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DIVISION II

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STATE OF WASHINGTON
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NO. 38783-2-II

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

JUDITH C. GREER, an individual, and STEPHEN CONNOR, an
individual,

Appellants,

v.

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

Respondents.

RESPONDENTS' BRIEF

Thomas F. Peterson, WSBA #16587
Adam R. Asher, WSBA #35517
SOCIUS LAW GROUP, PLLC
Attorneys for Respondents

Two Union Square
601 Union Street, Suite 4950
Seattle, WA 98101.3951
206.838.9100

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I. INTRODUCTION

Plaintiffs Kathleen Connor and Donald B. Mountjoy sued two corporate entities and their brother and sister, Defendant Stephen Connor (“Defendant Connor”) and Defendant Judith Connor Greer (“Defendant Greer”), to protect their rights to the Community Access Areas in Gull Harbor, Thurston County, Washington. Plaintiffs’ claims against the corporate entities arose out of a 1999 agreement. Plaintiffs added tort claims against Defendants Greer and Connor personally based on misrepresentations made before the Agreement was entered, and based on Defendants’ efforts to block Plaintiffs’ beach access, and other harassing conduct, which started in 2005. Neither Defendants Greer nor Connor was a party or signatory to the March 1999 Agreement (the “Agreement”). Further, throughout the litigation both Defendants Greer and Connor disclaimed any connection to the Agreement. Yet, at the conclusion of the case, both Defendants Greer and Connor asserted a right to attorneys’ fees from the very agreement they disavowed. This was the only basis they cited for an award of fees. Because they were not parties to the Agreement, the trial court properly denied their motions for attorneys’ fees.

II. ASSIGNMENTS OF ERROR

A. The trial court did not err in denying Defendant Greer’s motion for attorneys’ fees.

B. The trial court did not err in denying Defendant Connor's motion for attorneys' fees.

III. STATEMENT OF THE CASE

A. Parties

1. Kathleen L. Connor and Bruce D. Mountjoy ("Plaintiffs"), own Lot 10 of the Plat of Gull Harbor Division 1, Thurston County, Washington.

2. Judith Connor Greer, Defendant, is the sister of Kathleen Connor. Defendant Greer is the President and beneficial owner of Bayfield Resources Company ("Bayfield") and The Woodland Company ("Woodland"), which sold Lot 10 to Plaintiffs.

3. Stephen Connor, Defendant, is the brother of Kathleen L. Connor and Defendant Greer. Defendant Connor is the Vice President, Secretary, and Treasurer of Bayfield and Woodland.

B. History of Gull Harbor Property

Bayfield and Woodland are both family-run companies for which Defendant Greer is the beneficial owner and President. (CP 2141.) Velma Connor, the parties' mother, served as an officer of the companies until her death, at which time Defendant Connor became the Vice President, Secretary, and Treasurer. (CP 2144, 2148.) Bayfield was formed in 1988 contemporaneously with Defendant Greer's purchase of most of the lots

within Gull Harbor from the Federal Savings and Loan Insurance Company (“FSLIC”). (CP 2141-42.) Much of the property was a platted development known as Gull Harbor Division 1. (CP 2141.) In 1993, Woodland purchased Lot 10 of Gull Harbor Division 1, which was not included in the original purchase from FSLIC.

C. Lot 10 Transaction/Negotiations

In 1996, Plaintiffs rented Lot 10 from Defendant Woodland. From the time Woodland purchased Lot 10 in 1993 and while Plaintiffs rented Lot 10, discussions between Plaintiffs and Defendant Greer and Velma Connor occurred regarding the potential of Woodland selling Lot 10 to Plaintiffs. (CP 2117.) Because of her fondness for the Gull Harbor area, and specifically, the community paths, trails, and beaches, Plaintiff Kathleen Connor was interested in purchasing Lot 10 from Woodland. (CP 2117-18.)

During the negotiations, Defendant Greer requested that Plaintiffs sign a separate agreement containing clauses related to the use of the well, a license to use the adjoining property, and rights of first refusal for both parties. (CP 2126-32.) Defendant Greer also requested that Plaintiffs sign a “relinquishment” of their rights to the Community Access Areas. (CP 2118, 2153.) While initially concerned about this provision, Defendant Greer promised and “guaranteed” that despite the “relinquishment,”

Plaintiffs would have unfettered rights in the Community Access Areas, so long as the Plaintiffs or their family owned Lot 10. (CP 2118, 2153, 2160.) William Connor, the parties' father, recalls through many conversations and many gatherings, that Plaintiffs would always have access to the community areas and the beach. (CP 2164.) Plaintiffs requested several times that this promise be reduced to writing in the sale documents, and were assured of the same. (CP 2118, 2154.)

Based on these promises, and the trust Plaintiffs had in their mother and sister, Velma Connor and Defendant Greer, Plaintiffs agreed to purchase Lot 10 and to sign the Agreement, which includes the Relinquishment Provision. (CP 2118-19.) Absent such promises, Plaintiffs would not have signed the Agreement. (*Id.*)

D. March 1999 Agreement

The first paragraph of the March 1999 Agreement provides:

This Agreement (the "Agreement") is entered into as of _____, 1998 by and between BAYFIELD RESOURCES COMPANY, a Washington corporation, ("Bayfield"), THE WOODLAND COMPANY, a Washington corporation ("Woodland") and DONALD BRUCE MOUNTJOY and KATHLEEN L. CONNOR, husband and wife ("Grantees").

(CP 2126.) It is undisputed that Defendants Greer and Connor were not parties to the Agreement, are not mentioned in the Agreement, and did not sign the Agreement. Defendant Greer admits that she "did not sign" and

“was not a party to” the Agreement. (CP 327.) Defendant Connor similarly disclaimed any interest in the Agreement:

Stephen Connor did not own the property, did not sell the property, did not negotiate the transaction, did not draft or negotiate the Agreement, was not a party to the Agreement and was not an officer or director of either The Woodland Company or Bayfield Resources in 1999. Indeed, aside from his familial relations to the parties, Stephen Connor was a total stranger to the transaction.

(CP 1621.)

The Agreement provides, in pertinent part, as follows:

3. License. Bayfield hereby grants to Grantees a license to occupy and use, for the following purposes, that portion of Bayfield Property immediately adjacent to and abutting Grantees' Property, as further identified on Exhibit C attached hereto and by this reference incorporated herein.

3.1 Use. Any permissive use shall be limited to those uses for which Grantees have previously asked for and received permission in writing. Such use shall specifically exclude any right to construct any permanent improvements on the Bayfield Property, to alter the grade or landscaping thereof in any material fashion, to cut or remove any timber or to use any motorized vehicles for recreational purposes. Permission for such use may be revoked by Bayfield at any time upon thirty (30) days prior written notice to Grantees. In exchange for such permission to use, Grantees hereby waive and relinquish any claims they may now have or may acquire in the future to assert any claim of title to any portion of the Bayfield Property, whether arising through adverse possession or otherwise.

* * * *

5. Relinquishment of Rights. Grantees hereby relinquish and waive, for themselves, their heirs, successors and assigns, all rights to use of streets, drives, paths,

community access and tidelands, as provided in the plat of Gull Harbor, Division 1, dated and recorded October 2, 1959 in Volume 13 of Plats, Page 20, Records of Thurston County, Washington or as otherwise having accrued for the benefit of Grantees' Property, as the same benefit Grantees' Property. Such relinquishment is final and shall bind and run with Grantees' Property.

* * * *

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.

8. Benefit of Covenants. The covenants, conditions, restrictions, and easements shall run with and burden the property described in this Agreement and shall also benefit such property, and the rights and obligations set forth herein shall inure to and be binding upon the successors, heirs, and assigns of the parties to this Agreement; provided, however, that the right of first refusal set forth in Section 2 shall terminate and be of no further force and effect with respect to any of the property subject thereto which has been sold to an Offeror pursuant to Section 2.1.2 or 2.2.2 and provided further, and notwithstanding anything to the contrary contained herein, the right of first refusal set forth in Section 2.2 is personal to Kathleen L. Connor and Donald Bruce Mountjoy and their children by birth or adoption and shall terminate and be of no further force and effect as such time as Kathleen L. Connor and Donald Bruce Mountjoy or their children by birth or adoption no longer owns Grantees' Property.

(CP 2130-31.)

E. Dispute Between the Parties

Problems between Plaintiffs and Defendants began in the summer of 2005. (CP 2119-20.) At that time, other Connor siblings were involved in a dispute with Defendants Greer and Connor over Velma Connor's

estate. (*Id.*) Plaintiffs refrained from the involvement in the estate dispute because their children had long-standing friendships with Defendant Greer's children, which the Plaintiffs did not want disrupted by the estate controversy. (*Id.*) This relationship deteriorated, however, when Plaintiffs learned of the alleged assault of their then 15-year old son by Defendant Connor. (*Id.*) Upon learning of the alleged assault, Plaintiffs confronted Defendants Greer and Connor about the incident. (*Id.*)

Almost immediately thereafter, Defendants Greer and Connor instructed their attorney to write a letter that threatens the termination of a purported license to use the Community Access Areas and the beach. (CP 2184-86.) The letter cited Section 3 of the Agreement as authority for their revocation of a "license" to use the Community Access Areas and the beach. (*Id.*) Section 3, however, relates only to "that portion of the Bayfield Property immediately adjacent to and abutting Grantee's Property," not to the Community Access Areas. (CP 2130.) The letter sets forth a number of criteria that would need to be met, and concluded, "If any of these provisions are violated by either you or your family members, Bayfield and Woodland Company will immediately exercise their right to revoke your permission to occupy and use the paths and beachfront areas as set forth in the Agreement." (CP 2186.) A second letter was sent on May 18, 2006. (CP 2188-89.) This letter states, "Pursuant to paragraph 3.1 of the March 26, 1999 Agreement, we are giving you notice that your license and permission to access, occupy, and

use the beach is hereby revoked. Such revocation is effective thirty (30) days following your receipt of this written notice.” (CP 2189.)

After Plaintiffs’ refusal to comply with the terms of such letters, which were inconsistent with the terms of the Agreement, Plaintiffs were subjected to an unrelenting and ever-increasing campaign of intimidation and harassment by Defendants. (CP 2120.) Defendants’ harassment included, but was not limited to, the following:

- Purporting to revoke Plaintiffs’ rights to use the beach and Community Access Areas;
- Verbal harassment;
- Building fences to block Plaintiffs’ access to community trails, roads, and paths;
- Directing their attorney to send numerous threatening and intimidating letters to Plaintiffs;
- Continual running of loud heavy equipment at odd hours around the Plaintiffs’ property; and
- Constant videotaping of Plaintiffs and their minor son.

(CP 528, 2120.) This lawsuit followed.

F. Plaintiffs’ Claims

Plaintiffs filed this action against Defendants Bayfield and Woodland on June 1, 2006 for injunctive relief, to quiet title, and for declaratory judgment. (CP 11-35.) On April 27, 2007, Plaintiffs moved to amend their Complaint to add a claim for Consumer Protection Act violations against Bayfield and Woodland and to add various tort claims

against Judith Connor Greer and Stephen Connor. (CP 93-100.) Plaintiffs submitted a proposed Second Amended Complaint with all additional claims highlighted in bold. (CP 101-18.) On May 21, 2007, Plaintiffs were granted leave to amend their Complaint. (CP 148-49.) After the amendment, Plaintiffs asserted the following alternative causes of action: (1) Injunctive Relief; (2) Quiet Title; (3) Declaratory Judgment; (4) Violation of RCW 19.86 *et seq.* (Consumer Protection Act); (5) Misrepresentation; (6) Reformation Based on Mistake; (7) Breach of Fiduciary Duties; (8) Breach of Implied Duty of Good Faith; (9) Rescission Based on Frustration of Purpose; and (10) Equitable Relief. (CP 150-62.)

Of these claims, Plaintiffs asserted claims for Injunctive Relief, Violation of the Consumer Protection Act, Misrepresentation, Breach of Fiduciary Duty, and Breach of Implied Duty of Good Faith against Defendant Greer personally. (CP 150-62, Appendix A, Stipulation Clarifying Claims.)

Plaintiffs successfully defended two motions for summary judgment brought by Defendant Greer. Defendant Greer filed a motion for summary judgment on Plaintiffs' CPA claim on November 8, 2007. (CP 317-330.) Following a hearing, the trial court found that genuine issues of material fact precluded summary judgment per her December 14, 2007 Order. (CP 608-12.)

Shortly thereafter, on January 11, 2008, Defendant Greer filed a motion for summary judgment on Plaintiffs' Misrepresentation and

Implied Duty of Good Faith claims. (CP 613-31.) Following oral argument, the trial court found genuine issues of material fact existed and entered an order denying Defendant Greer's motion on February 15, 2008. (CP 661-63.)

On February 15, 2008, Plaintiffs filed a motion for summary judgment on their Third Cause of Action for Declaratory Judgment against Defendants Bayfield and Woodland, seeking a determination that the Relinquishment Provision in the March 1999 Agreement was void. (CP 793-812.) Paragraph 6.4 of the Complaint alleged, "Section 5 of the Agreement is void because defendants did not amend or alter the Plat of Gull Harbor Division 1 as required by RCW 58.17.215." (CP 157.) On April 24, 2008, the trial court entered an order granting Plaintiffs' motion for summary judgment, ruling that, "Section 5 of the Agreement recorded on March 29, 1999 under Thurston County Recording No. 3220322 between Bayfield Resources Company and The Woodland Company, and Donald Bruce Mountjoy and Kathleen L. Connor is void," but reserved ruling on the appropriate remedy. (CP 2260-62.)

On June 6, 2008, the trial court entered an oral ruling that the appropriate remedy was to strike the last sentence of Section 5 that read, "Such relinquishment is final and shall bind and run with Grantees' Property." (CP 2131.) On June 20, 2008, the parties presented their orders. Plaintiffs argued that to effectuate the trial court's intent, the "heirs, successors and assigns" language would need to be similarly deleted because that language is synonymous with a covenant that runs

with the land. (CP 2330-31.) The trial court agreed, and signed Plaintiffs' proposed Order. (CP 1234-38, 1652-55.)

As a result of their success on their declaratory judgment claim, Plaintiffs moved to voluntarily dismiss their remaining alternative claims on June 12, 2008. (CP 1226-28.) Subsequently, the parties stipulated to the dismissal of these claims, which was approved by the trial court on June 18, 2008. (CP 1231-33.) The claims were dismissed "without prejudice and without costs." (*Id.*)

Plaintiffs asserted claims for Injunctive Relief, Violation of the Consumer Protection Act, and Misrepresentation against Defendant Connor. (CP 150-62, Appendix A, Stipulation Clarifying Claims.) On April 22, 2008, Stephen Connor filed a motion for summary judgment. (CP 899-912.) The trial court granted his motion on June 6, 2009. (CP 1223-25.)

G. Defendants Greer's and Connor's Counterclaims

Defendant Greer filed a counterclaim against Plaintiffs for trespass. After considerable discovery had taken place, Plaintiffs drafted and filed a motion for summary judgment seeking the dismissal of Defendant Greer's counterclaim. (CP 513-23.) Upon receipt of Plaintiffs' motion, Defendant Greer voluntarily dismissed her counterclaim, and a stipulation and order of dismissal was entered on December 11, 2007. (CP 2115-16.)

Defendant Connor asserted counterclaims under CR 11 and RCW 4.84.185. He alleged that Plaintiffs' claims against him were frivolous

and that he was entitled to an award of sanctions and attorneys' fees. (CP 289-90.) On May 8, 2008, Plaintiffs filed a motion for summary judgment to dismiss Defendant Connor's counterclaim. Following oral argument, the trial court entered an order dismissing Defendant Connor's counterclaim on June 20, 2008. (CP 1239-40.)

IV. SUMMARY OF ARGUMENT

Defendants Greer and Connor rely upon the attorneys' fees provision in the Agreement as the basis for their request for fees. However, it is well settled in Washington that only parties to an agreement can benefit under its terms. *See Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Constr., Inc.*, 119 Wn.2d 334, 342-43, 831 P.2d 724 (1992). Neither Defendant Greer nor Defendant Connor are parties to the Agreement. Indeed, Defendants Greer and Connor both disclaimed any benefit or burden of the Agreement in their arguments to the trial court. Because they are not parties, and they failed to show any evidence that they were intended third-party beneficiaries, Defendants Greer and Connor are not entitled to the benefits of the attorneys' fees clause in the Agreement. The trial court's denial of fees should be upheld.

Even if Defendants Greer and Connor were "parties" to the Agreement or otherwise could claim benefits under it, Defendants Greer and Connor were not "prevailing parties." Greer stipulated to the dismissal of Plaintiffs' claims against her "without costs." This stipulation bars her from seeking fees under the holding in *Roberts v. Bechtel*, 74 Wn. App. 685, 687, 875 P.3d 14 (1994). As for Defendant Connor, both

parties prevailed on the claims against the other. If both parties prevail on major issues, an attorneys' fees award is not appropriate. *Marassi v. Lau*, 71 Wn. App. 912, 916, 859 P.2d 605 (1993) *overruled on other grounds* by 165 Wn.2d 481, 200 P.3d 683 (2009). Therefore, even if Defendants Greer and Connor could benefit from the Agreement, the trial court's denial of fees should nevertheless be upheld.

V. ARGUMENT

A. Standard of Review

Whether a specific statute, contractual provision, or recognized ground of equity authorizes an award of fees is a question of law and is reviewed de novo. *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 126, 857 P.2d 1053 (1993).

B. Defendants Greer and Connor are not Parties to the Agreement and Cannot Benefit from the Attorneys' Fees Provision

Under Washington law, a prevailing party may recover attorneys' fees only if authorized by a private agreement, by statute, or by a recognized ground in equity. *State v. Keeney*, 112 Wn.2d 140, 142, 769 P.2d 295 (1989). Here, Defendants Greer and Connor point to the Agreement entered by Plaintiffs and Bayfield and Woodland as the source of their ability to collect attorneys' fees as the prevailing party. Fatal to their argument is the fact the neither Defendants Greer nor Connor were parties to the Agreement.

It is a well-recognized principle that one who is not a party to a contract cannot claim benefits under it. *See Touchet Valley Grain*

Growers, Inc. v. Opp & Seibold Gen. Constr., Inc., 119 Wn.2d 334, 342-43, 831 P.2d 724 (1992). It is undisputed that the parties to the Agreement were Plaintiffs, on the one hand, and Bayfield and Woodland, on the other hand. Defendants Greer and Connor were not parties to the Agreement, did not sign the Agreement, and their names are not even mentioned in the Agreement. Moreover, title to the properties subject to the Agreement is held in the name of Bayfield and Woodland.

Further, both Defendants Greer and Connor disclaimed any connection with the Agreement. Defendant Greer admits she was not a party to the Agreement and has gone out of her way to disclaim any personal connection with the Agreement. For instance, in Defendant Greer's motion for summary judgment on Plaintiffs' CPA claim, she stated, "The Mountjoy's sixth and eight[h] cause of action seek reformation or rescission of an Agreement Judith Greer did not sign, and was not a party to. Yet, it is axiomatic that 'a contract . . . can only be enforced against those party to it'." (CP 327.) It is equally axiomatic that if Defendant Greer cannot be held to the contract, as she alleged, she cannot benefit from its provisions. Defendant Greer must be held to the position she previously took.¹ Because she is not a party to the Agreement, she cannot benefit from the attorneys' fees provision.

¹ Judicial estoppel prevents a party from asserting one position in a judicial proceeding and later taking an inconsistent position to gain an advantage. *Ashmore v. Duff*, 165 Wn.2d 948, 951-52, 205 P.3d 111 (2009); *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007). The core factors are whether the later position is clearly inconsistent with the earlier position, whether judicial acceptance of the second position would create a perception that either the first or second court was misled by the party's

Similarly, Defendant Connor admits that he was not a party to the Agreement, was not an officer of Bayfield and Woodland at the time the Agreement was signed, and aside from the familial relationship was a “total stranger” to the Agreement. (CP 1621.) Because Connor was a “total stranger” to the Agreement, he too cannot benefit from the attorneys’ fee provision in the Agreement.

This general principle has one exception: an intended-third party beneficiary is entitled to receive benefits under a contract. *See Postlewait Constr., Inc. v. Great Am. Ins. Cos.*, 106 Wn.2d 96, 99-100, 720 P.2d 805 (1986). However, this exception requires proof by the proponent that both parties to the contract intended that the benefits of the contract were to flow to the third-party. *Id.* at 99. Defendants Greer and Connor presented no such evidence in their motions for attorneys’ fees. Further, the record and the arguments in their motions belie any such assertion. Again, Defendants Greer and Connor have gone out of their way to distance themselves from the Agreement. Further, the Agreement itself provides which parties are bound and benefit from the Agreement. Section 8 provides:

8. Benefit of Covenants. The covenants, conditions, restrictions, and easements shall run with and burden the property described in this Agreement and shall also benefit such property, and the rights and obligations set forth

position, and whether the party asserting the inconsistent position would obtain an unfair advantage or imposes an unfair detriment on the opposing party if not estopped. *Arkinson*, 160 Wn.2d at 538-39.

herein shall inure to and be binding upon the successors,
heirs, and assigns of the parties to this Agreement[.]

(CP 2131) (Emphasis added.) No provision is made for Defendants Greer or Connor. Nor is any provision made for officers, directors, or agents of the parties. Had Plaintiffs and Bayfield and Woodland intended for Defendants Greer and Connor to be third-party beneficiaries, the Agreement could have so provided. No evidence can be found in the Agreement, or otherwise in the record, that both Plaintiffs and Bayfield and Woodland intended Defendants Greer and Connor to be third-party beneficiaries of the Agreement.

Defendant Greer's and Defendant Connor's reliance on *McClure v. Davis Wright Tremaine*, 77 Wn. App. 312, 314-15, 890 P.2d 466 (1995), for the proposition that a non-party may benefit from an Agreement is misplaced. Defendants Greer and Connor mischaracterize the court's rationale for permitting a non-party law firm to demand arbitration under an agreement. Contrary to their contention, the court did not permit the non-party to benefit from the agreement because of the "related to" language in the arbitration clause. Rather, it was the fact that the arbitration clause permitted "any party involved" in a dispute to submit the matter to arbitration. *Id.* at 314-15. The court explained:

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 the 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 315.

Here, the Agreement does not provide that “any party involved” may claim attorneys’ fees as the prevailing party. Rather, the Agreement merely refers to a “party.” This reference must be read in context of the overall Agreement. The first paragraph of the Agreement provides:

This Agreement (the “Agreement”) is entered into as of _____, 1998 by and between BAYFIELD RESOURCES COMPANY, a Washington corporation, (“Bayfield”), THE WOODLAND COMPANY, a Washington corporation (“Woodland”) and DONALD BRUCE MOUNTJOY and KATHLEEN L. CONNOR, husband and wife (“Grantees”).

(CP 2126.) “Party” therefore means either Plaintiffs or Bayfield and Woodland. Unlike the provision in *McClure*, there is no statement indicating an intent that the word “party” has a broader meaning, such as “any party involved.” The Agreement only applies between the parties to the Agreement. *McClure*, therefore, is inapposite.

McClure is further distinguishable based on the presumptions at play in the context of arbitration versus attorneys’ fees. As *McClure* acknowledged, 77 Wn. App. at 317, there is a strong public policy in favor of arbitration in Washington. *See, e.g., The Council of County and City Employees v. Spokane County*, 32 Wn. App. 422, 425, 647 P.2d 1058 (1982) (There is a strong presumption in favor of arbitrability; all questions upon which parties disagree are presumed to be within the arbitration provision unless negated expressly or by clear implication.); *Heights at Issaquah Ridge, Owner Ass’n v. Burton Landscape Group, Inc.*,

148 Wn. App. 400, 405, 200 P.3d 254 (2009) (Any doubts should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or like defenses to arbitration); *Zuver v. Air Touch Communications, Inc.*, 153 Wn.2d 293, 301, 103 P.3d 753 (2004) (same). Accordingly, a court starts its analysis with the presumption that if there is an agreement to arbitrate, the dispute is arbitrable. It was through this lens that the court in *McClure* reached its decision.

The presumptions applicable for an award of attorneys' fees are just the opposite. Washington has long followed the American rule on the award of attorneys' fees. The rule states attorneys' fees are not recoverable by the prevailing party as a cost of litigation absent a contract, statute, or recognized ground of equity. See *Rettkowski v. Dept. of Ecology*, 128 Wn.2d 508, 514, 910 P.2d 462 (1996). In other words, the baseline is that no fees are recoverable. The party seeking the fees must prove a contract, statute, or recognized ground of equity applies before fees can be awarded. Unlike in the arbitration context, any doubt regarding the applicability of an attorneys' fees clause is resolved against an award of fees. Because the presumptions at play in *McClure* are opposite from the presumptions applicable in attorneys' fees questions, *McClure* is distinguishable.

Defendants Greer and Connor argue that the "context rule" permits a court to view "the subsequent acts and conducts of the parties" in determining the intent of the contracting parties. (Greer Appellant's Brief

at 28.) They argue that after the Agreement was signed, Plaintiffs understood the attorneys' fees provision would apply to Defendants Greer and Connor, and therefore Defendants Greer and Connor should be entitled to the benefits of the Agreement. This is incorrect for several reasons.

First, Defendants Greer and Connor repeatedly cite the false "fact" that Plaintiffs intended the attorneys' fees provision to apply to claims against and between them and Defendants Greer and Connor. They point to Plaintiffs' Second Amended Complaint which contains a request for fees against "Defendants." Plaintiffs originally filed suit against Bayfield and Woodland asserting claims arising under the contract. In its requested relief, Plaintiffs prayed for fees against the "Defendants." When Plaintiffs amended their Complaint to add claims against Defendants Greer and Connor, the relief requested section pertaining to fees was unchanged. Indeed, Plaintiffs submitted their proposed Second Amended Complaint with changes in bold. (CP 101-18.) This portion of the brief was unchanged. This was not a conscious decision to seek fees against Defendants Greer and Connor, as they assert; it was a mere oversight. Furthermore, Plaintiffs' later conduct belies any such assertion. After obtaining summary judgment in its favor, Plaintiffs moved for fees against Bayfield and Woodland but not against Defendants Connor and Greer, believing that fees against the latter defendants were not recoverable against the latter defendants under the Agreement.

Second, and more fatal to their argument, the quoted portion of *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990) and *Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 28 P.3d 823 (2001), states, “Context may not be used . . . to contradict, modify, or add to the written terms of an agreement.” (Greer Appellant’s Brief at 28.) Defendants Greer and Connor seek to do precisely that. They seek to modify and add the words “any party involved” in the attorneys’ fee provision. This is expressly prohibited by *Berg* and its progeny.

Defendants Greer and Connor also rely upon the statement in *McClure* that nonsignatories can be compelled to arbitrate under the doctrine of equitable estoppel or under normal contract and agency principles. *McClure* cites the out-of-jurisdiction decision of *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993). Their reliance on *McClure* and *Sunkist* is misplaced. First, dictum is not the rule of law and cannot be relief upon as precedent.² The statement in *McClure* was not necessary to decide the case and is therefore dictum. Second, by the very terms of the statement, this rule applies to compelling “arbitration.” Other Eleventh Circuit cases describing the rule in *Sunkist* have stated that the rule was necessary because “[o]therwise . . . the

² See, e.g., *State ex rel. Hoppe v. Meyers*, 58 Wn.2d 320, 329-30, 363 P.2d 121 (1961) (“dictum in that case . . . should not be transformed into a rule of law”); *DCR, Inc. v. Pierce County*, 92 Wn. App. 660, 683 n. 16, 964 P.2d 380 (1998) (“Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed;” “Dicta is not controlling precedent.”); *In re Roth*, 72 Wn. App. 566, 570, 865 P.2d 43 (1994) (“Dicta is language not necessary to the decision in a particular case.”).

federal policy in favor of arbitration [is] effectively thwarted.” *MS Dealer Service Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999). Here, we are not construing an arbitration clause, but rather an attorneys’ fees clause. As discussed above, the presumptions involved are diametrically opposite. Neither *McClure* nor *Sunkist* holds that a non-signatory to an Agreement can benefit from an attorneys’ fees provision in the Agreement. Defendants Greer and Connor have utterly failed to cite a single case in any jurisdiction where equitable estoppel was applied in the context of an attorneys’ fees provision.

Additionally, Defendants Greer and Connor cite the equitable doctrine of “mutuality of remedy” in support of their position that the attorneys’ fees provision applies in this case. Defendants Greer and Connor cite *Park v. Ross Edwards, Inc.*, 41 Wn. App. 833, 706 P.2d 1097 (1985) and *Kaintz v. PLG, Inc.*, 147 Wn. App. 782, 197 P.2d 710 (2008). Their reliance on these cases is equally misguided. Both *Kaintz* and *Park* involved situations in which a defendant was successful in proving the unenforceability of a contract that contained a bilateral attorneys’ fees provision. The *Kaintz* court explained, “the principal of mutuality of remedy authorizes the award of attorneys’ fees where a party prevails in an action brought on a contract that contains a bilateral attorney fee clause (rendering RCW 4.84.330 inapplicable) by establishing the invalidity or unenforceability of the contract.” *Kaintz*, 147 Wn. App. at 789. Because the alleged contract that the plaintiffs sued under contained an attorneys’ fee provision, the court permitted the defendants to recover their fees.

This case bears no resemblance to *Kaintz or Park*. Plaintiffs never asserted breach of contract claims against Defendants Greer or Connor or alleged that they were parties to the Agreement. Nor did Defendants Greer or Connor prove the absence of an enforceable agreement with Plaintiffs. Rather, Plaintiffs filed various tort claims against Defendants Greer and Connor. The gravamen of which stem from misrepresentations made before the contract with Bayfield and Woodland was entered and from the harassing conduct that began in 2005, long after the contract was signed. *Kaintz* and *Park* simply have no applicability to the facts of this case.

Defendant Connor makes a separate but similar argument that RCW 4.84.330 supports an award of fees to him. RCW 4.84.330, by its terms, applies only to unilateral attorneys' fees provisions. The *Kaintz* decision stated, "By its terms, RCW 4.84.330 applies only to contracts with unilateral attorney fee provisions. As we have previously noted, 'where, as here, the agreement already contains a bilateral attorneys' fees provision, RCW 4.84.330 is generally inapplicable.'" *Kaintz*, 147 Wn. App. at 786. Here, there is no question that the attorneys' fee provision is bilateral. Accordingly, RCW 4.84.330 is inapplicable.

Lastly, Defendants Greer and Connor allege that if Plaintiffs' claims against them "arose out of" the Agreement, they are entitled to the benefit from the attorneys' fees provision. They cite the following authority: *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 Wn. App. 120, 130, 857 P.2d 1053 (1993); *Mehlenbacher v. Demont*, 103 Wn. App. 240, 244, 11 P.3d 871 (2000); and *Brown v. Johnson*, 109 Wn. App. 56, 58, 34 P.3d 1233 (2001). None of these cases involved a non-party, non-signatory to the contract at issue. That Plaintiffs' claims allegedly "arose out of" the Agreement, a fact Plaintiffs dispute, is irrelevant because Defendants Greer and Connor, as non-parties to the Agreement, cannot benefit from the attorneys' fee provision. There is nothing in the cases cited by Defendants Greer and Connor that change the well-settled rule that only parties to a contract can benefit from it. See *Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Constr., Inc.*, 119 Wn.2d 334, 342-43, 831 P.2d 724 (1992).

C. Greer and Connor are not the Prevailing Parties

In general, a prevailing party is one who receives an affirmative judgment in his or her favor. *Piepkorn v. Adams*, 102 Wn. App. 673, 686, 10 P.3d 428 (2000); *Riss v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 669 (1997). If neither party wholly prevails, then the party who substantially prevails is the prevailing party. *Piepkorn*, 102 Wn. App. at 686; *Marassi v. Lau*, 71 Wn. App. 912, 916, 859 P.2d 605 (1993). However, if both parties prevail on major issues, an attorneys' fees award is not appropriate. *Marassi*, Wn. App. at 916 (citing *American Nursery Prods. v. Indian Wells Orchards*, 115 Wn.2d 217, 235, 797 P.2d 477 (1990)).

As between Plaintiffs and Defendant Connor, neither party prevailed in this matter. Both parties moved for summary judgment dismissal of the other's claims. The trial court granted both motions,

dismissing all claims between the parties. Both parties were successful in obtaining dismissal of the other's claims. In this circumstance, neither party can be said to have substantially prevailed. Therefore, an award of fees is not appropriate.

Similarly, Defendant Greer is not a "prevailing party." While it is true that a defendant may be considered the "prevailing party" when a plaintiff voluntarily dismisses its claims, this result only occurs when a plaintiff dismisses its action in its entirety. See e.g., *Hawk v. Branjes*, 97 Wn. App. 776, 778, 986 P.2d 841 (1999) (Plaintiff voluntarily dismissed entire action); *Walji v. Candyco, Inc.*, 57 Wn. App. 284, 286, 787 P.2d 946 (1990) (entire action voluntarily dismissed); *Anderson v. Gold Seal Vineyards, Inc.*, 81 Wn.2d 863, 505 P.2d 790 (1973) (same). In *Marassi v. Lau*, 71 Wn. App. 912, 918-19, 859 P.2d 605 (1993), the court explained the rule: "In general, if a plaintiff voluntarily dismisses its entire action under CR 41, the defendant is considered to be the prevailing party for purposes of attorney fees." (Emphasis added.)

Here, Plaintiffs asserted numerous claims against Bayfield, Woodland, and Defendant Greer. These claims, however, were plead in the alternative. For instance, Plaintiffs' claim for Declaratory Judgment against Bayfield and Woodland sought the same relief as their claim for Misrepresentation against Defendant Greer: rescission or reformation of Section 5 of the Agreement. Plaintiffs, having received a favorable order that Section 5, as written, was void, dismissed their alternative causes of action because they were moot. In this circumstance, Plaintiffs cannot be

said to have taken a voluntary non-suit on all of their claims. Rather, Plaintiffs prevailed by receiving the relief they requested. Having received that relief, no further litigation was required. In this instance, Plaintiffs' voluntary dismissal of their claims against Defendant Greer does not amount to a dismissal of their entire action. Therefore, Defendant Greer cannot be considered the prevailing party on this basis.

Furthermore, the Stipulation and Order of Dismissal of Plaintiffs' claims against Defendant Greer precludes an award of attorneys' fees to Defendant Greer. The parties stipulated to the dismissal of these claims without prejudice and "without costs." (CP 1231-33.) A stipulated dismissal "without costs" precludes an award of attorneys' fees. *See Roberts v. Bechtel*, 74 Wn. App. 685, 687, 875 P.3d 14 (1994).

In *Roberts*, the attorneys for both parties signed a stipulation that "all causes herein, as between Roberts and Bechtel, have been fully settled and compromised and that this matter should be dismissed with prejudice and without costs." *Id.* at 686. Less than a month later, Roberts sought an award of attorneys' fees. *Id.* The trial court granted his motion for fees. *Id.* at 687. The Court of Appeals reversed. The court held that a stipulation signed by counsel for both parties precluded an award of fees because the stipulation dismissed all claims "without costs." *Id.* The court held, "Attorney fees are considered costs of litigation." *Id.* (citing *Detonics ".45" Assocs. v. Bank of Cal.*, 97 Wn.2d 351, 644 P.2d 1170 (1982)). The same result is warranted here. Defendant Greer agreed to the dismissal of Plaintiffs' remaining claims against her "without costs."

As a result of this stipulation, she is precluded from seeking fees on these dismissed claims.

Defendant Greer seeks to distinguish *Roberts* on the ground that the court “focused on the parties expressed intent to fully settle their dispute.” (Greer Appellant’s Brief at 38.) Contrary to Defendant Greer’s contention, the court’s focus was the “without costs” language in the agreement. The court reasoned as follows:

A written stipulation signed by counsel on both sides of the case is binding on the parties and the court. . . . It is undisputed Ms. Roberts, through her counsel, stipulated the matter should be dismissed without costs. Attorney fees are considered costs of litigation. . . . The court was bound by the stipulation precluding an award of costs.

Id. at 687. There is nothing in the court’s reasoning suggesting that the court focused on anything other than the “without costs” language.

Defendant Greer relies upon the Washington Supreme Court’s decision in *Jacobsen v. City of Seattle*, 98 Wn.2d 668, 658 P.2d 653 (1983) for the proposition that “without costs” does not include attorneys’ fees. *Jacobsen*, however, contains no such holding. Plaintiffs stipulated to dismissal of their claim for monetary damages set out in paragraph 5.2 of their complaint. *Id.* at 675. Paragraph 5.2 referred only to the claim for monetary damages. *Id.* Paragraph 5.4 requested an award of reasonable attorney’s fees, and was not included in the stipulated dismissal. *Id.* Because the stipulation only dismissed the claims for damages, not the separate claim for attorneys’ fees, the court held that the dismissal of the damage claims “without costs” did not eliminate all costs from the

proceedings. *Id.* Here, the parties agreed to the dismissal of all Plaintiffs' claims "without costs." Defendant Greer did not reserve a separate claim for attorneys' fees, as the plaintiff in *Jacobsen* did. Accordingly, *Jacobsen* is inapposite, and the rule stated in *Roberts* controls. Having agreed to dismissal of all claims "without costs," Defendant Greer waived her right to seek attorneys' fees.

D. Plaintiffs are Entitled to Attorneys' Fees on Appeal

Pursuant to RAP 18.1(b), a party requesting fees must devote a section of its opening brief to the request for fees or expenses.

RAP 18.9(a) permits an award of attorney fees as a sanction for filing a frivolous appeal:

The appellate court on its own initiative or on motion of a party may order a party or counsel . . . who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.

Washington courts recognize that "an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal." *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 241, 119 P.3d 325 (2005) (quoting *Green River Cmty. Coll. Dist. No. 10 v. Higher Educ. Pers. Bd.*, 107 Wn.2d 427, 442-43, 730 P.2d 653 (1986)); *Fay v. N.W. Airlines, Inc.*, 115 Wn.2d 194, 200-01, 796 P.2d 412 (1990).

Here, an award of fees is warranted. Defendants Greer's and Connor's appeal presents no debatable issues and is devoid of merit. It is well-settled law that if you are not a party to an agreement you cannot claim benefits under it. Throughout the litigation, Defendants Greer and Connor disclaimed any connection with the Agreement. Defendant Connor even alleged that he was a "total stranger" to the Agreement. Having disclaimed any connection with the Agreement, Defendants Greer and Connor cannot now claim benefit to it. For these reasons, their appeal is frivolous, and Plaintiffs should be awarded their reasonable attorneys' fees incurred in responding to this appeal.

Ironically, Greer's and Connor's position that they are entitled to fees under the mutuality of remedies doctrine arguably provides a basis for an award of fees to Plaintiffs should they prevail on this appeal. *See, e.g., Park v. Ross Edwards, Inc.*, 41 Wn. App. 833, 706 P.2d 1097 (1985); *Kaintz v. PLG, Inc.*, 147 Wn. App. 782, 197 P.2d 710 (2008). This doctrine does not apply to the underlying action because Plaintiffs did not sue Greer or Connor on a contract, nor did Greer or Connor prove the absence of an enforceable agreement. However, this doctrine does closely fit the situation on this appeal where Greer and Connor assert that a contractual attorneys' fees clause exists and Plaintiffs are forced to litigate the nonexistence or unenforceability of such contract. Therefore, if

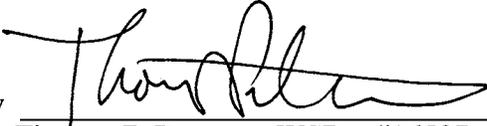
Plaintiffs prevail on this appeal, under Greer's and Connor's arguments, Plaintiffs would be entitled to an award of fees on appeal.

VI. CONCLUSION

The Court should affirm the trial court's denial of Defendant Greer's and Defendant Connor's motion for attorneys' fees. Greer and Connor were not parties to the Agreement. As non-parties, Defendants Greer and Connor are not entitled to the benefits of the Agreement. Even if Defendants Greer and Connor could claim some benefit under the Agreement based on an alternative theory, neither was a prevailing party. Defendant Greer stipulated to the dismissal of all Plaintiffs' claims "without costs," which includes attorneys' fees. As for Defendant Connor, both parties were successful in obtaining dismissal of the other's claims, resulting in neither party prevailing. For these reasons, Plaintiffs respectfully request that the Court affirm the trial court, dismiss Defendant Greer's and Defendant Connor's appeals, and award fees and costs to Plaintiffs.

Respectfully submitted, this 8th day of July, 2009.

SOCIUS LAW GROUP, PLLC

By 
Thomas F. Peterson, WSBA #16587
Adam R. Asher, WSBA #35517
Attorneys for Respondents

VII. CERTIFICATE OF SERVICE

I certify that on the 8th day of July, 2009, I caused a true and correct copy of this RESPONDENTS' BRIEF to be served on the following in the manner indicated below:

Martin L. Ziontz
 Peizer, Richards & Ziontz, P.S.
 1915 Pacific Building
 720 Third Avenue
 Seattle, WA 98104
 (206) 682-7700
 Facsimile: (206) 682-0721

- U.S. Mail
- Facsimile
- Legal Messenger
- Hand Delivery

Counsel for Appellants

Thomas F. Haensly
 Attorney at Law
 144 Railroad Avenue, Suite 217
 Edmonds, WA 98020
 (425) 775-4803
 Facsimile: (425) 775-9839

- U.S. Mail
- Facsimile
- Legal Messenger
- Hand Delivery

Counsel for Appellants

By: 
 Erin Knobler, Legal Assistant

FILED
 COURT OF APPEALS
 DIVISION II
 09 JUL 10 PM 12:16
 STATE OF WASHINGTON
 BY  DEPUTY

FILED
 COURT OF APPEALS
 STATE OF WASHINGTON
 2009 JUL -8 PM 4:54

VIII. APPENDIX

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SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

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

Plaintiffs,

v.

BAYFIELD RESOURCES COMPANY, a
Washington corporation, and THE
WOODLAND COMPANY, a Washington
corporation, JUDITH CONNOR GREER and
RICHARD GREER, husband and wife,
STEPHEN CONNOR, individual,

Defendants.

NO. 06-2-00992-1

STIPULATION CLARIFYING
CLAIMS AGAINST DEFENDANTS

Pursuant to CR 2A, Plaintiffs Donald B. Mountjoy and Kathleen L. Connor
("Plaintiffs") stipulate that the following claims in their Second Amended Complaint For:
1. Injunctive Relief; 2. Quiet Title; 3. Declaratory Judgment; 4. Violation of RCW 19.86 *et*
seq. (The Consumer Protection Act); 5. Misrepresentation; 6. Reformation Based on Mistake;
7. Breach of Fiduciary Duties; 8. Breach of Implied Duty of Good Faith; 9. Rescission Based
on Frustration of Purpose; and 10. Equitable Relief ("Complaint") are asserted against each
defendant:

Plaintiffs assert all claims in their Complaint against Defendants Bayfield Resources
Company and The Woodland Company.

STIPULATION CLARIFYING CLAIMS
AGAINST DEFENDANTS

Socius Law Group, PLLC
ATTORNEYS
Two Union Square • 601 Union Street, Suite 4950
Seattle, Washington 98101.3951
Telephone 206.838.9100
Facsimile 206.838.9101

1 Plaintiffs assert claims for Injunctive Relief (First Cause of Action), Violation of the
2 Consumer Protection Act (Fourth Cause of Action), Misrepresentation (Fifth Cause of
3 Action), Breach of Fiduciary Duty (Seventh Cause of Action), and Breach of Implied Duty of
4 Good Faith (Eighth Cause of Action) against Defendant Judith Connor Greer. No other
5 claims in the Complaint apply to Defendant Judith Connor Greer.

6 Plaintiffs assert claims for Injunctive Relief (First Cause of Action), Violation of the
7 Consumer Protection Act (Fourth Cause of Action), and Misrepresentation (Fifth Cause of
8 Action) against Defendant Stephen Connor. No other claims in the Complaint apply to
9 Defendant Stephen Connor.

10
11 DATED this 21st day of December, 2007.

12 SOCIUS LAW GROUP, PLLC

13
14 By 

15 Thomas F. Peterson, WSBA #16587
16 Adam R. Asher, WSBA #35517
17 Attorneys for Plaintiffs

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26 STIPULATION CLARIFYING CLAIMS
AGAINST DEFENDANTS

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Socius Law Group, PLLC
ATTORNEYS
Two Union Square • 601 Union Street, Suite 4950
Seattle, Washington 98101.3951
Telephone 206.838.9100
Facsimile 206.838.9101