FILED
DEC 30 2016
WASHINGTON STATE
SUPREME COURT

93982-9

NO. 73869-1-I

COURT OF APPEALS DIV I
STATE OF WASHINGTON
2016 DEC 20 PM 4:27

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

BIRNEY DEMPCY AND MARIE DEMPCY,

Petitioners/Appellants,

v.

CHRIS AVENIUS and NELA AVENIUS, husband and wife, and their marital community; et. al,

Respondents.

PETITION FOR REVIEW

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ORIGINAL

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COURT RULES

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A. IDENTITY OF PETITIONER

Petitioner/Appellants, Birney and Marie Dempcy, asks this Court to accept review of the Court of Appeals decision where they were the Appellants.

B. COURT OF APPEALS DECISION

Petitioner/Appellants respectfully request review of (i) the Unpublished Opinion filed in the Court of Appeals on September 26, 2016 in Case No. 73869-1-I (attached hereto as Appendix A) and (ii) the Order Denying Motion For Leave to File Reply Brief and Denying Motion For Reconsideration filed in the Court of Appeals on November 21, 2016 in Case No. 73869-1-I (attached hereto as Appendix B).

C. ISSUES PRESENTED FOR REVIEW

The Court of Appeal's decision (Appellate Decision) is in conflict with other Court of Appeals and Supreme Court decisions regarding the award of attorney's fees and costs to a prevailing party. RAP 13.4(b)(1) & (2). Specifically, the Appellate Decision is in direct conflict with:

1) Cases holding that Defendant cannot be a prevailing party if they do not file a counter claim when Plaintiff is granted affirmative relief;[1]

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[1]*Silverdale Hotel Associates. v. Lomas & Nettleton Co.*, 36 Wn. App. 762, 677 P.2d 773 (1984); *Marassi v. Lau*, 71 Wn.App. 912, 859 P.2d 605, 608 (1993) *abrogated by Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 200 P.3d 683 (2009).

2) Cases holding that if only Plaintiff files claims, they can be the "prevailing party" even though they do not receive all the relief requested;[2]

3) Cases holding that if Defendant does not file a claim, he must defeat all of Plaintiff's claims to be the "prevailing party";[3]

4) Cases holding that RCW 4.84.330 defines "prevailing party" as the party who is awarded "final judgment" and that the statute applies to bilateral contracts;[4]

5) Cases holding that a trial court has no discretion as to whether to award attorney's fees since this is a question of law; the only discretion that exists is what is a reasonable amount.[5]

In addition to conflicting with the Court of Appeals and Supreme Court decisions, the Appellate Decision created, without any precedent, a new type of analysis–a "ways" analysis–which is discussed below.

D. STATEMENT OF THE CASE

The Petitioners/Appellants and Respondents are neighbors who are subject to a recorded covenant entitled "Declaration of Protective Covenants, Restrictions, Easements For Pickle Point Association"

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[2] *Silverdale, supra; Stott v. Cervantes*, 23 Wn. App. 346, 595 P.2d 563 (1979); *Guillen v. Contreras*, 169 Wn.2d 769, 238 P.3d 1168 (2010), *as amended* (Dec. 21, 2010).

[3] *Marine Enterprises, Inc. v. Security Pacific Trading Corp.*, 50 Wn. App. 768, 750 P.2d 1290 (1988).

[4] *Singleton v. Frost*, 108 Wn.2d 723, 742 P.2d 1224 (1987); *JDFJ Corp. v. International Raceway, Inc.*, 97 Wn. App. 1, 970 P.2d 343 (1999), *as amended on reconsideration in part* (Aug. 25, 1999); *Sardam v. Morford*, 51 Wn. App. 908, 756 P.2d 174 (1988); *Rowe v. Floyd*, 29 Wn. App. 532, 629 P.2d 925 (1981).

[5] *Singleton; Sardam; Newport Yacht Basin Ass'n of Condominium Owners v. Supreme Northwest, Inc.*, 168 Wn. App. 86, 285 P.3d 70 (2012).

(hereinafter the "Pickle Point Declaration" and/or "PPD") *(CP 85-86).* Within the PPD, there is a specific covenant which provides as follows:

> Except for those existing on the date hereof, no fences, wall, hedge, or mass planting other than a foundation shall be permitted between Parcel 1 and Parcel 2 unless approved by the owners of both parcels...With respect to all parcels, no fence, wall, hedge or mass planting shall at any time extend higher than six feet above the ground.

PPD §2.6; (CP 86, 121-22).

Appellant owns Parcel 1 and Respondent owns Parcel 2. Along the property line, Respondent had installed and/or maintained a large hedge, a fence, eleven trees and a trellis. Appellant filed this action to enforce the covenant. The Appellants filed only one claim in regards to enforcing PPD §2.6. Respondent filed no claim against the Appellant.[6]

The Trial Court ruled that the large hedge and the fence violated PPD §2.6 and entered affirmative judgment in favor of the Appellants to have them removed stating "The [Respondents] must remove the Fence and Hedge by July 31, 2015." Memorandum Decision, dated June 15, 2015 *(CP 26-27)*. However, the trial Court did not order the removal of the trellis and 11 trees because they were not a "fence, wall, hedge or mass planting." No findings of fact were entered by the Trial Court. *Id.*

[6] There was another claim regarding an easement claim, but it is irrelevant because there was no attorney fees applicable to enforcement or defense of the easement claim.

The PPD contained an attorney's fees clause in Section 6.1 which says in part:

> Enforcement. Any owner of property within the property subject to this Declaration shall have the right to enforce the Covenants contained in this Declaration through an action at law or in equity. The Architectural Control Committee shall also have the right to bring such action in its name. 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.

PPD §6.1, (CP 86, 121-22)

The Memorandum Decision states that Respondent raised three defense arguments to defeat the claim to enforce PPD §2.6: waiver, equitable estoppel, and laches. The Memorandum Decision ruled in Appellant's favor on the three affirmative defense issues raised by the Respondent. The Memorandum Decision did not indicate that the Respondent made any argument regarding the trellis or the 11 trees. The Memorandum Decision simply stated that the trellis and 11 trees did not violate PPD §2.6 because they were not a "fence, wall, hedge or mass planting." Memorandum Decision, dated June 15, 2015 *(CP 26-27)*.

Based on receiving the only affirmative judgment, Appellant moved for an award of attorney's fees and costs pursuant to PPD §6.1 for "enforcing" PPD §2.6. The Appellants filed their petition for attorney fees

for prevailing on this issue.[7] *(CP 74-83)*. The Respondents, likewise, filed their own motion for attorney fees. *(CP 63-69)*. The Trial Court disagreed with the Appellants and denied their petition for attorney fees in its entirety. Order Denying Motions For Attorney Fees, dated August 27, 2015 *(CP 259-260)*. The Trial Court's rationale was as follows:

> The parties base their motion on the following provision, §6.1, in a restrictive covenant: '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(OK) (sts, and other expenses of litigation....' A trial on the restrictive covenant claim, each side won in part and lost in part. The Dempcys won on the issue of removing a fence and hedge. The Aveniuses won on the issue of removing a trellis and 11 trees.

Order Denying Attorney's Fees *(CP 259-260)*.

The Trial Court based its decision upon *American Nursery* and *Mellon.*[8] *(CP 259-260)*. The Trial Court's decision regarding attorney fees did not mention Appellants' favorable ruling defeating Respondents' three affirmative defenses. Plaintiff appealed the Order Denying Attorneys Fees on the basis that the Trial Court's authority was completely inapposite because the facts were fundamentally different. *American Nursery* involved

[7] The Appellants segregated the easement issue which did not have an attorney's fees provision.

[8] *American Nursery Products, Inc. v. Indian Wells Orchards,* 115 Wn.2d 217, 797 P.2d 477 (1990); *Mellon v. Regional Trustee Services Corp.,* 182 Wn. App. 476, 334 P.3d 1120 (2014).

claims filed by both parties against each other.[9] In the current case, only the Appellant had a claim against the Respondent. In *Mellon*, the Plaintiffs brought multiple different types of legal claims against the Defendants, all but one were defeated. In the current case, the Appellant only brought a single claim against the Respondent and received an affirmative judgment–the only affirmative judgment in the case–in its favor.

On appeal, the Appellants only questioned the Order Denying Attorney Fees on the basis that fees were not awarded to Appellants even though (i) the only affirmative relief was granted to Appellant, (ii) Respondent did not file any claim against Appellant, and (iii) Respondent did not defeat the sole legal claim of the Appellants, *to wit*, that Respondent violated Section 2.6 which resulted in the only affirmative judgment in the case. The Appellants argued that such a result clearly fit under the *Stott* and *Silverdale* decisions.[10] Those decisions state where the prevailing party on a case where there is a single claim which renders the sole affirmative judgment is entitled to attorney fees–*even though the prevailing party did not receive all the relief sought under their single claim.*

E. <u>ARGUMENT</u>

[9] In *American Nursery*, <u>both parties</u> brought a claim for breach of contract. From the opinion, it appears that <u>both parties</u> prevailed on their respective contract claims.

[10] *Silverdale Hotel Associates v. Lomas & Nettleton Co.*, 36 Wn. App. 762, 677 P.2d 773 (1984); *Stott v. Cervantes*, 23 Wn. App. 346, 595 P.2d 563 (1979).

Two lines of cases have developed over the years in Washington. For ease, one of these lines can be called the "claims rule" cases and the other "major issues rule" cases. Until the Appellate Decision, each line has its own rules as set forth in Washington cases. However, now the Appellate Decision has rendered them an unpredictable muddle, at best.

The "claims" cases divide cases into "single claim" cases and "multiple claims" cases. In "single claim" cases, the prevailing party is the Plaintiff, if the Plaintiff receives affirmative relief of its claim and Defendant does not file a claim.[11] The Defendant can only prevail if no affirmative relief is granted to Plaintiff.[12] In "multiple claim" cases where both parties file affirmative claims against each other and prevail on their claims, the "major issues" rule is applied.[13] If "multiple distinct and severable claims" are filed, pursuant to *Marassi*, a proportionality rule is applied in awarding attorney fees.[14] The proportionality rule requires that the trial court enter findings and conclusions on proportionality and, if not, the case is remanded to the trial court to do so.

The "major issues" cases portend to look at "issues" rather than "claims" although in practically most "issue" cases, the "issues" are

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[11] *Silverdale, supra; Stott, supra.*
[12] *Newport Yacht Basin, supra.*
[13] *JDFJ; supra.*
[14] *Marassi v. Lau*, 71 Wn.App. 912, 859 P.2d 605, 608 (1993) *abrogated by Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 200 P.3d 683 (2009).

"claims." Curiously, no Washington case has ever defined what is meant by "issue". Indeed, it appears the terms "claims" and "issues" are used interchangeably most times.[15] Regardless, in "major issue" cases, even if affirmative relief is granted to Plaintiff, and Defendant did not file a claim, attorney's fees may not be award to Plaintiff for his judgment if Defendant prevailed in defeating any of Plaintiff's claims.

As stated, the Appellant based its appeal on the "claims" line of cases. The Trial Court and the Respondent (on appeal) based their reply on the "major issues" line of cases. The Appellate Decision did not adopt either line of cases. Instead, it created its own new "ways" analysis which is not supported by any case law–though the Appellate Decision uses *Marassi* to justify its analysis. To that end, *Marassi* performs a thorough review on all the seminal cases on the subject–including *Silverdale* which the Appellants argued governs the current case.

This request for discretionary review asks the Supreme Court to end the confusion by interpreting *Marassi* to clarify the rules for awarding

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[15] For example, in *Sardan v Morford*, the Court stated: "However, there is considerable authority that, where both parties prevail on major issues, neither is entitled to attorney fees. Here, each party successfully defended against a major claim by the other." *Sardam v. Morford*, 51 Wn. App. 908, 911–12, 756 P.2d 174, 176 (1988) (internal cites omitted). Indeed, even the Washington Supreme Court in *JDFJ* starts by referring to "issues" at the beginning of the case but by the end of the case, the "issues" have turned into "claims." *JDFJ Corp. v. International Raceway, Inc.*, 97 Wn. App. 1, 970 P.2d 343 (1999), *as amended on reconsideration in part* (Aug. 25, 1999).

attorney's fees–and reject the newfound "ways" analysis employed by the Appellate Decision.

The Appellate Decision held *Marassi* is a "major issues" case which supports the Trial Court's decision that no attorney's fees should be awarded. However, the Trial Court did not cite *Marassi* as authority for its decision–nor did the Appellate Decision reference the cases the Trial Court cited.[16]

What exactly is an "issue" as opposed to a "claim?" Is it just another word for "legal claim" as the case law would indicate? Or, instead, is an "issue" something totally different, as the Appellate Decision seems to indicate? Can a single "claim" consists of multiple "issues?" Does a single claim case now require an additional step of "dissecting of the facts within a single legal claim" to determine the "ways" that a single legal claim is being prosecuted, as the Appellate Decision would have the Parties believe?

In *Marassi,* Plaintiff filed multiple "distinct and severable" claims, many of which had nothing to do with each other. The Defendant filed no claims. Plaintiff was granted relief on only 2 of 7 of their claims (Plaintiff dismissed five other claims by voluntarily nonsuit).[17] *Marassi* held that

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[16] Nevertheless, the Appellate Decision inexplicably says: "The trial court properly applied the *Marassi* rule to these facts." *Appellate Decision*, pg. 6. This is inexplicable because the Trial Court did not cite *Marassi* nor did it apply its proportionality rule.

[17] In *Marassi*, the Plaintiff, who was a lot purchaser, sued the developer for 7 different causes of action including breach of contract, negligence, fraudulent conveyance, and

even though a Defendant did not file a claim, the "multiple claims" rule could be applied so that proportionality would be required, thus creating a new principle. Contrary to the Appellate Decision, *Marassi* did not rule on the "major issues" line of cases, although it contained a fact pattern which could support that approach.

So, it appears that the Appellate Court condones a trial court picking either line of cases and potentially coming to a different conclusion on the same set of facts. If the Court selects "major issues," a Plaintiff cannot receive attorney fees. Alternatively, if the Court selects "claims," Plaintiff can get some fees awarded on a proportional basis. *Prima facie*, such discretion is completely arbitrary and violates the principle that the court does not have discretion as to whether attorney's fees are awarded.

The Appellate Decision attempted to create a middle ground between *Silverdale* and *Marassi* by creating a new rule dissecting the "ways" in which a single claim was trying to seek relief.

First, the Appellate Decision appeared to accept the Respondents' claim that the single claim to enforce a PPD §2.6 actually contained three "issues"–(i) the hedge/fence, (ii) the trellis, and (iii) the eleven (11) trees.

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misrepresentation. The plaintiff prevailed on 2 of the 7 claims and the Defendant was awarded a small amount on his claim. The court held that since these were multiple claims and Defendant succeeded in defending against 5 of the claims, attorney's fees should be awarded proportionately depending on the value of each claim.

Indeed, the Respondents claimed they "won" two out of the three "issues."[18] However, how are they sure those are the "issues" which should be counted? A reading of the Trial Court's Memorandum Decision shows that only one line was allocated to these two "issues" of the trellis and the 11 trees and there is no indication that the Defendant even made an argument on this point. *(CP 26-27)* Trial Court's Memorandum Decision mostly discussed Respondents' affirmative defenses: (a) Waiver by Plaintiff; (b) Equitable Estoppel; and (c) Laches, all of which the Plaintiff won.[19]

Neither the Trial Court nor the Respondent listed the Respondent's three affirmative defenses issues as "issues" raising the question of what exactly is an "issue" in a "major issues" case. Indeed, by *not* considering the affirmative defenses as "issues," the Appellate Decision seems to agree with the cases, that an "issue" is indistinguishable from a "claim," and not on something else like a "theory" or "way."

Second, the Respondents argued that the hedge, fence, trellis and 11 trees were "distinct and severable" claims per *Marassi.* However, the Appellate Decision explicitly ruled that that "This case did not involve

[18] The fallacy of this approach is obvious because it is not clear why Respondent did not argue that each of the 11 trees was an "issue" so that 12 "issues" would have been won.
[19] The number of words used by the Trial Court Memorandum Decision would indicate that these were the "major issues," all of which were won by Appellant. Without findings of fact, it is difficult for the Appellate Court to make a determination as to how much time the attorneys spent on each "issue."

multiple distinct and severable claims made by each party. Instead, the [Appellants] claimed the [Respondents] violated the [PPD] in multiple ways." Appellate Decision, pg. 6.

In sum, the Appellate Decision is in error because it mixes the two lines of cases, misquoting decisions and then tries to smooth this over by pronouncing a new rule of "ways." Appellate Decision, pg. 6. This appears to be an attempt to land somewhere between *Silverdale* (one single claim) and *Marassi* (multiple distinct claims). Here, the Appellate Decision ruled that the "claims" were not "distinct and severable claims," but yet that a single claim was supported by multiple "factual" "ways." If it had ruled otherwise, that these were "distinct and severable claims," the case would be subject to the proportionality rule of *Marassi* which would require that it be remanded to the trial court for findings. This was not done.

To that point, the Appellate Decision erroneously attempts to make *Marassi* look like a "major issues" case when it is really a multiple "claims" case. In discussing the *Silverdale* case, *Marassi* makes this clear:

> The Marassis argue that a party need not prevail on its entire claim to be the prevailing party, relying on *Silverdale Hotel Assocs. v. Lomas & Nettleton Co.,* 36 Wash.App. 762, 774, 677 P.2d 773 (1984). A proportionality approach is not inconsistent with *Silverdale Hotel.* The plaintiff in that case recovered approximately $600,000 in damages from a breach of contract claim, but was unable to prove other asserted consequential damages from the breach. The plaintiff was deemed the prevailing party even though it had

> not recovered its entire claim, the court noting that the defendant had not prevailed in the contract dispute. *Silverdale Hotel,* 36 Wash.App. at 774, 677 P.2d 773. *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, at 917.

The identical argument could be said for the current case. Appellant sued for a violation of PPD §2.6 with several violation theories. It did not seek enforcement for "multiple and distinct and severable" violations because all the violations were pursuant to the same cause of action and the same covenant. This is unlike *Marassi* where the Plaintiff sued under multiple different legal theories.[20] Indeed, the Appellate Decision relies on *Marassi* as authority, yet it states that the case does not involve multiple distinct and severable claims but involves "multiple ways".[21]

> This case did not involve multiple distinct and severable claims made by each party. Instead the Dempcys claimed that Avenius violated the CC&Rs in multiple *ways.*

Appellate Decision, pg. 6.

With this analysis, the Appellate Decision introduced a new analysis under the "ways" rule. "Ways" is something other than "claims." "Ways"

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[20] See Fn 18, *supra*.

[21] The Court states "This case does not involve multiple distinct and severable claims made by each party." The only assumption is that *neither* party alleged multiple distinct and severable claims. It would not make sense to find that both parties did not do so when *Marassi* was about what happens with attorney fees when defendant does not file any claim at all.

is something other than *Silverdale's* "theories" as *Marassi* held that multiple "theories" do not impose its rule. *Marassi* at 917. The Appellate Decision does not explain the legal significance of a "way." However, the Appellate Decision implies there must be some sort of articulable methodology to discern the multiple "ways" in which a single claim is factually supported which allows *Silverdale* to be ignored.

The Appellate Decision's conclusion that the disallowed items are "ways" within a single claim changes the law on awarding attorney's fees. For instance, assume a cause of action where Plaintiff sues under a single breach of contract claim alleging three "ways" that the contract was breached. Defendant files no claim but defends against the three "ways." The court enters judgment for Plaintiff that the contract was breached citing way 1 and enters an affirmative judgment, but holds that ways 2 & 3 were not breaches. The contract provides that the party who prevails by enforcing the contract is entitled to attorney's fees. Under the Appellate Decision's new "ways" theory, Defendant would get attorney fees because he won 2 of 3 "ways." Or Plaintiff would be denied attorney fees because he failed to prove all his allegations even though Plaintiff received an affirmative judgment that Defendant breached and Defendant filed no claim.

However, what should not get lost in all of this, is that the Appellate Decision misinterpreted *Marassi.* After review of the case law regarding

attorney fees, including cases where both parties prevail on "major issues," the *Marassi* court stated:

> These general principles, however, do not address situations in which a defendant has not made a counterclaim for affirmative relief but merely defended against the Plaintiff's claims.

Marassi at 915.

This is the current case. *Marassi* then discusses how the general principles differ with respect to single claim cases and, specifically, the *Silverdale* case. *Silverdale Hotel Assocs. v. Lomas & Nettleton Co.*, 36 Wn. App. 762, 677 P.2d 773 (1984); *Marassi* says there is nothing in *Silverdale* that is inconsistent with the proportionality rule which was the "general principle," because, "[In Silverdale], 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." *Id.*

So, *Marassi* reaffirms *Silverdale* and the Appellant's position. If Defendant does not file a claim and Plaintiff is granted affirmative relief, Plaintiff is the prevailing party. This is true even though Defendant has succeeded in reducing Plaintiff's claim. All *Marassi* does is create an exception to *Silverdale's* general rule that when Plaintiff files a large number of ***diverse <u>legal</u> claims*** and is only successful in some, a proportionality rule applies in awarding attorney fees. In this situation, *Marassi* condones the Defendant obtaining a proportionate recovery for his

defense efforts against distinct and severable claims. This exception to the general rule set forth in *Silverdale* is stated in *Marassi* as follows:

> In sum, we hold that when several distinct and severable breaches of contract claims are at issue, the defendant should be awarded attorney fees for those claims it successfully defends, and the plaintiff should be awarded attorney fees for the claims it prevails upon, and the awards should then be offset.

Marassi at 918.

In *Silverdale,* Plaintiff sued for damages and consequential damages which obviously required different facts to prove each claim. Defendant filed no claim but only defended against Plaintiff's claims. Plaintiff prevailed on the damage claim but Defendant successfully defended against the consequential damage claims. The court in *Silverdale* did not discuss "major issues," or "distinct and severable claims," but held that Plaintiff prevailed in the contract dispute. Defendant did not prevail on any affirmative claim except to reduce Plaintiff's claims.

This is exactly what happened in the current case. Appellant claimed that items constructed and maintained along the property line breached PPD §2.6 and entitled Appellant to enforce that section. The Respondent defended against Appellant's single claim and was able to reduce the number of items that violated the covenant. Regardless of Respondent prevailing on a few items, the Trial Court Memorandum dismissed the affirmative defenses and ultimately held that the balance of

items violated PPD §2.6, enforced its provisions as to those items, and issued the only affirmative judgment.

However, the Appellate Decision completely misstates the holding of the *Marassi* case and its application to the current case. The Appellate Decision holds that the current case does not involve "distinct and severable claims."[22] It then cites *Marassi* and *JDFJ,* which are two cases that are based upon "distinct and severable claims". Even here, there is another inherent conflict that the Appellate Decision does not resolve. Even though, *JDFJ* is based upon "distinct and severable claims," the Appellate Decision rejects it as inapposite. However, apparently, *Marassi* is controlling even though it is also based on "distinct and severable claims." In fact, *JDFJ* is based upon *Marassi.* The court said in *JDFJ*:

> In *Marassi,* we held that when a case consists of distinct and severable claims, the courts must apply a proportionality approach, whereby a court must offset the attorney fee awarded the Plaintiff for the claims it prevailed upon from those awarded the defendant on its prevailing claims.

JDFJ at 8.

The Appellate Decision then goes on to completely misstate the holding of *Marassi* by stating:

> The applicable rule here is that stated in *Marassi:* where both parties prevail on major issues, an attorney fee award is not appropriate. The trial court properly applied the *Marassi* rule to these facts.

[22] Appellate Decision, pg. 6

Appellate Decision, pg. 6.

Actually, *Marassi* held the opposite. The *Marassi* case is not a "major issues" case; it is a "claims" case. It is a "proportionality" case which would allow attorney's fees to be awarded to Plaintiff for the legal claims in which it prevailed. To use the holding of *Marassi* in the current case, it would have to be remanded to the trial court for findings.

Another area of conflict between appellate courts is the application of RCW 4.84.330 which states in part: "As used in this section "prevailing party" means the party in whose favor final judgment is rendered."

The Trial Court held that the statute did not apply to this case without setting forth any authority. The Appellate Court did not discuss the statute at all. The conflict is that *Walji* held that the statute only applied to unilateral attorney fee provisions and not to bilateral ones.[23] However, the overwhelming consensus of Washington cases hold to the contrary.[24] In the current case, the final judgment was that Respondent violated PPD §2.6 which the Trial Court did enforce and would qualify Plaintiff for attorney fees under PPD §6.1. The award of attorney fees to the prevailing party is mandatory. There is no discretion.

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[23] *Walji v. Candyco, Inc.*, 57 Wn. App. 284, 787 P.2d 946 (1990).

[24] *Singleton v Frost; JDFJ Corp. v. International Raceway, Inc.; Sardam v Morford; Marine Enterprises; Rowe v. Floyd.*

Another quandary about the Appellate Decision is the following statement: "On the record, the trial court did not abuse its discretion in ruling that both sides prevailed on major issues." Appellate Decision, pg. 5 (emphasis added). To what "discretion" is the Appellate Decision referring? The determination of whether attorney fees are to be awarded is a matter of law. The trial court only has discretion to determine the reasonable amount after it has been determined that legally an award is appropriate. *Newport Yacht Basin Ass'n of Condominium Owners v. Supreme Northwest, Inc.*, 168 Wash. App. 86, 98, 285 P.3d 70 (2012). If the Appellate Decision is predicated on the assumption that the Trial Court had discretion to award or not to award fees, the decision is in error.

The next question is: should "major issues" be entitled to the same proportionality rule that "distinct and severable" claims are entitled to under *Marassi*? The Appellate Decision says "no" without giving any reason. This is yet another problem with the "major issues" line of cases.

F. CONCLUSION

The Parties' arguments and the Appellate Decision show that there is great confusion as to the award of attorney fees that should be clarified by the Supreme Court. There is no consensus on many fronts:

1) What is an "issue?" Is it a "claim?" If not, how are they different? Are trees an "issue" or a "claim?" Are trees and a trellis "multiple distinct and severable claims?" If so, why?

2) What is a "major issue?" If Defendant does not file a claim, can he prevail on a "major issue?" Was *Marassi* consistent with the "major issue" cases as held by the Appellate Decision?

3) When do multiple claims by Plaintiff become "distinct and severable?"

4) Why do "issues" get treated differently than "claims?" With multiple "claims," Plaintiff can get his proportional share of fees but not with "issues."

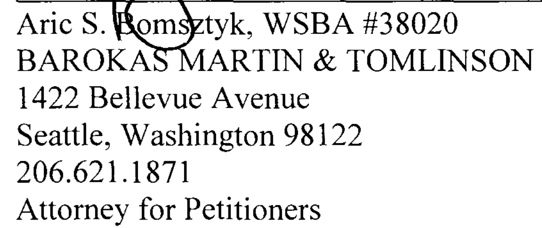
5) If Defendant files no claim and there are no "multiple distinct and severable claims," is the case determined by *Silverdale?*

6) If Plaintiff receives an affirmative judgment on the single claim but does not prevail on all of his claim and defendant makes no claim, is Plaintiff entitled to attorney fees? The Appellate Decision says no.

7) If Plaintiff receives an affirmative judgment and defendant files no claim, is the judgment awarded to Plaintiff a "final judgment" under RCW 4.84.330?

The Appellate Court made numerous errors in its decision such as holding that the facts of the *Marassi* case apply to the current case. The purpose of a review is to clarify the confusion in the law between "claims," "issues," "theories," and, now, "ways." The Appellants' respectfully request that the Supreme Court bring clarity to the awarding of attorney fees and define these terms. As of now, especially with the Appellate Decision, clarity does not exist.

Respectfully submitted this 20th day of December, 2016.



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Attorney for Petitioners

CERTIFICATE OF SERVICE

I am employed by the law firm of Barokas Martin & Tomlinson, over the age of 18, not a party to this action, and competent to be a witness herein.

On December 20, 2016, I caused the original and one copy of the foregoing document (*Petition for Review*) to be filed with the Court of Appeals, Division 1, with a copy delivered to the following via the following methods:

Counsel for Chris and Nela Avenius:

Allen R. Sakai, Esq. **Jeppesen Gray Sakai, P.S.** **10655 NE 4th Street, Suite 801** **Bellevue, Washington 98004**	**Via Email:** ***asakai@jgslaw.com*** **& Washington Legal Messenger**

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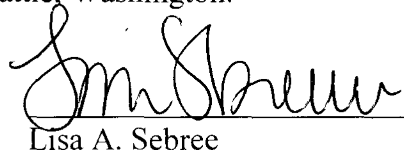
Counsel for Jack Shannon:

J. Richard Aramburu **Aramburu & Eustis** **720 3rd Avenue, Suite 2000** **Seattle, Washington 98104**	**Via Email Only:** ***rick@aramburu-eustis.com***

DATED: December 20, 2016 in Seattle, Washington.



Lisa A. Sebree

Appendix A

COURT OF APPEALS DIV I
STATE OF WASHINGTON

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IN THE COURT OF APPEALS 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, JACK SHANNON, an individual; and RADEK ZEMEL, an individual, Defendants.	No. 73869-1-I DIVISION ONE UNPUBLISHED OPINION FILED: September 26, 2016

APPELWICK, J. — The Dempcys sued their neighbors, the Aveniuses, to establish their right to an easement over part of the Aveniuses' property and to require the Aveniuses to remove a hedge, fence, trellis, and 11 trees from their property. The trial court dismissed the Dempcys' easement claim and their request to remove the trellis and 11 trees. The court ordered the Aveniuses to remove the hedge and fence. The Dempcys moved for attorney fees under the CC&Rs that govern the neighborhood. The court denied that motion, reasoning that each party prevailed on a major issue so there was no prevailing party. We affirm.

FACTS

Birney and Marie Dempcy and Chris and Nela Avenius are neighbors. The Aveniuses' property is immediately adjacent to and north of the Dempcys' property. Both properties are part of the Pickle Point Association.

The Pickle Point Association is governed by a declaration of protective covenants, restrictions, easements, and agreements (the CC&Rs). The CC&Rs contain a provision relating to fences. This provision prohibits the construction of fences, walls, hedges, and mass plantings between the Dempcy property and the Avenius property, unless both affected owners approve. It also restricts all fences, walls, hedges, or mass plantings from extending higher than six feet above the ground. The CC&Rs also permit the prevailing party in an action enforcing the CC&Rs to recover attorney fees.

The Dempcys sued the Aveniuses alleging that the Aveniuses' fence, hedge, trellis, and 11 of their trees violated the CC&Rs provisions pertaining to fences. And, the Dempcys asserted that the Aveniuses were interfering with an easement that gives the Dempcys the right to use the Aveniuses' property for ingress and egress and for utilities as may be reasonably necessary. The Dempcys argued that this easement also permitted them to use a different portion of the Aveniuses' property to walk from the east part of their own property to the west yard.

After a bench trial, the trial court rejected the Dempcys' claim that the easement permitted them to use a different strip of the Aveniuses' property. The

trial court also ruled that the fence and hedge between the Dempcy and Avenius properties violated the CC&Rs. But, the court determined that the Aveniuses' trellis and 11 trees did not violate the CC&Rs. Accordingly, the court ordered that the Aveniuses must remove the fence and hedge and denied with prejudice all other requested relief.

Following the trial court's decision, the Dempcys requested an award of attorney fees and costs pursuant to the CC&Rs. The trial court denied the Dempcys' motion for attorney fees. It noted that with regard to the claims relating to the CC&Rs, each side won in part and lost in part. As a result, the court held that there was no prevailing party, and an award of attorney fees was not appropriate.

The Dempcys appeal.

DISCUSSION

The Dempcys assert that the trial court erred in determining that they were not the prevailing party and therefore denying their motion for attorney fees. And, both parties contend that they are entitled to reasonable attorney fees on appeal.

The determination of which party was the prevailing party below is a mixed question of law and fact that we review under the error of law standard. Sardam v. Morford, 51 Wn. App. 908, 911, 756 P.2d 174 (1988); Eagle Point Condo. Owners Ass'n v. Coy, 102 Wn. App. 697, 706, 9 P.3d 898 (2000).

Attorney fees are not available unless permitted by a contract, statute, or recognized ground of equity. City of Seattle v. McCready, 131 Wn.2d 266, 273-

74, 931 P.2d 156 (1997). When authorized by contract, the trial court has discretion to determine a reasonable fee award. Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc., 168 Wn. App. 86, 97-98, 285 P.3d 70 (2012). Generally, the prevailing party is the party that receives a favorable judgment. Sardam, 51 Wn. App. at 911.

In this case, the CC&Rs contained a provision permitting the prevailing party in any action to enforce the CC&Rs to collect attorney fees and costs. Therefore, the issues related to the CC&Rs only could support an award of attorney fees.

The Dempcys assert that, because they were the only party that received an affirmative judgment on a claim, they are the prevailing party. They point to the court's order requiring the Aveniuses to remove the fence and hedge as evidence of an affirmative judgment in their favor. They argue that under Washington law, a party who does not receive the full amount of relief sought is still the prevailing party. See Silverdale Hotel Assocs. v. Lomas & Nettleton Co., 36 Wn. App. 762, 774, 677 P.2d 773 (1984) (noting that a party need not recover its entire claim to be the prevailing party); Stott v. Cervantes, 23 Wn. App. 346, 347, 349, 595 P.2d 563 (1979) (plaintiffs who recovered damages of $3,419 in suit for $10,000 were prevailing party).

However, Washington case law recognizes that a defendant can be a prevailing party by successfully defending against a claim. Marassi v. Lau, 71 Wn. App. 912, 918, 859 P.2d 605 (1993), abrogated on other grounds by Wachovia SBA Lending, Inc. v. Kraft, 165 Wn.2d 481, 200 P.3d 683 (2009). The defendant

need not have made a counterclaim for affirmative relief to recover as a prevailing party. Newport Yacht, 168 Wn. App. at 99. When both parties prevail on major issues, attorney fees are not appropriate. Marassi, 71 Wn. App. at 916.

Here, the Dempcys prevailed on whether the CC&Rs prohibited the Aveniuses' fence and hedge. The Aveniuses prevailed on whether the CC&Rs prohibited the trellis and 11 trees.

The Dempcys respond that the CC&Rs issue constituted a single claim, and the trial court erred in treating them as two separate issues so as to deny their motion for attorney fees. However, the record does not contain a transcript of the trial pertaining to these claims. Our review is limited to the pleadings in the record and the trial court's oral ruling, memorandum decision, and order. The Dempcys alleged two violations of the CC&Rs: the Aveniuses' "fence structure and mass plantings between the Dempcy property and the Avenius property." The trial court found in their favor on the fence and hedge, but denied the Dempcys' other requested relief with prejudice. In denying the Dempcys' motion for attorney fees, the court ruled that both sides prevailed on major issues related to the covenant. On this record, the trial court did not abuse its discretion in ruling that both sides prevailed on major issues.

Alternatively, the Dempcys contend that the trial court failed to follow the appropriate procedure for awarding attorney fees in a multiple claim case. They argue that under International Raceway, Inc. v JDFJ Corp., 97 Wn. App. 1, 970

P.2d 343 (1999), the trial court is required to provide findings of fact and conclusions of law to support the allocation of fees among the claims.

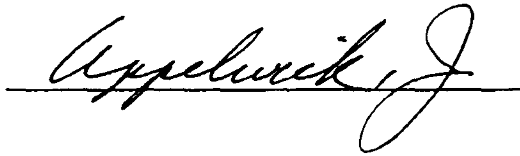
JDFJ Corp. does not apply on these facts. In that case, each party made a separate and distinct claim against the other. JDFJ Corp., 97 Wn. App. at 4. The trial court determined that neither party prevailed on one issue, and International Raceway won on the other issue. Id. at 7. Reasoning that the issue on which International Raceway prevailed constituted two-thirds of the action, the court awarded International Raceway two-thirds of its attorney fees. Id. On appeal, the court held that this proportionality approach is appropriate in cases where multiple distinct and severable claims are at issue. Id. at 8-9.

This case did not involve multiple distinct and severable claims made by each party. Instead, the Dempcys claimed that the Aveniuses violated the CC&Rs in multiple ways. They were successful in part and unsuccessful in part. The applicable rule here is that stated in Marassi: where both parties prevail on major issues, an attorney fee award is not appropriate. 71 Wn. App. at 916. The trial court properly applied the Marassi rule to these facts.

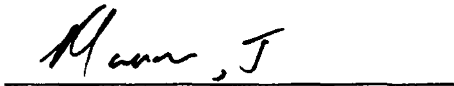
The Dempcys and the Aveniuses both seek attorney fees on appeal under RAP 18.1. RAP 18.1(a) permits attorney fees on appeal if authorized by applicable law. Where a contract allows for attorney fee awards in the trial court, the prevailing party before this court may seek reasonable attorney fees incurred on appeal. Viking Bank v. Firgrove Commons 3, LLC, 183 Wn. App. 706, 717-18, 334 P.3d 116 (2014). Here, the CC&Rs authorize attorney fee awards in any action to

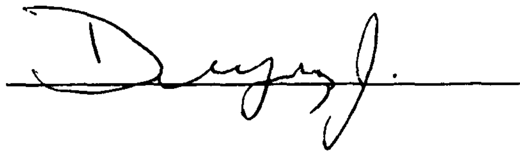
enforce it, so the prevailing party on appeal may also recover attorney fees. Because we hold that the trial court did not err in denying the Dempcys' motion for attorney fees, the Aveniuses are the prevailing party on appeal. They are entitled to reasonable attorney fees for the costs of appeal.

We affirm.



WE CONCUR:





Appendix B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

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, JACK SHANNON, an individual; and RADEK ZEMEL, an individual, Defendants.	No. 73869-1-I ORDER DENYING MOTION FOR LEAVE TO FILE REPLY BRIEF AND DENYING MOTION FOR RECONSIDERATION

The appellants, Birney and Marie Dempcy, have filed a motion for reconsideration. The respondents, Chris and Nela Avenius, have filed a response. The Dempcy's have filed a motion for leave to file a reply brief. A panel of the court has considered the motions pursuant to RAP 12.4 and has determined that the motions should be denied. Now, therefore, it is hereby

ORDERED that the motion for leave to file a reply brief is denied; it is further

ORDERED that the motion for reconsideration is denied.

DATED this 21st day of November, 2016.

Judge

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