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Court of Appeals No. 54324-9-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

RON JONES and SEPPO SAARINEN,

Respondents/Cross Appellants,

v.

AARON WILCOX and AUBREY WILCOX,

Appellants/Cross Respondents.

REPLY BRIEF OF CROSS APPELLANTS

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TABLE OF CONTENTS

Table of Authorities ii

Argument

Involuntary Dismissal 1

Attorney Fees 21

Conclusion 25

Appendices

RCW 7.24.110 . . . . . App 1

TABLE OF AUTHORITIES

Washington Cases

4105 1st Avenue South v. Green Depot,
179 Wash. App. 777, 321 P.3d 254 (2014). 23

Armstrong Marine v. Wiley,
53163-1-II, unpublished 22

Betchard-Clayton v. King,
41 Wash.App. 887, 707 P.2d 1361 (1985) 15-16

Burton v. Clark County,
91 Wash.App. 505, 958 P.2d 343 (1998) 6

Guenther v. Fariss,
66 Wash.App. 691, 833 P.2d 417 (1992) 9-10

Hawk v. Branjes,
97 Wash.App. 776, 986 P.2d 841 (1999) 22, 23, 24

Jones and Saarinen v. Wilcox and Knight's Pointe HOA,
19-2-03402-06. . . . . 2, 6

Lewis County Savings & Loan v. Black,
60 Wash.2d 362, 374 P.2d 157 (1962) 2

Lloyd v. Superior Court,
42 Wash.2d 908, 259 P.2d 369 (1953) 6

Riss v. Angel,
131 Wash.2d 612, 934 P.2d 669 (1997) 9, 12, 14, 20, 25

Saunders v. Meyers,
175 Wash.App. 427, 306 P.3d 978 (2013) 7, 8, 12, 13, 15, 18, 19, 20

Spinnaker Ridge v. Guest,
No. 49038-2-II, 2019 WL 2185113 (2019). 11

State v. Wineberg,
74 Wash.2d 372, 444 P.2d 787 (1968) 17

Treyz v. Pierce County,
118 Wash.App. 458, 76 P.3d 292 (2003) 9

Vogt v. Seattle-First National Bank,
117 Wash.2d 541, 817 P.2d 1364 (1991) 4

Wachovia SBA Lending v. Kraft,
165 Wash.2d 481, 200 P.3d 683 (2009) 23

Walji v. Candyco,
57 Wash.App. 284, 787 P.2d 946 (1990) 24

Wimberly v. Caravello,
136 Wash.App. 327, 149 P.3d 402 (2006) 8, 16, 17, 18

Revised Code of Washington

RCW 7.24.110 . . . . . 7, 9, 10, 25

Chapter 24.03 RCW 2

Other Authorities

Black's Law Dictionary, 6th Ed., 1990 21

ARGUMENT

Involuntary Dismissal

The present cross appeal is governed by RAP 2.2(a)(3), which authorizes appeal of written decisions affecting substantial rights:

> Unless otherwise prohibited by statute or court rule and except as provided in sections (b) and (c), a party may appeal from only the following superior court decisions: . . .
>
> (3) Decision Determining Action. Any written decision affecting a substantial right in a civil case which in effect determines the action and prevents a final judgment or discontinues the action.

The trial court's ruling that the HOA is a necessary party affects cross appellants' right to prosecute claims against the Wilcoxes alleging violation of *specific* covenants. Such dismissal, in effect, determines that the action is governed by HOA consent-to-construction, which prejudices cross appellants. The ruling opens the door to balancing the reasonableness of HOA consent; thus denying cross appellants of their right to direct enforcement:

> 8.1 Enforcement. The Association, or **any owner**, . . . **shall have the right to enforce, by proceeding at law or equity, all** restrictions, conditions, **covenants**, reservations, liens and charges now or hereafter imposed by the provisions of this Declaration, and to recover damages for violation thereof. . . .

Trial Exhibit 1 at 26 (27 of 31); *CP 344*, emphasis added.

By analogy, in *Lewis County Savings & Loan v. Black*, a defendant was prejudiced by the mere dismissal of a counterclaim:

> [A] decree of foreclosure was entered, which substantially prejudiced appellants' remedy on their counterclaim. Not only would the loss of their house create irreparable and unnecessary damage to appellants, but, if they are able to establish the truth of the allegations of their counterclaim, the very damage caused by respondent would, by reducing the value of the mortgaged property, increase the likelihood of a deficiency judgment being entered against appellants.

Lewis County Savings & Loan v. Black, 60 Wash.2d 362, 370-71, 374 P.2d 157 (1962). The Supreme Court articulated a requirement of statutory authority for dismissal without prejudice:

> Unless there is some statutory basis for doing so, the trial court has no discretion to enter an involuntary order of dismissal without prejudice.

Lewis County Savings & Loan, 60 Wash.2d at 370.

Cross appellants in the present case filed a second action after entry of dismissal,[1] against both the Wilcoxes and Knight's Pointe HOA, in order to stop the statute of limitations from running in favor of the HOA. That action, now stayed, includes claims against the HOA alleging breach of fiduciary duty and violation of Chapter 24.03 RCW. While such claims are essential if the HOA is added, the HOA's presence opens the door to

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[1] *Jones and Saarinen v. Wilcox and Knight's Pointe HOA*, 19-2-03402-06.

confusion of consent-to-construction covenants with specific covenants. The latter may be enforced regardless of HOA review and approval. The decision dismissing cross appellants' claims is appealable because addition of the HOA affects cross appellants' substantial right to enforce specific covenants, and determines the applicability of HOA consent.

Contrary to the Wilcoxes' argument, the HOA has no vested interest in defending approval of the Wilcox accessory development unit ("ADU"), because that decision is not at issue. The HOA is not charged with interpreting specific covenants, it is charged with determining: "harmony of external design and location in relation to surrounding structures and topography, building setback restrictions and finished grade elevations." *CP 340*, paragraph 7.24. Moreover, "[t]he 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." *CP 341*, paragraph 7.25(D). It is no contradiction that factors which the HOA considers may overlap specific covenants; however, design review does not excuse noncompliance with specific covenants. The HOA is not qualified to interpret and enforce specific covenants; rather, proposals must satisfy both HOA design review *and* court-ordered compliance with specific covenants.

The Wilcoxes mistakenly assume that Washington law is satisfied by supplanting covenant interpretation and construction with design review by private associations. However, HOA design review is not a replacement for court authority. Cross appellants did not challenge design review approval, which they could have done had they disagreed with "harmony of external design and location in relation to surrounding structures and topography, building setback restrictions and finished grade elevations." The HOA may conceivably have an interest in such dispute if it falls within the HOA's limited authority. To the contrary, cross appellants challenge the *presence* of a free standing ADU, as well as the Wilcoxes' freedom to construct it under the CCRs. The HOA has no authority nor competence over such issues.

By analogy, courts do not defer to agency jurisdiction unless "a private claim involves a factual question requiring expertise that the courts do not have or involves an area where a uniform determination is desirable." *Vogt v. Seattle-First National Bank*, 117 Wash.2d 541, 554, 817 P.2d 1364 (1991). Moreover, "an administrative agency should not be accorded primary jurisdiction if the agency is powerless to grant the relief requested." *In re Real Estate Brokerage Antitrust Litigation*, 95 Wash.2d 297, 304, 622 P.2d 1185 (1980).

The Washington Supreme Court has articulated three elements for judicial deference under the doctrine of primary jurisdiction:

> (1) The administrative agency has the authority to resolve the issues that would be referred to it by the court. . . .
>
> (2) The agency must have special competence over all or some part of the controversy which renders the agency better able than the court to resolve the issues . . .; and
>
> (3) The claim before the court must involve issues that fall within the scope of a pervasive regulatory scheme so that a danger exists that judicial action would conflict with the regulatory scheme.

In re Real Estate Brokerage Antitrust Litigation, 95 Wash.2d at 302. The HOA has no authority to resolve covenant disputes, nor to enforce demolition of the Wilcox ADU. The HOA is composed of homeowners with *no* special competence that would render the HOA better able to resolve covenant interpretation and construction issues than Superior Court. Obviously, our analogy is not based upon a regulatory scheme, but if we extend the comparison, the CCRs do apply to all lots within this subdivision. Nonetheless, there is no danger that judicial action would conflict with any general scheme; to the contrary, allowing the HOA to determine legal issues would risk conflicting decisions because board members are not educated in the rules of covenant interpretation and construction.

The Wilcoxes repeatedly quote cross appellants as arguing that "the dismissal they now appeal 'will have no effect upon the ultimate outcome;'" however, the Wilcoxes take the quotation out of context by deleting the final clause of the sentence:

> In obtaining involuntary dismissal, the Wilcoxes did not succeed on the merits, and the dismissal will have no effect on the ultimate outcome, **which will be determined either on remand or in *Jones v. Wilcox, et al.*, 19-2-03402-06**.

Reply Brief of Respondents at 27, emphasis added. The present appeal is an alternative that will resolve the dismissal "on remand." In fact, determination on remand is preferred because it will keep the case from developing branches. *Burton v. Clark County*, 91 Wash.App. 505, 513 fn.9, 958 P.2d 343 (1998) ("In proceeding as they did, the parties violated RAP 7.2 and 8.3, which are intended to keep a case from 'develop[ing] branches'. . . (See also CR 54(b) and RAP 2.2(d))"). Moreover, Superior Courts have authority to stay cases pending the outcome of appeals in other actions:

> A court has the power to stay the trial of an action pending an appeal from a judgment in another action. The granting of a motion to stay the trial of such action is within the discretion of the court, and its ruling will not be disturbed by an appellate court unless it appears that such discretion has been abused as that term is understood in legal parlance.

Lloyd v. Superior Court, 42 Wash.2d 908, 909, 259 P.2d 369 (1953).

The sole relevance of erroneous dismissal being reversed in the present appeal, or superseded by judgment in the stayed action, is to show that the Wilcoxes did not prevail at trial. That does not render the trial court correct in ruling that the HOA was a necessary party. Nor does it render the present appeal moot because the presence of the HOA in the stayed action is based upon an erroneous decision that the HOA is a necessary party in covenant interpretation and construction. The only possible roll the HOA could play is to defend its design review decision, which is not at issue in construction and interpretation of specific covenants.

The Wilcoxes cite RCW 7.24.110 (*App 1*) and general authority in *Williams v. Poulsbo* for the proposition that necessary parties must be added. Such analysis overlooks the issue of whether the HOA is *actually* a necessary party in an action seeking direct enforcement of specific covenants. In their argument, the Wilcoxes ignore published opinions directly on point:

> CCR ¶1 explicitly gives Somerset homeowners a legal right to enforce all of the covenants against other homeowners. The Meyerses are correct that CCR ¶10 gives the CRC power to enforce that particular covenant, but CCR ¶1 entitles homeowners to do the same. Therefore, the Saunderses are entitled to bring a legal action directly against the Meyerses for violating the covenants.

Saunders v. Meyers, 175 Wash.App. 427, 438, 306 P.3d 978 (2013).

The Court in *Saunders* held that failure to join did not prejudice rights of the homeowners association because: "failure to join affects only the court's authority over the absent party." *Saunders*, 175 Wash.App. at 437. See also *Wimberly v. Caravello*, 136 Wash.App. 327, 334, 149 P.3d 402 (2006) ("injunctions are binding solely on entities whose interests are represented.")

The Wilcoxes argue that "[a] decision on the merits would have directly affected the HOA's right to interpret its rules as well as its interest in having its decision upheld." *Reply Brief of Appellants* at 8. However, this argument perpetuates a misconception that HOA design review decides the same issues as court enforcement of specific covenants. It does not. The HOA did not determine the interpretation and construction of specific covenants, and Superior Court was not asked to decide "harmony of external design and location in relation to surrounding structures and topography, building setback restrictions and finished grade elevations." *CP 340*, paragraph 7.24. An HOA determination regarding the acceptable design of ADUs is no less valid after the court decides that ADUs are not allowed at all, or not allowed because they block views. The HOA has no decision to uphold or reverse because it has no authority to decide legal issues, only design review issues which Superior Court was not asked to address.

The Court of Appeals articulated rules governing identification of necessary parties:

> A party is necessary if "a complete determination of a controversy cannot be had" without its presence. . . . Stated another way, a necessary party is "one whose ability to protect its interest in the subject matter of the litigation would be impeded by a judgment.". . . The party must have a sufficient interest "such that [a] judgment cannot be determined without affecting that interest."

Treyz v. Pierce County, 118 Wash.App. 458, 462-63, 76 P.3d 292 (2003).

In the present case, a complete determination of the controversy could be had without the HOA because specific covenants preclude multiple residences, multi-family uses and unnecessary inhibition of views. Those preclusions obtain even if the proposed ADU satisfies design review criteria. No exercise of discretion on the part of the HOA is relevant because specific covenants supersede consent-to-construction covenants, and homeowner associations may exercise discretion only as to the latter. *Riss v. Angel*, 131 Wash.2d 612, 625-26, 934 P.2d 669 (1997).

In other words, the HOA has no interest in the subject matter which judgment would impede. Judgment in favor of cross appellants may encourage the HOA to disapprove future ADUs; however:

> an effect on operation is not the equivalent of an effect on an interest of the [entity], as that term is used in RCW 7.24.110.

Guenther v. Fariss, 66 Wash.App. 691, 698, 833 P.2d 417 (1992). Whether the HOA has or claims an interest under RCW 7.24.110 should be based upon legal rights and interests, not subjective expression. As in *Guenther*, the interests at stake are purely the individual interests of the cross appellants and Wilcoxes. The HOA has no separate interest in the action.

The Wilcoxes argue that the "CCRs vest the HOA with exclusive authority over architectural approvals for compliance with the CCRs (CP 341) and the right 'to determine all questions and interpret the CCRs.' (CP 345)" *Reply Brief of Appellant*s at 12. Actually, the root "exclusive" appears only once on *CP 341*:

> Approval [of plans] shall be by the Architectural Landscape Committee. The jurisdiction and authority shall be *exclusively* that of the Homeowners, acting through its Board of Directors, or by an Architectural Landscape Committee . . .

CP 341, paragraph 7.25(A), emphasis added. The foregoing paragraph follows immediately upon a discussion of the HOA's authority to review of "harmony of external design and location in relation to surrounding structures and topography, building setback restrictions and finished grade elevations." *CP 340*, paragraph 7.24; *supra*. Hence, the reference to "jurisdiction" clearly refers back to the HOA's limited design review delegation. It does not confer a binding arbitration obligation upon owners within the subdivision.

Nonetheless, the Wilcoxes seem to infer that the CCRs somehow confer original jurisdiction upon the HOA over matters of covenant interpretation and construction. Original jurisdiction to interpret covenants was addressed in *Spinnaker Ridge v. Guest* as follows:

> Spinnaker Ridge brought an action for enforcement of the Spinnaker Ridge CC&Rs. There is no other court in which enforcement of covenants are provided for. Therefore, the superior court had original jurisdiction over an action for enforcement of covenants under art. 4, sec. 6 of the Washington Constitution.

Spinnaker Ridge v. Guest, No. 49038-2-II, 2019 WL 2185113 at *3 (2019), *review dismissed*, 194 Wash.2d 1017, 455 P.3d 134 (2020). *Spinnaker Ridge* is not reported in the Pacific Reporter; however, "unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as non-binding authorities, . . . and may be accorded such persuasive value as the court deems appropriate." GR 14.1. Private covenants cannot contract around constitutional provisions.

The Wilcoxes argue that "[cross appellants'] 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 [Architectural Landscape Committee]." *Reply Brief of Appellants* at 12. This claim was abandoned prior to trial, and is not mentioned in cross appellants' trial brief. *CP 423-36*.

The Wilcoxes argue that cross appellants "did not allege any violation of a specific covenant like the minimum size covenant at issue in *Riss*." *Reply Brief of Appellant*s at 13. At risk of beating this horse long after its demise, we point out that cross appellants allege violation of CCR paragraph 7.1, limiting improvements to a single residence; paragraph 7.3, limiting uses to single-family residential; and paragraph 7.15 prohibiting unnecessary inhibition of views. *Trial Exhibit 1* at 13 (14 of 31), 18 (19 of 31); *CP 331, 336*. We note the distinction in *Saunders* between "unnecessary" and "unreasonable" interference with views. *Saunders*, 175 Wash.App. at 444. The covenant in *Saunders* expressly delegated authority to the Covenants Review Committee ("CRC"). *Saunders*, 175 Wash.App. at 435 ("The . . . Committee shall be the sole judge in deciding whether there has been such interference.") Instead of evaluating what was *necessary* to sustain grandfathered trees, the CRC ordered removal "if trimming . . . to 30 feet wide would adversely affect the tree's health." *Saunders*, 175 Wash.App. at 444–45. The Court distinguished "*unreasonable* interference," which is subjective, from "*unnecessary* interference," which "depends upon a balancing of rights, not feelings or preferences;" and ruled that the CRC applied the incorrect standard. *Saunders*, 175 Wash.2d at 443-44.

By comparison, the present case requires a determination of what is necessary to add a "bedroom, bathroom and living space" to the Wilcox residence, their admitted intent. *CP 91:10-13*. Under *Saunders*, the Wilcoxes bear the burden of showing that a two-story structure was authorized by the Declaration. *Saunders*, 175 Wash.App. at 444. The Wilcox ADU comprises 1,480 square feet, including 935 square feet of first floor and 545 square feet of loft:

> AREA CALCULATIONS:
>
> FIRST FLOOR ADDITION . . . . . 935 SF
> LOFT FLOOR ADDITION . . . . . 545 SF
> TOTAL CONDITIONED FLOOR AREA . . . . . 1,480 SF

Trial Exhibit 87 at 2. A comparison of plan sheets A2.2 and A2.3 reveals that the first floor bedroom, bath, walk in closet, vestibule, and covered entry all fit within the dimensions of the loft, 545 square feet. *Id* at 4, 5. There is an additional 390 square feet of living space on the first floor (935 – 545 = 390). Clearly, 935 square feet on the first floor is sufficient to satisfy the Wilcoxes' admitted intent to add a "bedroom, bathroom and living space." *CP 91:10-13*. Just as clearly, the second-story loft is unnecessary to satisfy that purpose. Hence, the phrase "unnecessary inhibition of views" in the present case must be resolved based upon legal analysis not HOA discretion.

In response to the Wilcoxes' request for explanation, *Reply Brief of Appellants* at 14; it is not consent-to-construction which renders the HOA unnecessary; rather, it is cross appellants' right to enforce specific covenants directly in court proceedings:

> The Association, or **any owner, . . . shall have the right to enforce, by proceeding at law or equity, all** restrictions, conditions, **covenants**, reservations, liens and charges now or hereafter imposed by the provisions of this Declaration, and to recover damages for violation thereof.

Trial Exhibit 1 at 26 (27 of 31); *CP 344*.

Because the HOA may exercise discretion only as to consent-to-construction covenants, *Riss*, 131 Wash.2d at 625-26; HOA interpretation of specific covenants is irrelevant. Contrary to the Wilcoxes' arguments, cross appellants did not challenge HOA consent; rather, they challenged the permissibility of a free-standing ADU which blocks views, *regardless of HOA consent*. Had the HOA denied the Wilcox application, the Wilcoxes could have sued to overturn that decision; in which case, the HOA would be a necessary party because the court would then review HOA consent-to-construction. In the present case, joining the HOA prejudices cross appellants by forcing them to prove the unreasonability of HOA consent, which is irrelevant to the enforcement of specific covenants.

This distinction is the entire point of holding that homeowners are entitled to bring legal actions directly against other homeowners for violating specific covenants. *Saunders*, 175 Wash.App. at 438.

The Wilcoxes argue that "plaintiffs sought a declaration voiding the HOA's prior approval," *Reply Brief of Appellants* at 15; however, as noted above, cross appellants' claim alleging improper constitution of the Architectural Landscape Committee was abandoned prior to trial. Cross appellants' trial brief did not argue improper constitution. *CP 423-36*.

* * *

The Wilcoxes argue that "CR 21, which deals only with misjoinders, is inapplicable." *Reply Brief of Appellants* at 16. To the contrary, the rule expressly provides, as a remedy for "nonjoinder," that "[p]arties may be . . . added by order of the court:"

> Rule 21. Misjoinder and **Nonjoinder** of Parties
>
> Misjoinder of parties is not ground for dismissal of an action. **Parties may be** dropped or **added by order of the court** on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

CR 21, emphasis added. The Wilcoxes argue that non-named parties may be added only if they participated in proceedings and had notice of all matters.

Reply Brief of Appellants at 16, citing *Betchard-Clayton v. King*, 41 Wash.App. 887, 895, 707 P.2d 1361 (1985). HOA awareness and participation in court proceedings is evidenced by a *Declaration of Colleen Swettman*, HOA President and Board member, dated August 31, 2018, over one year prior to involuntary dismissal on September 23, 2019:

> I reside in Knight's Pointe Subdivision and serve as President of the Knight's Pointe Homeowner's Association ("HOA") Board.

CP 1:20-21. See also *Declaration of Paige Spratt in Support of . . . Attorneys' Fees and Costs* filed October 4, 2019, Exhibit A:

> 08/30/18 . . . Confer with Colleen Swettman regarding HOA process and Wilcox approval; draft declaration for Coleen's signature . . .

CP 221.

* * *

The Wilcoxes argue that "*Wimberly v. Caravello* . . . does not address . . . what a trial court should do when it cannot fairly resolve the issues without the presence of the HOA." *Reply Brief of Appellants* at 17. As noted above, the trial court could have resolved the case without presence of the HOA because cross appellants did not challenge HOA design review approval; rather, they sued to enforce specific covenants.

The Wilcoxes distinguish *Wimberly*, arguing that "plaintiffs sought declaratory relief invalidating the HOA's decision, not just an injunction requiring the Wilcoxes to tear down a portion of their home." *Repy Brief of Appellants* at 18. Although asserting that this distinction is "dispositive," the Wilcoxes fail to provide argument that the distinction is material. *State v. Wineberg*, 74 Wash.2d 372, 378-79, 444 P.2d 787 (1968). Materiality of the distinction is informed by the discretion delegated to the HOA, which is limited to "harmony of external design and location in relation to surrounding structures and topography, building setback restrictions and finished grade elevations." *CP 340*, paragraph 7.24; *supra*. It makes no difference whether cross appellants prayed to void the HOA decision because the HOA lacks authority to interpret and construe specific covenants. Moreover, cross appellants prayed to void "approvals of [the Wilcox] accessory dwelling unit," not design review approval. *CP 317:7-8*. Cross appellants did not pray for judgment that the Wilcox ADU is inharmonious with "external design and location in relation to surrounding structures and topography, building setback restrictions and finished grade elevations." Cross appellants prayed for judgment invalidating approval to construct a free-standing ADU which unnecessarily inhibits views, because it is prohibited outright by the CCRs.

The Wilcoxes also distinguish *Saunders v. Meyers*, arguing that "[t]he 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." *Reply Brief of Appellants* at 19. The Court of Appeals, in *Saunders*, held that the "covenants review committee" was not a necessary party in actions to enforce specific covenants notwithstanding a provision that the committee was the sole judge in deciding whether there had been an unnecessary interference with views:

> Like in Wimberly, the Saunderses did not assert any claim against the CRC. Rather, they sued to enforce the covenant, which they were entitled to do under the plain terms of CCR ¶1. **We hold that the trial court acted within its discretion in determining that the CRC was not an indispensible party in an action by homeowners to enforce CCR ¶10.**

Saunders, 175 Wash.App. at 435, 438, emphasis added.

Under the most sympathetic interpretation, the Wilcoxes' distinction of *Saunders* would appear to rest upon whether an enforcement action is commenced before or after HOA approval. However, such interpretation conflicts with express holding in *Saunders*:

> The Meyerses are correct that CCR ¶10 gives the CRC power to enforce that particular covenant, but CCR ¶1 entitles homeowners to do the same. Therefore, **the Saunderses are entitled to bring a legal action directly against the Meyerses for violating the covenants.**

Saunders, 175 Wash. App. at 438, emphasis added. Moreover, the Wilcoxes' distinction is unsupported by the facts of *Saunders*, in which the covenants review committee ordered a tree trimmed to 30 feet in width, or removed if such trimming would adversely impact the tree's health:

> Original large trees that were already tall enough so that a neighbor did not have a particular view over the tree at the time of the covenants could continue to grow higher as long as it did not block other existing views. There would be no taking of a view since there was no pre-existing view to be taken. However, this does not allow a tree to take away an existing view by spreading out in the horizontal plane. This is what has happened with your tree. A tree's width can have as much impact on a neighbor's view as the tree's height.

Saunders, 175 Wash.App. at 433-34, quoting CRC. The covenants review committee then appended its decision with a requirement that the offending tree also be topped, all of which occurred prior to commencement of the Saunders' action for breach of covenant. *Saunders*, 175 Wash.App. at 434.

On the other hand, the Wilcoxes may base their distinction upon whether legal action seeks to enforce an HOA decision. However, the right in *Saunders* is based not upon enforcement of an HOA decision, but upon enforcement of a specific covenant. *Saunders*, 175 Wash.App. at 438 ("enforce that particular covenant"). It would be odd indeed, if necessary party status turned on whether the party agrees or disagrees with the plaintiff.

Moreover, the Court in *Saunders* ruled that a covenants review committee was not a necessary party in actions to enforce specific covenants. *Saunders*, 175 Wash.App. at 438. The Wilcoxes fail to explain why the HOA is a necessary party in actions seeking enforcement *inconsistent* with HOA consent, but not in actions seeking enforcement *consistent* with HOA consent. The HOA's limited delegation of authority should determine necessary party status, not the HOA's posture.

In summary, the determination that an HOA is a necessary party in an action to enforce specific covenants against another homeowner determines the outcome by introducing reasonability of HOA consent, because the HOA may exercise discretion only regarding consent-to-construction covenants:

> 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.

Riss, 131 Wash.2d at 625-26. Consent is reviewed for reasonability:

> Regardless of the good or bad faith of the homeowners, . . . a decision under a consent to construction covenant must be reasonable.

Riss, 131 Wash.2d at 627. At very least, having to litigate irrelevant HOA consent is prejudicial to cross-appellants, even if judgment were ultimately entered enforcing specific covenants.

Attorney Fees

The Wilcoxes argue that drafters of the CCRs "included language indicating that fees were to be awarded even in absence of litigation." *Reply Brief of Appellants* at 23. According to the Wilcoxes, this indicates an implicit rejection of "any definition of prevailing party that would require a judgment on the merits." *Id.* However, the Wilcoxes fail to acknowledge the express language of the attorney fee provision:

> Any party **who successfully enforces these CC&R's** shall be entitled to recover their reasonable costs and attorney fees, whether a lawsuit is filed or not.

CP 344, paragraph 8.1. The word "enforce" is defined in Black's as follows:

> To put into execution; to cause to take effect; to make effective; as, to enforce a particular law, a writ, a judgment, or the collection of debt or fine; to compel obedience to.

Black's Law Dictionary, 6th Ed., 1990, at 528. The CCRs were not enforced, put into execution or caused to take effect because the trial court did not rule on the merits. The trial court dismissed the case on purely procedural grounds: ruling that the HOA is a necessary party in actions to enforce specific covenants. *RP September 24, 2019, 192:14-16.* The Wilcoxes acknowledge that they did not prevail on the merits, but fail to explain how they were successful in enforcing any provision of the CCRs.

The Wilcoxes cite a recent unpublished decision for their argument that "there was no basis to limit [the] reasoning in *Hawk* to voluntary, versus involuntary dismissals." *Reply Brief of Appellants* at 27, citing *Armstrong Marine v. Wiley*, 53163-1-II (2020). The cited case has no persuasive value, particularly as misquoted. The Court actually held that "[t]here is no compelling reason not to apply [*Hawk's*] reasoning to dismissals for lack of prosecution," and went on to quote the oft-repeated justification from *Hawk*:

> 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.

Armstrong Marine at 3; citing *Hawk v. Branjes*, 97 Wash.App. 776, 783, 986 P.2d 841 (1999). Dismissal for want of prosecution is as close to voluntary dismissal as one can imagine; it is the plaintiff who fails to prosecute, just as it is the plaintiff who voluntarily dismisses. Lack of prosecution might well be described as voluntary dismissal by default. In both cases, the plaintiff avoids final judgment, and could avoid paying statutory or contract attorney fees. The present case was *involuntarily* dismissed upon the Wilcoxes' motion, and was immediately re-filed to accommodate the trial court's erroneous decision. The rationale of granting attorney fees for *voluntary* dismissal simply does not apply in the present case.

The Wilcoxes cite a second rationalization in *Hawk* for granting attorney fees on *voluntary* dismissal: "to hold otherwise would unnecessarily subject the courts to separate actions to recover fees readily ascertainable upon dismissal of the underlying claim." *Hawk*, 97 Wash.App. at 783. In the present case, *dismissal itself* forced cross appellants to re-file in order to prevent running of the statute of limitations, as might be expected whenever dismissal is based upon an alleged failure to join necessary parties.

As distinct from cases cited by the Wilcoxes, "dismissal . . . did not leave the parties in the position 'as if the action had never been brought,'" because the second action against the Wilcoxes and the HOA is still pending. *4105 1st Avenue South v. Green Depot*, 179 Wash. App. 777, 787, 321 P.3d 254 (2014); citing *Wachovia SBA Lending v. Kraft*, 165 Wash.2d 481, 492, 200 P.3d 683 (2009). The Supreme Court noted that mutuality is fulfilled, under RCW 4.84.330: "where neither party prevails with a final judgment, [and] neither party is entitled to attorney fees." *Wachovia SBA Lending*, 165 Wash.2d at 492. In the present case, neither party successfully enforced the CCRs; however, enforcement will occur either on remand or in the second action. Under the express language of the CCRs, attorney fees are reserved for successful enforcement. *CP 344*, paragraph 8.1.

The Wilcoxes' citation to "court" holding in *Hawk*, that the defendant was successful when the case was dismissed without prejudice, refers to the holding of the *trial court*, not the Court of Appeals. *Reply Brief of Appellant* at 24; citing *Hawk*, 97 Wash.App. at 778-79. The Court of Appeals ruled that defendant is regarded as having prevailed upon a *voluntary* nonsuit. *Id* at 781; citing *Walji v. Candyco*, 57 Wash.App. 284, 288, 787 P.2d 946 (1990).

The decision in *Hawk* also quoted *Walji* for deference to the trial court decision regarding attorney fees:

> The decision as to whether a particular voluntary nonsuit should trigger attorney fees should be left to the discretion of the trial judge in light of the circumstances of the particular case, whether interpreting a contract clause or statute.

Hawk, 97 Wash.App. 776, 783, 986 P.2d 841 (1999); quoting *Walji*, 57 Wash.App. at 290. While the present case involved *involuntary* dismissal, the Wilcoxes suggest no reason why deference to the trial court's discretion should be limited. The trial court based its decision on the rationale in *Hawk* and *Walji* :

> In this case the plaintiffs did not decide to dismiss the case and did not control the outcome, the court did. . . .
>
> [D]efendants' motion for attorneys' fees and costs is denied.

CP 472-73.

CONCLUSION

Dismissal under CR 41(b)(3) is appealable under RAP 2.2(a)(3) because it was based on a ruling that the HOA is a necessary party, which determines the action by imposing reasonability of HOA consent on the enforcement of specific covenants, contrary to the holding in *Riss v. Angel*.

Dismissal should be reversed because the HOA's authority is limited to design review, which does not excuse noncompliance with specific covenants. The HOA does not have authority to resolve, nor competence to interpret and construe, specific covenants. Lacking such authority and competence, the HOA has no interest which judgment would impede under RCW 7.24.110.

The trial court's denial of attorney fees to the Wilcoxes should be affirmed because the CCR's require "successful enforcement," which has not yet occurred, and because both the weight and rationale of appellate decisions do not support attorney fees in cases of *involuntary* dismissal.

RESPECTFULLY SUBMITTED this 29th day of July, 2020.

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By: _____
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CERTIFICATE OF SERVICE

#54324-9-II

I certify that on July 29, 2020, I caused a true and correct copy of the foregoing *Reply Brief of Cross Appellants* to be served on the following in the manner indicated below:

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DATED this 29th day of July, 2020

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RCW 7.24.110

Parties—City as party—Attorney general to be served, when.

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[**1935 c 113 § 11**; RRS § 784-11.]

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