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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

RON J. JONES; and SEPPO SAARINEN, trustee of the SAARINEN TRUST dated September 28, 2017, Respondents, v. AARON S. WILCOX and AUBREY L. WILCOX, trustees of the "Oh, The Places You'll Go Trust" u/a/d/ October 4, 2017, Appellants.	No. 54324-9-II UNPUBLISHED OPINION

SUTTON, J. — This appeal arises from a lawsuit between neighbors to enforce specific covenants in their homeowners' association (HOA) governed subdivision. Ron Jones and Seppo Saarinen sued Aaron and Aubrey Wilcox, alleging that they violated covenants, conditions, and restrictions (CC&Rs/Declaration)[1] when they built an HOA board approved addition onto their residence. The case proceeded to trial and, after Jones and Saarinen rested, the Wilcoxes moved for a directed verdict, arguing that the HOA was a necessary and indispensable party under CR 19 and would be prejudiced by any decision on the merits. The trial court agreed and ruled that the HOA was a necessary and indispensable party. The trial court then involuntarily dismissed the lawsuit without prejudice under CR 41(b)(3), denied Jones's and Saarinen's motion for

[1] "Declaration of Covenants, Conditions and Restrictions of Knight's Pointe Subdivision." Clerk's Papers at 319.

reconsideration, and denied the Wilcoxes' request for reasonable attorney fees and costs under the CC&Rs. The trial court ruled that the Wilcoxes would be entitled to fees if the suit were refiled and they prevailed. Jones and Saarinen then filed a second lawsuit against the Wilcoxes and joined the HOA as a defendant.[2] The Wilcoxes appeal the trial court's order denying their attorney fees. Jones and Saarinen cross-appeal the trial court's order granting involuntary dismissal without prejudice and denying reconsideration.

On appeal, the Wilcoxes argue that the trial court erred by denying their fee request because they successfully enforced the CC&Rs when the court ruled that the HOA was a necessary and indispensable party and involuntarily dismissed the case without prejudice.

We hold that the trial court did not err by denying the Wilcoxes' fee request because they have not successfully enforced the CC&Rs at this juncture and because a new lawsuit has already been filed. If the Wilcoxes are successful in the subsequent pending suit, then they can make a request to recover attorney fees under the CC&Rs for this case that was involuntarily dismissed without prejudice because the CC&Rs allow for attorney fees even if no lawsuit was filed.

On cross-appeal, Jones and Saarinen argue that the trial court erred by dismissing the first lawsuit and that the involuntary dismissal order under CR 41(b)(3) is appealable under RAP 2.2(a)(3) because it impacts their substantial right to enforce HOA specific covenants. We hold that the involuntary dismissal order is not appealable under RAP 2.2.

[2] Jones's and Saarinen's second suit was stayed pending the outcome of Jones's and Saarinen's cross appeal in this case. *Ron Jones; and Seppo Saarinen, trustee of the Saarinen Trust dated September 28, 2017 v. Aaron S. Wilcox and Aubrey L. Wilcox, trustees of the "Oh, The Places You'll Go" u/a/d October 4, 2017; and the Knight's Pointe Homeowners Association*, Order Granting Plaintiff's Motion to Stay Proceedings, No. 19-2-03402-06, filed March 6, 2020.

Accordingly, we affirm the orders denying the Wilcoxes their reasonable attorney fees, deny the Wilcoxes' request for appellate attorney fees, and remand for further proceedings consistent with this opinion.

FACTS

I. BACKGROUND

A. THE CC&RS, THE HOA, AND THE PROPERTIES

The parties all reside in the same subdivision in Camas, Washington. The subdivision is governed by the Knight's Point HOA. The HOA maintains a series of CC&Rs that were recorded in 2005. The CC&Rs require approval of building plans by either the Board of Directors (HOA Board) or the Architectural Landscape Committee of the HOA. The CC&Rs grant the HOA Board exclusive authority to determine if a building proposal meets the requirements outlined in the CC&Rs. Regarding enforcement, the CC&Rs explicitly state:

> The [HOA], or any owner, or the owner of any recorded mortgage or trust deed upon any part of said property shall have the right to enforce, by any proceeding at law or in equity, all restrictions, conditions, covenants, reservations, liens and charges now or hereafter imposed by the provision of this Declaration, and to recover damages for violation thereof. Failure by the [HOA], or by any owner, to enforce any covenant or restriction herein contained shall in no event be deemed a waiver of the right to do so thereafter. *Any party who successfully enforces these CC&Rs shall be entitled to recover their reasonable costs and attorney fees, whether a lawsuit was filed or not*.

Clerk's Papers (CP) at 30 (provision 8.1) (emphasis added).

Regarding interpretation, the CC&Rs state:

> The Board of Directors of the Homeowners Association shall have the right to determine all questions arising in connection with this Declaration and to construe and interpret the provisions of this Declaration. The Board's good faith determination, construction, or interpretation of this Declaration shall be final and binding.

CP at 31 (provision 8.6).

The HOA Board is composed of four members. Since around 2012, the HOA Board has been unable to acquire enough volunteers for a three-person Architectural Landscape Committee. As a result, the HOA Board has reviewed all building proposals and made all determinations since at least 2012.

Saarinen's property is directly to the west of the Wilcoxes' property. Saarinen testified that the Wilcoxes' addition entirely obscured the easterly view from one of the second-story bedrooms in his residence. He and his wife purchased this specific lot because it had views in all four directions.

Jones's property is two lots to the east and one lot north east of the Wilcoxes' property, but does not directly abut the Wilcoxes' property. Jones testified that he had a southwest view of downtown Portland before the Wilcoxes built their addition. After the Wilcoxes built their addition, Jones's view was entirely obscured. The view of downtown Portland was important to Jones when deciding to purchase this specific lot.

B. THE WILCOXES APPLIED FOR APPROVAL TO BUILD AN ADDITION

The Wilcoxes submitted three applications to the Board to build an addition to their residence. The Board, acting as the Architectural Landscape Committee, denied the first application because the addition appeared to be a second residence that could be rented. The Board denied the second application because it wanted a more integrated approach. The Wilcoxes submitted a third application and demonstrated how the proposed addition might impact Jones's view. The third application proposed connecting the new addition to the residence via a portico.

On August 30, 2017, the Board approved the Wilcoxes' third application. On December 17, the city of Camas granted the Wilcoxes a building permit. On January 26, 2018, Aaron Wilcox sent Saarinen an email in which he described the addition and told him that the Board and the City had approved the addition.

On June 29, 2018, Jones approached Coleen Swettman, the president of the HOA, regarding the HOA's approval of the Wilcoxes' addition. Swettman explained that the addition had been approved and she sent a follow-up email to Jones detailing the Board's approval process. Jones expressed concerns that his view of downtown Portland would be impacted.

II. PROCEDURAL HISTORY

On July 24, 2018, Jones and Saarinen filed suit against the Wilcoxes, alleging that the addition to their residence violated the CC&Rs. They sought injunctive relief requiring the Wilcoxes to remove the addition, a declaratory judgment "that any [HOA] approvals of [the Wilcoxes'] accessory dwelling unit are void for failure to comply with the requirements of the Declaration," and requested attorney fees and costs under the CC&Rs. Jones and Saarinen did not name or join the HOA as a party, nor did they disclose that the HOA had already approved the addition as complying with the CC&Rs.

In September 2019, trial began. Jones and Saarinen presented their case to the trial court. After they rested, the Wilcoxes moved for a directed verdict. . The Wilcoxes argued that the HOA was a necessary and indispensable party that Jones and Saarinen failed to join and that, under *Gurrad v. Klipsun Waters Homeowners Ass'n*, noted at 109 Wn. App. 1045, 2001 WL 1782658 (Dec. 14, 2001), Jones's and Saarinen's case should be dismissed. The trial court adjourned. The next day, the trial court agreed with the reasoning in *Gurrad*, found that the HOA was a necessary

and indispensable party under RCW 7.24.110, and involuntarily dismissed the case without prejudice. In its ruling, the trial court stated:

> A necessary party is one whose ability to protect its interests and the subject matter of the litigation would be impeded by the judgment. Such a party's interest in the litigation must be such that judgment cannot be determined without affecting that interest.
>
> . . . .
>
> [H]ere the HOA approved the application in this particular matter. [Jones and Saarinen] are requesting that the [c]ourt determine that the [CC&Rs] were violated and that the structure be demolished as a result. I do find that the HOA's interest in enforcing its protective covenants, whether it chooses to do so or not in this particular case, are affected by this declarative action, therefore, I find that the HOA is an indispensable party according to [RCW] 7.23.110[.]
>
> [H]ere we have an HOA that made the decision, applied its CC&Rs to a particular permit and decided to grant authority to – by particular homeowner to engage in a construction project on his property. They have an interest, I think, in protecting that decision and they also have an interest, if the [c]ourt were eventually to determine that they were unreasonable and failed to comply with their [CC&Rs], to appeal the [c]ourt's decision if the [c]ourt decided that. Here they're foreclosed from doing that[.]

VRP (Sept. 24, 2019) at 190, 192-93.

The trial court also denied Jones's and Saarinen's motion for reconsideration.[3] The Wilcoxes then moved for an award of attorney fees under provision 8.1 of the CC&Rs, citing *Hawk v. Branjes*, 97 Wn. App. 776, 778, 986 P.2d 841 (1999). They argued that

[3] This order is titled "Court's Ruling and Order Denying Defendants' Motion for Reconsideration." CP at 474. The substance of this order addresses Jones's and Saarinen's motion for reconsideration. In a separate order, the trial court refers to that document as a "ruling and Order denying the *Plaintiffs'* Motion for Reconsideration." CP at 471 (emphasis added). Thus, we presume the title of the order to be a scrivener's error and we treat it as an order denying Jones's and Saarinen's motion for reconsideration.

> [a] fees award is appropriate at this juncture in this case because, under Washington law, where "a bilateral attorneys' fee provision in a [contract] provides for fees to the successful party in an action to enforce the terms of the [contract], an award of reasonable fees is appropriate notwithstanding the definition of 'prevailing party.'"

CP at 208 (quoting *Hawk*, 97 Wn. App. at 778).

In its order denying the Wilcoxes' motion for attorney fees and costs, the trial court distinguished *Hawk* because that case involved a voluntary dismissal and this case involved an involuntarily dismissal. The trial court explained that because Jones and Saarinen gave "every indication" they would re-file the lawsuit following dismissal, the Wilcoxes may be able to recover their reasonable attorney fees and costs as the "prevailing party" following a "decision on the merits" in the second action. CP at 472. Accordingly, the trial court denied the Wilcoxes' request for e attorney fees and costs.

On November 14, 2019, Jones and Saarinen filed a second lawsuit against the Wilcoxes, this time naming the HOA as a defendant. On December 10, the Wilcoxes appealed the trial court's order denying their motion for attorney fees and costs. Jones and Saarinen cross-appealed the trial court's ruling dismissing the case without prejudice and denying their motion for reconsideration.

ANALYSIS

I. WILCOXES' APPEAL

The Wilcoxes argue that they "successfully" enforced the CC&Rs when the trial court involuntarily dismissed Jones's and Saarinen's action, and thus, they were entitled to an award of attorney fees and costs under the CC&Rs, and the trial court erred by denying their request. We disagree.

Washington law under CR 41(b)(3) does not authorize an award of attorney fees upon involuntary dismissal. CR 41(b)(3) states:

> *Defendant's Motion After Plaintiff Rests.* After the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subsection and any dismissal not provided for in this rule, *other than a dismissal* for lack of jurisdiction, for improper venue, or *for failure to join a party under rule 19*, operates as an adjudication upon the merits.

(Emphasis added). We review de novo whether there is a legal basis for awarding attorney fees by statute, under contract, or in equity. *Gander v. Yeager*, 167 Wn. App. 638, 647, 282 P.3d 1100 (2012).

We apply principles of contract interpretation to interpret provisions in CC&Rs and other governing documents relating to real estate developments. *See, e.g.*, *Roats v. Blakely Island Maint. Comm'n, Inc.*, 169 Wn. App. 263, 273-75, 279 P.3d 943 (2012). Contract interpretation is a question of law we review de novo. *Dave Johnson Ins., Inc. v. Wright*, 167 Wn. App. 758, 769, 275 P.3d 339 (2012). "The purpose of contract interpretation is to determine the parties' intent." *Roats*, 169 Wn. App. at 274. Contractual language generally must be given its "ordinary, usual, and popular meaning." *Jensen v. Lake Jane Estates*, 165 Wn. App. 100, 105, 267 P.3d 435 (2011).

"The question of whether an ambiguity exists in a contract is an issue of law reviewed de novo." *Stranberg v. Lasz*, 115 Wn. App. 396, 402, 63 P.3d 809 (2003). A provision is not ambiguous merely because the parties suggest opposing meanings. *Mayer v. Pierce County Med.*

Bureau, Inc., 80 Wn. App. 416, 421, 909 P.2d 1323 (1995). And, the interpretation of an unambiguous contract is a question of law, even if the parties dispute the legal effect of an unambiguous provision. *Mayer*, 80 Wn. App. at 420.

The Wilcoxes base their fee request on the CC&Rs. The CC&Rs provide in relevant part that "[a]ny party who successfully enforces these CC[&]Rs shall be entitled to recover their reasonable costs and attorney fees, whether a lawsuit is filed or not." CP at 30. They cite *Hawk*, which affirmed a fee award after voluntary dismissal, based upon a bilateral contract fee provision. But *Hawk* is distinguishable.

Here, unlike the plaintiff in *Hawk*, the Wilcoxes were not the prevailing party because no decision on the merits has occurred. 97 Wn. App. at 782-82. Black's Law Dictionary defines a "prevailing party" as "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded." BLACK'S LAW DICTIONARY (11th ed. 2019). And although this definition does not apply to all situations, we find it persuasive here.

On these unique facts we hold that the Wilcoxes are not the "prevailing party" because no judgment has been rendered by the trial court below, and the facts that form the basis of this action are the subject of the new lawsuit that was immediately filed by Jones and Saarinen against the Wilcoxes and the HOA. Whether the Wilcoxes "successfully" enforce the CC&Rs will be determined in the second lawsuit. Should the Wilcoxes prevail on the merits, they would be entitled to an award of reasonable attorney fees and costs under the CC&Rs, as the trial court correctly ruled below. Thus, we hold that the trial court did not err by denying the Wilcoxes' request for attorney fees and costs.

II. CROSS APPEAL

In response to Jones's and Saarinen's cross-appeal, the Wilcoxes argue that the order dismissing their claims without prejudice is not an appealable order under RAP 2.2. We agree.

"A dismissal without prejudice is not appealable under RAP 2.2 unless it is a final judgment or a 'decision affecting a substantial right in a civil case which in effect determines the action and prevents a final judgment or discontinues the action.'" *American Stats Ins. Co. v. Chun*, 127 Wn.2d 249, 254, 897 P.2d 362 (1995) (quoting *Munden v. Hazelrigg*, 105 Wn.2d 39, 43, 711 P.2d 295 (1985)); RAP 2.2(a)(3). This action was dismissed without prejudice, and Jones and Saarinen have already filed a second lawsuit against the Wilcoxes based on the same facts and joined the HOA as a party. Thus, their action has not been discontinued. Accordingly, we hold that the dismissal order is not appealable under RAP 2.2.

III. APPELLATE ATTORNEY FEES

The Wilcoxes request an award of appellate attorney fees and costs under RAP 18.1. Under RAP 18.1, the prevailing party is entitled to appellate attorney fees and costs when applicable law authorizes the reward. *McGuire v. Bates*, 169 Wn.2d 185, 191, 234 P.3d 205 (2010). Here, the Wilcoxes do not prevail. Therefore, we deny the Wilcoxes' request for appellate attorney fees and costs.

CONCLUSION

We hold that the Wilcoxes did not successfully enforce the CC&Rs at this juncture because the case was involuntarily dismissed without prejudice and a new lawsuit has already been filed. Thus, the trial court did not err by denying the Wilcoxes their request for attorney fees and costs under the CC&Rs. If the Wilcoxes are successful in the subsequent pending suit, then they may

make a request to recover attorney fees for this suit that has been dismissed without prejudice. We hold that the Wilcoxes are not entitled to attorney fees and costs on appeal because they are not a prevailing party. We further hold that the order involuntarily dismissing the case without prejudice is not appealable under RAP 2.2 because their action was involuntarily dismissed without prejudice and they have filed a subsequent lawsuit based on the same facts; thus, their action was not discontinued.

Accordingly, we affirm the orders denying the Wilcoxes their attorney fees and costs and denying reconsideration, we deny the Wilcoxes' request for appellate attorney fees, and we remand for further proceedings consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.

SUTTON, J.

We concur:

J., C.J.

LEE, C.J.

Worswick J

WORSWICK, J.