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No. 38783-2-11

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

STEPHEN M. CONNOR, an individual,
Appellant;

v.

DONALD B. MOUNTJOY and KATHLEEN L. CONNOR, husband and
wife,
Respondents

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BRIEF OF APPELLANT STEPHEN M. CONNOR

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I. INTRODUCTION

Plaintiffs Donald B. Mountjoy and Kathleen Connor, husband and wife (hereafter, "Plaintiffs" or "Mountjoys"), sued two corporations in Thurston County Superior Court based on Plaintiffs' contract with those corporations. Several months later, Plaintiffs added Stephen Connor as a defendant in his individual capacity and on claims identical to those made against the corporations (ten claims in all, including for contract-authorized attorneys' fees). Mr. Connor initially had no formal relationship with the corporations, but later was an officer, director, and land manager of them (Mr. Connor is brother to Plaintiff Kathleen Connor and Defendant Judith Connor Greer). After seven months of litigation and Stephen Connor incurring many thousands of dollars in attorneys' fees, Plaintiffs stipulated that they would pursue only three of their claims against Mr. Connor. Six months thereafter, with considerably more litigation and Stephen Connor expending many more thousands of dollars in attorneys' fees, Mr. Connor on a contested motion for summary judgment won dismissal of all of Plaintiffs' remaining claims against him. As his request for prevailing party attorneys' fees under the contract was

denied by the court below, Mr. Connor seeks reversal and remand for a determination of his reasonable attorneys' fees and expenses.

II. ASSIGNMENTS OF ERROR

The court below erred in denying Stephen Connor's motion for attorneys' fees on the basis that he was not a party to the March 1999 Agreement and cannot receive rights under it. The issues pertaining to the assignment of error are:

1. Where Stephen Connor was an officer and director of the corporations that were parties to the March 1999 Agreement and was sued for enforcing the Agreement on behalf of the corporate parties, is he entitled to the prevailing party attorneys' fees which the Agreement makes available to "any controversy or claim arising out of or relating to this Agreement"?
2. If Plaintiffs requested their attorneys' fees in the Complaint from Defendants Connor and Greer, does this establish the parties' intent that the contract should be interpreted to provide such fees to the prevailing party?
3. If the March 1999 Agreement was central to and "inextricably intertwined" with claims against Defendants Connor and Greer, does the

doctrine of equitable estoppel require the award of prevailing party attorneys' fees to defendant Stephen Connor?

4. If the Plaintiffs have pleaded in their Complaint that they were entitled to prevailing party attorneys' fees against Defendant Stephen Connor, does the doctrine of mutuality of remedies entitled him to recover such fees from Plaintiffs?

III. STATEMENT OF THE CASE

A. The Property on Gull Harbor Division 1.

In 1988, Bayfield Resources Company (hereafter, "Bayfield"), a company founded by Judith Connor Greer (hereafter, "Ms. Greer") purchased the Gull Harbor Division No. 1 subdivision in Thurston County. Deposition of Ms. Greer (hereafter, "Greer Dep."), Vol. 1 at p. 21:12-16 (May 14, 2007), attached as Exhibit A to the Declaration of Barbara J. Duffy in Support of Motion for Partial Summary Judgment (October 11, 2007) (hereafter, "Duffy Dec.") CP 331-408. Ms. Greer was, and still is, the President of Bayfield. Defendants' Supplementary Answers to Plaintiffs' Interrogatories Nos. 11 and 12, at p. 1 (January 31, 2007) (Id., Ex. B, CP 343). One of the few tracts of land in Gull Harbor Division 1

that Bayfield did not purchase in 1988 was Tract 10. Id., Ex. A at p. 96:9-13. CP 339.

When Tract 10 came up for sale in 1993, The Woodland Company (hereafter, “Woodland”), a second company founded by Ms. Greer, purchased it. Id., CP 339, Duffy Dec., Ex. A. Ms. Greer also was, and still is, the President of Woodland. Id., Ex. B. Defendants’ Supplementary Answers to Plaintiffs’ Interrogatories Nos. 11 and 12. CP 344. Woodland purchased Tract 10 in an effort to assemble all the lots from the original plat under the ownership of Woodland and Bayfield. Id., Ex. A., Greer Dep., Vol. I at p. 92:11-21, CP 338. After it took ownership of Tract 10, Woodland rented the house on the lot to third party tenants. Id., Greer Dep., Vol. I at p. 107:8-16, CP 340.

B. How the Mountjoys Came to Own Tract 10 of Gull Harbor Division 1, the Subject of this Dispute.

In August 1996, the Mountjoys began renting the house on Tract 10 from Woodland while they prepared a house they owned in Thurston County for sale. Id., Ex. D., Deposition of Kathleen L. Connor, Vol. I at p. 8:11-14 (April 25, 2007) K. Connor Dep., CP 349. The Mountjoys initiated negotiations with Woodland for the purchase of Tract 10 and submitted written proposals to Woodland. Id., Ex. F., CP 365; See House

Purchase Proposal (April 10, 1998), and 5829 Gull Harbor Drive Proposal. Id., Ex. G, CP 369.

By March 1999, an agreement had been reached and Woodland sold Tract 10 and the house on it to the Mountjoys. Id., Ex. H, CP 371-391. Ms. Greer signed the residential purchase and sale agreement as President of Woodland. Id., p. 3 of Exhibit H, CP 373.

As part of the purchase, the Mountjoys entered into an agreement (hereafter, the “Agreement” or “March 1999 Agreement”) with Woodland and Bayfield. Id., Ex. J., CP 397-408. The Agreement gave the Mountjoys well water and rights of first refusal to certain tracts owned by Bayfield, but, most significantly, also resulted in the Mountjoys’ relinquishment of all rights otherwise provided under the Gull Harbor Division No. 1 plat to use the streets, drives, paths, community access areas, and tidelands in Gull Harbor Division No. 1 (hereafter, collectively “community access rights”). Id., Ex. J. Id., at ¶¶ 1-5, CP 397-401. The Mountjoys knew that, due to Bayfield’s need to preserve control over Gull Harbor Division No. 1, the only way that Woodland would sell Tract 10 was without these community access rights. Id., Ex. D, K. Connor Dep., at 171:21-23; 178:18-20, CP 356, 358.

The Agreement contained the following integrated, remedial provisions:

6. Arbitration. *Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration with the rules, then pertaining, of the American Arbitration Association, and judgment upon the award may be entered in any court having jurisdiction thereof. The parties shall have all remedies at law or in equity available to them for the violation or attempted violation of the covenants set forth herein including, but not limited to, recovery of damages for any breach and/or injunctive relief.*

7. Attorneys' Fees. *If said controversy or claim is referred to an attorney, the losing party shall pay the prevailing party's reasonable attorneys' fees and costs, including attorneys' fees and costs incurred in any appeal.*

Id. Ex. J (italics supplied.), CP 402.

C. **The Mountjoys' Complaint Against Bayfield and Woodland and Amended Complaint Adding Stephen Connor and Ms. Greer Individually.**

On June 1, 2006, the Mountjoys filed this action against Woodland and Bayfield only. Plaintiffs asserted, notwithstanding their relinquishment of the community access rights, that Defendants Woodland and Bayfield had orally granted them rights in perpetuity to use Bayfield's property. Complaint to Quiet Title and for Declaratory Judgment, CP 11-

35; Plaintiffs' First Amended Complaint for Injunctive Relief, Quiet Title and Declaratory Judgment, CP 36-57.

On April 20, 2007, Plaintiffs filed Plaintiffs' Donald B. Mountjoy's and Kathleen L. Connor's Motion for Leave to Amend First Amended Complaint to add new claims and add Stephen Connor and Ms. Greer as defendants. CP 93-118. Plaintiffs' rationale for adding Stephen Connor and Ms. Greer as defendants was as follows:

The motion for leave to amend presently before this court adds new theories of relief based on the same predicate facts. These facts are based on the actions of the parties to the purchase and sale of the Mountjoy Property and the force and effect of agreements relating to the same and Defendants' attempt to prevent Plaintiffs from using the streets, drives, paths, easements, and community access areas of the plat and to accessing the beach. Accordingly, Plaintiffs should be granted leave to amend their complaint as the new causes of action are based on the same facts, involve the same players, and are merely seeking alternative forms of relief.

Id. at 7 (italics supplied), CP 99. Plaintiffs further argued that the individual defendants would not be prejudiced by being added in their personal capacities:

Nor will the proposed inclusion of the additional individual defendants cause prejudice. These individuals were intimately involved with the transactions that gave rise to the litigation. Moreover, as officers and owners of Defendants Bayfield and Woodland, they have no doubt been kept apprised of the litigation.

Id. at 8 (italics supplied), CP 100.

On May 14, 2007, the only defendants at the time, Bayfield and Woodland, filed Defendants' Opposition to Plaintiffs' Motion to Amend. CP 124-133. In her accompanying declaration, CP 119-123, Ms. Greer stated that: "*None of the actions alleged by Plaintiffs were taken by myself or Stephen Connor outside of our capacities as officers and directors of Bayfield and Woodland.*" Id. at 6 (italics supplied), CP 121, Par. 6. In the Declaration of Stephen M. Connor in Opposition to Plaintiffs' Motion for Leave to Amend, CP 136-139, Stephen Connor declared:

All of my activities of which Plaintiffs complain in the Third Complaint [sic] were performed in my capacity as an officer, director, and land manager for either or both of the corporate defendants.

CP 137, ¶ 2. Stephen Connor further stated: "I did not make any representations to the Plaintiffs about their purchase of property from Woodland." Id. at ¶ 6, CP 138. Stephen Connor also did not become an officer of Defendants Bayfield and Woodland until 2002. Declaration of Richard L. Martens in Support of Stephen Connor's Motion for Summary Judgment, Exhibit 3, Defendants' Supplementary Answers to Plaintiffs' Interrogatories, CP 873-874.

Bayfield and Woodland pointed out the severe financial effects on Stephen Connor and Ms. Greer if they were added as defendants in their individual capacity, noting that, “each of the[m] will need their own counsel, who must review all the pleadings, discovery, and thousands of pages of documents to get up to speed on the facts and allegations of the case.” Defendants’ Opposition to Plaintiffs’ Motion to Amend, CP 124-135, at 7.

On May 17, 2007, Plaintiffs filed Plaintiffs’ Donald B. Mountjoy’s and Kathleen L. Connor’s Reply to Defendants’ Opposition to Motion for Leave to Amend Their First Amended Complaint. CP 140-147. Plaintiffs stated:

In addition, Plaintiffs seek to formally add individuals that are intimately involved in the transactions at issue, individuals that have already injected themselves in this lawsuit, Judith Connor Greer and Stephen Connor.

Id. at 2, CP 141. Plaintiffs further stated:

In addition, Plaintiffs are alleging that Judith Connor Greer and Stephen Connor have acted improperly. For example, Plaintiffs allege that Judith Connor Greer made misrepresentations to Plaintiffs, among other things. Plaintiffs allege that Stephen Connor attempted to improperly revoke a license granted to Plaintiffs, among other things. *To the extent that either individual acted improperly, they are liable in their individual capacities.*

Id. at 5-6 (italics supplied), CP 145-146.

At the hearing on Plaintiffs' Motion to Amend, Plaintiffs' counsel Thomas F. Peterson, gave as reasons for adding Defendants Greer and Connor:

Now, more recently, Bayfield and Woodland through its officers, Judith Connor Greer and Stephen Connor, have taken actions to deprive Kathleen Connor and Bruce Mountjoy of their rights to use the beach near their home. They have engaged in a campaign of intimidation.

Stephen Connor, an officer and board member of Woodland and Bayfield, is the central actor in the campaign of intimidation. *The amended complaint adds several new and alternative causes of action based on the same predicate facts. There are no new actors. There is [sic] no new events. It is the same transactions, the same people underlying the amended complaint as underlying the original complaints.*

RP, 5/18/2007, 5:15 – 6:3 (italics supplied). When asked to explain the need to add Connor and Greer in their individual capacities, Peterson explained:

As we have gone into discovery here, we have realized that there is a family dispute going on here, that the motivation for the corporation to take the action that has been taken is because of bad blood between and anger and animosity between siblings, and we have also seen that the actions that have been taken and that continue to be taken are being taken by individuals.

The people that are doing the things that are happening in this case are people, and those people are Judith and Stephen, and although they are the officers and owners of Bayfield and Woodland, ultimately if we are going to get complete relief there, i.e., to prevent Bayfield and Woodland from barring our clients' access to the beach and the community access areas, we also need that restriction to apply to the brother and sister who are out there on the property running the heavy equipment and doing the various things to prevent access, building fences and so forth.

RP, 5/18/07, 11:16–12:10 (italics supplied).

Plaintiffs were allowed to amend their complaint, CP 148-149, and on May 25, 2007 filed their Second Amended Complaint. CP 156-162.

The allegations in Plaintiffs' Second Amended Complaint against Stephen Connor are virtually identical to the allegations against Bayfield and Woodland. CP 150–179:

(1) First Cause of Action for Injunctive Relief, ¶¶ 4.2 and 4.3, is directed at “*Defendants*,” CP 156 (italics supplied);

(2) Second Cause of Action for Quiet Title, ¶ 5.3, seeks a judgment “quieting title to their easement as against the claims of *defendants*” *Id.* (italics supplied);

(3) Third Cause of Action for Declaratory Relief at ¶ 6.4, alleges that Section 5 of the Agreement (relinquishment of community

access rights) is void, “because *defendants* did not amend or alter the Plat of Gull Harbor Division 1 as required by RCW 58.17.215;” at ¶ 6.6 alleges, “*Defendants* did not have an interest in the property rights that the agreement purports to terminate;” at ¶ 6.8 alleges, “*Defendants* violated the Shoreline Master Program for the Thurston Region by attempting to transfer the Mountjoy Property without access to the beach;” at ¶ 6.9 alleges, “*Defendants* [sic] attempt to grant rights to a stranger to the deed ... does not have any effect under Washington law.” CP 157 (italics supplied);

(4) Fourth Cause of Action, Consumer Protection Act at ¶ 7.2 alleges, “*Defendants* engaged in an unfair or deceptive act or practice” relating to the real estate purchase and sale transaction, CP 158 (italics supplied);

(5) Fifth Cause of Action for Misrepresentation, at ¶ 8.2 allege, “*Defendants made a material representation of an existing fact to Plaintiffs that was false,*” that Bayfield owned the Community Access Area, *Id.* (italics supplied);

(6) Sixth Cause of Action for Reformation Based on Mistake, at ¶ 9.2 allege, “*Defendants made a material representation of an existing*

fact to Plaintiffs that was false,” that Bayfield owned the Community Access Area, CP 159 (italics supplied);

(7) Ninth Cause of Action for Rescission Based on Frustration of Purpose, at ¶12.2 alleges that, “[t]he continued amicable relationship of the Plaintiffs and *Defendants* was a basic assumption of *the parties’ agreement* in exchanging the relinquishment of certain rights for personal rights to continued use of all of the streets, drives, paths, easements, and community access areas of the plat and to the beach.” CP 160 (italics supplied).

(8) Tenth Cause of Action for Equitable Remedies, ¶ 13.3, allege, “Notwithstanding this court’s ruling on the effectiveness of the Agreement between Plaintiffs and *Defendants*, Plaintiffs request that this court order the *Defendants* to protect and maintain the community access areas according to the Plat of Gull Harbor Division No. 1.” CP 161 (italics supplied).

(9) Demand for Attorneys’ Fees, at ¶ 14, wherein Plaintiffs request all their attorneys’ fees from all of the Defendants without distinction as to claims or identity of the allegedly responsible party, as follows:

14.2 Section 7 of the Agreement provides that, *in any controversy or claim under the Agreement, the losing party shall pay the prevailing party's reasonable attorneys' fees and costs.*

14.3 Plaintiffs are entitled to recover their fees and costs incurred in this action *from defendants.*

Id. (italics supplied).

D. Relationship of Plaintiffs' Claims and Defendants' Actions to the March 1999 Agreement.

In his answer, CP 281-292, Defendant Stephen Connor asserted a single counterclaim, which was, "That heretofore, plaintiffs and their agents have conspired and engaged in a continuous pattern of harassment, bad faith and abuse by filing multiple lawsuits and making multiple complaints . . . all of which violate CR 11, RCW 4.84.185, and other provisions of Washington law." CP 290. Plaintiffs' Motion for Summary Judgment on Defendant Stephen Connor's Counterclaim sought dismissal of this counterclaim. CP 1214-1222. With regard to their claim against him for misrepresentation, they argued that Stephen Connor, "*was intricately involved in the management and development plans of Bayfield and Woodland ... knew of potential legal issues surround the community access areas; ... represented to Plaintiffs that Defendant Bayfield owned the community access areas.*" CP 1220-1221 (italics supplied). With

regard to Plaintiffs' claim that Stephen Connor violated the Consumer Protection Act, Plaintiffs argued, "Defendant Connor, *acting for Defendants Bayfield and Woodland*, has engaged in unfair and harassing conduct towards Plaintiffs in an effort to force Plaintiffs to sell their home." CP 1222 (italics supplied). Finally, Plaintiffs sought injunctive relief against Defendant Connor based upon the fact that he had been *the primary enforcer of Defendants Bayfield's and Woodland's actions* regarding the property. *Id.* (italics supplied).

In opposition to Defendants Connor's, Greer's, and Bayfield's Motions for Summary Judgment on the CPA Claim, Plaintiffs filed the Declaration of Kathleen Connor. It recited in pertinent part:

Since that time we have been subjected to an unrelenting and *ever-increasing campaign of intimidation and harassment by Judith, Stephen, and their companies*. The first thing they did was to purportedly terminate our rights to use the beach and community access areas of our plat. Then we learned that the Bayfield and Woodland companies were entering into conservation easement agreements with Capitol Land Trust that included easements over community access areas and appeared to include future easements over waterfront property for which we had first right of refusal. *We filed this lawsuit as a defense measure to maintain our rights.*

Declaration of Kathleen Connor in Opposition to Defendants' Motions for Summary Judgment on CPA Claims (November 30, 2007) at 3, ¶ 4, ll.3-11 (italics supplied), CP 528.

Plaintiffs moved for summary judgment against Defendants Bayfield and Woodland on the basis that the March 1999 Agreement between Plaintiffs, Bayfield, and Woodland was illegal. In oral argument, Plaintiffs' counsel made it clear that the claims of personal liability against Mr. Connor were for enforcing this contract:

I think it's important for the court [sic] to know that, despite the 14 files in this case, a lot of it – *basically what it centers around is six words and that is we want to use the beach*. There's more to it. There's other property involved beyond the beach, but *it's at the foundation really a pretty simple thing that we're trying to protect, a right that we're trying to protect*.

RP, 3/21/08, at 34:2-9 (italics supplied).

E. Disposition of Key Claims Involving Other Parties.

On March 26, 2008 the Court issued its letter opinion. CP 863-65.

The Court's core holding was that a single clause in the March 1999 Agreement between Plaintiffs, Bayfield, and Woodland was illegal:

Plaintiffs asked the Court to determine that the purported extinguishment of the community access (in particular the beach access) for Lot 10 was void, and the Court agrees with that proposition.

March 26, 2008 Letter Opinion, CP 863–65 at 864. The Court reserved ruling, however, on the appropriate remedy given the adverse effects of this decision on Plaintiffs, Bayfield, and Woodland. *Id.* On April 24, 2008, the Court signed and entered its Order Granting Plaintiffs’ Motion for Partial Summary Judgment Against Defendants Bayfield Resources Company and The Woodland Company re: Invalidity of Relinquishment Provision. CP 1207-1209, attached as Exhibit C to the Declaration of Thomas F. Peterson in Support of Plaintiffs’ Motion for Summary Judgment on Defendant Stephen Connor’s Counterclaim. CP 1194-1213.

On June 20, 2008, the Court entered its Order Regarding Remedies on Plaintiffs’ Motion for Partial Summary Judgment Against Defendants Bayfield Resources Company and The Woodland Company Re: Relinquishment Provision. CP 1234-38. While the Court ruled that the Agreement’s provision pertaining to relinquishment of community access rights was illegal, it ordered this provision amended such that it was inapplicable only as to heirs, successors, and assigns. It was further, “ORDERED, ADJUDGED AND DECREED that, except as provided herein, the Agreement remains in full force and effect in accordance with

its terms.” Consequently, Plaintiffs’ relinquishment of the community access rights as to themselves was held to be enforceable.

F. Disposition of Claims Involving Stephen Connor; Ruling on Motions for Attorneys’ Fees.

In a stipulation clarifying claims against Defendants signed on December 21, 2007, seven months after adding Stephen Connor as a defendant on all claims, Plaintiffs stipulated that they intended to pursue only their First (Injunctive Relief), Fourth (CPA), and Fifth (Misrepresentation) claims against Mr. Connor. Stipulation Clarifying Claims Against Defendants, attached as Exhibit 1 to Declaration of Richard L. Marten’s in Support of Stephen Connor’s Motion for Summary Judgment, CP 866-898. Stephen Connor thereafter moved for summary judgment of dismissal of all claims against him. CP 899-912. On June 6, 2008, the Court granted summary judgment dismissing all of Plaintiffs’ claims against Stephen Connor. CP 1223-25. Subsequently, the Court, finding that Plaintiffs’ claims against Stephen Connor were not frivolous, granted Plaintiffs’ motion for partial summary judgment and dismissed Mr. Connor’s counterclaim. CP 1239-40.

Having prevailed on his Motion for Summary Judgment on all claims asserted against him by Plaintiffs, Defendant Stephen Connor filed

his motion for an award of attorneys' fees and costs and expenses. CP 1620-1630. Plaintiffs opposed Stephen Connor's motion for an award of attorneys' fees on various bases, but primarily on the basis that Mr. Connor was not a party to the March 1999 Agreement. CP 2038-2047. Faced with the unanticipated exposure to responsibility for Stephen Connor's attorneys' fees, Plaintiffs abandon their prior assertions that he had acted in his official capacity as an officer of Defendants Bayfield and Woodland, did an about face, and embraced Mr. Connor's defense that he was not a party to the March 1999 Agreement. Plaintiffs' Opposition to Defendant Stephen Connor's Motion for an Award of Attorneys' Fees, Costs and Expenses, CP 2038-2047.

The Court entered its letter opinion of November 7, 2008 denying Stephen Connor's motions for attorneys' fees. CP 2063-2066. The basis for denying Mr. Connor's Motion for Attorneys' Fees was:

Defendant Connor argues that he was able to achieve the dismissal of all claims against him. He acknowledges that he was not a party to the March, 1999 agreement, yet requests attorneys fees pursuant to Section 7 of the agreement. Because he was not a party to the agreement, he cannot be bound by it or receive rights under it. The Court has no authority to award him fees.

Piepkorn, even though plaintiff Piepkorn's claim for damages was dismissed, he was deemed the substantially prevailing party and entitled to attorneys' fees because he received injunctive relief under the neighborhood covenants. *Id.* at 686-87. Similarly, here, Stephen Connor prevailed on the merits in obtaining the dismissal of all of Plaintiffs' claims against him. Plaintiffs' modest success in obtaining dismissal of Stephen Connor's sole counterclaim that Plaintiffs' claims were frivolous does not change the outcome that summary judgment was entered in favor of Stephen Connor on each and every claim they asserted against him. As a result, he is the prevailing party and is, therefore, entitled to his attorneys' fees under the Agreement.

3. Plaintiffs' Claims Against Defendant Stephen Connor Arose Out of the March 1999 Agreement, the Agreement was Central to those Claims, and Therefore Stephen Connor is Entitled to his Attorneys' Fees.

It is well established in Washington that where a contract contains an attorneys' fee provision, a litigant is entitled to a fee award if the action "arose out of" the contract and the contract is "central to the dispute." *Seattle-First Nat'l Bank v. Washington Ins. Guar. Ass'n.*, 116 Wn.2d 398, 413, 804 P.2d 1263 (1991); *Tradewell Group, Inc. v. Mavis*, 71 Wash.App. 120, 130, 857 P.2d 1053 (1993) ("an action is on a contract for

purposes of a contractual attorney fees provision if the action arose out of the contract and if the contract is central to the dispute”). Critically, this is true for tort and statutory claims, even in the absence of a breach of contract claim, so long as the contract is central to the dispute. *See, e.g., Hill v. Cox*, 110 Wash.App. 394, 411-412, 41 P.3d 495 (2002) (contractual attorneys’ fee provision applied to statutory tort claim); *Brown v. Johnson*, 109 Wash.App. 56, 58-59, 34 P.3d 1233 (2001) (misrepresentation claims); *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wash.App. 834, 855-56, 942 P.2d 1072 (1997) (fiduciary duty and negligence claims).

In *Mehlenbacher v. Demont*, 103 Wash.App. 240, 244, 11 P.3d 871 (2000), Division II of the Court of Appeals held that the prevailing party may recover attorneys’ fees in an action to defend or enforce a contract where the contract has an attorneys’ fees provision and the contract is central to the dispute. Similarly, in *Brown v. Johnson*, 109 Wash.App. 56, 58, 34 P.3d 1233 (2001), the Court of Appeals held that if a tort action [such as misrepresentation] is based on a contract with an attorneys’ fee provision, the prevailing party is entitled to attorneys’ fees provided that the action arose out of the contract and the contract is central

to the dispute. In reversing the trial court's refusal to award fees and costs, the court held:

If an action in tort is based on a contract containing an attorney fee provision, the prevailing party is entitled to attorney fees. An action is "on a contract" if (a) the action arose out of the contract; and (b) the contract is central to the dispute.

Id.

The allegations in Plaintiffs' Second Amended Complaint against Stephen Connor are nearly identical to the allegations against Bayfield and Woodland. CP 156–162. The allegations: (a) arose out of the relinquishment provision of the contract; and (b) that contract provision is central to the dispute. See discussion in Statement of the Case at 6-16.

It is beyond dispute that Plaintiffs' Agreement with Bayfield and Woodland was central to their dispute with Stephen Connor. Plaintiffs' singular stated goal was to acquire the beach access that they had relinquished in the Agreement. They failed in all of their claims against Stephen Connor. Stephen Connor is therefore entitled to the benefit of the attorneys' fees provision of the Agreement.

4. The March 1999 Agreement Entitles Stephen Connor to his Reasonable Attorneys' Fees.

Paragraph 7 of the March 1999 Agreement provides that attorneys' fees are available to the prevailing party:

7. Attorneys' Fees. *If said controversy or claim is referred to an attorney, the losing party shall pay the prevailing party's reasonable attorneys' fees and costs, including attorneys' fees and costs incurred in any appeal.*

Id. Ex. J, CP 402 (italics supplied). The phrase "said controversy or claim" in paragraph 7 is described in, and integrated with, the preceding paragraph of the Agreement as being "Any controversy or claim arising out of or relating to this Agreement, or the breach thereof ..."

The fact that Mr. Connor was not a signatory to the Agreement does not alter Plaintiffs' commitment under paragraphs 6 and 7 to pay the prevailing party's attorneys' fees if "*any controversy or claim arising out of or relating to this Agreement, or the breach thereof...*" is referred to an attorney (italics supplied). Plaintiffs were plainly put on notice, by Defendants' Opposition to Plaintiffs' Motion to Amend, of the attorneys' fees that Plaintiffs would impose on Stephen Connor by adding him as an individual defendant. CP 124–135 at CP 133. Plaintiffs understood this reciprocal obligation under the Agreement and sought their own attorneys'

fees from Defendant Connor in their Second Amended Complaint, par. 14.2 & 14.3, CP 161.

Language similar to that in the March 1999 Agreement has been held by Division 1 of the Court of Appeals to extend an arbitration clause to disputes between parties and non-parties for claims arising out of or related to the contract. *McClure v. Davis Wright Tremaine, et al.*, 77 Wash.App. 312, 314-15, 890 P.2d 466 (Div. 1, 1995). In *McClure*, limited partner Charles McClure sued both the general partner, Donald Lewison (who had signed the agreement) and the limited partnership's law firm, Davis Wright Tremaine (which had not). The key language in the arbitration clause in *McClure* read:

Any dispute, controversy or claim *arising out of or in connection with, or relating to*, this Agreement or any breach or alleged breach hereof, ..., shall, upon the request of any party involved, be submitted to, and settled by, arbitration ...

Id. at 314 (italics supplied). Davis Wright moved to compel arbitration, which was ordered by the trial court. When McClure moved for reconsideration, the trial court denied the motion and imposed CR 11 sanctions on McClure. The Court of Appeals affirmed, observing that the inclusion of disputes “relating to” the contract expands the reach of the

clause: “An arbitration clause which encompasses any controversy *relating to* a contract is broader than language covering only claims *arising out of* a contract.” Id. at 315 (italics supplied). Even when the arbitration clauses in *McClure* had the additional limitation “any party involved” in the dispute, the “relating to” language still allows arbitration by non-parties to the contract:

McClure relies on the portion of the arbitration clause which states that a controversy “upon the request of any party involved, be submitted to, and settled by, arbitration” to support his first argument. He contends that because of this limitation, a nonsignatory such as Davis Wright cannot compel arbitration. We disagree.

Taken in context of the entire sentence, the phrase “any party involved” appears to refer to any party involved in a controversy relating to the Agreement, not simply to parties to the Agreement. *Thus, if McClure’s controversy with Davis Wright related to the Agreement, Davis Wright would have the authority to request arbitration even though it was not a signatory to the Agreement.*

Id. at 314 -15 (italics supplied).

This analysis applies equally to the remedial provisions here, especially because they are integrated within the Agreement. Par. 6 of the March 1999 Agreement provides that, “[a]ny *controversy or claim arising out of or relating to* this Agreement, or the breach thereof, shall be settled by arbitration ...” (italics supplied). Under Par. 7, even for controversies

not submitted to or settled by arbitration, “If said controversy or claim is referred to an attorney, the losing party shall pay the prevailing party’s reasonable attorneys’ fees and costs, including attorneys’ fees and costs incurred in any appeal.” Thus, under *McClure*, Stephen Connor is entitled to his attorneys’ fees.

The *McClure* Court noted that while it might be a more difficult proposition to impose arbitration if a party signing an arbitration agreement sought to compel a non-signing party to arbitrate, “*McClure* [and Plaintiffs here] is a signatory and, therefore, was on notice that he would be required to arbitrate disputes arising out of the Agreement.” *Id.* at footnote 1. Similarly here, Plaintiffs sought their own attorneys’ fees against Stephen Connor at Par. 14 of their Second Amended Complaint. Plaintiffs plainly expected the attorneys’ fees remedy to be available to them and, conversely, it is available to Defendant Connor.

While it is true that the parties’ Agreement did not explicitly say that these remedial provisions would also apply to claims against non-signatories, the *McClure* Court found that contract and agency principles and equitable estoppel can provide an independent and sufficient basis to subject a signatory to the contract to a remedial provision in an agreement:

Even if this court were to accept McClure's interpretation of the phrase "any party involved," it would not foreclose a decision that the matter was arbitrable. Numerous courts have held that even when it is not explicitly provided for in an arbitration agreement, some nonsignatories can compel arbitration under the doctrine of equitable estoppel or under normal contract and agency principles. E.g., *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir.1993), cert. denied, 513 U.S. 869, 115 S.Ct. 190, 130 L.Ed.2d 123 (1994); *American Ins. Co. v. Cazort*, 316 Ark. 314, 871 S.W.2d 575, 579 (1994).

Id. at 316. Plaintiffs clearly based their litigation strategy toward Stephen Connor on Mr. Connor's relationship to the corporate defendants and his enforcement of the March 1999 Agreement on their behalf.

From the Plaintiffs' inclusion in the Second Amended Complaint of their own claim for attorneys' fees from Stephen Connor and Ms. Greer, Plaintiffs established their intent that the remedial provisions of paragraphs 6 & 7 of the March 1999 Agreement would apply in actions between themselves and the corporate defendants' officers and directors. As the Court of Appeals said in enforcing arbitration between an employee and employer in *Tjart v. Smith Barney, Inc.*, 107 Wash.App. 885, 28 P.3d 823 (Div. 1, 2001):

Under Washington law, all contracts, including agreements to arbitrate, are interpreted under the context rule enunciated in *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990)....The "context rule" is the framework for

interpreting written contract language which involves determining the intent of the contracting parties by viewing the contract as a whole, including the subject matter and objective of the contract, all circumstances surrounding its formation, *the subsequent acts and conduct of the parties*, statements made by the parties in preliminary negotiations, and usage of trade and course of dealings. The application of the context rule leads the courts to discover the intent of the parties based on their real meeting of the minds, as opposed to insufficient written expression of their intent. ^{FN14} Context may not be used, however, to contradict, modify or add to the written terms of an agreement. Nor may context be used for the purpose of importing into writing an intention not expressed therein.

Id. at 895-96 (footnotes omitted, italics supplied).

In *Sunkist*, the 11th Circuit held that where the claims by parties against non-parties are central to and dependent on a contract, equitable estoppel prevents a signing party from avoiding the contract's arbitration clause when a claim is asserted by a non-signing party:

This court adopted the reasoning of *Hughes Masonry [Hughes Masonry Co. v. Greater Clark County School Bldg. Corp., 659 F.2d 836 (7th Cir. 1981)]* in *McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co., Inc., 741 F.2d 342 (11th Cir.1984)*. On facts nearly identical to *Hughes Masonry*, this court held that a party may be estopped from asserting that the lack of a written arbitration agreement precludes arbitration. Id. at 344. The *McBro* court noted the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the nonsignatory's obligations and duties in the contract, and decided that the claims were "intimately founded in and intertwined with the underlying contract obligations."

The license agreement at issue here does not specify or make mention of any duties or obligations that Del Monte owes to Sunkist. On this basis, *Sunkist* attempts to distinguish the instant case from *McBro* and *Hughes*. *Although the nonsignatories were expressly mentioned in the contracts at issue in McBro and Hughes Masonry, and each court took this into account, the reference to a third party was neither a crucial nor dispositive factor in either case. Instead, these decisions rest on the foundation that ultimately, each party must rely on the terms of the written agreement in asserting their claims. The references in the contracts to the nonsignatories merely added further support to the courts' conclusions that the claims against the third parties were "intimately founded in and intertwined with the underlying contract obligation."*

10 F.3d at 757 (italics supplied). When adding Defendant Connor to this suit, Plaintiffs ignored the distinction between the defendant corporations and Defendant Stephen Connor. Plaintiffs sought to impose contractual and non-contractual liability, but all of their claims were based on alleged conduct arising out of or related to the Agreement. As in *Sunkist*, because of the "close relationship between the entities involved, as well as the relationship of the alleged wrongs to the non-signatories' obligations and duties in the contract," Plaintiffs should be estopped from asserting that the lack of a written attorneys' fee agreement between Plaintiffs and Mr. Connor precludes the award of attorneys' fees. Plaintiffs should be estopped from now repudiating that they had demanded their attorneys'

fees from Mr. Connor and retreating behind the distinction between the defendant signatory corporations and the individual non-signatory defendants to escape such an award.

5. Statutory Mutuality of Attorneys' Fees Under RCW 4.84.330 Supports the Award of Fees to Stephen Connor.

RCW 4.84.330 provides additional authority to impose Defendant Connor's fees on Plaintiffs. RCW 4.84.330 provides:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, *shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not*, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorney's fees is void.

As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

(italics supplied). In *Herzog Aluminum, Inc. v. General American Window Corp.*, 39 Wash.App. 188, 692 P.2d 867 (Div. 1, 1984), Herzog Aluminum, Inc. (Herzog) brought an action for breach of contract against

General American Window Corporation (General American) seeking damages for lost profits. Despite the absence of an executed contract, the court nevertheless implemented the contract's terms and awarded defendant General American as the prevailing party attorneys' fees and costs and expenses. The un-executed "contract" between the parties provided: "Herzog shall be entitled to recover any and all costs, expenses and attorney fees incurred arising from or out of any dispute relating to this order." The *Herzog* Court held that so long as the contract provided attorneys' fees to the prevailing party, such fees are available even if the court determines the parties did not enter into that contract:

Considering the remedial purpose behind the enactment of RCW 4.84.330, that unilateral attorney fees provisions be applied bilaterally, *Detonics ".45" Assocs. v. Bank of California*, 30 Wash.App. 179, 182, 633 P.2d 114 (1981), rev'd on other grounds, 97 Wash.2d 351, 644 P.2d 1170 (1982), and the chronological juxtaposition between the enactment of RCW 4.84.330 and the judicial interpretations of § 1717 of the California Civil Code, the analysis presented in the California cases is persuasive. Accordingly, we conclude that the broad language "[i]n any action on a contract" found in RCW 4.84.330 encompasses any action in which it is alleged that a person is liable on a contract. Further, because General American obtained a judgment dismissing Herzog's cause of action, General American became a "prevailing party" within the meaning of that statutory terminology. Hence, General American was properly entitled to an award of reasonable attorney fees incurred at trial.

Id. at 196-197 (italics supplied). Similarly here, Plaintiffs brought an “action on a contract” against all of the defendants, including non-signatory Stephen Connor. They alleged that Defendant Connor acted wrongfully both in the formation of the March 1999 Agreement and in enforcing it. See Plaintiffs’ Second Amended Complaint, CP 156-162, discussed supra at pages 11-14. Plaintiffs sought to obtain their own attorneys’ fees from Defendant Connor. *Id.* at Par. 14, CP 161. Consequently, RCW 4.84.330 entitles Stephen Connor as a prevailing party to his attorneys’ fees from Plaintiffs.

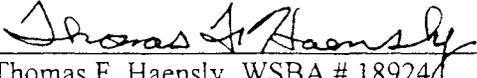
V. CONCLUSION

Plaintiffs should not be allowed to bring claims (including for their attorneys’ fees) against Stephen Connor for his enforcement of the March 1999 Agreement on behalf of Bayfield and Woodland, and, then, avoid paying contractual attorneys’ fees after Plaintiffs have lost those claims. Plaintiffs chose to sue Stephen Connor as part of their litigation strategy. They must now be held responsible for the attorneys’ fees that are the consequences of that decision. The Order Denying Stephen Connor’s Motion for Attorneys’ Fees should be reversed and the case remanded for a determination of his reasonable attorneys’ fees.

DATED this 8th day of June, 2009.

Thomas F. Haensly, WSBA # 18924
Attorney for Appellant Stephen Connor

DATED this 8th day of June, 2009.


Thomas F. Haensly, WSBA # 18924
Attorney for Appellant Stephen Connor