the decision seeks to prevent plaintiffs from avoiding contractual fee awards through *voluntary* dismissals.” (CP 452) In support of this argument, Plaintiffs cited to the analysis under the second subheading in *Hawk*, addressing jurisdiction, in which the court explained that it retained jurisdiction to hear a fee petition following a voluntary dismissal because “[a]ny 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.* (citing *Hawk*, 97 Wn. App. at 783). At that juncture of the court’s opinion, however, it had already determined that the *Hawk* defendants were entitled to attorneys’ fees under the contract when the case was

dismissed without an adjudication on the merits. *Hawk*, 97 Wn. App. at 781–82. The reasoning Plaintiffs cited was not relied upon in any way by the court in its decision to award fees under the contract. Instead, in holding that the *Hawk* defendants were entitled to fees following the dismissal, the court cited *Walji* for the general proposition that “at the time of a voluntary dismissal, the defendant has ‘prevailed’ in the commonsense meaning of the word.” *Id.* at 780. In other words, the *Hawk* court found that a dismissal was a “success.” Nothing in the court’s analysis of this issue suggests that it intended this holding to be limited to voluntary dismissals.

Applying the reasoning from the second half of the *Hawk* opinion to limit recovery of fees to cases involving voluntary dismissals is illogical. If the purpose of allowing fees following a dismissal (as opposed to a judgment) is to prevent a plaintiff from evading an award of fees, that risk equally exists with respect to an involuntary dismissal. Plaintiffs had the opportunity to test their case through trial. Surely they had a sense for whether they were likely to prevail or not. Following dismissal, the choice of whether to refile or not was entirely in Plaintiffs’ hands. They could have evaded an award of fees, and frustrated the purpose of the CC&Rs, by simply choosing not to refile their case.

Finally, just last month, Division I issued an unpublished opinion re-affirming that contractual attorney fees are available to a defendant following an involuntary dismissal. In *SE Boise Boat & RV Storage, LLC v. Graham*, 2020 Wash. App. LEXIS 1075 at \* 7-8 (April 20, 2020), the court affirmed an award of contractual attorney fees following a dismissal without prejudice for improper venue. In so doing, the court explained that the attorney fee agreement at issue “provide[d] for an award of fees to the prevailing party in any ‘[p]roceeding [ ] commenced for the purpose of interpreting or enforcing any provision of [the] Agreement.’ Dismissal on the merits is not required.” *Id.* The same unremarkable logic applies here—the Wilcoxes are entitled to their fees under the CC&Rs because they succeeded in the action. No judgment on the merits was required and there is no reason to limit the definition of “success” to a voluntary, as opposed to an involuntary, dismissal. *See Bin*, 163 Wn. App. at 377.

**C. The Mutuality of Remedies Doctrine also Supports an Award of Fees.**

Plaintiffs dragged the Wilcoxes through months of expensive discovery, trial preparations, and then trial, only to be told after obtaining a dismissal of Plaintiffs’ claims that they could not recover their fees because Plaintiffs may decide to take another bite at the apple. Had

Plaintiffs prevailed, as they intended and sought to do, they would have been entitled to their fees under the CC&Rs.

Mutuality of remedy is a “well recognized principle of equity.” *Mt. Hood Beverage Co. v. Constellation Brands, Inc.*, 149 Wn.2d 98, 121, 63 P.3d 779 (2003). It provides that if one party sues on a contract that would have permitted the recovery of fees if they prevailed, then a defendant who obtains a dismissal of those claims is entitled to its fees in equity—whether the contract was enforced or not. *Kaintz*, 147 Wn. App. at 789 (citing *Mr. Hood Beverage Co.*, 149 Wn.2d at 121-122)).

Plaintiffs sued the Wilcoxes in an attempt to force them to tear down a portion of their family home and sought fees from the Wilcoxes. Had Plaintiffs prevailed, they would have been entitled to an award of fees under the CC&Rs. Because the Wilcoxes successfully defended the claims and obtained a dismissal following Plaintiffs’ case at trial, equity supports an award of fees. To rule otherwise would allow Plaintiffs to avoid the very fee provision they sought to enforce.

**D. Request for Fees on Appeal Pursuant to RAP 18.1.**

The Wilcoxes should not be forced to shoulder the burden of Plaintiffs’ unsuccessful litigation campaign against them. They

respectfully request an award of their fees and costs on appeal pursuant to RAP 18.1 and Article 8.1 of the CC&Rs. (CP 30)

**VI. CONCLUSION**

For all the foregoing reasons, the Wilcoxes ask that the Court reverse the trial court's order denying their petition for fees and costs, and remand for entry of an order awarding them the reasonable attorney's fees and costs they were forced to incur in successfully defending against this suit, including fees on appeal.

Dated: May 7, 2020

SCHWABE, WILLIAMSON & WYATT, P.C.

By: /s/ Molly J. Henry  
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 7<sup>th</sup> day of May, 2020, I arranged for service of the foregoing APPELLANTS' OPENING BRIEF 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](mailto:mark@eriksonlaw.com)  
[kris@eriksonlaw.com](mailto: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

PDX\MJHE\27577193.2

**SCHWABE WILLIAMSON & WYATT, P.C.**

**May 07, 2020 - 1:55 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 54324-9  
**Appellate Court Case Title:** Ron Jones & Seppo Saarinen, Cross-Respondents v. Aaron & Aubrey Wilcox,  
Cross-Appellants  
**Superior Court Case Number:** 18-2-01548-4

**The following documents have been uploaded:**

- 543249\_Briefs\_20200507135225D2422170\_6193.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was Appellants' Opening Brief.pdf*

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

- lhubbard@schwabe.com
- mark@eriksonlaw.com
- pspratt@schwabe.com

**Comments:**

Appellants' Opening Brief

---

Sender Name: Heather Stephen - Email: fretonio@schwabe.com

**Filing on Behalf of:** Molly Henry - Email: mhenry@schwabe.com (Alternate Email:  
AppellateAssistants@schwabe.com)

Address:  
1420 Fifth Avenue  
Suite 3400  
Seattle, WA, 98101  
Phone: (206) 292-1380

**Note: The Filing Id is 20200507135225D2422170**