73869-1

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No. 73869-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BIRNEY DEMPCY and MARIE DEMPCY, husband and wife, and their marital community, Appellants

v.

CHRIS AVENIUS and NELA AVENIUS, husband and wife, and their marital community, Respondents

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BRIEF OF RESPONDENTS

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1. Statement of the Case

For purposes of this appeal, the relevant underlying facts are relatively simple.

1.1 Parties and Properties.

The Respondents Christopher and Nela Avenius reside at 425 94th Ave SE, Bellevue, WA 98004 ("Avenius Property"). CP 8. The Respondents, Birney and Marie Dempcy reside at 429 94th Ave SE, Bellevue, WA 98004 ("Dempcy Property"). CP 8. The Avenius Property is immediately adjacent to and north of the Dempcy Property. CP 11, 17. Both properties are developed with single family residences.

Both the Avenius Property and the Dempcy Property are part of the Pickle Point Association, a private homeowners association. CP 121, 134-135. There are a total of 4 properties that are part of the Pickle Point Association. CP 121, 134-135. Those 4 properties are owned by the Appellants, the Respondents, Jack Shannon (CP 8) and Radek Zemel. CP 9. Mr. Shannon and Mr. Zemel were sued by the Appellants but that part of the lawsuit is the subject of another unrelated appeal case (Case No. 73369-9-I). Mr. Shannon and Mr. Zemel were not parties in the trial below nor are they parties to this appeal. The Pickle Point Association

and its members and properties are governed by a set of recorded Declaration of Protective Covenants, Restrictions, Easements, and Agreements for Pickle Point Association recorded in 1990 under King County Recording No. 9006081651 ("Declarations"). CP 121-136.

1.2 Appellants' Allegations.

The Appellants alleged that the Respondents' violated Section 2.6 of the Declarations. CP 11-12. Section 2.6 of the Declarations prohibited fences, hedges and mass plantings between the Dempcy Property and the Avenius Property. CP 24, 122-123.

With respect to the alleged violations of Section 2.6 of the Declarations, the Appellants raised three (3) separate and distinct issues or breaches of the Declarations. First, there was an existing fence and hedge on the boundary between the Avenius Property and the Dempcy Property, which fence and hedge had been in place since 1989-1999 when it was built by a prior owner of the Avenius Property. CP 25.

Second, the Respondents built a trellis on the Avenius Property and somewhat near the common boundary between the Avenius Property and the Dempcy Property. CP 26.

Third, the Respondents planted 11 widely spaced trees near the common boundary between the Avenius Property and the Dempcy Property. CP 26, 42.

The existing fence and hedge, trellis and 11 trees were not physically connected in any way (CP 42) and they were built/planted at different times by different owners of the Avenius Property. CP 25. The Appellants brought all 3 alleged breaches to trial asking the judge to order removal of all 3 alleged violations. CP 24.

The statements made in the Appellants' Brief about the claims they made at trial are not consistent or accurate. They state that the only claim they brought under Section 2.6 of the Declarations was "whether certain plantings violated PPD Section 2.6." Appellants' Brief at Pages 2-3. But they then go on to state that "a massive hedge/fence . . . violated PPD Section 2.6." Appellants' Brief at Page 3. Then they claim that there were "scattered plantings . . . that violated PPD Section 2.6." Appellants' Brief at Page 3. Regardless of the inconsistent mischaracterizations of their own claims by the Appellants in their own brief, the Appellants actually went to trial on three (3) alleged breaches of Section 2.6 of the Declarations. As the Honorable Chad Allred stated in his Memorandum

Decision, "[T]he Dempcys seek a ruling that requires the Aveniuses to remove a fence, a hedge, a trellis and the 11 trees mentioned above." CP 24.

1.3 Trial Court Decision.

After a bench trial, Judge Allred made his decision. Judge Allred ruled in favor of the Appellants regarding the existing fence and hedge (they were ordered to be removed because they were in violation of Section 2.6 of the Declarations) (CP 25-26, 55) but he ruled in favor of the Respondents on the trellis and 11 trees (they were allowed to remain in place because they were not in violation of Section 2.6 of the Declarations). CP 26, 55. These substantive decisions by Judge Allred are not being appealed by the Appellants. Appellants' Brief at Page 1.

The Appellants are being disingenuous when they state that "[t]he Memorandum Decision could not be any clearer that there was only one affirmative judgement: 'Based on the decision above, it is ORDERED that: 1. The Aveniuses must remove the Fence and Hedge by July 31, 2015.'" Appellants' Brief at Page 9. This quotation of only part of Judge Allred's decision is misleading. A closer look at all of Judge Allred's written orders reveals the full extent of his rulings. In the Order portion of

his Memorandum Decision, he does make the statement set forth above. CP 26. But he also states that "[a]ll other relief requested in the trial before Judge Allred is denied with prejudice." CP 26. The relief denied by Judge Allred included the Appellants' request to have the Respondents remove their trellis and 11 trees, both of which were brought as separate violations of Section 2.6 of the Declarations. CP 24, 26.

Moreover, the Judgment entered on August 4, 2015 by Judge Allred states the same thing. The Respondents must remove their fence and hedge but the Appellants' attempts to force the Respondents to remove their trellis and 11 trees were denied with prejudice. CP 55.

1.4 No Award of Attorney Fees.

Following the trial, the Appellants made a motion for recovery of attorney fees. CP 74-83. Judge Allred ruled that because the Appellants had prevailed on the fence and hedge and the Respondents had prevailed by successfully defending against the Appellants' claims to remove the trellis and 11 trees, that neither side prevailed. CP 260. Because neither side prevailed, attorney fees were denied as to both parties. CP 260.

It is only this attorney fee determination by Judge Allred that is being appealed by the Appellant. CP 262; Appellants' Brief at Pages 1, 6. See also, December 3, 2015 letter from Appellants' counsel to this Court (attached in Appendix).

2. Summary of Argument

2.1 The Memorandum Decision of Judge Allred is the only record before this court regarding the trial court's decision that the Appellants prevailed on some significant issues and lost on other significant issues.

2.2 A party can be a prevailing party by successfully defending against an issue even if it did not bring a claim.

2.3 If each party prevails on a major issue (one party successfully prevailing on some issues and the other successfully defending against other issues), then neither side is deemed to be the prevailing party for purposes of awarding attorney fees under a contract.

2.4 If neither side is determined to be the prevailing party, then neither side is awarded attorney fees.

2.5 However, as the prevailing party on appeal, the Respondents are entitled to an award of attorney's fees under RAP 18.1.

2.6 Citation to the Other Appeal Case by the Appellants is Inexplicable.

3. Argument

3.1 No Evidence Before This Court Regarding the Division of a Single Claim Into Multiple Claims by the Trial Court.

The Appellants allege error by Judge Allred because he "looked at one claim . . . but divided it into three distinct parts." Appellants' Brief at Page 7. But the Appellants have presented no evidence from the trial court to support this position. The trial transcript was not submitted to this Court. None of the evidence submitted to Judge Allred at trial was submitted to this Court. Judge Allred did not say he divided the Appellants' claims. The definitive (and undisputed) finding of fact on this issue is set forth in Judge Allred's Order Denying Motions for Attorney Fees:

> "Neither side disputes that removing the fence and hedge was a major issue. But the Dempcys argue that their request to remove the trellis and 11 trees was not significant (thus, the Aveniuses did not prevail on a major issue). This is inconsistent with the Dempcys' arguments at trial, where they vigorously urged removing the trellis and trees based on the restrictive covenant. The Court finds that the request to remove the trellis and trees was a major issue."

CP 260.

This statement is critical for several reasons. First, it is a finding of fact made by Judge Allred. This is not a legal conclusion. Second, these findings are unchallenged by the Appellants. As set forth above, there is no evidence presented to this Court regarding the significance of the several issues presented to Judge Allred and whether the Appellants fought vigorously or not. The Appellants do not challenge these factual findings nor do they present any evidence to this Court on which to base such a challenge. Because the Appellants did not challenge any of Judge Allred's factual findings, they are verities on appeal. Kyle v. Williams, 139 Wash.App. 348, 353, 161 P.3d 1036 (2007).

It should be noted that nowhere in the record before this Court did Judge Allred say anything about dividing a single claim into 3 claims. He just made a determination that there were 3 major issues or Declaration breaches brought to trial by the Appellants, that all of the 3 issues were significant, and that the Respondents prevailed on more of the major issues than did the Appellants. CP 260. Although it may not be particularly germane to this appeal, it is ironic to note that the Appellants

seek to recover their attorney fees in a case in which they lost on more of the issues they brought to trial than they won!

3.2 Whether the Trial Judge Committed an Error of Law is the Correct Standard of Review.

The Appellants incorrectly identify the standard of review in this case. The Appellants state: "The meaning of an attorney's fee statute is a question of law that is reviewed de novo." Appellants' Brief at Page 8. But this case involves the interpretation of whether one side or the other is the prevailing party, not the meaning of an attorney fee statute.

> "The determination of the prevailing party is often reviewed quite closely on appeal, and at least one court has described it as a mixed question of law and fact to be reviewed under the error of law standard. Sardam v. Morford, 51 Wash.App. 908, 911, 756 P.2d 174 (1988)."

Eagle Point Condominium Owners Association v. Coy, 102 Wash. App. 697, 706, 9 P.3d 898, 904 (2000). See also, Newport Yacht Basin Association of Condominium Owners v. Supreme Northwest, Inc., 168 Wash.App. 86, 98, 285 P.3d 70, 78, review denied, 175 Wn.2d 1015, 287 P.3d 10 (2012). In such cases involving a mixed question of fact and law, this Court should not retry the facts de novo, but instead should apply the law to the facts found by the trial judge. Renton Education Association v.

Public Employment Relations Commission, 101 Wash.2d 435, 441, 680 P.2d 40 (1984).

As set forth above, the unchallenged findings of fact are verities on appeal. By not appealing or challenging the facts, the Appellants only appeal Judge Allred's application of the law to the facts that he found. And contrary to the Appellants' claim, Judge Allred correctly applied the law to the facts he found.

3.3 Party Prevails By Successfully Defending Against a Claim.

The Appellants completely ignore established case law that a defendant successfully defending against a claim can be a prevailing party. Marassi v. Lau, 71 Wash. App. 912, 918, 859 P.2d 605, 608 (1993), abrogated on other grounds, Wachovia SBA Lending, Inc. v. Kraft, 165 Wash. 2d 481, 200 P.3d 683 (2009). The Appellants repeatedly state that the Respondents cannot be the prevailing party because the Respondents brought no claims for relief of their own under the Declarations. Appellants' Brief at Pages 7, 11. Yet case law states over and over that a defendant who successfully defends against a claim can indeed be a prevailing party.

> "Moreover, a successful defendant can also recover as a prevailing party. Marine Enters., Inc. v. Sec. Pac. Trading Corp., 50 Wash.App. 768, 772, 750 P.2d 1290 (1988). The defendant need not have made a counterclaim for affirmative relief, as the defendant can recover as a prevailing party for successfully defending against the plaintiff's claims. See Marassi, 71 Wash.App. at 916, 859 P.2d 605."

Newport Yacht Basin Association of Condominium Owners v. Supreme Northwest, Inc., 168 Wash.App. 86, 99, 285 P.3d 70, 78, review denied, 175 Wn.2d 1015, 287 P.3d 10 (2012). The Appellants' position that one must bring an affirmative claim in order to be a prevailing party for purposes of awarding attorney fees is simply not supported by case law in Washington.

3.4 If Each Side Prevails on a Major Issue, Then There is No Prevailing Party.

The attorney fee provision at issue is set forth in Section 6.1 of the Declarations. It states:

> "The prevailing party in any action brought to enforce the Covenants contained in this Declaration shall have the right to collect attorney's fees, court costs, and other expenses of litigation, in addition to any damages which may be awarded."

CP 128.

As Judge Allred correctly ruled, "[e]ach side prevailed on a major issue, [so] there is no 'prevailing party,' and, therefore, the restrictive covenant does not provide for an award of attorney fees or costs (nor does RCW 4.84)." CP 260. The appellate courts of this state agree with Judge Allred's analysis.

> "If both parties prevail on major issues, however, there may be no prevailing party. American Nursery Prod. Inc. v. Indian Wells Orchards, 115 Wash.2d 217, 234-35, 797 P.2d 477 (1990); Puget Sound Serv. Corp. v. Bush, 45 Wash.App. 312, 320-21, 724 P.2d 1127 (1986). In such situations, neither party is entitled to an attorney fee award. American Nursery, 115 Wash.2d at 235, 797 P.2d 477; Puget Sound, 45 Wash.App. at 321, 724 P.2d 1127. Accordingly, when both parties to an action are afforded some measure of relief and there is no singularly prevailing party, neither party may be entitled to attorney fees. Marine Enter., Inc. v. Security Pacific Trading Corp., 50 Wash.App. 768, 772, 750 P.2d 1290, review denied 111 Wash.2d 1013 (1988)."

Phillips Building Co. v. An, 81 Wash. App. 696, 702-03, 915 P.2d 1146, 1149-50 (1996).

Judge Allred cited two cases on which his decision was based - American Nursery Products, Inc. v. Indian Wells Orchards, 115 Wash.2d 217, 797 P.2d 477 (1990) and Mellon v. Regional Trustee Services Corp., 182 Wash.App. 476, 334 P.3d 1120 (2014). CP 260. In American Nursery Products, the appellant (American Nursery) contracted with the

respondent (Indian Wells) to provide tree nursery services for the respondent. The respondent was to provide apple trees to the appellant and the appellant was to grow them and ultimately deliver them to the respondent's orchard after they had matured. The contract contained an exclusionary clause which excluded consequential damages in the event of a breach. The appellant failed to deliver all of the contracted for trees and the respondent failed to pay the full amount due under the contract. Both sides filed claims against the other. The Washington Supreme Court held in favor of the respondent and awarded damages. However the Supreme Court also found for the appellant that the exclusionary clause applied and therefore the respondent could not recover consequential damages. Both parties sought attorney fees under RAP 18.1 as the prevailing party. The Supreme Court held:

> "However, because both parties have prevailed on major issues, neither qualifies as the prevailing party under the contract. See Sardam v. Morford, 51 Wash.App. 908, 756 P.2d 174 (1988). We decline to award attorney fees on appeal."

American Nursery Products, Inc. v. Indian Wells Orchards, 115 Wash. 2d 217, 234-35, 797 P.2d 477, 487 (1990). See also, City of Lakewood v. Koenig, 160 Wash.App. 883, 896, 250 P.3d 113, 120 (2011);

Contrary to the Appellants' position, the key is not whether the parties made claims or prevailed on claims. The analysis must focus on issues, not claims. Thus even though the Respondents did not make any counterclaims for violations of the Declarations, the Respondents did prevail by winning on 2 of the 3 major issues brought by the Appellants.

In Mellon, the appellants (Mellon) borrowed money from IndyMac to purchase a home. When the appellants encountered financial difficulties, they entered into a forbearance agreement with IndyMac. The appellants were unable to maintain their payments under the forbearance agreement so IndyMac foreclosed. The respondent (Regional Trustee) was the trustee foreclosing on IndyMac's deed of trust. The appellants filed suit under the Washington deed of trust foreclosure act claiming that IndyMac acted in bad faith and the appellants also claimed that IndyMac violated Washington's consumer protection act. IndyMac defended on the grounds that federal law preempted state law. The Court of Appeals upheld the dismissal of the appellants' non-CPA claims. Mellon v. Regional Trustee Services Corp., 182 Wash.App. at 487. But the court also held that the appellants' CPA claims could proceed. Id. at 496. On the issue of attorney fees, the Court of Appeals held:

> "The parties seek appellate attorney fees and costs as the prevailing party under the deed of trust, RCW 4.84.330, and RAP 18.1(a). But considering our analysis, each party prevails on a major issue and loses on others. Thus, no party stands as the clear victor meriting such an award."

Mellon v. Regional Trustee Services Corp., 182 Wash. App. at 498-99.

The Appellants mischaracterize Judge Allred's ruling when they state that the trial judge's ruling was "[b]ased on the concept that Appellants did not prevail as to one hundred percent of their claim even though they caused the covenant to be enforced." Appellants' Brief at Page 6. Judge Allred did not rule this way. Instead he made factual findings that there were several significant issues litigated by the Appellants and they won one and lost 2 others. CP 260. He then applied case law to those now-unchallenged findings of fact, determined that both sides had prevailed on some issues and thus neither side was the prevailing party and therefore neither side should be awarded their attorney fees. CP 260.

The only 3 cases cited by the Appellants to support their position that they were the prevailing party are distinguishable. The Appellants cite only to a mechanic's lien foreclosure case and single claim cases in which the plaintiffs did not obtain the full amount of monetary

damages they sought but yet they were deemed the prevailing party for attorney fee purposes. None of the Appellants' cited cases involves cases where the plaintiffs sought relief on several distinct issues and where the plaintiffs won some and lost some as the Appellants did in our case.

In Stott v. Cervantes, 23 Wash.App. 346, 595 P.2d 563 (1979), cited by the Appellants, the plaintiff/buyer of real property claimed money damages against the seller because of misrepresentations made by the seller as to the condition of the property. The plaintiffs' money damage claim was the only claim before the court. Instead of being awarded all of their claimed money damages, the court awarded the plaintiff/buyer only about 1/3 of the money damages claimed. Id. at 564. The lower court did award costs to the plaintiff/buyer but did not award attorney fees to the plaintiff/buyer because the plaintiff/buyer was awarded less than the amount they sought in money damages. The Court of Appeals reversed and did award the plaintiff their attorney fees reasoning that even if the plaintiff did not recover all that they sought, they still won because they were awarded part of the money damages they sought. The Court of Appeals also reasoned that if the plaintiff was the prevailing party for purposes of awarding costs, they must be the prevailing party for purposes

of awarding attorney fees. Id. at 564. Unlike the case before this court, the Stott case was only about a single money damage claim in which the plaintiffs won their cause of action but were not awarded all of their claimed money damages. The plaintiff did not lose anything in the case. They prevailed but they simply were awarded a little less money than what they sought.

Silverdale Hotel Associates v. Lomas & Nettleton Co., 36 Wash.App. 762, 677 P.2d 773 (1984), also cited by Appellants, is similar to Stott. Silverdale entered into a construction loan agreement with Lomas & Nettleton, the successor lender. The lender breached the loan agreement by failing to pay three legitimate draw requests made by Silverdale so Silverdale could not pay its contractor Wick. Id. at 764-765. Silverdale sued the lender for money damages as a result of the lender's failure to fund the draw requests. The trial court awarded money damages to Silverdale but did not award lost profits claimed by Silverdale nor did the trial court award attorney fees to Silverdale as the prevailing party. Id. at 765. The Court of Appeals reversed as to attorney fees. Id. at 774. As in the Stott case, the plaintiff brought a single claim for money damages and the Court of Appeals found that even though the plaintiff did not

recover all of the money it sought in damages, it did prevail and money damages were awarded so the plaintiff was entitled to attorney fees as the prevailing party. Id. at 774. Again, unlike the case before this court, the plaintiff in Silverdale did not lose anything. They just did not win as much money as they sought to recover.

The citation to the Silverdale case (a Division 2 case) by the Appellants is particularly inapposite because it was distinguished by this Court in Marassi v. Lau, 71 Wash.App. 912, 859 P.2d 605, abrogated on other grounds, Wachovia SBA Lending, Inc. v. Kraft, 165 Wash. 2d 481, 200 P.3d 683 (2009). Marassi brought several claims to trial against appellant Dynasty Development Corporation arising out of the purchase of a new house by Marassi from Dynasty. The claims included breach of contract, negligence, fraudulent conveyance, and misrepresentation. Marassi v. Lau, 71 Wash.App. at 913. The amount of money damages sought at trial by Marassi was approximately $88,000. Marassi won on only 2 of the original 12 claims it brought and only received a damage award of approximately $15,000 on the 2 claims it won. Id. at 914-916. Marassi sought to recover attorney fees as the sole prevailing party and thus cited the Silverdale case for the proposition that one does not have to

recover 100% of its claimed damages in order to be the prevailing party for purposes of an attorney fee award. This Court disagreed that the holding of Silverdale applied to support Marassi's position.

> "Silverdale Hotel is also distinguishable. There the plaintiff was suing on a single breach of contract with several damages theories; it did not seek recovery for multiple distinct and severable breaches, as did the Marassis."

Marassi v. Lau, 71 Wash. App. at 917. Like the plaintiffs in Marassi (and unlike the plaintiffs in Silverdale), the Appellants here seek relief based on multiple separate and distinct issues, not a single claim. CP 259-260. The holding in the Silverdale case is simply not applicable to our case, just as it was not applicable in the Marassi case (which was another multiple claim case).

Finally, the Appellants cite to Moritzky v. Heberlein, 40 Wash.App. 181, 697 P.2d 1023 (1985). Moritzky was a mechanic's lien foreclosure case and it too was distinguished by this Court in the Marassi case.

> "Both parties argue that a net affirmative judgment determines the prevailing party in situations where both parties are awarded relief, relying on Moritzky v. Heberlein, 40 Wash.App. 181, 183, 697 P.2d 1023 (1985). In Moritzky, the plaintiff received judgment for $2,092; the defendant received $4,937 on a

> counterclaim. The court found that the defendant was the prevailing party because the net affirmative judgment was in its favor. However, the court was construing RCW 60.04.130, the lien statute. Moritzky must be read in light of more recent authority construing RCW 4.84.330, which states that fees should not be awarded when both parties prevail on major issues. See, e.g., Puget Sound Serv. Corp. v. Bush, 45 Wash.App. 312, 320-21, 724 P.2d 1127 (1986)."

Marassi v. Lau, 71 Wash. App. 912, 916, 859 P.2d 605, 607 (1993) abrogated on other grounds, Wachovia SBA Lending, Inc. v. Kraft, 165 Wash. 2d 481, 200 P.3d 683 (2009) (Footnote 2).

3.5 RCW 4.84.330 Is Not Applicable In This Case

The Appellants' opening argument is to cite to RCW 4.84.330 and the definition of prevailing party set forth in that statute. Appellants' Brief at Page 6. The Appellants' position is not well taken. RCW 4.84.330 is not to be applied where a contract already has a bilateral attorney fee provision in it.

> "Queen Anne Group contends that the definition of 'prevailing party' contained in RCW 4.84.330, the reciprocal attorney fee statute, must be employed in interpreting this provision. RCW 4.84.330 states in relevant part: As used in this section 'prevailing party' means the party in whose favor final judgment is rendered. Queen Anne Group asserts that because a dismissal without prejudice is not a final judgment, Candyco could not be deemed the prevailing party and attorney fees could not be awarded under the lease

> provision. We disagree. No authority is cited, nor is any compelling legal reason urged, for adopting the statutory definition of 'prevailing party' quoted above in interpreting the lease provision."

Walji v. Candyco, Inc., 57 Wash. App. 284, 287-88, 787 P.2d 946, 948 (1990). Since the Declarations at issue already have a bilateral attorney fee provision (CP 209), RCW 4.84.330 is not applicable.

> "Walji merely held that the statutory definition of 'prevailing party' under RCW 4.84.330 could not be imposed where there was already a bilateral contract."

Wachovia SBA Lending, Inc. v. Kraft, 165 Wash. 2d 481, 490, 200 P.3d 683, 687 (2009). The true purpose of this statute is insuring that unilateral contractual attorney fee provisions are applied bilaterally.

> "By its plain language, the purpose of RCW 4.84.330 is to make unilateral contract provisions bilateral. The statute ensures that no party will be deterred from bringing an action on a contract or lease for fear of triggering a one-sided fee provision. It does so by expressly awarding fees to the prevailing party in a contract action. It further protects its bilateral intent by defining a prevailing party as one that receives a final judgment. This language must be read into a contract that awards fees to one party any time an action occurs, regardless of whether that party prevails or whether there is a final judgment."

Wachovia SBA Lending, Inc. v. Kraft, 165 Wash. 2d at 489, 200 P.3d at 687. Moreover, even if RCW 4.84.330 were to be applied, it would not support the Appellants' position.

> "In Delta Air Lines, Inc. v. August, 450 U.S. 346 101 S.Ct. 1146, 67 L.Ed.2d 287 (1981) the court construed the impact of Fed.R.Civ.P. 54(d) and 68, as they related to costs in a settlement offer context. Here, as in Delta, a plain reading of the statute is determinative. RCW 4.84.330 contemplates an award of fees to one of the parties, the prevailing party. Since there was no singularly prevailing party, the statute is inapplicable to either."

Rowe v. Floyd, 29 Wash.App. 532, 536, 629 P.2d 925, 927 (1981). In fact, Section 6.1 of the Declarations only provides for attorney fees for the prevailing party, not the substantially prevailing party. With both the Appellants and Respondents having prevailed on significant issues, there is no single prevailing party. Therefore, Judge Allred properly did not award attorney fees to either party.

3.6 Appellants Inexplicably Mention the Other Appeal Case.

The Appellants inexplicably mention the other claims they brought against defendants Shannon and Zemel. Appellants' Brief at Page 2. Those claims are the subject of another appeal under Case No. 73369-

9-I, not this appeal. The appeals have nothing to do with one another. Defendants Zemel and Shannon were not named in the part of the lawsuit under appeal in this case. CP 12; Appellants' Brief at Page 2. Defendants Shannon and Zemel did not participate in the trial and neither they nor their counsel were involved in the trial. CP 17, 29. Only the Appellants Dempcy and the Respondents Avenius were involved in the trial which precipitated this appeal. CP 17, 29. This Court by notation ruling dated January 5, 2016 linked the cases for consideration by the same panel of judges. But other than having the same judges decide both appeals, the two appeals have nothing to do with one another. It is unclear why the Appellants made reference to the other appeal in their brief in this case.

3.7 Attorney Fees on Appeal.

The Respondents request recovery of their attorney fees on appeal. The sole issue before this Court is the Appellants' claim that Judge Allred should have awarded attorney fees in favor of the Appellants after trial. If this Court affirms Judge Allred's decision that neither side should have been awarded their attorney fees, then the Respondents would be the prevailing party on this appeal. Hence the Respondents are entitled

to recovery of their reasonable attorney fees incurred in defending this appeal.

> "Both parties further contend they should be awarded attorney fees on appeal. RAP 18.1 allows the award of attorney fees on appeal if authorized by applicable law. A contractual provision authorizing attorney fees is authority for granting fees incurred on appeal. Leen v. Demopolis, 62 Wash.App. 473, 485, 815 P.2d 269 (1991), review denied, 118 Wash.2d 1022, 827 P.2d 1393 (1992). The parties' agreement and RCW 4.84.330 authorize the award of attorney fees to the prevailing party. Because Dynasty has substantially prevailed on appeal, it should be entitled to a reasonable award of attorney fees for the expense of this appeal."

Marassi v. Lau, 71 Wash. App. 912, 920, 859 P.2d 605, 609 (1993), abrogated on other grounds, Wachovia SBA Lending, Inc. v. Kraft, 165 Wash. 2d 481, 200 P.3d 683 (2009).

4. Conclusion

The Appellants sought relief from trial Judge Allred asking the judge to order the removal of: (1) a fence and hedge; (2) 11 trees, and (3) a trellis. Judge Allred made a factual finding that these were all significant issues brought to trial by the Appellants. This factual finding was not appealed by the Appellants. In fact the Appellants did not submit to this Court any trial evidence at all.

Judge Allred made other factual findings. Of the issues brought to trial by the Appellants, they prevailed on one issue (Judge Allred ordered removal of the hedge and fence) and lost on 2 issues (Judge Allred allowed the 11 trees and the trellis to remain in place). These factual findings were also not appealed by the Appellants.

Judge Allred then ruled that since the Appellants prevailed on one issue (the fence and hedge) and the Respondents prevailed on two issues (the 11 trees and trellis), there was no prevailing party for purposes of attorney fees. Therefore, Judge Allred did not award attorney fees to either side.

Washington case law confirms that a defendant does not have to bring a claim in order to be a prevailing party for purposes of an attorney fees award. Instead, a party can prevail by defeating a plaintiff's claim. In our case, the Appellants prevailed on one issue and the Respondents prevailed on two issues. As a result there is no single prevailing party under Section 6.1 of the Declarations.

Based primarily on this line of cases, the Respondents respectfully request that this Court affirm the decision of the trial court to not award

attorney fees to either party at trial and award the Respondents' their attorney fees on appeal under RAP 18.1.

DATED this 20th of May, 2016.

Respectfully Submitted,

Allen R. Sakai

APPENDIX

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December 3, 2015

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Re: *Dempcy v Avenius, et. al.*
COA Case No's.: 73369-9-1 / 73869-1-1 - Feasibility of Consolidation

Dear Mr. Johnson:

This letter is in response to Allen Sakai's letter of December 2, 2015 which is attached as **Exhibit A** *sans exhibits.*

To be explicitly clear, the Dempcys restate that the "second appeal," Case # 73869-1-I only involves determining the prevailing party for attorney fees as stated in their November 30, 2015 letter.

The Dempcys are not appealing any other aspect of Judge Allred's rulings, including, but not limited to any easement claims over the Avenius property as set forth in the Dempcy's second and fifth causes of action in the Dempcy's Second Amended Complaint (sub #122).

The issue in the "second appeal" solely addresses the attorney fees issues as set forth in the Dempcy's November 30, 2015 letter to the Court. The Dempcys will amend the notice of appeal, if and as necessary, to reflect the very narrow scope of the "second appeal."

Very truly yours,

BAROKAS MARTIN & TOMLINSON

Aric Bomsztyk

ASB:pc

Cc: Alan Sakai, Christina Mehling, Richard Aramburu

CERTIFICATE OF SERVICE

I certify that on the 20th day of May, 2016 I caused a true and correct copy of this Brief of Respondents to be served on the following in the manner indicated below:

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