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SUPREME COURT
STATE OF WASHINGTON

IN THE SUPREME COURT ^{AB}
OF THE STATE OF WASHINGTON

Supreme Court No. ~~80318-8~~

Court of Appeals No. 34714-8-II

WACHOVIA SBA LENDING, INC., d/b/a
WACHOVIA SMALL BUSINESS CAPITAL,
a Washington corporation,

Plaintiff/Respondent,

v.

DEANNA D. KRAFT, individually,

Defendant/Appellant.

On Appeal from the Superior Court of the State of Washington
In and for the County of Pierce
Superior Court Docket Number 05-2-11846-1

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. IDENTITY OF RESPONDENT

Respondent Wachovia S.B.A. Lending, Inc., d/b/a Wachovia Small Business Capital, submits Respondent's Supplemental Brief in accordance with RAP 13.7(d).

B. STATEMENT OF THE ISSUES

1. Did the trial court err in not awarding Kraft her attorneys' fees under RCW 4.84.330 when Wachovia voluntarily dismissed its claims without prejudice and the trial court never determined whether Washington or North Carolina law applied in this case? Answer: No.

2. Did the trial court err in dismissing the underlying action without prejudice when the trial court never determined whether Washington or North Carolina law applied, and the parties never briefed the applicable statutes of limitations regarding Wachovia's two claims? Answer: No.

3. Is the Amicus mistaken in his assertion that Division Two of the Court of Appeals held below that "final judgments entered 'without prejudice' by virtue of CR 41(a)(1)(B) can never be a basis for awarding attorney fees ... absent an act of the legislature?" Answer: Yes.

4. Is RCW 4.84.330 in conflict with CR 41 when RCW 4.84.330 provides for an award of attorney's fees to the prevailing party upon the entry of a final judgment while CR 41 does not contain any mention of attorney's fees, final judgments, or prevailing parties? Answer: No.

C. STATEMENT OF THE CASE

The Plaintiff in the action giving rise to this appeal, Wachovia SBA Lending, Inc. (“**Wachovia**”), Respondent herein, is the legal holder of a U.S. Small Business Administration Promissory Note dated June 30, 1997 in the principal amount of \$172,000.00 (“**Note**”). CP 19. Randolph S. Kraft, Defendant/Appellant Deanna M. Kraft’s (“**Kraft**”) ex-husband, executed the Note. CP 19. The Note secured a commercial loan in the principal amount of \$172,000.00 with an interest rate of the prime rate plus 2.5% per annum, payable in regular installments (“**Loan**”). Id. The Note was secured by a Deed of Trust on the Krafts’ real property in North Carolina (“**Property**”), the state in which they previously lived. Id.

The Note and Deed of Trust provide that in the event the holder of these instruments forecloses on the Deed of Trust and sells the Property, Randolph and Deanna Kraft will be liable for any deficiency balance. CP 20. The stated purpose of the Loan was for Mr. Kraft’s veterinary clinic, which was located on the Property. Id. Kraft is also a veterinarian. CP 75, 83.

Kraft executed a Small Business Administration Guaranty in connection with the Note and Loan on June 30, 1997 (“**Guaranty**”). CP 10-13, 20. Wachovia is the legal holder of the Guaranty. CP 20. Per the Guaranty, Kraft absolutely and unconditionally guaranteed to pay the holder of the Note and Guaranty in accordance with the terms set forth therein. CP 10-13.

Read together, the Note, Deed of Trust, and Guaranty require Kraft and her ex-husband to pay for any costs and attorney's fees incurred by the holder of these obligations in enforcing these responsibilities. CP 10-20.¹ These documents do *not* contain a *bilateral* attorney's fees provision by including language like "in the event of litigation, the prevailing party shall be entitled to a reasonable attorney's fee and all costs and expenses." See id.

Because both Wachovia and the United States Small Business Administration ("SBA") have rights regarding the Loan, the SBA has the right to enforce the Note and Guaranty in the event Wachovia chooses not to do so. See CP 81-101. Wachovia is also obligated to obtain SBA approval in the event a borrower makes a settlement offer on an SBA loan that lies below a particular threshold. Id.

Randolph S. Kraft filed an individual voluntary Chapter 7 bankruptcy in the United States Bankruptcy Court for the Western District of Washington at Tacoma under Case Number 03-50941 on September 29, 2003 ("**Kraft Bankruptcy**"). CP 20. Mr. Kraft received his Order Granting Discharge on January 28, 2004. Id. Mr. Kraft's obligations under the Note were discharged in the Kraft Bankruptcy. Id.

Wachovia obtained an order granting its Motion for Relief From Stay in the Kraft Bankruptcy on February 11, 2004. CP 20. Per this

¹ A true and correct copy of the Note, Guaranty, and Deed of Trust are attached to the Affidavit of Michelle Snorgrass in Support of Plaintiff's Motion for Summary Judgment and designated as A-5 to Respondent's Answer to Petition for Review.

order, Wachovia foreclosed its Deed of Trust on the Property and sold the Property at a foreclosure sale. See CP 10-11, 20. After applying these proceeds to the outstanding Kraft indebtedness, approximately \$78,196.77 was due and owing under the Guaranty, not including Wachovia's costs and attorney's fees. CP 20. Wachovia last received payment on the Loan on December 22, 2004. CP 82.

Wachovia filed its Complaint for Judgment on Guaranty and Unjust Enrichment against Kraft in Pierce County Superior Court Case No. 05-2-11846-1 on September 19, 2005. CP 4. Kraft retained two Washington attorneys and a North Carolina attorney to represent her with respect to Wachovia's claims. See RP 12. Kraft filed her Answer and Affirmative Defenses on October 10, 2005, which did not include any counterclaim against Wachovia. CP 10-13. Kraft's Answer did not assert the statute of limitations as a defense to either of Wachovia's claims. Id. As an affirmative defense, Kraft stated in paragraph 2.8 of her Answer that "[t]he law of the State of North Carolina governs this case." CP 13.

After numerous discussions regarding a possible settlement, it appeared the parties herein reached an impasse. RP 7. Accordingly, Wachovia filed its Motion for Summary Judgment on January 26, 2006, in which Wachovia sought the entry of summary judgment against Kraft on its claims for breach of the Guaranty and unjust enrichment. CP 45-49.

After Kraft filed her Affidavit of Prejudice, the Honorable Linda Lee was assigned to this case, and it was Judge Lee who presided over the hearing on Plaintiff's Motion for Summary Judgment on March 3, 2006.

See RP 10. After hearing argument from counsel, the trial court denied Plaintiff's Motion for Summary Judgment in part because of a concern as to whether Washington or North Carolina law applied in this case. RP 10; CP 104-05. The trial court stated at the summary judgment hearing on March 3, 2006 that this issue would have to be briefed by the parties, and the trial court did not make any factual findings or legal conclusions at that time. CP 105.

Trial was set for March 20, 2006 at 9:00 a.m. CP 1. Neither party conducted any discovery in this case. See CP 45-49; CP 66-73.

In the hope of settling this case short of trial, the parties agreed to split the cost of an appraisal of Kraft's home, which had considerable equity that could be used to settle Wachovia's claims even after taking Kraft's homestead exemption into account, which at the time was \$40,000.00. See RP 7. At that time, based largely on an analysis of what Wachovia would receive from Kraft's bankruptcy estate in the event Kraft filed a chapter 7 bankruptcy, Kraft offered to settle Wachovia's claims against her for \$16,882.00. Id. Although Wachovia stated it would accept this offer, Wachovia made clear that both Wachovia *and* the SBA would have to approve a settlement in this amount because said amount is approximately 20% of the principal amount owing under the Guaranty. See RP 7; CP 81-101.

Because it could take approximately two (2) weeks to receive word back from the SBA as to whether this proposal would be acceptable, Wachovia's counsel suggested continuing the March 20, 2006 trial date

until word could be received both from Wachovia and the SBA; however, Kraft refused to continue the trial date. See RP 7. This led Wachovia to notify Kraft and the trial court on or about March 8, 2006 of Wachovia's inclination to voluntarily dismiss this action without prejudice and without costs, which Kraft objected to. See RP 4.

When Wachovia learned on Thursday, March 16, 2006 that the SBA agreed to accept Kraft's \$16,882.00 offer of settlement and Wachovia communicated this fact to Kraft, Kraft revoked her settlement offer and stated she intended to proceed to the hearing on Wachovia's Motion for Voluntary Dismissal in the hope of having Wachovia's claims against her dismissed with prejudice as opposed to without prejudice. See id. at 7-11.

After a hearing on Monday, March 20, 2006 (the original trial date in this case), the trial court entered an order granting Wachovia's Motion for Voluntary Dismissal Without Prejudice ("**Order**"), thereby dismissing the underlying lawsuit without prejudice and causing Wachovia and Kraft to bear their own costs and attorneys' fees. CP 108-9.

The trial court correctly noted at this hearing that because it had not determined whether the statute of limitations had expired on Wachovia's two claims, the lawsuit should be dismissed without prejudice as opposed to with prejudice. RP 7. The trial court also considered Kraft's request for her costs and attorneys' fees at this time, and concluded, after hearing argument from counsel and considering CR 41

and other applicable law, that each party should bear its own costs and fees. RP 13; CP 108-9

Kraft filed her Notice of Appeal of the Order on April 17, 2006. CP 110-12. After Division Two of the Court of Appeals considered briefing on the issue of whether this appeal was properly before that court, the Court of Appeals Court Clerk advised counsel by letter dated June 9, 2006 that the Order was appealable to the extent that it did not grant Kraft's request for attorneys' fees. The question of whether the trial court erred in dismissing the underlying action without prejudice as opposed to with prejudice was not before the Court of Appeals.

Division Two of the Court of Appeals published its decision in this case on May 30, 2007, in which it held that as a matter of first impression, a CR 41 voluntary dismissal without prejudice is not a "final judgment" under RCW 4.84.330, which provides for prevailing party attorney's fees in an action on a contract that contains a unilateral attorney's fees provision and defines "prevailing party" as the party in whose favor final judgment is rendered. Wachovia SBA Lending v. Kraft, 138 Wn. App. 854, 158 P.3d 1271 (2007) ("**Decision**"). Kraft's Petition for Review followed shortly thereafter.

D. ARGUMENT

1. The Court of Appeals Rightly Held A Dismissal Without Prejudice Is Not A "Final Judgment" Under RCW 4.84.330.

Although the trial court never determined whether Washington or North Carolina law applied in this case, the Court of Appeals considered

whether Kraft could recover her attorney's fees from Wachovia under Washington law, namely, RCW 4.84.330.²

RCW 4.84.330 provides for the recovery of attorney's fees by the "prevailing party" in actions on a contract in which there is a unilateral attorney's fees provision, even if the actual "prevailing party" is not the party entitled to recover its attorney's fees under said contract. This statute goes on to state "[a]s used in this section "prevailing party" means the party in whose favor final judgment is rendered."

The Court of Appeals rightly held that a CR 41 voluntary dismissal without prejudice is not a "final judgment" under RCW 4.84.330 by considering the plain meaning of "final judgment" and noting that since the underlying action was dismissed without prejudice, "Wachovia is free to file a new action against Kraft, leaving final judgment on their dispute for a future day." Decision, 138 Wn. App. at 861-62, 158 P.3d 1271.

The Court of Appeals's conclusion that a dismissal without prejudice is not a "final judgment" under RCW 4.84.330 is also supported by RCW 4.56.120 and related case law. RCW 4.56.120 provides that "[w]hen judgment of nonsuit is given, the action is dismissed, *but such*

² Substantial authority holds that when a given state's substantive law applies, that state's law concerning the entitlement to attorney's fees also applies. See, e.g., Boise Tower Associates, LLC v. Washington Capital Joint Master Trust Mortgage Income Fund, 2007 WL 4355815 (D. Idaho 2007). Wachovia's legal research has led it to conclude North Carolina does not have an analog to RCW 4.84.330, which makes a unilateral attorney's provision bilateral. Hence, it appears Kraft could not recover her attorney's fees from Wachovia under North Carolina law in the event this case is remanded and the trial court determines North Carolina law applies.

judgment shall not have the effect to bar another action for the same cause.” RCW 4.56.120(8) (emphasis added).

Hence, there can be no “final judgment” under RCW 4.84.330 when an action is dismissed without prejudice as opposed to with prejudice. See, e.g., Maib v. Maryland Casualty Co., 17 Wn.2d 47, 135 P.2d 71 (1943); Bates v. Drake, 28 Wn. 447, 454, 68 P. 961 (1902) (concluding dismissal without prejudice is not a bar to another action since “it is evident, however, that it is to the judgment actually entered in an action which is or is not a bar to another action, not a judgment that might or ought to have been entered therein”).

Because the trial court properly dismissed the underlying action without prejudice, it never entered a final judgment. As such, the Court of Appeals rightly held Kraft cannot recover her attorneys’ fees under RCW 4.84.330 since she is not the “prevailing party” under this statute.

2. The Trial Court Properly Dismissed The Underlying Action Without Prejudice Because Wachovia’s Claims Against Kraft Are Still Viable.

Kraft also argues the trial court erred in dismissing Wachovia’s claims without prejudice as opposed to with prejudice because Kraft believes Wachovia’s claims against her are time barred. This issue was not considered by the Court of Appeals, and is not properly before this Court. Regardless, the trial court never determined whether Washington or North Carolina law applied in this case. RP 10. The trial court also recognized that the parties did not brief the statute of limitations issue,

which was raised for the first time at the hearing on Wachovia's Motion for Voluntary Dismissal. See id.³ But regardless of which state's law applies, as seen from Wachovia's Answer to Petition for Review, both of Wachovia's claims against Kraft were viable on March 20, 2006, the date the underlying action was dismissed. Hence, the trial court did not err in dismissing the underlying action without prejudice as opposed to with prejudice.⁴

3. The Decision Is Not Inconsistent With Washington Case Law.

Contrary to the assertions of Kraft and *amicus curiae* Harold T. Hartinger ("Amicus"), the Decision is not in conflict with other Court of Appeals decisions such as Hawk v. Branjes, 97 Wn. App. 776, 986 P.2d 841 (1999), Allahayari v. Carter Subaru, 78 Wn. App. 518, 897 P.2d 413 (1995), Marassi v. Lau, 71 Wn. App. 912, 859 P.2d 605 (1993), and Walji v. Candyco, Inc., 57 Wn. App. 284, 787 P.2d 946 (1990).

In Allahayari, because the plaintiff sought damages in an amount less than \$10,000.00, RCW 4.84.250, entitled "Attorney's fees as costs in damage actions of ten thousand dollars or less – Allowed to prevailing party" provided the plaintiff with a basis to recover his attorney's fees in

³ Nor did Kraft cite the applicable Washington or North Carolina statute of limitations regarding a suit on the Guaranty. Because the Guaranty is an independent obligation separate and apart from the Deed of Trust, a suit on the Guaranty is not subject to the one year statute of limitations for pursuing a deficiency judgment after a foreclosure sale.

⁴ Further explanation as to why the trial court correctly dismissed the underlying action without prejudice as opposed to with prejudice is set forth on pages 7–9 of Respondent's Answer to Petition for Review.

the event he prevailed in the lawsuit. See RCW 4.84.250. However, the defendant prevailed in Allahayari, and the Court of Appeals held that the trial court erred in not awarding the prevailing defendant its attorney's fees under RCW 4.84.250 because the plaintiff took nothing by voluntarily dismissing his suit, thereby making the defendant a "prevailing party" under RCW 4.84.270. 78 Wn. App. at 524, 897 P.2d at 15-16.⁵

Importantly, RCW 4.84.250 – RCW 4.84.300 do not specifically require a "prevailing party" to obtain a final judgment before seeking its attorney's fees. In contrast, the statute at issue herein, RCW 4.84.330, states "[a]s used in *this* section 'prevailing party' means the party in whose favor *final judgment is rendered*." (Emphasis added). Given that Allahayari did not involve RCW 4.84.330, this case is not in conflict with the Decision.

Marassi v. Lau is not in conflict with the Decision either. Marassi involved a final judgment entered after trial; it did not involve a CR 41 voluntary dismissal. Further, attorney's fees were awarded in Marassi pursuant to a bilateral attorney's fees provision contained in the subject contract, which allowed the "successful party" in litigation to recover its attorney's fees. 71 Wn. App. at 913, 859 P.2d 605. Marassi is inapplicable to this case because the contract at issue herein contains unilateral attorney's fees provisions in favor of the holder of the loan and

⁵ RCW 4.84.270, entitled "Attorney's fees as costs in damage actions of ten thousand dollars or less – When defendant deemed prevailing party," states it applies to RCW 4.84.250, *not* RCW 4.84.330, the statute at issue herein.

security documents. Further, the trial court herein never entered a final judgment, let alone after a trial, as it dismissed Wachovia's claims without prejudice, per its request.

Similarly, in Hawk v. Branjes, the subject contract contained a bilateral attorney's fees provision, in which the "prevailing party" was entitled to recover its attorney's fees from the other party. After the plaintiffs voluntarily dismissed their suit, the trial court awarded the defendants reasonable attorney's fees under this bilateral fee provision. On appeal, the plaintiffs argued this award was not supportable under RCW 4.84.330. The Hawk court noted that "at issue here is not the statutory definition of prevailing party [set forth in RCW 4.84.330], but rather the intent of the parties with regard to the [bilateral] attorney's fee provision in the lease agreement." 97 Wn. App. at 779, 986 P.2d 841.

Hawk differs from this case because the attorney's fees provisions herein are unilateral. Based on the express language of the Note, Deed of Trust, and Guaranty, it is clear that the SBA and The Money Store never intended to pay for the Krafts' attorneys' fees or costs in the event of litigation. Thus, Kraft cannot recover her attorneys' fees under the specific language of the contract at issue herein. That was not the case for the defendants in Hawk, who were the prevailing parties within the meaning of the contract at issue therein.

As with Hawk, Walji v. Candyco, Inc. involved an award of attorney's fees after a CR 41 voluntary dismissal made pursuant to a bilateral attorney's fees provision in a written contract. 57 Wn. App. at

286, 787 P.2d 946. The contract at issue in Walji stated “the prevailing party shall be entitled to a reasonable attorneys’ fee and all costs and expenses expended or incurred in connection with such default or action.” Id. at 287, 787 P.2d 946. The Walji court upheld the award of fees by effectuating the intent of the parties in light of their bilateral attorney’s fees provision. Id. Because of the bilateral attorney’s fees provision, the Walji court saw no reason to apply the definition of “prevailing party” found in RCW 4.84.330 as being the party in whose favor final judgment is rendered.

The Amicus cites Western Stud Welding, Inc. v. Omark Industries, Inc., 43 Wn. App. 293, 716 P.2d 959 (1986) and Herzog Aluminum, Inc. v. General American Window Corp., 39 Wn. App. 188, 692 P.2d 867 (1984) to support Kraft’s position. But these cases do nothing to bolster Kraft’s argument.

In Western Stud Welding, Division One of the Court of Appeals held that after the plaintiff dismissed its case with prejudice, the prevailing defendant was entitled to an award of attorney’s fees pursuant to the parties’ written contract, which contained a bilateral attorney’s fees provision. 43 Wn. App. at 295-96, 716 P.2d 959.⁶ Unlike Western Stud Welding, the case at bar involves a dismissal *without* prejudice, and the

⁶ Western Stud Welding cited RCW 4.84.330 to support an award of attorney’s fees in that case. However, the award of fees therein should have been upheld based on the bilateral attorney’s fees provision in the parties’ contract, not on this statute.

contract at issue herein does not contain a bilateral attorney's fees provision.

Herzog did not involve a voluntary dismissal, but instead concerned a case where the defendant successfully defended a breach of contract lawsuit at trial, thereby obtaining a final judgment on the merits. 39 Wn. App. at 190, 692 P.2d 867. In Herzog, Division One of the Court of Appeals held the prevailing defendant was entitled to an award of attorney's fees under RCW 4.84.330 in light of the attorney's fees provision in the parties' written contract. Id. at 197, 692 P.2d 867. In so holding, the Herzog court noted RCW 4.84.330 "is a duplicate of the Cal.Civ.Code § 1717" with the exception of a few additional words. Id. at 194, 692 P.2d 867.

While the Herzog court recognized "Oregon has a statute similar to RCW 4.84.330[.]" it also recognized the California analog to RCW 4.84.330 is almost a "duplicate" of RCW 4.84.330, and that the Oregon Court of Appeals has "relied heavily" on the California case law interpreting Cal.Civ.Code § 1717. Id., fn. 3.

While the Amicus has cited several Oregon cases from the early 1970's in support of Kraft's position, the Amicus has neglected to cite any California law concerning Cal.Civ.Code § 1717 in his brief. California's courts have published multiple decisions concerning Cal.Civ.Code § 1717 in the years following the Oregon cases cited by the Amicus, Sackett v. Mitchell, 505 P.2d 1136 (Ore. 1973), Ferrell v. Leach, 520 P.2d 357 (Ore. 1974), and Dean Vincent, Inc. v. Krishell Laboratories, Inc., 532 P.2d 237

(Ore. 1975). In fact, as seen below, the California Supreme Court has held a voluntary dismissal without prejudice is not a “final judgment” under Cal.Civ.Code § 1717, the California equivalent of RCW 4.84.330.

4. The Court Should Follow The California Supreme Court By Refusing To Allow An Award Of Attorney’s Fees Under RCW 4.84.330 When A Case Is Dismissed Without Prejudice.

In International Industries, Inc. v. Olen, 577 P.2d 1031 (Cal. 1978) the California Supreme Court addressed the question of whether a defendant could recover its attorney’s fees under Cal.Civ.Code § 1717 after the plaintiff voluntarily dismissed its case without prejudice. At that time, Cal.Civ.Code § 1717 was virtually identical to RCW 4.84.330, and Cal.Civ.Code § 1717 provided that as used in that section “prevailing party” meant “the party in whose favor final judgment is rendered.” Olen, 577 P.2d at 1033 (citing complete text of Cal.Civ.Code § 1717 as it existed then). The Olen court denied the defendant’s request for fees and held that in pretrial dismissal cases, the parties should be left to bear their own attorney’s fees. Id. at 1035.

The Olen court reasoned that the plaintiff might have a number of good reasons for dismissing its case short of trial. See id. at 1034. For instance, the plaintiff may learn the defendant is insolvent, rendering any judgment hollow. Id. The Olen court further reasoned that permitting the recovery of attorney fees in all cases of voluntary dismissal before trial would encourage plaintiffs to maintain pointless litigation in moot cases or against insolvent defendants to avoid liability for those fees. Id. at 1035.

The Olen court concluded “that concern for the efficient and equitable administration of justice requires that the parties in pretrial dismissal cases be left to bear their own attorney fees, whether claim is asserted on the basis of the contract or section 1717’s reciprocal right.” Id.

After Olen, the California Legislature amended Cal.Civ.Code § 1717 to specifically provide that “[w]here an action has been voluntarily dismissed ... there shall be no prevailing party for purposes of this section.” See, e.g., Honey Baked Hams, Inc. v. Dickens, 37 Cal.App.4th 421, 426 (Cal.App.3.Dist. 1995). In following Olen, the California Court of Appeals noted contracting parties could get around the revised Cal.Civ.Code § 1717, which was amended to specifically prohibit the recovery of fees in the pretrial dismissal context, by way of their own contractual relations. Dickens, 37 Cal.App.4th at 429, fn. 5. The Dickens court reasoned that “[t]his is the same dichotomy presented by the general legislative policy against recovery of attorney fees[.]” Id.; see also Ryder v. Peterson, 51 Cal.App.4th 1056 (Cal.App.4.Dist. 1996) (denying award of attorney’s fees after dismissal without prejudice pursuant to Cal.Civ.Code § 1717 and other applicable law).

In 1998, the California Supreme Court upheld Olen by ruling Cal.Civ.Code § 1717 barred the recovery of the defendants’ attorney’s fees incurred in connection with a breach of contract claim after the plaintiffs voluntarily dismissed their case with prejudice. Santisas v. Goodin, 951 P.2d 399, 408 (Cal. 1998) (quoting Olen and noting “[t]he purpose of litigation is to resolve participants’ disputes, not compensate

participating attorneys. Our courts are sufficiently burdened without combat kept alive solely for attorney fees.”) The Santisas court went on to hold that a defendant who prevails in defending a breach of contract claim cannot be a “prevailing party” under Cal.Civ.Code § 1717 after the plaintiffs have voluntarily dismissed the action. Id. at 414.

Wachovia urges the Court to affirm the Court of Appeals on the bases articulated in the Decision and also based on the reasoning of the California Supreme Court. As seen above, the California Supreme Court determined in Olen that a voluntary dismissal without prejudice is not a “final judgment” within the meaning of Cal.Civ.Code § 1717, which at the time of Olen was virtually identical to RCW 4.84.330.

5. The Amicus Has Incorrectly Broadened The Scope Of The Court Of Appeals’s Holding Below.

According to the Amicus, the second issue for this Court to review is “[d]id the Court err by ruling that final judgments entered ‘without prejudice’ by virtue of CR 41(a)(1)(B) can never be a basis for awarding attorney fees to defendant Kraft, absent an act of the legislature[.]”⁷ First, this statement is flatly inconsistent, as there is no such thing as a “final judgment” when the judgment is entered “without prejudice.” E.g., RCW 4.56.120. Second, this statement mistakenly characterizes the holding of the Court of Appeals in this case. The Court of Appeals simply held that “a CR 41 voluntary dismissal without prejudice is not a ‘final judgment’

⁷ Memorandum of Amicus Curiae Harold T. Hartinger in Support of Petition for Review (“Amicus Brief”) at 1-2.

within the meaning of RCW 4.84.330's 'prevailing party' language[.]”
Decision, 138 Wn. App. 854, 862, 158 P.3d 1271.

The Decision does not prevent Kraft — or anyone else — from seeking an award of attorney’s fees after a voluntary dismissal without prejudice pursuant to (1) a bilateral attorney’s fees provision, which may be bargained for; (2) a “recognized ground in equity”; or (3) a statute other than RCW 4.84.330. Nor does the Decision offend this Court’s holding in Andersen v. Gold Seal Vineyards, Inc., 81 Wn.2d 863, 505 P.2d 790 (1973). Andersen held that the trial court was authorized by RCW 4.28.185(5) to award costs and attorneys’ fees to the defendants when they were dismissed on motion of the plaintiffs.⁸ Given the statute at issue in that case, which specifically gave the court the discretion to award or not award fees, the Court determined the award of fees under that statute “was within the proper exercise of the court’s discretion, and no abuse of that discretion has been shown.” Id. at 868, 505 P.2d 790.

The Amicus’s claim that “[a dismissal] entered ‘without prejudice’ by virtue of CR 41(a)(1)(B) can *never* be a basis for awarding attorney fees” is simply not correct.⁹ Granted, for the reasons set forth above, Kraft cannot properly recover her attorneys’ fees in *this* case. But in the case where there is either a contract with a bilateral attorney’s fees provision that allows fees prior to the entry of a final judgment, a

⁸ RCW 4.28.185(5) provides in relevant part that an out of state defendant who prevails in the action “may” be awarded a reasonable attorney’s fee.

⁹ (Emphasis added).

“recognized ground in equity,” or a statute like RCW 4.28.185 that provides for an award of fees prior to the entry of a final judgment, a party may, in an appropriate case, still recover fees after a CR 41 dismissal — even when the case is dismissed without prejudice.

6. The Amicus’s Arguments In Support Of Kraft’s Position Fall Short Of The Mark.

The Amicus has asked the Court to award Kraft fees pursuant to RCW 4.84.330 by (1) ignoring the definition of “prevailing party” in that statute; (2) ignoring the plain meaning of RCW 4.56.120 and the effect of a dismissal without prejudice as opposed to with prejudice; (3) ignoring decisions from this Court like Maib and Bates; and (4) ignoring the unresolved choice of law question. Further, the Amicus Brief has nothing whatsoever to say about the numerous California cases involving Cal.Civ.Code § 1717, the analog to RCW 4.84.330, which hold a dismissal without prejudice is not a “final judgment” under California’s version of the statute at issue.

The reality is that the Amicus is asking this Court to ignore, among other things, the plain meaning of RCW 4.84.330 “by interpreting the last paragraph of the statute to include ‘final judgments without prejudice’ as well as ‘final judgments with prejudice.’”¹⁰ But as seen from the preceding authority, there is no such thing as a “final judgment” when the

¹⁰ Amicus Brief at 6.

case is dismissed without prejudice — be it under RCW 4.84.330 or any other Washington statute or case.

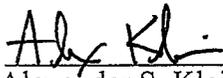
Lastly, the Amicus contends RCW 4.84.330 and CR 41 are in “irreconcilable conflict” with one another, “and that conflict must be resolved by reading an implied exemption to the statute[.]”¹¹ But the fact is there is no such conflict. Unlike RCW 4.84.330, CR 41 does not itself provide for an award of attorney’s fees. In fact, CR 41 does not even contain the word “fee.” Nor does CR 41 contain the words “prevailing party” or “final judgment” like RCW 4.84.330. CR 41 does not govern the trial court’s ability to award attorney’s fees pursuant to statute, contract, or a recognized ground in equity when there is reason for doing so. There is no “irreconcilable conflict” here.

E. CONCLUSION

The Court of Appeals rightly held that “a CR 41 voluntary dismissal without prejudice is not a ‘final judgment’ within the meaning of RCW 4.84.330’s ‘prevailing party’ language.”¹² As such, Wachovia urges the Court to affirm the Court of Appeals in this regard.

RESPECTFULLY SUBMITTED this 1st day of May, 2008.

EISENHOWER & CARLSON, PLLC

By: 
Alexander S. Kleinberg, WSBA # 34449
Attorneys for Respondent
Wachovia S.B.A. Lending, Inc.

¹¹ See Amicus Brief at 8-9.

¹² Decision, 138 Wn. App. at 863, 158 P.3d 1271.

Certificate of Service

I, Deidre M. Turnbull, am a legal assistant with the firm of
Eisenhower & Carlson, PLLC, and am competent to be a witness herein.

On May 1, 2008, I caused a true and correct copy of the
Supplemental Brief of Respondent to be served via email and via
ABC Legal Services, Inc. for same-day delivery to:

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I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

DATED this 1st day of May, 2008, at Tacoma, Washington.

Deidre M Turnbull
Deidre M. Turnbull

APPENDIX A

RCW 4.56.120**Judgment of dismissal or nonsuit, grounds, effect -- Other judgments on merits.**

An action in the superior court may be dismissed by the court and a judgment of nonsuit rendered in the following cases:

(1) Upon the motion of the plaintiff, (a) when the case is to be or is being tried before a jury, at any time before the court announces its decision in favor of the defendant upon a challenge to the legal sufficiency of the evidence, or before the jury retire to consider their verdict, (b) when the action, whether for legal or equitable relief, is to be or is being tried before the court without a jury, at any time before the court has announced its decision: PROVIDED, That no action shall be dismissed upon the motion of the plaintiff, if the defendant has interposed a setoff as a defense, or seeks affirmative relief growing out of the same transaction, or sets up a counterclaim, either legal or equitable, to the specific property or thing which is the subject matter of the action.

(2) Upon the motion of either party, upon the written consent of the other.

(3) When the plaintiff fails to appear at the time of trial and the defendant appears and asks for a dismissal.

(4) Upon its own motion, when, upon the trial and before the final submission of the case, the plaintiff abandons it.

(5) Upon its own motion, on the refusal or neglect of the plaintiff to make the necessary parties defendants, after having been ordered so to do by the court.

(6) Upon the motion of some of the defendants, when there are others whom the plaintiff fails to prosecute with diligence.

(7) Upon its own motion, for disobedience of the plaintiff to an order of the court concerning the proceedings in the action.

(8) Upon the motion of the defendant, when, upon the trial, the plaintiff fails to prove some material fact or facts necessary to sustain his action, as alleged in his complaint. When judgment of nonsuit is given, the action is dismissed, but such judgment shall not have the effect to bar another action for the same cause. In every case, other than those mentioned in this section, the judgment shall be rendered upon the merits and shall bar another action for the same cause.

[1929 c 89 § 1; RRS §§ 408, 409, 410. Formerly RCW 4.56.120, 4.56.130, and 4.56.140. Prior: Code 1881 §§ 286, 287, 288; 1877 p 58 §§ 290, 291, 292; 1869 p 69 §§ 288, 289, 290; 1854 p 171 §§ 223, 224.]

NOTES:

Rules of court: Cf. CR 41(a), (b).

APPENDIX B

We find precedent for the foregoing result in a line of cases based on principles of double jeopardy. Our concern there was specifically to preclude vindictiveness and more generally to avoid penalizing a defendant for pursuing a successful appeal. In *People v. Ali* (1967) 66 Cal.2d 277, 281, 57 Cal.Rptr. 348, 351, 424 P.2d 932, 935, we stated that "a defendant should not be required to risk being given greater punishment on a retrial for the privilege of exercising his right to appeal." And in *People v. Hood* (1969) 1 Cal.3d 444, 459, 82 Cal.Rptr. 618, 627, 462 P.2d 370, 379, we held, "had defendant not appealed, his maximum term would have been 14 years. To preclude penalizing him for appealing, the court may not impose a maximum sentence of more than 14 years if on retrial he is again found guilty." (See also *People v. Henderson* (1963) *supra*, 60 Cal.2d 432, 35 Cal.Rptr. 77, 336 P.2d 677; *People v. Schuere* (1973) 10 Cal.3d 553, 560-561, 111 Cal.Rptr. 129, 516 P.2d 833.) The concerns addressed in these cases apply as well to our decision herein. The defendant should not be penalized for properly invoking *Rossi* to overturn his erroneous conviction and sentence by being rendered vulnerable to punishment more severe than under his plea bargain.

The disposition herein substantially restores the agreement previously negotiated. It permits the defendant to realize the benefits he derived from the plea bargaining agreement, while the People also receive approximately that for which they bargained.

The judgment is reversed and the cause remanded for further proceedings in accordance with the views expressed herein.

TOBRINER, RICHARDSON, MANUEL
and NEWMAN, JJ., concur.

CLARK, Justice, dissenting.

I dissent from reversal of the judgment, and from Part I of the majority opinion, for the reasons expressed in my dissenting opinion in *People v. Rossi* (1976) 18 Cal.3d

295, 304-307, 184 Cal.Rptr. 64, 555 P.2d 1313.

BIRD, C. J., concurs.



145 Cal.Rptr. 691

INTERNATIONAL INDUSTRIES, INC.,
Plaintiff and Respondent,

v.

Maurice OLEN, Defendant and
Appellant.

L.A. 30760.

Supreme Court of California,
In Bank.

May 8, 1978.

In action by sublessor against sublessee, appeal was taken from order of the Superior Court, Los Angeles County, Robert Weil, J., denying defendant costs and attorney fees following plaintiff's voluntary dismissal without prejudice. The Supreme Court, Clark, J., held that: (1) statute on costs entitled defendant to recover filing fees as a matter of right, but (2) in pretrial dismissal cases, parties must bear their own attorney fees, whether claim for fees is asserted on the basis of contract or on reciprocal right created by statute.

Reversed in part and otherwise affirmed.

Mosk, J., filed a dissenting opinion in which Tobriner, J., concurred.

Jefferson, J., assigned, filed a dissenting opinion in which Tobriner, J., concurred.

Opinion, 66 Cal.App.3d 521, 135 Cal.Rptr. 906, vacated.

1. Costs ⇐48

Upon plaintiff's voluntary dismissal without prejudice, statute on costs entitled defendant to recover filing fee as a matter of right. West's Ann.Code Civ.Proc. § 1082.

2. Costs ⇐172

Unless authorized by statute or agreement, attorney fees ordinarily are not recoverable as costs. West's Ann.Code Civ. Proc. § 1021.

3. Costs ⇐48

Under statute creating reciprocal right to attorney fees when contract provides right to one party but not to the other, defendant was not entitled to recovery of attorney fees when plaintiff voluntarily dismissed without prejudice prior to trial. West's Ann.Civ.Code, § 1717.

4. Costs ⇐48

Parties in pretrial dismissal cases must bear their own attorney fees, whether claim for fees is asserted on the basis of contract or on reciprocal right created by statute. West's Ann.Civ.Code, § 1717.

Myron W. Curzon, Los Angeles, for defendant and appellant.

Hill, Wynne, Troop & Meisinger, Louis M. Meisinger and Barbara A. Hindin, Los Angeles, for plaintiff and respondent.

CLARK, Justice.

Proceeding to review order denying defendant costs and attorney's fees following plaintiff's voluntary dismissal without prejudice.

Plaintiff sublessor and defendant sublessee entered a written sublease providing for plaintiff's costs and attorney fees incurred in enforcing plaintiff's rights under the agreement. Plaintiff served amended notice to pay or quit in December 1975. In the same month, plaintiff filed complaints in superior court to recover rent and in municipal court for unlawful detainer. In the superior court action, plaintiff alleged

1. We are concerned here with only costs and attorney fees in the superior court action, the

damages of more than \$5,000 for defendant's breach of the lease. The complaint also sought recovery of reasonable attorney fees.¹

In January 1976, defendant returned to plaintiff the key to the demised premises. Plaintiff advised defendant acceptance of the key and efforts to relet were not to be interpreted as waiver of plaintiff's right to recover damages. (Civ.Code, § 1951.2, subd. (d).) Plaintiff subsequently relet the premises for a higher rental than that provided in the lease.

In February 1976, plaintiff agreed to defendant's request for extension of time to answer, plaintiff offering to settle for \$700. Defendant rejected the offer and answered in the superior court alleging that plaintiff had waived payment of rent until 1 March 1976, that plaintiff had refused defendant's tender of rent, that defendant had never occupied the premises, and that plaintiff had relet at increased rental. Defendant also filed and served written interrogatories.

On 26 April 1976, plaintiff filed request for voluntary dismissal without prejudice in the superior court action. (Code Civ.Proc., § 581, subd. (1).) Defendant was not immediately notified of plaintiff's request. On 29 April 1976, the superior court granted defendant's motion to compel answers to interrogatories and imposed a sanction of \$200 on plaintiff. Plaintiff requested dismissal of the municipal court proceeding on 30 April 1976. Defendant received notice of dismissal as to each action on 6 May 1976. Plaintiff then paid defendant the \$200 sanction, informing him that in light of the dismissals plaintiff would not answer the interrogatories.

After being notified of the dismissals, defendant moved for entry of judgment in the superior court. He also filed a memorandum of costs alleging \$35 filing fee and \$1,285 attorney fees. Plaintiff moved to tax costs and to strike defendant's memorandum on the ground defendant was not the prevailing party. The superior court

appeal having been taken from an order entered in that action.

granted plaintiff's motions and denied defendant's motion for entry of judgment.

We conclude defendant is entitled to recover his filing fee as costs, but not his attorney fees.

FILING FEE

[1] Code of Civil Procedure section 1032 provides in relevant part: "In the superior court, except as otherwise expressly provided costs are allowed of course: . . . [¶] (b) Defendant. To the defendant upon a judgment in his favor in special proceedings and in actions mentioned in subdivision (a) of this section, or as to whom the action is dismissed." (Italics added.)

Filing fees are recoverable as costs. (4 Witkin, Cal. Procedure (2d ed. 1971) Judgment, § 101, p. 3257; Cal. Civil Procedure During Trial (Cont.Ed.Bar 1960) § 23.26, p. 619.) The above emphasized portion of section 1032 entitles defendant to filing fees as a matter of right.

ATTORNEY FEES

[2] Unless authorized by statute or agreement, attorney fees ordinarily are not recoverable as costs. (Code Civ.Proc., § 1021; *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 24-27, 112 Cal.Rptr. 786, 520 P.2d 10; *Freeman v. Goldberg* (1961) 55 Cal.2d 622, 625, 12 Cal.Rptr. 668, 361 P.2d 244; *Young v. Redman* (1976) 55 Cal.App.3d 827, 834-835, 128 Cal.Rptr. 86.)

[3] Defendant contends he is entitled to attorney fees by virtue of Civil Code section 1717. Section 1717 provides: "In any action on a contract, where such contract specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements. [¶] Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract which is entered into after

the effective date of this section. Any provision in any such contract which provides for a waiver of attorney's fees is void. [¶] As used in this section 'prevailing party' means the party in whose favor final judgment is rendered." (Italics added.) Unlike section 1032, section 1717 contains no provision specifically providing for recovery on voluntary dismissal.

Associated Convalescent Enterprises v. Carl Marks & Co., Inc. (1973) 33 Cal.App.3d 116, 108 Cal.Rptr. 782, appears identical to the present case. In *Associated*—as here—the plaintiff procured a voluntary dismissal without prejudice pursuant to Code of Civil Procedure section 581, subdivision 1; the defendant—as here—contended it was entitled to attorney fees by virtue of section 1717. The court held the defendant was not entitled to attorney fees because no final judgment had been rendered in its favor. (*Id.* at pp. 120-121, 108 Cal.Rptr. 782.) *Associated* reasoned the entry of judgment following voluntary dismissal is nonjudicial because performed by the clerk, and not final because such judgment does not determine the rights of the parties. (*Id.*) Finally, the court noted the rendition of a judgment is a judicial act, not a ministerial act like the entry of the voluntary dismissal. (*Id.* at p. 121, 108 Cal.Rptr. 782.)

Gray v. Kay (1975) 47 Cal.App.3d 562, 120 Cal.Rptr. 915, is also identical to the present case. *Gray* followed *Associated* in holding that a voluntary judgment of dismissal does not involve rendition of a final judgment. (*Id.* at p. 565, 120 Cal.Rptr. 915.) Similarly, in *Samuels v. Sabih* (1976) 62 Cal.App.3d 335, 133 Cal.Rptr. 74, the court held a dismissal procured by the defendant for want of prosecution (Code Civ.Proc., § 583, subd. (b)), is not an adjudication on the merits, and is not a final judgment within the meaning of section 1717. (*Id.* at pp. 339-340, 133 Cal.Rptr. 74.)

Section 1717 is obviously intended to create a reciprocal right to attorney fees when the contract provides the right to one party but not to the other. (*System Inv. Corp. v. Union Bank* (1971) 21 Cal.App.3d 137, 163, 98 Cal.Rptr. 735; Review of Selected 1968

Code Legislation (Cont.Ed.Bar) pp. 35-36.) To implement legislative intent and determine which party is entitled to attorney fees, it is necessary first to consider the rules applicable to contractual claims for attorney fees.

Prior to enactment of section 1717, a contractual provision providing for attorney fees in favor of defendant was not deemed to permit, on procedural grounds, recovery when the plaintiff voluntarily dismissed prior to trial. In *Genis v. Krasne* (1956) 47 Cal.2d 241, 246, 302 P.2d 289, 292, this court held that "where attorneys' fees are allowable solely by virtue of contract they cannot be recovered by merely including them in the memorandum of costs." (Italics in orig.) We specifically rejected the contrary rule of *Wagner v. Shapona* (1954) 123 Cal. App.2d 451, 454, 463, 267 P.2d 378. (47 Cal.2d at p. 246, fn. 2, 302 P.2d 289.) Since fees could not be taxed as costs, they could not be recovered after dismissal. Fees could not be recovered by the defendant during the proceedings prior to dismissal—there would be no opportunity to secure an award because the clerk was not authorized to delay entry of dismissal for determination of the award. Accordingly, prior to adoption of section 1717 recovery of fees by the defendant under a contractual provision was effectively barred when the plaintiff voluntarily dismissed prior to trial.

While the procedural bar to recovery of attorney fees in pretrial voluntary dismissal cases may have been removed (*T. E. D. Bearing Co. v. Walter E. Heller & Co.* (1974) 38 Cal.App.3d 59, 63 et seq., 112 Cal.Rptr. 910), we are satisfied that sound public policy and recognized equitable considerations require that we adhere to the prior practice of refusing to permit recovery of attorney fees based on contract when the plaintiff voluntarily dismisses prior to trial.

In *Ecco-Phoenix Electric Corp. v. Howard J. White, Inc.* (1969) 1 Cal.3d 266, 272, 81 Cal.Rptr. 849, 461 P.2d 83, this court rejected literal and inflexible interpretation of attorney fee clauses, pointing out that literal construction of the clause before the

court would permit—contrary to sound public policy—the promisee to recover even if he was responsible for the litigation, encouraging and in fact indemnifying vexatious and frivolous litigation. Although the contract provision in that case provided for defendant's recovery of fees for any litigation, this court held that fees could be recovered only to the extent necessary to protect the defendant's rights and that where the plaintiff is partially successful, the plaintiff's liability is limited to fees for the part of the defense which was successful. Other cases have likewise recognized that the contractual provisions for attorney fees will not be inflexibly enforced and that the form of the judgment is not necessarily controlling, but must give way to equitable considerations. (*National Computer Rental, Ltd. v. Bergen Brunswick Corp.* (1976) 59 Cal.App.3d 58, 63, 130 Cal.Rptr. 360; *Babcock v. Omansky* (1973) 31 Cal.App.3d 625, 633-634, 107 Cal.Rptr. 512; *Levy v. Ross* (1969) 269 Cal.App.2d 231, 233, 74 Cal.Rptr. 622.) Nevertheless, some older decisions have taken a mechanical approach to attorney fees clauses.

Enactment of section 1717 commands that equitable considerations must rise over formal ones. Building a reciprocal right to attorney fees into contracts, and prohibiting its waiver, the section reflects legislative intent that equitable considerations must prevail over both the bargaining power of the parties and the technical rules of contractual construction.

[4] Because award of contractual attorney fees is governed by equitable principles, we must reject any rule that permits a defendant to automatically recover fees when the plaintiff has voluntarily dismissed before trial. Although a plaintiff may voluntarily dismiss before trial because he learns that his action is without merit, obviously other reasons may exist causing him to terminate the action. For example, the defendant may grant plaintiff—short of trial—all or substantially all relief sought, or the plaintiff may learn the defendant is insolvent, rendering any judgment hollow. Such defendants may not recover attorney

Cite as 577 P.2d 1031

fees within the equitable principles of *Ecco-Phoenix Electric Corp.* Moreover, permitting recovery of attorney fees by defendant in all cases of voluntary dismissal before trial would encourage plaintiffs to maintain pointless litigation in moot cases or against insolvent defendants to avoid liability for those fees.

It has been suggested that in pretrial dismissal cases the court should determine whether, and to what extent, the complaint is meritorious and award attorney fees accordingly. However, to arrive at that determination would require the court to try the entire case. The purpose of litigation is to resolve participants' disputes, not compensate participating attorneys. Our courts are sufficiently burdened without combat kept alive solely for attorney fees.

In pretrial dismissal cases, we are faced with a Hobson's choice of either (1) adopting an automatic right to attorney fees, thereby encouraging the maintenance of pointless litigation and violating the equitable principles which should govern attorney fee clauses, (2) providing for application of equitable considerations, requiring use of scarce judicial resources for trial of the merits of dismissed actions, or (3) continuing the former rule, denying attorney fees in spite of agreement. We are satisfied that concern for the efficient and equitable administration of justice requires that the parties in pretrial dismissal cases be left to bear their own attorney fees, whether claim is asserted on the basis of the contract or section 1717's reciprocal right.

The portion of the order denying defendant filing fees is reversed. The order otherwise is affirmed. Plaintiff to recover costs on this appeal.

BIRD, C. J., and RICHARDSON and MANUEL, JJ., concur.

MOSK, Justice, dissenting.

I dissent.

It has long been the rule that taxing costs and settling a cost bill are judicial functions, the result of which is a judgment for costs. (See *Hopkins v. Superior Court*

(1902) 136 Cal. 552, 554, 69 P. 299.) The result may not be a determination on the merits of the underlying claim, but it is in all respects a final judgment.

Thus if, as the majority appear to agree, the defendant is entitled to his costs upon plaintiff's filing a voluntary dismissal, the defendant thereby satisfies the only requirement of Civil Code section 1717 for becoming a "prevailing party": he is "the party in whose favor final judgment is rendered."

When attorney's fees are recoverable pursuant to statutory authorization, they are deemed an element of costs. For example, Code of Civil Procedure section 874.010, relating to actions for partition of property, provides for recovery of the "costs of partition" which include "Reasonable attorney's fees"; section 836, relating to libel actions, provides a prevailing defendant shall recover \$100 "to cover counsel fees in addition to the other costs"; and in eminent domain proceedings recoverable "litigation expenses," i. e., costs, include reasonable attorney's fees (Code Civ.Proc., § 1235.140), and these, significantly, are to be awarded to a defendant whenever the "proceeding is wholly or partly dismissed for any reason" (Code Civ.Proc., § 1268.610).

Many authorities also refer to attorney's fees as an element of costs. (See e. g., *System Inv. Corp. v. Union Bank* (1971) 21 Cal.App.3d 137, 162, 98 Cal.Rptr. 735.) In *Woodward v. Bruner* (1951) 104 Cal.App.2d 83, 85, 230 P.2d 861, 862, the court declared that the "rule of the common law that counsel fees were to be classed as costs and not damages is a part and parcel of our law," unless, of course, a statute or contract provides otherwise.

In view of the consistent references to statutory and contractual attorney's fees as an element of costs, we should construe section 1717 as providing for recovery of such attorney's fees whenever other costs are properly recoverable. Code of Civil Procedure section 1032 awards to a defendant "as to whom the action is dismissed" his costs, not merely part of his costs. Yet reduction to only a small fraction of actual

costs results from the majority's strained interpretation permitting recovery of the filing fee but not attorney's fees pursuant to contract.

A voluntary dismissal terminates litigation with finality comparable to a formal judgment based on sustaining a demurrer, or on findings or a verdict on the facts. That there has been no determination of the merits and that a new lawsuit on the same subject may be filed have no bearing on the pragmatic result: termination of the pending litigation. No persuasive reason appears to insulate a plaintiff from his obligation to pay costs, including attorney's fees, merely because he elects to terminate litigation by means of dismissal rather than by pursuit to a conclusion on the merits.

I would reverse the order of the trial court.

TOBRINER, J., concurs.

JEFFERSON, * Justice, dissenting.

I dissent.

I agree with Justice Mosk's disagreement with the majority, but I place my disagreement on broader grounds.

The majority relies in part upon the three cases of *Associated Convalescent Enterprises v. Carl Marks & Co., Inc.* (1973) 33 Cal. App.3d 116, 108 Cal.Rptr. 782; *Gray v. Kay* (1975) 47 Cal.App.3d 562, 120 Cal.Rptr. 915; and *Samuels v. Sabih* (1976) 62 Cal.App.3d 335, 133 Cal.Rptr. 74. The majority apparently approves of the reasoning set forth in these three cases that a defendant is not entitled to attorney's fees under Civil Code section 1717 because a voluntary dismissal by plaintiff does not constitute a final judgment within the meaning of section 1717 which defines the prevailing party to be a party in whose favor a final judgment is rendered. In my view the reasoning advanced in these three cases is not persuasive. Hence, this court should disapprove of the results reached in these cases.

The majority presents no convincing reasons why a voluntary dismissal of an action

by plaintiff should not be considered a final judgment for the purposes of making the defendant a prevailing party under section 1717. The fact that a plaintiff, who voluntarily dismisses his action without prejudice, may refile the action, does not preclude a holding that such dismissal is a final determination of that proceeding and is thus a final judgment. It is to be noted that Civil Code section 1717 does not require that a final judgment must be a judgment on the merits in order for a party to be a prevailing party.

The Legislature did not intend by use of the phrase "final judgment" in Civil Code section 1717 that a termination of a lawsuit should be considered a final judgment only if such termination was on the merits. In chapter 1 (Judgment in General) of title 8 of the Code of Civil Procedure, section 582 follows sections 577 through 581 which deal with an assortment of various types of judgments which are not judgments on the merits. Section 582 follows with its provisions that "[i]n all other cases judgment shall be rendered on the merits." Had the Legislature in section 1717 of the Civil Code intended that, for the purposes of obtaining attorney's fees, a prevailing party shall be limited to a party who has obtained a final judgment *on the merits* in his favor, language similar to that set forth in Code of Civil Procedure section 582 would have been used.

Since a plaintiff's voluntary dismissal of an action "finally disposes of the particular action and prevents further proceedings as effectually as would any formal judgment based on ruling on demurrer, or on findings or verdict on the facts" (*Southern Pac. R.R. Co. v. Willett* (1982) 216 Cal. 387, 390, 14 P.2d 526, 527), it should be deemed a final judgment in defendant's favor—thus carrying out the legislative intent of Civil Code section 1717 to permit defendant's recovery of attorney's fees as the prevailing party.

The majority reaches its result primarily on what it deems "sound public policy and recognized equitable considerations." The majority places heavy reliance upon *Ecco-*

* Assigned by Chairperson of the Judicial Council.

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Phoenix Electric Corp. v. Howard J. White, Inc. (1969) 1 Cal.3d 266, 81 Cal.Rptr. 849, 461 P.2d 33. The majority points out that the *Ecco-Phoenix Electric Corp.* court rejected a literal and inflexible interpretation of an attorney's fee clause in the parties' written contract involved in that case, and applied equitable principles, and that these principles support the majority's result in the case at bench. But I see nothing in the *Ecco-Phoenix Electric Corp.* case which supports the majority's view that an application of "sound public policy" and "equitable considerations" to the case before us requires the result that a defendant should not be entitled to attorney's fees when plaintiff voluntarily dismisses his action.

In *Ecco-Phoenix Electric Corp.*, a printed form contract between a subcontractor and contractor, drawn by the subcontractor, contained a clause which provided: "Should litigation be necessary to enforce any term or provision of this agreement, then all litigation and court costs and reasonable attorney's fees shall be borne wholly by the Sub-Contractor." (See *Ecco-Phoenix Electric Corp.*, supra, 1 Cal.3d 266, 272, 81 Cal.Rptr. 849, 852, 461 P.2d 33, 36.) (Latter italics added.) The court found this clause to be ambiguous, stating: "We find the clause less than certain on its face, leaving unanswered such questions as 'litigation' by whom, and made 'necessary' by whom." (*Id.* at 272, 81 Cal.Rptr. at 852, 461 P.2d at 36.) The court concluded that a "reasonable interpretation" of the attorney's fees clause required the subcontractor to be "liable for costs and attorney's fees only if it, the subcontractor, has made the litigation 'necessary.'" (*Id.* at 272, 81 Cal.Rptr. at 852, 461 P.2d at 36.)

All that the *Ecco-Phoenix Electric Corp.* court did was to reject a literal interpretation of the attorney's-fee clause and apply generally recognized standards of contractual interpretation. Thus, the court stated: "As this printed form contract was prepared by defendant, and in light of the oppressive nature of a literal interpretation of the clause, we resolve any uncertainties in favor of a fair and reasonable interpretation and against the inflexible construction

adopted by the trial court. [Citations.]" (*Ecco-Phoenix Electric Corp.*, supra, 1 Cal.3d 266, 272, 81 Cal.Rptr. 849, 852, 461 P.2d 33, 36.)

The case at bench does not begin to present a problem of a literal construction of Civil Code section 1717 of an oppressive nature and which would produce an inequitable result. The language used by the Legislature in section 1717 is not remotely similar to the one-sided language of the printed form contract which *Ecco-Phoenix Electric Corp.* found to be oppressive if interpreted literally. The majority takes the view that to interpret section 1717 to permit a defendant to recover attorney's fees when a plaintiff voluntarily dismisses an action before trial would constitute a mechanical application of the section. But the majority's result produces a mechanical application of section 1717—a type of application which it professes to abhor. If an automatic award of fees to defendant in such a case constitutes a mechanical application of the section, so does the majority's result of automatically denying fees upon a plaintiff's voluntary dismissal of the action. An interpretation of section 1717 cannot rest logically or reasonably upon the assumption that one interpretation represents a mechanical application of the statute while the reverse interpretation is grounded in sound public policy and equitable considerations.

The majority seems to think that permitting a defendant to recover attorney's fees in cases of a voluntary dismissal by a plaintiff would encourage plaintiffs to maintain pointless litigation. In my view the recovery of attorney's fees by a defendant upon a voluntary dismissal of the action by plaintiff would be in the interest of sound public policy and in accord with equitable principles, since it would tend to discourage the filing of nonmeritorious actions by a party to a contract containing an attorney's-fee clause. With knowledge that a voluntary dismissal will result in fees to the defendant, one party to the contract is not likely to start litigation based on the contract unless such party feels he has a reasonable opportunity of prevailing.

I find no magic in language used by the majority—sound public policy and equitable considerations. Both of these concepts, like beauty, have different meanings, dependent upon the eyes and ideas of the beholder. I consider that the majority's view of adopting an interpretation of Civil Code section 1717 that denies to defendant a right to attorney's fees when there is a voluntary dismissal by plaintiff will encourage the filing of fruitless and nonmeritorious litigation and does violence to the same sound public policy and equitable principles which the majority espouses on the basis of *Ecco-Phoenix Electric Corp.* The majority stresses the fact that, although a plaintiff may voluntarily dismiss his action before trial because it lacks merit, there are other reasons also which may cause a plaintiff to

terminate the action. But a recognition that there are various reasons which motivate different plaintiffs to voluntarily dismiss actions before trial offers no convincing argument that sound public policy or equity favors the plaintiff to justify denying to defendant an award of attorney's fees in this situation.

I would reverse the order of the trial court.

TOBRINER, J., concurs.



APPENDIX C

17 Cal.4th 599

71 Cal.Rptr.2d 830

Benjamin SANTISAS et al., Plaintiffs
and Appellants,

v.

Robert J.J. GOODIN et al., Defendants
and Respondents.

No. S050326.

Supreme Court of California.

Feb. 26, 1998.

Defendants sought award of attorney fees pursuant to the attorney fee provision of a real estate purchase agreement, after the voluntary pretrial dismissal by plaintiffs of their action for contract and tort damages relating to their purchase of a home. The Superior Court, San Francisco County, No. 891945, Stuart R. Pollak, J., awarded defendants \$16,546.90 in attorney fees. Plaintiffs appealed. The Court of Appeal affirmed. The Supreme Court granted review, superseding the opinion of the Court of Appeal. The Supreme Court, Kennard, J., held that: (1) statute regarding attorney fee awards in actions on contract applies to contracts containing reciprocal as well as unilateral attorney fee provisions, disapproving of *Honey Baked Hams, Inc. v. Dickens*, 37 Cal.App.4th 421, 43 Cal.Rptr.2d 595; (2) Supreme Court would assume that in the attorney fee provision, the parties used the term "prevailing party" in its ordinary or popular sense, disapproving of *Sweat v. Hollister*, 37 Cal.App.4th 603, 43 Cal.Rptr.2d 399; (3) attorney fee award for defending against plaintiffs' tort claims was not barred by statute, disapproving of *Jue v. Patton*, 33 Cal.App.4th 456, 39 Cal.Rptr.2d 364, and *Ryder v. Peterson*, 51 Cal.App.4th 1056, 59 Cal.Rptr.2d 562; but (4) attorney fee award for defending against plaintiffs' contract claims was barred by statute.

Reversed and remanded.

Opinion, 45 Cal.Rptr.2d 877, vacated.

Mosk, J., concurred and filed an opinion.

Baxter, J., concurred and dissented, and filed an opinion in which Werdégar and Brown, JJ., concurred.

1. Costs ⇐194.16

Litigation costs recoverable by prevailing party include attorney fees, but only when prevailing party has legal basis, independent of cost statutes and grounded in an agreement, statute, or other law, upon which to claim recovery of attorney fees. West's Ann.Cal.C.C.P. §§ 1032(b), 1033.5(a)(10).

2. Costs ⇐194.22

Statute providing that measure and mode of compensation of attorneys is left to agreement of parties does not independently authorize recovery of attorney fees as statutory costs, but instead recognizes that attorney fees incurred in prosecuting or defending an action may be recovered as costs only when they are otherwise authorized by statute or by parties' agreement. West's Ann.Cal.C.C.P. §§ 1021, 1032(b), 1033.5(a)(10).

3. Costs ⇐194.36

Real estate purchase agreement authorized award of attorney fees as statutory costs to prevailing party for both contract claims and tort claims, where agreement provided for attorney fees if "legal action is instituted by the Broker(s), or any party to this agreement, or arising out of the execution of this agreement or the sale, or to collect commissions." West's Ann.Cal.C.C.P. §§ 1032(b), 1033.5(a)(10)(A).

4. Costs ⇐194.36

In case involving claim for attorney fees incurred in defending against action dismissed voluntarily before trial, Supreme Court would assume that in attorney fee provision of real estate purchase agreement, parties used the term "prevailing party" in its ordinary or popular sense; agreement did not define the term, there was no extrinsic evidence indicating that parties ascribed to it a particular or special meaning; and there was no settled technical meaning of the term, as applied to voluntary pretrial dismissals, under cost recovery statutes; disapproving of *Sweat v. Hollister*, 37 Cal.App.4th 603, 43 Cal.Rptr.2d 399. West's Ann.Cal.Civ.Code § 1717(b)(2); West's Ann.Cal.C.C.P. § 1032(a)(4).

5. Costs ⇌ 194.36

Under rules of contract law, defendants in whose favor voluntary pretrial dismissal of action had been entered were "prevailing party" under attorney fee provision of real estate purchase agreement; plaintiffs did not obtain by judgment or settlement any of the relief they requested, and defendants succeeded in their objective of preventing plaintiffs from obtaining their requested relief. West's Ann.Cal.C.C.P. § 1032(a)(4).

See publication Words and Phrases for other judicial constructions and definitions.

6. Costs ⇌ 194.32

Primary purpose of statute regarding attorney fee awards in actions on contract is to ensure mutuality of remedy for attorney fee claims under contractual attorney fee provisions. West's Ann.Cal.Civ.Code § 1717.

7. Costs ⇌ 194.32

Statute regarding attorney fee awards in actions on contract applies to contracts containing reciprocal as well as unilateral attorney fee provisions, including provisions authorizing recovery of attorney fees by "prevailing party"; disapproving of *Honey Baked Hams, Inc. v. Dickens*, 37 Cal.App.4th 421, 43 Cal.Rptr.2d 595. West's Ann.Cal.Civ.Code § 1717.

8. Costs ⇌ 194.32

If action asserts both contract and tort or other non-contract claims, statute regarding attorney fee awards in actions on contract applies only to attorney fees incurred to litigate the contract claims. West's Ann.Cal.Civ.Code § 1717(a).

9. Costs ⇌ 194.32

Provision, in statute regarding attorney fee awards in actions on contract, that there is no "prevailing party" eligible to receive attorney fee award if action has been voluntarily dismissed or dismissed pursuant to settlement of case, applies only to contract claims, and thus, in pretrial voluntary dismissal cases, contractual award of attorney fees incurred in defending tort and other non-contract claims is not barred by the statute; instead, attorney fee awards for such tort or other non-contract claims are gov-

erned by wording of the contractual attorney fee provision; disapproving of *Jue v. Patton*, 33 Cal.App.4th 456, 39 Cal.Rptr.2d 364, and *Ryder v. Peterson*, 51 Cal.App.4th 1056, 59 Cal.Rptr.2d 562. West's Ann.Cal.Civ.Code § 1717(b)(2); West's Ann.Cal.C.C.P. §§ 1032(b), 1033(a)(10).

10. Costs ⇌ 194.32

Provision, in statute regarding attorney fee awards in actions on contract, that there is no "prevailing party" eligible to receive attorney fee award if action has been voluntarily dismissed or dismissed pursuant to settlement of case, overrides or nullifies conflicting contractual provisions such as provisions expressly allowing recovery of attorney fees in the event of voluntary dismissal or provisions defining "prevailing party" as including parties in whose favor dismissal has been entered. West's Ann.Cal.Civ.Code § 1717(b)(2); West's Ann.Cal.C.C.P. §§ 1032(b), 1033.5(a)(10).

11. Costs ⇌ 194.32

Statute specifying methods by which court may fix amount of attorney fees claimed as costs does not require that attorney fees awarded under contractual attorney fee provision be authorized under statute regarding attorney fee awards in actions on contract. West's Ann.Cal.Civ.Code § 1717; West's Ann.Cal.C.C.P. § 1033.5(c)(5).

12. Courts ⇌ 92

Appellate decision is not authority for everything said in court's opinion, but only for points actually involved and actually decided.

13. Costs ⇌ 194.32

In making contractual award for attorney fees incurred in defending tort or other non-contract claims in action dismissed voluntarily before trial, if attorney fees provision of the contract does not define "prevailing party" or expressly either authorize or bar recovery of attorney fees for a dismissed action, court may base its attorney fees decision on pragmatic definition of the extent to which each party has realized its litigation objectives, whether by judgment, settlement, or otherwise. West's Ann.Cal.C.C.P. § 1032(a)(4).

Raul S. Picardo and Gilbert T. Graham, San Francisco, for Plaintiffs and Appellants.

Bronson, Bronson & McKinnon, Robert J. Stumpf, Jr., Michele K. Trausch and Richard M. Foehr, San Francisco, for Defendants and Respondents.

KENNARD, Justice.

Many contracts include a provision requiring a contracting party to pay any attorney fees that the other party incurs to enforce the contract or in litigation arising from the contract. To ensure that these contractual attorney fee provisions do not operate in an unfairly one-sided manner, the Legislature enacted Civil Code section 1717, which states in part: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."

In *International Industries, Inc. v. Olen* (1978) 21 Cal.3d 218, 145 Cal.Rptr. 691, 577 P.2d 1031 (*Olen*), which involved a claim for attorney fees under Civil Code section 1717, a majority of this court held that "recovery of attorney fees based on contract" is not permitted "when the plaintiff voluntarily dismisses prior to trial." (*Olen, supra*, at p. 223, 145 Cal.Rptr. 691, 577 P.2d 1031.)

After this decision, the Legislature amended Civil Code section 1717 to state, in subdivision (b)(2), that if "an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section."

The issues here are these: When a plaintiff has voluntarily dismissed before trial an action asserting both tort and contract claims, all of which arise from a real estate

sales contract containing a broadly worded attorney fee provision, may the defendant recover any of the attorney fees incurred in defending the action? Or is any or all of such recovery precluded by either Civil Code section 1717 or this court's decision in *Olen, supra*, 21 Cal.3d 218, 145 Cal.Rptr. 691, 577 P.2d 1031?

We conclude that in voluntary pretrial dismissal cases, Civil Code section 1717 bars recovery of attorney fees incurred in defending contract claims, but that neither Civil Code section 1717 nor *Olen, supra*, 21 Cal.3d 218, 145 Cal.Rptr. 691, 577 P.2d 1031, bars recovery of attorney fees incurred in defending tort or other noncontract claims. Whether attorney fees incurred in defending tort or other noncontract claims are recoverable after a pretrial dismissal depends upon the terms of the contractual attorney fee provision.

I. FACTS

Plaintiffs Benjamin and Anita Santisas brought this action against defendants Robert J.J. and Phyllis L. Goodin (the Goodins), Goodin Realty Co., Inc. (Goodin Realty), Daniel J. Guthrie, and others seeking both general and exemplary damages occasioned by certain alleged defects in a home they had purchased from the Goodins in a transaction in which Robert Goodin acted as the sellers' broker and as the agent of Goodin Realty, and in which Guthrie acted as Goodin Realty's attorney. The verified complaint's allegations were grouped into causes of action for breach of contract, negligence, deceit, negligent misrepresentation, and suppression of fact.¹ The complaint alleged, in paragraph XXIII, that "plaintiffs and defendants entered into a written agreement, a copy of which is attached hereto as EXHIBITS A and B, and made a part hereof." Attached to the complaint as "Exhibit A" was a document entitled "Residential Purchase Agreement and Deposit Receipt."² The document in-

exhibits, designated B through G, and alleges that each is attached to the complaint.

1. The appellate record contains only one copy of the complaint, and this copy appears to be incomplete. Moreover, only one exhibit, labeled "Exhibit A," is attached to this copy of the complaint, even though the complaint refers to other

2. The complaint alleges that exhibit B is a "counter offer."

cluded this provision: "In the event legal action is instituted by the Broker(s), or any party to this agreement, or arising out of the execution of this agreement or the sale, or to collect commissions, the prevailing party shall be entitled to receive from the other party a reasonable attorney fee to be determined by the court in which such action is brought." The complaint sought attorney fees.

In response to the complaint, the Goodins, Goodin Realty, and Guthrie (collectively, the seller defendants)³ jointly submitted a verified answer in which they denied, among other things, that the document attached to the complaint as Exhibit A represented the agreement entered into by plaintiffs and the Goodins. They did not deny, however, the allegations of paragraph XXIII of the complaint that plaintiffs and defendants had entered into a written agreement that consisted of the documents attached to the complaint as exhibits A and B.

After discovery proceedings, including the depositions of plaintiffs and certain of the defendants, plaintiffs voluntarily dismissed the action with prejudice. The seller defendants then moved to recover their attorney fees as costs under Code of Civil Procedure sections 1021, 1032, and 1033.5, and under the attorney fee provision in the real estate purchase agreement. In support of this motion, the seller defendants submitted a declaration by their attorney containing this statement: "By their Complaint filed May 13, 1988, Plaintiffs have placed in issue the Purchase Agreement dated March 7, 1987. A true and correct copy of that Agreement is attached hereto as Exhibit 'A.'" Attached to this declaration was a document identical to exhibit A to plaintiffs' complaint, except that it includes three additional pages. The first page bears the title "ADDENDUM TO PURCHASE AGREEMENT" and appears to have been executed on March 23, 1987; the second page is untitled, undated, unsigned, and contains terms identical to those in the addendum; and the third page bears

3. For purposes of determining their right to recover attorney fees as costs, we treat the seller defendants collectively, without attempting to draw any distinction among them, because they

the title "COUNTER OFFER" and appears to have been executed on March 8, 1987.

In opposition to the seller defendants' motion to recover attorney fees as costs, plaintiffs submitted a memorandum of points and authorities in which they argued that Civil Code section 1717 and this court's decision in *Olen, supra*, 21 Cal.3d 218, 145 Cal.Rptr. 691, 577 P.2d 1031, preclude an award of attorney fees under a contractual attorney fee provision following a voluntary dismissal of the action. In this memorandum, plaintiffs conceded that "[t]he contract on which the action was based provided for reasonable attorney fee[s] to the prevailing party to be determined by the court." They did not indicate, however, whether they conceded also that the contract at issue included the additional pages in the exhibit attached to the declaration of the seller defendants' attorney.

Rejecting plaintiffs' argument, the superior court granted the seller defendants' motion and awarded them \$16,546.90 in attorney fees as costs. The appellate record does not indicate whether the superior court made any findings resolving the factual issue of which documents, in addition to exhibit A to the plaintiffs' complaint, comprised the contract between the parties.

On plaintiffs' appeal from the order granting attorney fees as costs, the Court of Appeal affirmed. The Court of Appeal majority, in an opinion authored by Justice Smith and in which Justice Phelan concurred, held "that a party who successfully defends a tort action arising from a contract which entitles the winner in any litigation to an award of attorney fees is the 'prevailing party' and may recover such fees as an element of costs, even where the plaintiff dismisses the suit voluntarily." The majority rejected plaintiffs' reliance on Civil Code section 1717 on the basis that it applies only to actions upon a contract, whereas plaintiffs' action here sounded in tort. The majority rejected plaintiffs' reliance on this court's decision in *Olen, supra*, 21 Cal.3d 218, 145 Cal.Rptr. 691, 577 P.2d 1031, on the same basis, that the

have been jointly represented and have filed joint pleadings and briefs throughout this litigation, and because the parties have not argued that they should be treated other than collectively.

decision applies only to contract actions, whereas plaintiffs' action here sounded in tort. The Court of Appeal majority acknowledged that this reading of *Olen* conflicted with *Jue v. Patton* (1995) 33 Cal.App.4th 456, 39 Cal.Rptr.2d 364, a decision of a different division of the same appellate district, because in *Jue* the Court of Appeal had construed *Olen* as barring recovery of attorney fees in all pretrial dismissal cases, even those alleging only tort claims, where the sole basis for awarding attorney fees is a contractual attorney fee provision.

In a concurring opinion, Presiding Justice Kline agreed with the majority that Civil Code section 1717 "does not apply to this action," but he gave a different reason for this conclusion. In his view, "Civil Code section 1717 applies only to contracts authorizing fees to one party and not the other." Because the contractual attorney fee provision at issue here authorized attorney fees to "the prevailing party," it was a reciprocal provision and therefore, in the view of Presiding Justice Kline, outside the scope of Civil Code section 1717.

Presiding Justice Kline agreed with the majority that this court's decision in *Olen*, *supra*, 21 Cal.3d 218, 145 Cal.Rptr. 691, 577 P.2d 1031, does not apply to this action, but again he gave a reason different from the majority's. The reason *Olen* does not govern here, in Presiding Justice Kline's view, "is that subsequent actions of the Legislature have rendered it obsolete." Specifically, the Legislature rendered *Olen* "obsolete," according to Presiding Justice Kline, by enacting both Code of Civil Procedure section 1032, which provides that a prevailing party is entitled to costs and defines "prevailing party" as including a defendant in whose favor a dismissal is entered, and Code of Civil Procedure section 1033.5, which defines awardable costs as including attorney fees authorized by contract.

We granted review to resolve the conflict between the Court of Appeal's decision in this case, which generally follows the reasoning of *Kelley v. Bradelis* (1996) 45 Cal. App.4th 1819, 53 Cal.Rptr.2d 536 and *Honey Baked Hams, Inc. v. Dickens* (1995) 37 Cal. App.4th 421, 43 Cal.Rptr.2d 595, and the

Court of Appeal decisions in *Jue v. Patton*, *supra*, 33 Cal.App.4th 456, 39 Cal.Rptr.2d 364, and *Ryder v. Peterson* (1996) 51 Cal. App.4th 1056, 59 Cal.Rptr.2d 562.

II. DISCUSSION

A. Entitlement to Litigation Costs Generally

In seeking to recover the attorney fees they incurred in defending this action, the seller defendants contend that these expenses are recoverable as litigation costs. Accordingly, we begin with the question whether the seller defendants are generally entitled to recover their litigation costs in this action.

Whether a party to litigation is entitled to recover costs is governed by Code of Civil Procedure section 1032, which provides, in subdivision (b), that "[e]xcept as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." For the purpose of determining entitlement to recover costs, Code of Civil Procedure section 1032 defines "prevailing party" as including, among others, "a defendant in whose favor a dismissal is entered." (Code Civ. Proc., § 1032, subd. (a)(4).)

Because plaintiffs voluntarily dismissed this action with prejudice, the seller defendants are defendants in whose favor a dismissal has been entered. Accordingly, they are "prevailing parties" within the meaning of Code of Civil Procedure section 1032, subdivision (b), and are "entitled as a matter of right to recover costs" unless another statute expressly provides otherwise. Plaintiffs have not called to our attention, nor are we aware of, any statute that would preclude a cost award to the seller defendants in this action.

B. Recoverable Litigation Costs as Including Attorney Fees

Having determined that the seller defendants are generally entitled as a matter of right to recover their costs in this litigation, we next address the question whether the costs that the seller defendants may recover include the amounts they have incurred as attorney fees in defending this litigation.

[1] Code of Civil Procedure section 1033.5 provides, in subdivision (a)(10), that attorney fees are "allowable as costs under Section 1032" when they are "authorized by" either "Contract," "Statute," or "Law." Thus, recoverable litigation costs do include attorney fees, but only when the party entitled to costs has a legal basis, independent of the cost statutes and grounded in an agreement, statute, or other law, upon which to claim recovery of attorney fees. Accordingly, the seller defendants may recover their attorney fees as costs if, but only if, the seller defendants have an independent legal basis for recovery of attorney fees.

[2] The seller defendants do not contend that their claim for attorney fees has a legal basis that is both independent of the cost statutes and grounded in a statute or other noncontractual source of law.⁴ What they do contend is that recovery of the attorney fees they incurred in this litigation is a contractually based right, arising from an express provision of the real estate purchase agreement. We must determine, therefore, whether it has been established that the parties entered into a valid and enforceable real estate purchase agreement that contains an attorney fee provision and, if so, whether this provision entitles the seller defendants to recover their attorney fees following the voluntary dismissal of plaintiffs' action.

C. Contractual Right to Attorney Fees

In their complaint, plaintiffs alleged that they had entered into a real estate purchase agreement consisting of exhibits A and B attached to the complaint. In their answer to the complaint, the seller defendants did not deny this allegation. The document attached to the complaint as exhibit A included

4. The seller defendants have directed our attention to Code of Civil Procedure section 1021, which provides: "Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to their costs, as hereinafter provided." The Legislature enacted this section to codify the "American rule" that, ordinarily, "each party to litigation must bear the expense of its own attorney fees." (*City and County of San Francisco v. Sweet* (1995) 12

a provision for recovery of attorney fees in any litigation arising out of the execution of the agreement or the sale of the property. In their motion to collect attorney fees as costs, the seller defendants alleged that they had entered into an agreement with plaintiffs consisting of the document attached to the complaint as exhibit A and certain additional documents that may or may not have been identical to other exhibits attached to the complaint but not included in the appellate record (see fn. 1, *ante*). In their opposition to this motion, plaintiffs did not take issue with defendant's allegations regarding the contents of the purchase agreement. Accordingly, although there may be uncertainty as to some terms of the purchase agreement, it is undisputed that the parties entered into a purchase agreement that included an express provision for attorney fees in these words: "In the event legal action is instituted by the Broker(s), or any party to this agreement, or arising out of the execution of this agreement or the sale, or to collect commissions, the prevailing party shall be entitled to receive from the other party a reasonable attorney fee to be determined by the court in which such action is brought." Apart from plaintiffs' contentions that recovery of attorney fees after a voluntary dismissal is barred under Civil Code 1717 and *Olen, supra*, 21 Cal.3d 218, 145 Cal.Rptr. 691, 577 P.2d 1031, no issue has been raised regarding the validity or enforceability of either the agreement as a whole or its attorney fee provision.

[3] Having determined that the parties entered into a real estate purchase agreement that contains a facially valid and enforceable attorney fee provision, we proceed to decide whether, without considering Civil Code section 1717 and *Olen, supra*, 21 Cal.3d

Cal.4th 105, 115, 48 Cal.Rptr.2d 42, 906 P.2d 1196; see also *Trope v. Katz* (1995) 11 Cal.4th 274, 278-279, 45 Cal.Rptr.2d 241, 902 P.2d 259.) Code of Civil Procedure section 1021 does not independently authorize recovery of attorney fees. Rather, consistent with subdivision (a)(10) of Code of Civil Procedure section 1033.5, Code of Civil Procedure section 1021 recognizes that attorney fees incurred in prosecuting or defending an action may be recovered as costs only when they are otherwise authorized by statute or by the parties' agreement.

218, 145 Cal.Rptr. 691, 577 P.2d 1031, this provision entitles the seller defendants to recover their attorney fees following the voluntary dismissal of this particular action.

In their complaint in this action, plaintiffs alleged both a contract claim and various tort claims. Does the contractual provision permit the prevailing party to recover attorney fees incurred for the defense of each of these claims? We conclude that it does.

On its face, the provision embraces all claims, both tort and breach of contract, in plaintiffs' complaint, because all are claims "arising out of the execution of th[e] agreement or the sale." (See *Lerner v. Ward* (1993) 13 Cal.App.4th 155, 160-161, 16 Cal. Rptr.2d 486.) Plaintiffs do not argue otherwise. If a contractual attorney fee provision is phrased broadly enough, as this one is, it may support an award of attorney fees to the prevailing party in an action alleging both contract and tort claims: "[P]arties may validly agree that the prevailing party will be awarded attorney fees incurred in any litigation between themselves, whether such litigation sounds in tort or in contract." (*Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal. App.4th 1338, 1341, 5 Cal.Rptr.2d 154.)

[4] Are the seller defendants "prevailing part[ies]" within the meaning of their own agreement? To answer this question, we apply the ordinary rules of contract interpretation. "Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. (Civ.Code, § 1636.) Such intent is to be inferred, if possible, solely from the written provisions of the contract. (*Id.*, § 1639.) The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' (*id.*, § 1644), controls judicial interpretation. (*Id.*, § 1638.) Thus, if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning. (See, e.g., *Reserve Insurance Co. v. Pisciotto* (1982) 30 Cal.3d 800, 807, 180 Cal.Rptr. 628;

640 P.2d 764; *Crane v. State Farm Fire & Cas. Co.* (1971) 5 Cal.3d 112, 115, 95 Cal. Rptr. 513, 485 P.2d 1129, 48 A.L.R.3d 1089.)" (*AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 821-822, 274 Cal.Rptr. 820, 799 P.2d 1253.)

The purchase agreement does not define the term "prevailing party," nor is there any extrinsic evidence indicating that the parties ascribed to it a particular or special meaning. As used in California statutes, the term has more than one technical meaning. For purposes of the cost statutes, the term "prevailing party" includes a party in whose favor a judgment of dismissal has been entered. (Code Civ. Proc., § 1032, subd. (a)(4).) Under subdivision (b)(2) of Civil Code section 1717, however, there is no prevailing party when the action has been voluntarily dismissed. Because "prevailing party" has no settled technical meaning as including or excluding a party in whose favor a dismissal has been entered, we will assume, in the absence of evidence to the contrary, that the parties understood the term in its ordinary or popular sense.⁵

[5] Giving the term "prevailing party" its ordinary or popular sense, the seller defendants are the prevailing parties in this litigation. Plaintiffs' objective in bringing this litigation was to obtain the relief requested in the complaint. The objective of the seller defendants in this litigation was to prevent plaintiffs from obtaining that relief. Because the litigation terminated in voluntary dismissal with prejudice, plaintiffs did not obtain by judgment any of the relief they requested, nor does it appear that plaintiffs obtained this relief by another means, such as a settlement. Therefore, plaintiffs failed in their litigation objective and the seller defendants succeeded in theirs. Giving the term "prevailing party" its ordinary or popular meaning, the seller defendants are the "prevailing part[ies]" under their agreement with plaintiffs, and, if we consider only the rules of contract law, they are entitled to recover the amounts they incurred as attor-

5. To the extent it is inconsistent with this analysis, we disapprove *Sweat v. Hollister* (1995) 37

Cal.App.4th 603, 611, fn. 7, 43 Cal.Rptr.2d 399.

ney fees in defending all claims asserted in this action.

D. Civil Code Section 1717 and *Olen*

Having concluded that under the cost statutes and under the terms of their agreement with plaintiffs the seller defendants are entitled to recover their attorney fees as costs, we come to the main issue presented here, which is whether such recovery is precluded by either Civil Code section 1717 (hereafter section 1717) or the decision of this court in *Olen, supra*, 21 Cal.3d 218, 145 Cal.Rptr. 691, 577 P.2d 1031. To resolve this issue, we begin with descriptions of both section 1717 and *Olen* and then proceed to decide whether they apply on the facts of this case and, if so, what effect they have on defendants' claim for attorney fees.

1. Section 1717

The text of section 1717, as it concerns us here, reads:

"(a) In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.

"Where a contract provides for attorney's fees, as set forth above, that provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract.

"Reasonable attorney's fees shall be fixed by the court, and shall be an element of the costs of suit.

"Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract which is entered into after the effective date of this section. Any provision in any such contract which provides for a waiver of attorney's fees is void.

"(b)(1) The court, upon notice and motion by a party, shall determine who is the party

prevailing on the contract for purposes of this section, whether or not the suit proceeds to final judgment. Except as provided in paragraph (2), the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section.

"(2) Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section."

[6] The primary purpose of section 1717 is to ensure mutuality of remedy for attorney fee claims under contractual attorney fee provisions. (*Trope v. Katz, supra*, 11 Cal.4th 274, 285, 289, 45 Cal.Rptr.2d 241, 902 P.2d 259.) Courts have recognized that section 1717 has this effect in at least two distinct situations.

The first situation in which section 1717 makes an otherwise unilateral right reciprocal, thereby ensuring mutuality of remedy, is "when the contract provides the right to one party but not to the other." (*Olen, supra*, 21 Cal.3d 218, 223, 145 Cal.Rptr. 691, 577 P.2d 1031.) In this situation, the effect of section 1717 is to allow recovery of attorney fees by whichever contracting party prevails, "whether he or she is the party specified in the contract or not" (§ 1717, subd. (a)).

The second situation in which section 1717 makes an otherwise unilateral right reciprocal, thereby ensuring mutuality of remedy, is when a person sued on a contract containing a provision for attorney fees to the prevailing party defends the litigation "by successfully arguing the inapplicability, invalidity, unenforceability, or nonexistence of the same contract." (*North Associates v. Bell* (1986) 184 Cal.App.3d 860, 865, 229 Cal.Rptr. 305.) Because these arguments are inconsistent with a contractual claim for attorney fees under the same agreement, a party prevailing on any of these bases usually cannot claim attorney fees as a contractual right. If section 1717 did not apply in this situation, the right to attorney fees would be effectively unilateral — regardless of the reciprocal wording of the attorney fee provision allowing attorney

fees to the prevailing attorney — because only the party seeking to affirm and enforce the agreement could invoke its attorney fee provision. To ensure mutuality of remedy in this situation, it has been consistently held that when a party litigant prevails in an action on a contract by establishing that the contract is invalid, inapplicable, unenforceable, or nonexistent, section 1717 permits that party's recovery of attorney fees whenever the opposing parties would have been entitled to attorney fees under the contract had they prevailed. (See, e.g., *Reynolds Metals Co. v. Alperston* (1979) 25 Cal.3d 124, 128-129, 158 Cal.Rptr. 1, 599 P.2d 83; *North Associates v. Bell*, *supra*, at p. 865, 229 Cal.Rptr. 305.)

2. *Olen*

Olen concerned two actions to enforce a sublease containing a provision giving the sublessor (but not the sublessee) the right to recover attorney fees incurred to enforce the sublease. (*Olen, supra*, 21 Cal.3d 218, 220, 145 Cal.Rptr. 691, 577 P.2d 1031.) The sublessor sued in superior court to recover rent and in municipal court for unlawful detainer. (*Ibid.*) The sublessee vacated the premises to the sublessor, who sublet them again to another subtenant at a higher rent. (*Ibid.*) When the sublessor dismissed both actions with prejudice, the defendant sublessee moved in superior court for an award of costs including a \$35 filing fee and \$1,285 in attorney fees. (*Id.* at p. 221, 145 Cal.Rptr. 691, 577 P.2d 1031.) The superior court denied the motion for costs. (*Ibid.*) On appeal, this court concluded that the superior court had erred in disallowing the \$35 filing fee, but a bare majority⁶ of the court also concluded that the superior court had properly denied attorney fees as costs. (*Ibid.*)

In reaching this conclusion, the *Olen* majority acknowledged that under the cost statute, former Code of Civil Procedure section

1032,⁷ the sublessee, as a defendant in whose favor a dismissal had been entered, was entitled as a matter of right to recover his costs. (*Olen, supra*, 21 Cal.3d 218, 221, 145 Cal.Rptr. 691, 577 P.2d 1031.) But the *Olen* majority also recognized that, under Code of Civil Procedure section 1021, attorney fees are not recoverable as costs "[u]nless authorized by statute or agreement." (*Olen, supra*, at p. 221, 145 Cal.Rptr. 691, 577 P.2d 1031.) The sublessee claimed entitlement to attorney fees as authorized by section 1717. (*Olen, supra*, at p. 222, 145 Cal.Rptr. 691, 577 P.2d 1031.) As it then read, section 1717 authorized recovery of attorney fees to the "prevailing party" in "any action on a contract, where such contract specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract, shall be awarded to one of the parties. . . ." (*Olen, supra*, at p. 222, 145 Cal.Rptr. 691, 577 P.2d 1031.) But section 1717 then defined "prevailing party" simply as "the party in whose favor final judgment is rendered." (*Olen, supra*, at p. 222, 145 Cal.Rptr. 691, 577 P.2d 1031, italics omitted.)

The *Olen* majority concluded that a defendant in whose favor a dismissal had been entered was not a party in whose favor a judgment had been "rendered" (and thus not a "prevailing party") because rendition of judgment requires a judicial act by a court, whereas the entry of a dismissal is a ministerial act performed by the court clerk. (*Olen, supra*, 21 Cal.3d 218, 222, 145 Cal.Rptr. 691, 577 P.2d 1031.) The *Olen* majority further reasoned that denying an award of attorney fees as costs in this situation was consistent with the purpose of section 1717. The *Olen* majority observed, first, that before the enactment of section 1717, attorney fees were not recoverable as costs and therefore could not be included in a cost bill submitted after a voluntary dismissal. (*Olen, supra*, at p.

issue with the majority's conclusion that the sublessee was entitled to recover the filing fee.

6. The majority consisted of Justice Clark, who authored the opinion, Chief Justice Bird, and Justices Richardson and Manuel. Justice Mosk wrote a dissenting opinion (*Olen, supra*, 21 Cal.3d 218, 225, 145 Cal.Rptr. 691, 577 P.2d 1031), as did Justice Jefferson, sitting by assignment (*id.* at p. 226, 145 Cal.Rptr. 691, 577 P.2d 1031); Justice Tobriner signed both dissenting opinions. The dissenting justices did not take

7. Former Code of Civil Procedure section 1032, enacted in 1933, was repealed in 1986 and replaced by a new Code of Civil Procedure section 1032 addressing the same subject matter. (Stats. 1986, ch. 377, §§ 5-6, pp. 1578-1579.)

223, 145 Cal.Rptr. 691, 577 P.2d 1031.) The *Olen* majority acknowledged that the technical legal basis for this procedural bar appeared to have been removed by a change in the wording of the cost statute, but it nonetheless went on to say that it was "satisfied that sound public policy and recognized equitable considerations require that we adhere to the prior practice of refusing to permit recovery of attorney fees based on contract when the plaintiff voluntarily dismisses prior to trial." (*Ibid.*)

Citing certain appellate decisions as authority for the proposition "that the contractual provisions for attorney fees will not be inflexibly enforced and that the form of the judgment is not necessarily controlling, but must give way to equitable considerations" (*Olen, supra*, 21 Cal.3d 218, 224, 145 Cal. Rptr. 691, 577 P.2d 1031), the *Olen* majority further reasoned that section 1717 "reflects legislative intent that equitable considerations must prevail over both the bargaining power of the parties and the technical rules of contractual construction" (*Olen, supra*, at p. 224, 145 Cal.Rptr. 691, 577 P.2d 1031). Because the rest of the *Olen* majority's reasoning is central to the issue raised here, we quote it in full:

"Because award of contractual attorney fees is governed by equitable principles, we must reject any rule that permits a defendant to automatically recover fees when the plaintiff has voluntarily dismissed before trial. Although a plaintiff may voluntarily dismiss before trial because he learns that his action is without merit, obviously other reasons may exist causing him to terminate the action. For example, the defendant may grant plaintiff — short of trial — all or substantially all relief sought, or the plaintiff may learn the defendant is insolvent, rendering any judgment hollow. Such defendants may not recover attorney fees within the equitable principles of *Ecco-Phoenix Electric Corp. v. Howard J. White, Inc.* (1969) 1 Cal.3d 266, 81 Cal.Rptr. 849, 461 P.2d 33.] Moreover, permitting recovery of attorney fees by defendant in all cases of voluntary dismissal before trial would encourage plaintiffs to maintain pointless litigation in moot

cases or against insolvent defendants to avoid liability for those fees.

"It has been suggested that in pretrial dismissal cases the court should determine whether, and to what extent, the complaint is meritorious and award attorney fees accordingly. However, to arrive at that determination would require the court to try the entire case. The purpose of litigation is to resolve participants' disputes, not compensate participating attorneys. Our courts are sufficiently burdened without combat kept alive solely for attorney fees.

"In pretrial dismissal cases, we are faced with a Hobson's choice of either (1) adopting an automatic right to attorney fees, thereby encouraging the maintenance of pointless litigation and violating the equitable principles which should govern attorney fee clauses, (2) providing for application of equitable considerations, requiring use of scarce judicial resources for trial of the merits of dismissed actions, or (3) continuing the former rule, denying attorney fees in spite of agreement. We are satisfied that concern for the efficient and equitable administration of justice requires that the parties in pretrial dismissal cases be left to bear their own attorney fees, whether [the] claim is asserted on the basis of the contract or section 1717's reciprocal right." (*Olen, supra*, 21 Cal.3d 218, 224-225, 145 Cal.Rptr. 691, 577 P.2d 1031.)

In 1981, after this court's decision in *Olen, supra*, 21 Cal.3d 218, 145 Cal.Rptr. 691, 577 P.2d 1031, the Legislature amended section 1717. (Stats.1981, ch. 888, § 1, p. 3399.) It deleted the definition of "prevailing party" as "the party in whose favor final judgment is rendered," and added, among others, the provision, persisting in the current version of section 1717, that "there shall be no prevailing party" if the action "has been voluntarily dismissed or dismissed pursuant to a settlement of the case." (*Id.*, subd. (b)(2).)

E. Application of Section 1717 and *Olen* to This Action

1. Section 1717

[7] In his concurring opinion, Presiding Justice Kline took the position that section 1717 does not apply to this action because it

is restricted to unilateral attorney fee provisions — that is, provisions that give the attorney fees recovery right to one of the contracting parties but not to the other. Although this construction is consistent with the language of section 1717 as originally enacted (see Stats.1968, ch. 266, § 1, p. 578 [granting reciprocal right “where such contract specifically provides that attorney’s fees and costs . . . shall be awarded to one of the parties . . .”]), it is inconsistent with the language of section 1717 as it now reads. Since 1981, section 1717 has applied, in the statute’s own words, “where the contract specifically provides that attorney’s fees and costs . . . shall be awarded *either to one of the parties or to the prevailing party . . .*” (§ 1717, subd. (a), italics added; see Stats. 1981, ch. 888, § 1, p. 3399). Giving effect to the plain meaning of the statute’s words — and guided by its purpose of ensuring mutuality of remedy when a party sued on a contract containing a reciprocal attorney fee provision successfully defends on the basis that no contract was ever formed, that the contract is invalid, or that he or she was not a party to the contract — we conclude that section 1717 applies to contracts containing reciprocal as well as unilateral attorney fee provisions, including provisions, like the one at issue here, authorizing recovery of attorney fees by a “prevailing party.”⁸ Thus, section 1717 applies to the contractual attorney fee provision at issue here.

The Court of Appeal majority concluded that plaintiffs’ action was entirely outside the scope of section 1717 for a different reason — because the action asserted only tort claims. Recognizing that plaintiffs had framed their complaint as including one claim denominated “Breach of Contract,” the Court of Appeal majority concluded that “[t]he ‘breach of contract’ count is actually a misnomer, since the alleged ‘breach’ is the failure to disclose certain defects in the property, a claim rooted exclusively in tort.”

[8] We agree with the Court of Appeal majority that this action is outside the ambit of section 1717 insofar as it asserts tort claims. The operative language of section

8. To the extent it is inconsistent with this conclusion, we disapprove *Honey Baked Hams, Inc. v.*

1717 states that it applies “[i]n *any action on a contract*, where the contract specifically provides that attorney’s fees and costs, which are incurred *to enforce that contract*, shall be awarded either to one of the parties or to the prevailing party . . .” (§ 1717, subd. (a), italics added.) Consistent with this language, this court has held that section 1717 applies only to actions that contain at least one contract claim. (*Stout v. Turney* (1978) 22 Cal.3d 718, 730, 150 Cal.Rptr. 637, 586 P.2d 1228; see also *Moallem v. Coldwell Banker Com. Group, Inc.* (1994) 25 Cal.App.4th 1827, 1832–1833, 31 Cal.Rptr.2d 253.) If an action asserts both contract and tort or other non-contract claims, section 1717 applies only to attorney fees incurred to litigate the contract claims. (*Reynolds Metals Co. v. Alperson, supra*, 25 Cal.3d 124, 129–130, 158 Cal.Rptr. 1, 599 P.2d 83.)

Although we agree with the Court of Appeal majority that section 1717 is limited to contract claims, we do not agree with the Court of Appeal majority that plaintiffs mislabeled their “breach of contract” claim. Under that claim, the alleged breach did not consist of a “failure to disclose certain defects in the property,” as the Court of Appeal majority asserted. Rather, the complaint alleged that “defendants breached the contract by failing to provide for the premises to be without structural defect and roof leakage; failing to replace chimney caps; failing to install downspout; failing to repair broken front door lock; failing to complete work recommended by Dudley Termite report, including the second inspection; and all the work necessary for energy conservation ordinance clearance including the repair of the windows.” Thus, the complaint alleged a breach of contract consisting of the seller defendants’ failure to perform repairs and other remedial work required by the contract in connection with the sale. This claim sounds in contract, not tort, and is therefore an “action on a contract” within the meaning of section 1717.

[9] Because plaintiffs’ complaint includes a claim for breach of contract within the

Dickens, supra, 37 Cal.App.4th 421, 426, 43 Cal.Rptr.2d 595.

scope of section 1717, we must look to section 1717 to determine whether the seller defendants are "part[ies] prevailing on the contract" who may recover attorney fees incurred in the defense of that claim. As here relevant, subdivision (b)(2) of section 1717 provides: "Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section." Under section 1717, therefore, the seller defendants are not "part[ies] prevailing on the contract" and may not recover the attorney fees they incurred in the defense of the contract claim.

Defendants may be understood to argue, as Justice Baxter argues in his concurring and dissenting opinion, *post*, that even if, as we have concluded, they are not "prevailing part[ies]" as defined in section 1717, and thus they may not claim attorney fees under section 1717, their contractual right to recover attorney fees is not affected by section 1717. Stated differently, defendants argue in favor of a construction of section 1717 under which that provision operates only to *permit* recovery of attorney fees that would not otherwise be recoverable as a matter of contract law and never to *bar* recovery of attorney fees that would otherwise be recoverable as a matter of contract law. We reject this construction of section 1717 for two reasons.

First, this construction would be inconsistent with the legislative history of section 1717. That history generally reflects a legislative intent to establish uniform treatment of fee recoveries in actions on contracts containing attorney fee provisions and to eliminate distinctions based on whether recovery was authorized by statute or by contract. A holding that in contract actions there is still a separate contractual right to recover fees that is not governed by section 1717 would be contrary to this legislative intent. More specifically, the 1981 amendment of section 1717 followed *Olen, supra*, 21 Cal.3d 218, 145 Cal. Rptr. 691, 577 P.2d 1031, in which this court held that "recovery of attorney fees based on contract" is not permitted "when the plaintiff voluntarily dismisses prior to trial." (*Id.* at p. 223, 145 Cal. Rptr. 691, 577 P.2d 1031, italics added.) Among other things, we stat-

ed: "We are satisfied that concern for the efficient and equitable administration of justice requires that the parties in pretrial dismissal cases be left to bear their own attorney fees, whether [the] claim is asserted on the basis of the contract or section 1717's reciprocal right." (*Id.* at p. 225, 145 Cal. Rptr. 691, 577 P.2d 1031, italics added.) Thus, this court imposed a bar on the recovery of attorney fees in pretrial dismissal cases that operated not only in those cases in which the party seeking attorney fees necessarily relied on section 1717 but also in those cases in which the party seeking attorney fees would otherwise have a valid contractual attorney fee claim without resort to the provisions of section 1717.

By the 1981 amendment of section 1717, the Legislature codified this court's holding in *Olen*. (*Hsu v. Abbata* (1995) 9 Cal.4th 863, 873, 39 Cal. Rptr.2d 824, 891 P.2d 804.) Therefore, *Olen* is properly consulted to determine the meaning and scope of the language added by the 1981 amendment. To be consistent with the logic of *Olen*, that language should be construed as barring recovery of attorney fees in pretrial dismissal cases whether those fees are sought on the basis of the contractual provision or under section 1717.

Second, defendants' proposed construction would, in voluntary dismissal cases, defeat the underlying purpose of section 1717 to assure mutuality of remedy for attorney fees claims based on contractual attorney fee provisions. This is so because adoption of the proposed construction would mean that whenever an "action on a contract" terminated by voluntary dismissal, and thus there was no prevailing party for purposes of recovering attorney fees under section 1717, the right to recover attorney fees would be governed entirely by contract law and would depend on whether the contractual attorney fee provision was unilateral or reciprocal, and on whether the defendant had alleged that the contract was inapplicable, unenforceable, invalid, or nonexistent. In short, for all "action[s] on a contract" that terminate by voluntary dismissal or dismissal pursuant to settlement, this proposed construction of section 1717 would result in exactly the sort of

one-sided enforcement of contractual attorney fee provisions that section 1717 was intended to preclude.

[10] Accordingly, we construe subdivision (b)(2) of section 1717, which provides that "[w]here an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section," as overriding or nullifying conflicting contractual provisions, such as provisions expressly allowing recovery of attorney fees in the event of voluntary dismissal or defining "prevailing party" as including parties in whose favor a dismissal has been entered. When a plaintiff files a complaint containing causes of action within the scope of section 1717 (that is, causes of action sounding in contract and based on a contract containing an attorney fee provision), and the plaintiff thereafter voluntarily dismisses the action, section 1717 bars the defendant from recovering attorney fees incurred in defending those causes of action, *even though the contract on its own terms authorizes recovery of those fees.*

This bar, however, applies *only* to causes of action that are based on the contract and are therefore within the scope of section 1717. If the voluntarily dismissed action also asserts causes of action that do not sound in contract, those causes of action are not covered by section 1717, and the attorney fee provision, depending upon its wording, may afford the defendant a contractual right, not affected by section 1717, to recover attorney fees incurred in litigating those causes of action. Similarly, if a plaintiff voluntarily dismisses an action asserting *only* tort claims (which are beyond the scope of section 1717), and the defendant, relying on the terms of a contractual attorney fee provision, seeks recovery of *all* attorney fees incurred in defending the action, the plaintiff could not successfully invoke section 1717 as a bar to such recovery.

[11] In this regard, we reject plaintiffs' argument, based on their reading of subdivision (c)(5) of Code of Civil Procedure section 1033.5, that attorney fees due under a contractual attorney fee provision may be recovered as costs *only* when expressly allowed under the terms of section 1717, and thus

that attorney fees incurred to litigate tort or other noncontract claims, which are outside the scope of section 1717, may never be recovered as costs under a contractual attorney fee provision.

To understand plaintiffs' argument, it is necessary to review the language of Code of Civil Procedure section 1033.5. Subdivision (a)(10) of that section provides that attorney fees are recoverable as costs "when authorized by any of the following: [¶] (A) Contract. [¶] (B) Statute. [¶] (C) Law." As here relevant, subdivision (c)(5) of the same section provides: "Attorney's fees allowable as costs pursuant to subparagraph (B) of paragraph (10) of subdivision (a) may be fixed as follows: (A) upon a noticed motion, (B) at the time a statement of decision is rendered, (C) upon application supported by affidavit made concurrently with a claim for other costs, or (D) upon entry of default judgment. Attorney's fees allowable as costs pursuant to subparagraph (A) or (C) of paragraph (10) of subdivision (a) shall be fixed either upon a noticed motion or upon entry of a default judgment, unless otherwise provided by stipulation of the parties. [¶] Attorney's fees awarded pursuant to Section 1717 of the Civil Code are allowable costs under Section 1032 as authorized by subparagraph (A) of paragraph (10) of subdivision (a)." (Code Civ. Proc., § 1033.5, subd. (c)(5).)

Plaintiffs read the last sentence as meaning that "attorney's fees awarded pursuant to section 1717 are the only costs allowable under Section 1032 as authorized by subparagraph (A) of paragraph (10) of subdivision (a), (relating to contractual fees)." We find no support in the language of the statute, or otherwise, for the assertion that contractual attorney fees may be awarded as costs *only* under section 1717.

As is evident from its substance, subdivision (c)(5) of Code of Civil Procedure section 1033.5 is procedural, its purpose being to specify the *methods* by which a court may fix the amount of attorney fees claimed as costs. The subdivision lists four such methods — in response to a noticed motion, in a statement of decision, in response to an application made concurrently with a claim for other

costs, and upon entry of default judgment. The subdivision provides that if the legal basis of the attorney fees claim is a statute, any of these methods may be used, but if the legal basis is a contract or nonstatutory law, then only two of these methods — in response to a noticed motion or upon entry of default judgment — are permitted, unless the parties stipulate otherwise. Finally, the statute provides that *for the purpose of determining which methods are available*, attorney fee claims under section 1717 are to be treated as claims based on contract rather than as claims based on statute.

The Legislature apparently added this last provision because it recognized that fee claims under section 1717 are based in part on a contractual provision and in part on a statute (that is, section 1717). To avoid any uncertainty about the proper classification of section 1717 attorney fees claims, the Legislature specified that they should be regarded as claims based on contract. Had the Legislature intended to make attorney fees owing under a contractual attorney fee provision recoverable as costs *only* when authorized by section 1717, the logical place to express such a substantive restriction would have been subdivision (a)(10)(A) of Code of Civil Procedure section 1033.5. We decline to read subdivision (c)(5) of that section as imposing any such restriction.

We summarize our conclusions to this point. Under section 1717, the seller defendants are not “part[ies] prevailing on the contract” because that section specifies that there is no party prevailing on the contract when, as here, the plaintiffs have voluntarily dismissed the action, and therefore defendants may not recover the attorney fees they incurred in the defense of the contract claim. But this conclusion does not affect the seller defendants’ right to recover as costs the attorney fees they incurred in defense of the tort claims. Because section 1717 does not apply to those claims (*Reynolds Metals Co. v. Alperson*, *supra*, 25 Cal.3d 124, 129–130, 158 Cal.Rptr. 1, 599 P.2d 83; *Stout v. Turney*, *supra*, 22 Cal.3d 718, 730, 150 Cal.Rptr. 637, 586 P.2d 1228; *Moallem v. Coldwell Banker Com. Group, Inc.*, *supra*, 25 Cal.App.4th 1827, 1831–1832, 31 Cal.Rptr.2d 253), it does

not bar recovery of attorney fees that were incurred in litigation of those claims and that are otherwise recoverable as a matter of contract law.

2. *Olen*

Does this court’s holding in Olen, supra, 21 Cal.3d 218, 145 Cal.Rptr. 691, 577 P.2d 1031, bar recovery, under a contractual attorney fee provision, of attorney fees incurred for the defense of tort or other noncontract claims that are outside the scope of section 1717? How best to answer this question has divided the Courts of Appeal.

In *Jue v. Patton*, *supra*, 33 Cal.App.4th 456, 39 Cal.Rptr.2d 364, the Court of Appeal read *Olen, supra*, 21 Cal.3d 218, 145 Cal.Rptr. 691, 577 P.2d 1031, as establishing a broad rule that whenever a claim for attorney fees is based on a contractual attorney fee provision, attorney fees are not recoverable as costs if the action has terminated by pretrial dismissal. The *Jue* court cited our statement in *Olen* “that concern for the efficient and equitable administration of justice requires that the parties in pretrial dismissal cases be left to bear their own attorney fees, *whether [the] claim is asserted on the basis of the contract or section 1717’s reciprocal right.*” (*Olen, supra*, 21 Cal.3d 218, 225, 145 Cal.Rptr. 691, 577 P.2d 1031, italics added.) In the present case, the Court of Appeal read *Olen* as establishing a narrower rule applying only to those actions and claims that are subject to section 1717. Regarding the sentence from *Olen* just quoted, the Court of Appeal stated: “Given the nature of its prior discussion and the narrow question before it, we think it unlikely that the court intended this single sentence to announce a new rule governing pretrial dismissals extending beyond the scope of section 1717.” (See also *Kelley v. Bredelis, supra*, 45 Cal.App.4th 1819, 1828–1829, 53 Cal.Rptr.2d 536; *Honey Baked Hams, Inc. v. Dickens, supra*, 37 Cal.App.4th 421, 427, 43 Cal.Rptr.2d 595.)

This court’s subsequent references to *Olen, supra*, 21 Cal.3d 218, 145 Cal.Rptr. 691, 577 P.2d 1031, suggest that we have viewed that decision narrowly as deciding only the right *under section 1717* to recover attorney fees as costs in pretrial dismissal cases. For

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example, we have cited *Olen* for the proposition that “[c]ontractual fees should not be awarded under Civil Code section 1717 where plaintiffs voluntarily dismiss an action without prejudice before trial” (*Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 686, fn. 34, 186 Cal.Rptr. 589, 652 P.2d 437, italics added, original italics omitted), and we commented that this rule was “premised on the avoidance of pointless litigation . . . as well as statutory language providing that the prevailing party is the party in whose favor final judgment is rendered” (*ibid.*, italics added). More recently, we described *Olen* as a decision in which “this court determined that a defendant could not recover attorney fees under section 1717 when the plaintiff voluntarily dismissed the action before trial.” (*Hsu v. Abbata*, *supra*, 9 Cal.4th 863, 872, 39 Cal.Rptr.2d 824, 891 P.2d 804, italics added.)

[12] An appellate decision is not authority for everything said in the court’s opinion but only “for the points actually involved and actually decided.” (*Childers v. Childers* (1946) 74 Cal.App.2d 56, 61, 168 P.2d 218, italics omitted; accord, *Trope v. Katz*, *supra*, 11 Cal.4th 274, 284, 45 Cal.Rptr.2d 241, 902 P.2d 259.) In *Olen*, the point “actually involved and actually decided” was the right to recover attorney fees under section 1717 following voluntary pretrial dismissal of the action. The case did not present an issue concerning the right to recover attorney fees under a contractual attorney fee provision as applied to claims or actions sounding in tort rather than contract and thus outside the scope of section 1717. Therefore, *Olen*, *supra*, 21 Cal.3d 218, 145 Cal.Rptr. 691, 577 P.2d 1031, is not authority in the latter situation.

To read *Olen* as establishing a rule extending beyond the reach of section 1717 would mean that our decision did not merely engage in statutory construction of section 1717 but instead independently declared contractual attorney fee provisions unenforceable, on public policy grounds, in all pretrial dismissal cases. Historically, this court has been reluctant to declare contractual provisions void or unenforceable on public policy grounds without firm legislative guidance. (See *Ste-*

venson v. Superior Court (1997) 16 Cal.4th 880, 889–890, 66 Cal.Rptr.2d 888, 941 P.2d 1157; *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1095, 4 Cal.Rptr.2d 874, 824 P.2d 680.) When this court decided *Olen*, *supra*, 21 Cal.3d 218, 145 Cal.Rptr. 691, 577 P.2d 1031, there was no statutory or constitutional provision clearly articulating a public policy against enforcement of contractual attorney fee provisions in voluntary pretrial dismissal cases. In response to *Olen*, the Legislature barred attorney fee awards in voluntarily dismissed actions within the scope of section 1717, but the Legislature did not act to expand the scope of section 1717 to encompass tort and other noncontract claims arising from contracts containing broadly worded attorney fee provisions, nor did it enact separate legislation to address such claims or otherwise articulate public policy as permitting or precluding attorney fee awards as costs for such claims. Given this legislative inaction, we cannot assume that the Legislature views such awards as against public policy. Indeed, as Presiding Justice Kline observed in his concurring opinion in this case, the 1986 enactment of the current version of Code of Civil Procedure section 1032, defining “prevailing party” for purposes of costs as including a party in whose favor a dismissal has been entered, and the 1990 amendment of Code of Civil Procedure section 1033.5, defining awardable costs as including attorney fees authorized by contract, at least suggest that the Legislature does not view contractual attorney fee cost awards in voluntary pretrial dismissal cases as necessarily or invariably being against public policy. (See also *Kelley v. Bredelis*, *supra*, 45 Cal.App.4th 1819, 1829, 53 Cal.Rptr.2d 536; *Honey Baked Hams, Inc. v. Dickens*, *supra*, 37 Cal.App.4th 421, 427–428, 43 Cal.Rptr.2d 595.)

[13] Moreover, upon fresh consideration of the matter, we are of the view that the practical difficulties associated with contractual attorney fee cost determinations in voluntary pretrial dismissal cases are not as great as suggested by the majority in *Olen*, *supra*, 21 Cal.3d 218, 145 Cal.Rptr. 691, 577 P.2d 1031. The *Olen* majority soundly reasoned that attorney fees should not be

awarded *automatically* to parties in whose favor a voluntary dismissal has been entered. In particular, it seems inaccurate to characterize the defendant as the "prevailing party" if the plaintiff dismissed the action only after obtaining, by means of settlement or otherwise, all or most of the requested relief, or if the plaintiff dismissed for reasons, such as the defendant's insolvency, that have nothing to do with the probability of success on the merits. The *Olen* majority also soundly reasoned that scarce judicial resources should not be used to try the merits of voluntarily dismissed actions merely to determine which party would or should have prevailed had the action not been dismissed. But we do not agree that the only remaining alternative is an inflexible rule denying contractual attorney fees as costs in all voluntary pretrial dismissal cases. Rather, a court may determine whether there is a prevailing party, and if so which party meets that definition, by examining the terms of the contract at issue, including any contractual definition of the term "prevailing party" and any contractual provision governing payment of attorney fees in the event of dismissal. If, as here, the contract allows the prevailing party to recover attorney fees but does not define "prevailing party" or expressly either authorize or bar recovery of attorney fees in the event an action is dismissed, a court may base its attorney fees decision on a pragmatic definition of the extent to which each party has realized its litigation objectives, whether by judgment, settlement, or otherwise. (See *Hsu v. Abbata*, *supra*, 9 Cal.4th 863, 877, 39 Cal.Rptr.2d 824, 891 P.2d 804.)

9. To the extent they are inconsistent with this conclusion, we disapprove *Jue v. Patton*, *supra*, 33 Cal.App.4th 456, 39 Cal.Rptr.2d 364, and *Ryder v. Peterson*, *supra*, 51 Cal.App.4th 1056, 59 Cal.Rptr.2d 562.

We perceive no inconsistency between our conclusion here and the decision in *Rosen v. Robert P. Warmington Co.* (1988) 201 Cal.App.3d 939, 247 Cal.Rptr. 635, in which the Court of Appeal upheld the trial court's decision denying attorney fees following the dismissal of an action asserting both contract and tort claims arising from a real property lease agreement. The attorney fee provision at issue in that case, unlike the one at issue here, was narrowly drawn to cover only claims "to recover the possession of the demised premises, collect any money due ...

For all of these reasons, we conclude that this court's decision in *Olen*, *supra*, 21 Cal.3d 218, 145 Cal.Rptr. 691, 577 P.2d 1031, did not establish an inflexible rule of contract law operating beyond the scope of section 1717, but rather, as the Court of Appeal concluded here, *Olen* merely construed section 1717 and has been effectively superseded by the 1981 amendment of section 1717 codifying its holding.

III. CONCLUSION

As set forth above, we conclude that contractual attorney fee provisions are generally enforceable in voluntary pretrial dismissal cases except as barred by section 1717.⁹ Applying this rule to the facts presented here, we further conclude that the seller defendants are entitled under the attorney fee provision of the purchase agreement to recover as costs the amount they incurred in attorney fees to defend the tort claims asserted against them in this action, and that section 1717 does not bar recovery of these fees. But we also conclude that section 1717 does bar the recovery of attorney fees incurred in the defense of the breach of contract claim.¹⁰

The judgment of the Court of Appeal is reversed and the cause is remanded to that court for further proceedings consistent with this opinion.

GEORGE, C.J., and MOSK and CHIN, JJ., concur.

hereunder or enforce any other provision, condition or agreement of this lease...." (*Id.* at p. 941, fn. 1, 247 Cal.Rptr. 635.) Thus, the defendant had no contractual right under the lease to recover attorney fees incurred in defense of the tort claims.

10. We foresee that upon remand a question may arise regarding defendants' right to recover as costs attorney fees they incurred to litigate issues common to the contract and tort claims. (Cf. *Reynolds Metals Co. v. Alperson*, *supra*, 25 Cal.3d 124, 129-130, 158 Cal.Rptr. 1, 599 P.2d 83.) Because the Court of Appeal did not address this allocation issue, and because the parties did not brief it in this court, we decline to express any opinion here on its proper resolution.

MOSK, Justice, concurring.

I concur. Although I believe it is a close question, I agree with the majority that Civil Code section 1717 applies in this matter to bar recovery of attorney fees for defending contract claims after voluntary dismissal. I am persuaded that Civil Code section 1717 applies without regard to whether the attorney fee provision is drafted as a nonreciprocal or reciprocal agreement, based on the statute's reference to "any action on a contract, where the contract specifically provides that attorney's fees and costs . . . shall be awarded *either to one of the parties or to the prevailing party . . .*" (*Ibid.*, italics added.)

As the majority observe, in providing that "[w]here an action has been voluntarily dismissed . . . , there shall be no prevailing party for the purposes of this section . . ." Civil Code section 1717 effectively codified the majority decision in *International Industries, Inc. v. Olen* (1978) 21 Cal.3d 218, 145 Cal. Rptr. 691, 577 P.2d 1031, from which I dissented (*id.* at pp. 225-226, 145 Cal. Rptr. 691, 577 P.2d 1031 (dis. opn. by Mosk, J.)). *Olen* held, in my view incorrectly, that public policy and equitable considerations precluded recovery of attorney fees based on contract when the plaintiff voluntarily dismisses an action prior to trial. As the majority also observe, however, the Legislature subsequently enacted provisions at least suggesting that it does *not* view contractual attorney fee costs in the case of a voluntary pretrial dismissal as necessarily or invariably against public policy. (Maj. opn., *ante*, at p. 844 of 71 Cal. Rptr.2d, at p. 413 of 951 P.2d.) Thus, Code of Civil Procedure section 1032 defines "prevailing party" for the purposes of costs as *including* a party in whose favor a dismissal has been entered, and the 1990 amendment of Code of Civil Procedure section 1033.5 defines awardable costs as including attorney fees authorized by contract.

The apparent inconsistency on this point of public policy between the Civil Code section 1717 and Code of Civil Procedure sections 1032 and 1033.5 indicates the need for legislative reconsideration of the underlying question: Is an award of attorney fees fair for the party who prevails not in a trial but by virtue

of his opponent's voluntary dismissal? In my view, the answer is affirmative.

It is true that counsel was not required to participate in the travail of a contested trial, with all of its time-consuming complexities and uncertainties. Nevertheless the attorney whose client is the beneficiary of a dismissal has necessarily interviewed the client perhaps numerous times, may have sought witnesses, prepared pleadings, perhaps taken depositions and, in short, performed many or all of the preparations in anticipation of a contested trial. Although the trial did not materialize, substantial attorney services may have been performed and the desired result has prevailed.

Therefore I see no basic unfairness in an award of attorney fees to the party whose position prevails in the absence of a formal trial.

BAXTER, Justice, concurring and dissenting.

In order to assure mutuality of remedy with respect to contractually authorized attorney fees, Civil Code section 1717 (hereafter section 1717) creates a reciprocal right to such fees whenever an attorney fees clause benefits fewer than all of the parties involved in litigation over a contract containing such a clause. (§ 1717, subd. (a).) By its own terms, however, section 1717 does not permit recovery of attorney fees for the defense of an action that is voluntarily dismissed prior to trial. (§ 1717, subd. (b)(2).) The question we must decide today is this: Where, as here, a contract contains an attorney fees clause that is fully reciprocal in nature, does section 1717 defeat the prevailing parties' contractual right to recover attorney fees when the action arising out of that contract has been voluntarily dismissed? Although the majority respond to this question in mixed fashion, I believe the answer simply is no.

To clarify my position, I concur with the majority's conclusion that section 1717 does not defeat defendants' contractual right to recover attorney fees incurred in the litigation of plaintiffs' voluntarily dismissed tort causes of action. However, I conclude that section also presents no obstacle to defen-

dants' recovery of fees with respect to the voluntarily dismissed contract claim. Indeed, as I shall explain, an entirely different set of statutes governs here because both sides to the instant litigation are bound by a mutually beneficial or "bilateral" fee clause.

In California, the Legislature has long sanctioned the right of parties to contract for the recovery of attorney fees in the event of litigation. (Code Civ. Proc., § 1021, enacted 1872.) In 1990, legislation was enacted specifying that contractually authorized attorney fees "are allowable as costs" under Code of Civil Procedure section 1032. (Code Civ. Proc., § 1033.5, subd. (a)(10)(A), as amended by Stats.1990, ch. 804, § 1, p. 3551.) Under Code of Civil Procedure section 1032, a "prevailing party" is ordinarily entitled "as a matter of right" to recover costs in any action. (Code Civ. Proc., § 1032, subd. (b).) As defined by that statute, a prevailing party includes, *inter alia*, "a defendant in whose favor a dismissal is entered." (Code Civ. Proc., § 1032, subd. (a)(4).)

In the case before us, plaintiffs and defendants entered into a real estate purchase agreement that contained a reciprocal provision for attorney fees broadly covering both contract and tort claims. When plaintiffs discovered defects in the real estate they purchased from defendants, they filed a complaint that alleged both contract and tort causes of action. After discovery but before any trial, plaintiffs chose to voluntarily dismiss their action with prejudice.

As the majority correctly observe, defendants are entitled to recover their attorney fees as costs both under Code of Civil Procedure sections 1021, 1032 and 1033.5, and under the terms of their agreement with plaintiffs. (Maj. opn., *ante*, at pp. 834-837 of 71 Cal.Rptr.2d, at pp. 403-406 of 951 P.2d.) However, the majority determine that section 1717 bars the recovery of attorney fees incurred in the defense of the voluntarily dismissed contract claim. I disagree. The language and legislative histories of the relevant statutes make clear that section 1717 has no application in the instant case.

Code of Civil Procedure section 1021 is unambiguous in stating that "Except as attorney's fees are specifically provided for by

statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties...." As the majority apparently agree (maj. opn., *ante*, at p. 835, fn. 4 of 71 Cal.Rptr.2d, at p. 404, fn.4 of 951 P.2d), this statute evinces a legislative intent that attorney fees incurred in prosecuting or defending an action ordinarily are not recoverable as costs unless authorized by statute or by the parties' agreement. (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 127, 158 Cal. Rptr. 1, 599 P.2d 83.)

Prior to the enactment of section 1717, not all parties who prevailed in actions over contracts with attorney fees clauses could assert a contractual right to recover such fees. For instance, many contracts contained so-called "unilateral" fee clauses that provided the right to attorney fees to one party but not to the other. Concerned that parties not having the benefit of such clauses were at a serious disadvantage in litigation, the Legislature enacted section 1717 to establish "mutuality of remedy" and to prevent "oppressive use of one-sided attorney's fees provisions." (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 870, 39 Cal.Rptr.2d 824, 891 P.2d 804; *Reynolds Metals Co. v. Alperson*, *supra*, 25 Cal.3d at p. 128, 158 Cal.Rptr. 1, 599 P.2d 83; see generally Review of Selected 1968 Code Legislation (Cont. Ed. Bar 1968) at p. 35.)

As originally enacted in 1968, section 1717 provided in relevant part: "In any action on a contract, where such contract specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements...." (Stats.1968, ch. 266, § 1, p. 578.) As interpreted by case law, the statute accomplished several purposes. First, it created a reciprocal right to attorney fees when the contract at issue contained a unilateral fee clause. (See *International Industries, Inc. v. Olen* (1978) 21 Cal.3d 218, 223, 145 Cal.Rptr. 691, 577 P.2d 1031 (hereafter *Olen*).) Second, it permitted recovery of attorney fees when a nonsignatory to a con-

Cite as 951 P.2d 399 (Cal. 1998)

tract prevailed in defending a contract action, if the plaintiff would have been contractually entitled to attorney fees had it prevailed in enforcing the contract. (*Reynolds Metals Co. v. Alperson, supra*, 25 Cal.3d at p. 128, 158 Cal.Rptr. 1, 599 P.2d 83.) Third, it provided a procedural mechanism by which parties to either unilateral or bilateral attorney fee agreements were allowed to recover their attorney fees as items of costs rather than as special damages. (*Beneficial Standard Properties, Inc. v. Scharps* (1977) 67 Cal. App.3d 227, 231-232, 136 Cal.Rptr. 549 [bilateral provisions]; *T.E.D. Bearing Co. v. Walter E. Heller & Co.* (1974) 38 Cal.App.3d 59, 112 Cal.Rptr. 910 [unilateral provisions]; contra, *Mabee v. Nurseryland Garden Centers, Inc.* (1979) 88 Cal.App.3d 420, 152 Cal. Rptr. 31.)

In 1981, the Legislature amended section 1717. As pertinent here, the statute was divided into subdivisions and the substance of the language quoted above was placed in subdivision (a). Consistent with the case law cited above, subdivision (a) provided in express terms: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the prevailing party, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements..." (Stats. 1981, ch. 888, § 1, p. 3399.) Substantially similar language appears in the current version of the statute.¹ Although, as I mentioned previously and will later explain more fully, prevailing parties subject to bilateral fee agreements may now proceed under Code of Civil Procedure sections 1032 and 1033.5 to recover their contractual fees as costs, section 1717 remains vital for purposes of assuring mutuality of remedy for parties litigating under one-sided fee agreements.

1. As it currently reads, subdivision (a) of section 1717 provides in relevant part: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing

Subdivision (b)(2) was also added to section 1717 in 1981. The relevant portion of that provision, which has remained unchanged to this day, reads: "Where an action has been voluntarily dismissed . . . , there shall be no prevailing party *for purposes of this section*. . . ." (Italics added.) Thus, when a party relies upon section 1717 to establish a reciprocal right to attorney fees, the restriction set forth in subdivision (b)(2) will preclude recovery if the action has been voluntarily dismissed prior to trial. Conversely, when the contract itself establishes mutuality of remedy for all parties to an action on the contract, the restriction has no application and the "measure and mode of compensation of attorneys . . . is left to the agreement . . . of the parties." (Code Civ. Proc., § 1021.)

Even though section 1717, subdivision (b)(2), by its own terms specifies a restrictive definition of the term "prevailing party" strictly "*for purposes of th[at] section*" (italics added), the majority proceed to find such definition controlling whether or not resort to section 1717's reciprocity provisions is necessary to extend the benefit of an attorney fees clause to all of the parties to an action on a contract. To support such widespread application of subdivision (b)(2)'s bar, the majority rely in part upon the 1981 legislative amendment to subdivision (a) that revised its language to expressly provide that the party who is determined to be the prevailing party "shall be entitled to reasonable attorney's fees" in addition to other costs where the contract specifically provides that such fees and costs shall be awarded "*either to one of the parties or to the prevailing party* . . . whether he or she is the party specified in the contract or not." (§ 1717, subd. (a), italics added, as amended by Stats. 1981, ch. 888, § 1, p. 3399.) But while that language establishes in clear terms that attorney fees may be claimed as costs by any party, including a nonsignatory, who prevails in a contract action where the contract contains either a unilateral or a bilateral fee provision, it falls

party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs..." (Stats. 1987, ch. 1080, § 1, p. 3648.)

far short of suggesting that subdivision (b)(2)'s voluntary dismissal provision shall apply even when the claim for fees is not dependent upon the statute.

In an attempt to bolster their expansive reading of section 1717, the majority reach back to our 1978 decision in *Olen*, *supra*, 21 Cal.3d 218, 145 Cal.Rptr. 691, 577 P.2d 1031 to determine the meaning and scope of the voluntary dismissal provision.² (Maj. opn., *ante*, at p. 841 of 71 Cal.Rptr.2d, at p. 410 of 951 P.2d.) Emphasizing *Olen*'s conclusion that "concern for the efficient and equitable administration of justice requires that the parties in pretrial dismissal cases be left to bear their own attorney fees, whether [the] claim is asserted on the basis of the contract or section 1717's reciprocal right" (*Olen*, *supra*, 21 Cal.3d at p. 225, 145 Cal.Rptr. 691, 577 P.2d 1031, italics added), the majority perceive *Olen* as holding that, with respect to attorney fees incurred in litigation over contract claims, the voluntary dismissal bar extends both to fee claims based on section 1717 and to contractual fee claims that are independent of the provisions of section 1717. (Maj. opn., *ante*, at pp. 840-841 of 71 Cal.Rptr.2d, at p. 409-410 of 951 P.2d.)

In *Honey Baked Hams, Inc. v. Dickens* (1995) 37 Cal.App.4th 421, 43 Cal.Rptr.2d 595 (hereafter *Dickens*), the Court of Appeal exposed the flaw in the foregoing reasoning. As *Dickens* pointed out, *Olen* involved a situation in which the party seeking attorney fees had to rely exclusively on section 1717 because the contract at issue contained a nonreciprocal attorney fee provision in favor of the other party. (*Dickens*, *supra*, 37 Cal.App.4th at p. 426, 43 Cal.Rptr.2d 595; see *Olen*, *supra*, 21 Cal.3d at pp. 220, 222, 145 Cal.Rptr. 691, 577 P.2d 1031.) At the time *Olen* was decided, section 1717 did not expressly provide there would be no prevailing party in cases of voluntary dismissal; instead it simply defined the term "prevailing party" to mean "the party in whose favor final judgment is rendered." (Stats.1968, ch. 266, § 1, p. 578.) Relying on public policy and equitable considerations, *Olen* held that a defen-

dant is not entitled *under section 1717* to attorney fees as a prevailing party when the plaintiff has voluntarily dismissed its action prior to trial.

As *Dickens* explained, while it is true that *Olen* discussed claims for contractual fees that were not substantively dependent upon section 1717's reciprocity provisions, such discussion was limited to observing that the enactment of section 1717 removed a previously existing procedural bar to recovery of attorney fees as costs following a plaintiff's pretrial dismissal. (*Dickens*, *supra*, 37 Cal.App.4th at p. 427, 43 Cal.Rptr.2d 595; see *Olen*, *supra*, 21 Cal.3d at p. 223, 145 Cal.Rptr. 691, 577 P.2d 1031.) On that point, *Olen* appears to have been commenting on the fact that fairly recent case law had established that parties to contracts containing unilateral or bilateral attorney fee provisions could recover such fees either as special damages or as items of costs pursuant to section 1717. (See *Olen*, *supra*, 21 Cal.3d at p. 223, 145 Cal.Rptr. 691, 577 P.2d 1031, citing *T.E.D. Bearing Co. v. Walter E. Heller & Co.*, *supra*, 38 Cal.App.3d 59, 112 Cal.Rptr. 910 [unilateral provisions]; see also *Beneficial Standard Properties, Inc. v. Scharps*, *supra*, 67 Cal.App.3d at pp. 231-232, 136 Cal.Rptr. 549 [bilateral provisions].)

Putting the discussion into proper perspective, it is evident that when *Olen* purported to conclude that concern for efficiency and equity "requires that the parties in pretrial dismissal cases be left to bear their own attorney fees, whether [the] claim is asserted on the basis of the contract or section 1717's reciprocal right" (21 Cal.3d at p. 225, 145 Cal.Rptr. 691, 577 P.2d 1031, italics added), it was simply determining "that neither a defendant seeking substantive entitlement to fees by virtue of section 1717's reciprocity provisions nor a defendant claiming contractual fees who invoked section 1717's procedure could recover these fees as costs following a pretrial dismissal by the plaintiff." (*Dickens*, *supra*, 37 Cal.App.4th at pp. 427-428, 43 Cal.Rptr.2d 595; see also *Kelley v. Bredelis* (1996) 45 Cal.App.4th 1819, 1828-

2. The Legislature's addition of subdivision (b)(2) to section 1717 in 1981 is viewed as a codification of our holding in *Olen*, *supra*, 21 Cal.3d 218,

145 Cal.Rptr. 691, 577 P.2d 1031. (See *Hsu v. Abbara*, *supra*, 9 Cal.4th at p. 873, 39 Cal.Rptr.2d 824, 891 P.2d 804.)

1829, 53 Cal.Rptr.2d 536.) In other words, *Olen*'s bar on the recovery of attorney fees was limited to defendants relying either substantively or procedurally on section 1717's provisions to enforce a claim for attorney fees. (*Dickens, supra*, 37 Cal.App.4th at p. 428, 43 Cal.Rptr.2d 595.) Accordingly, to the extent the Legislature intended to codify *Olen* by adding subdivision (b)(2) to section 1717 in 1981 (see *Hsu v. Abbara, supra*, 9 Cal.4th at p. 873, 39 Cal.Rptr.2d 824, 891 P.2d 804), "this is all the limitation in subdivision (b)(2) embraces." (*Dickens, supra*, 37 Cal.App.4th at p. 428, 43 Cal.Rptr.2d 595; *Kelley v. Bredelis, supra*, 45 Cal.App.4th at p. 1829, 53 Cal.Rptr.2d 536.)

These narrower readings of *Olen* and section 1717 are supported by the latter's legislative history. In particular, legislative documents confirm that section 1717 was amended in 1981 in part to codify *Beneficial Standard Properties, Inc. v. Sharps, supra*, 67 Cal.App.3d 227, 136 Cal.Rptr. 549, which held that section 1717 provided an option for parties to bilateral fee agreements to recover attorney fees as costs instead of as special damages, and to effectively overrule other cases, such as *Mabee v. Nurseryland Garden Centers, Inc., supra*, 88 Cal.App.3d 420, 152 Cal.Rptr. 31, which held that section 1717 did not authorize the recovery of attorney fees as costs when a bilateral fee agreement was at issue. (See Sen. Republican Caucus, analysis of Sen. Bill No. 1028 (1981-1982 Reg. Sess.) as amended Aug. 24, 1981, pp. 1-2; Sen. Com. on Judiciary, Rep. on Sen Bill No. 1028 (1981-1982 Reg. Sess.) as introduced, p. 2; Sen. Democratic Caucus, analysis of Sen. Bill No. 1028 (1981-1982 Reg. Sess.) p. 1.)

Notably, nothing in section 1717's legislative history indicates that a purpose of the 1981 amendments was to make that section the exclusive basis for the recovery of contractual attorney fees. Likewise, none of the legislative analyses prepared in connection with the 1981 amendments suggests that the prohibition set forth at subdivision (b)(2) was intended to apply to fee claims that were neither substantively nor procedurally based upon section 1717's provisions. To the contrary, the language of the statute is quite

explicit in stating there are no prevailing parties after a pretrial dismissal "for purposes of *this* section." (§ 1717, subd. (b)(2), italics added; *Dickens, supra*, 37 Cal.App.4th at p. 428, 43 Cal.Rptr.2d 595.)

Legislative action since 1981 has eliminated any doubt that parties bound by fully reciprocal attorney fee agreements are entitled to recover their attorney fees as costs after pretrial dismissals. As originally enacted in 1986, Code of Civil Procedure section 1033.5 allowed recovery of attorney fees as costs only when "authorized by statute." (Code Civ. Proc., § 1033.5, subd. (a)(10), as added by Stats.1986, ch. 377, § 13, p. 1580.) In 1990, that statute was amended to provide that attorney fees are allowable as costs under Code of Civil Procedure section 1032 when authorized by either statute or contract. (Code Civ. Proc., § 1033.5, subd. (a)(10), as amended by Stats.1990, ch. 804, § 1, p. 3551.) Code of Civil Procedure section 1032, in turn, specifies that a prevailing party — explicitly defined as including "a defendant in whose favor a dismissal is entered" — is entitled "as a matter of right" to recover its costs except as otherwise expressly provided by statute. (Code Civ. Proc., § 1032, subds. (a)(4), (b).) Consequently, parties who have agreed to mutually beneficial fee agreements may now proceed under Code of Civil Procedure sections 1033.5 and 1032 to recover their attorney fees as costs following voluntary dismissals.

Code of Civil Procedure section 1033.5 was amended in other ways which confirm that section 1717 does not govern all contractual fee claims. In addition to the revision mentioned above, the statute was amended to specify that attorney fees authorized by contract are costs that shall be fixed either upon noticed motion or upon entry of a default judgment, unless otherwise stipulated by the parties. (Code Civ. Proc., § 1033.5, subd. (c)(5), as amended by Stats.1990, ch. 804, § 1, p. 3552.) At the same time, the statute was revised to provide that attorney fees awarded pursuant to section 1717 shall be fixed in the same manner applicable to contractually authorized fees. (Code Civ. Proc., § 1033.5, subd. (c)(5), as amended by Stats.1990, ch. 804, § 1, p. 3552.) In passing these amend-

ments, the Legislature declared its intent to clarify the "great uncertainty as to the procedure to be followed in awarding attorney's fees where entitlement thereto is provided by contract to the prevailing party." (Stats. 1990, ch. 804, § 2, p. 3552.) As recognized in *Dickens, supra*, 37 Cal.App.4th at page 429, 43 Cal.Rptr.2d 595, there would have been no need for the Legislature to include separate provisions "clarifying" application of the same procedure for both contract-based attorney fee claims and section 1717 attorney fee claims if all contract-based fee claims were necessarily subject to the provisions of section 1717.

On a final note, the majority fret that preserving a separate contractual right to recover fees that is not governed by section 1717 "would, in voluntary dismissal cases, defeat the underlying purpose of section 1717 to assure mutuality of remedy for attorney fee claims based on contractual attorney fee provisions." (Maj. opn., *ante*, at p. 841 of 71 Cal.Rptr.2d, at p. 410 of 951 P.2d.) However, as the majority's analysis on the issue of tort litigation fees confirms, section 1717 was never intended to guarantee mutuality of remedy in every action involving a contractual fee provision. In any event, recognizing that section 1717 does not affect the contractual rights of parties who are bound by mutually beneficial attorney fee clauses clearly would be consistent with section 1717's central purpose to assure mutuality of remedy.

To summarize, after plaintiffs in this case voluntarily dismissed their complaint, defendants became entitled to recover all of their contractually authorized attorney fees as costs under the terms of their agreement and under Code of Civil Procedure sections 1021, 1032 and 1033.5. Section 1717 — which now functions primarily to establish mutuality of remedy when ordinary application of contract principles would otherwise preclude parties prevailing in contract actions from recovering their attorney fees — simply has no bearing where, as here, the parties are already contractually bound by a fully reciprocal fee clause. In holding that section 1717 bars the recovery of attorney fees for parties who have willingly agreed amongst themselves to

evenhanded availability of fees in cases of voluntary dismissal, the majority not only frustrate the right of parties to contract for such fees (Code Civ. Proc., § 1021) but also defeat the Legislature's clearly expressed intent that "a defendant in whose favor a dismissal is entered" (Code Civ. Proc., § 1032, subd. (a)(4)) is entitled "as a matter of right" (Code Civ. Proc., § 1032, subd. (b)) to recover its contractually authorized attorney fees as costs (Code Civ. Proc., § 1033.5, subd. (a)(10)(A)).

I would affirm the judgment of the Court of Appeal.

WERDEGAR and BROWN, JJ., concur.



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71 Cal.Rptr.2d 851

EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN, Plaintiff and Respondent,

v.

TUTOR-SALIBA CORPORATION, Defendant and Appellant.

No. S058283.

Supreme Court of California.

March 2, 1998.

Workers' compensation insurance carrier intervened in personal injury action by subcontractor's employee against general contractor, seeking reimbursement for benefits paid to worker. After judgment was entered against carrier, general contractor moved for attorney fees. The Superior Court, Los Angeles County, No. SOC 096588, Robert L. LaFont, J., denied motion, and general contractor appealed. The Court of Appeal, 59 Cal.Rptr.2d 92, affirmed. Granting general contractor's petition for review, the Supreme Court, Brown, J., held that carrier, as subrogee of its insured, was bound by contract between subcontractor and general contractor providing for recovery of at-