IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DONALD B. MOUNTJOY and KATHLEEN L. CONNOR, husband and wife, Respondents, v. BAYFIELD RESOURCES COMPANY, a Washington corporation, and THE WOODLAND COMPANY, a Washington corporation, Defendants, JUDITH CONNOR GREER, an individual, and STEPHEN CONNOR, an individual, Appellants.	No. 38783-2-II UNPUBLISHED OPINION

Bridgewater, P.J. — Judith Connor Greer and Stephen Connor appeal the trial court's denial of their request for attorney fees under a contract among Bayfield Resources Company, The Woodland Company, and Kathleen L. Connor. Because Judith and Stephen were neither parties nor third-party beneficiaries to that contract, we affirm the trial court's denial of attorney

fees.

FACTS

Judith Connor Greer, Kathleen L. Connor, and Stephen Connor are siblings. Judith[1] owns two companies, Bayfield Resources Company (Bayfield) and The Woodland Company (Woodland). In the late 1980s, Bayfield bought the Gull Harbor Division 1 in Thurston County, acquiring all but a few tracts of Gull Harbor, including "Tract 10", which was not for sale at the time. By the early 1990s, however, Tract 10 came up for sale, and Woodland bought Tract 10 in an effort to assemble all the lots from the original Gull Harbor plat under Judith's companies' ownership.

Kathleen and her husband, Donald Mountjoy (collectively the Mountjoys), eventually bought Tract 10 from Woodland. As part of the purchase, the Mountjoys entered into an agreement (the Agreement) with Woodland and Bayfield. Under the Agreement, the Mountjoys relinquished all rights to use the streets, drives, paths, community access areas, and tidelands (collectively community access areas) in Gull Harbor. Specifically, the Agreement stated:

> **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 . . . . Such Relinquishment is final and shall bind and run with Grantees' Property.

CP at 402. Concerned with relinquishing rights to use portions of Gull Harbor that Bayfield owned, the Mountjoys sought and received a license to access Bayfield property that was "immediately adjacent to and abutting [their] [p]roperty." CP at 2130.

The Mountjoys lived on Tract 10 without incident until, about six years after entering the

[1] We use first names for clarity and intend no disrespect.

Agreement, a family dispute fueled problems. Within a month of the family dispute erupting, Judith, along with her brother Stephen, who managed aspects of Bayfield, sought to revoke the Mountjoys' license to use the community access areas in Gull Harbor. In response, the Mountjoys refused to comply with the revocation and sued Bayfield and Woodland to reinstitute their access rights. The Mountjoys eventually amended their complaint to assert various tort claims against Judith and Stephen personally.[2]

The Mountjoys filed a partial motion for summary judgment, arguing that the Agreement's relinquishment clause was void. The trial court agreed and struck the portions of the clause that bound the relinquishment to the Mountjoys' "heirs, successors and assigns" and that bound it to run with the Mountjoys' property. CP at 1236. The trial court, however, otherwise found that "Agreement remains in full force and effect in accordance with its terms." CP at 1236.

The Mountjoys voluntarily dismissed their remaining claims against Bayfield, Woodland, and Judith. Stephen also was granted summary judgment on the tort claims that the Mountjoys asserted against him. Judith and Stephen now appeal the trial court's denial of their request for attorney fees.

[2] The Mountjoys asserted the following claims against Judith personally: injunctive relief, violation of the Consumer Protection Act (CPA), misrepresentation, breach of fiduciary duty, and breach of implied duty of good faith. The Mountjoys also asserted the following claims against Stephen: injunctive relief, violation of the CPA, and misrepresentation.

ANALYSIS

I. Not Entitled to Attorney Fees Under Contract

The Mountjoys argue that Judith and Stephen cannot rely on the Agreement to obtain attorney fees because they were not parties to the Agreement and because they were not otherwise intended third-party beneficiaries to the Agreement. We agree.

We may award attorney fees when a contract, a statute, or a recognized ground in equity authorizes them. *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 849-50, 726 P.2d 8 (1986). Whether a specific statute, contractual provision, or recognized ground in equity authorizes an award of attorney fees is a question of law that we review de novo. *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 126, 857 P.2d 1053 (1993). Judith and Stephen point to the Agreement as the source of their ability to collect attorney fees, even though neither of them signed the Agreement. Therefore, the question before us is whether Judith and Stephen, as non-parties to the Agreement, can use it to obtain attorney fees.

In construing a written contract, such as the Agreement here, we have consistently applied the following rules: (1) the parties' intent controls; (2) we ascertain that intent from reading a contract as a whole; and (3) we do not read ambiguity into a contract that is otherwise clear and unambiguous. *Dice v. City of Montesano*, 131 Wn. App. 675, 683-84, 128 P.3d 1253, *review denied*, 158 Wn.2d 1017 (2006); *Mayer v. Pierce County Med. Bureau*, *Inc.*, 80 Wn. App. 416, 420, 909 P.2d 1323 (1995). In determining the parties' intent, we also view "the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the

reasonableness of respective interpretations advocated by the parties." *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990) (quoting *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973)).

Generally, a non-party to a contract cannot claim benefits under it. *See, e.g., Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Constr., Inc.*, 119 Wn.2d 334, 342-43, 831 P.2d 724 (1992). As an exception to this general principle, a third-party beneficiary is entitled to receive benefits under a contract so long as the contracting parties objectively intend to create the third party beneficiary. *Postlewait Constr., Inc. v. Great Am. Ins. Cos.*, 106 Wn.2d 96, 99-100, 720 P.2d 805 (1986). "[T]he key is not whether the contracting parties had an altruistic motive or desire to benefit the third party, but rather, 'whether performance under the contract would necessarily and directly benefit' that party." *Postlewait*, 106 Wn.2d at 99 (quoting *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 361-62, 662 P.2d 385 (1983)).

Here, for several reasons, the only intended parties to the whole Agreement are Bayfield, Woodland, and the Mountjoys. First, the Agreement lists "Bayfield Resources Company" and "The Woodland Company" as the grantors and lists "Donald Bruce Mountjoy" and "Kathleen L. Connor" as the grantees. CP at 397. Second, the Agreement states that it was "entered into . . . between" Bayfield, Woodland, and the Mountjoys.[3] CP at 397. Third, the Agreement uses the

[3] The first paragraph of the Agreement states:

> 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 at 397.

term "parties" in contexts that refer to "Grantees," "Bayfield," and "Woodland." CP at 397-403. For example, the Agreement's "Recitals" section refers to "Grantees," "Bayfield," and "Woodland" before it refers to them collectively as "[t]he parties." CP at 397-98. Fourth, the Agreement never otherwise mentions Judith or Stephen. And finally, neither Judith nor Stephen signed the Agreement.[4]

Judith and Stephen also cannot show that they were intended third-party beneficiaries to the Agreement generally. The Agreement had three sections with three primary goals: Section 1 gave the Mountjoys well water rights; Section 2 provided the Mountjoys, Bayfield, Woodland, and in certain circumstances, a "Family Member," [5] with rights of first refusal[6]; and Section 3 provided the Mountjoys with a revocable license to use the Bayfield property immediately adjacent to and abutting the Mountjoys' property.

Only Section 2 has language indicating that performance under the Agreement could, under the right circumstances, benefit a third party. Specifically, Section 2.3 of the Agreement allows transfer of rights of first refusal to a "Family Member," which creates the possibility that a "Family Member" who is not a party to the Agreement might benefit under the Agreement. CP at

---

[4] Velma Connor—Judith, Kathleen, and Stephen's mother—signed the Agreement as secretary of both Bayfield and Woodland.

[5] "A 'Family Member' shall mean a spouse, a lineal ancestor, a descendant by birth or adoption, a sibling, or a trust for the exclusive benefit of any of the foregoing, of (i) Grantees, in the case of Grantees' Property or (ii) any shareholder of Bayfield, in the case of the Bayfield First Refusal Property." CP at 401.

[6] The Mountjoys had rights of first refusal to a certain portion of Bayfield's property, while Bayfield and Woodland had rights of first refusal to Tract 10. In certain circumstances a "Family Member" could receive either the Mountjoys' or Bayfield and Woodland's rights of first refusal. CP at 401.

401. But Section 2.3, by its own terms, limits such transfer of rights of first refusal to the "rights and restrictions set forth in . . . Section 2." CP at 401. Consistent with this limited third-party beneficiary role is the Agreement's conspicuous silence about granting a "Family Member" the possibility of becoming a third-party beneficiary of the Agreement's other provisions. Thus, only in the event that Judith and Stephen acquired a right of first refusal to Tract 10 and otherwise met the conditions to become third-party beneficiaries under Section 2 could they enforce Section 2's "rights and restrictions." CP at 401. Absent a dispute regarding the benefits and liabilities of the right of first refusal, Judith and Stephen are not third party beneficiaries to, and thus cannot enforce, the other provisions to the contract. Accordingly, we hold that Judith and Stephen are not third-party beneficiaries with authority to enforce the Agreement's attorney fee clause for matters not pertaining to rights of first refusal.

Nonetheless, Judith and Stephen argue that the Agreement entitled them to attorney fees even though they were not parties to the Agreement. They rely on *McClure v. Davis Wright Tremaine*, 77 Wn. App. 312, 890 P.2d 466 (1995), and read the following paragraphs of the Agreement as allowing them to recover attorney fees under *McClure*:

> **6. Arbitration.** Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration . . . .
>
> **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.

CP at 402. First, they argue that the Mountjoys' actions against them fit within the confines of "[a]ny controversy or claim . . . relating to this Agreement." *See* Judith's Br. at 24; Stephen's Br.

at 25. They next argue that paragraph 7 allows attorney fees for "said controversy or claim," which is integrated under "[*a*]*ny* controversy or claim . . . relating to this Agreement." Judith's Br. at 24-27; Stephen's Br. at 25. Finally, they argue that because paragraph 6 allows attorney fees for "*any controversy or claim*," paragraph 7 necessarily allows *any* party to the controversy or claim to collect them. Judith's Br. at 26-27; Stephen's Br. at 25. Their argument fails.

We read a contract as an average person would read it, giving it a practical and reasonable meaning, not a strained or forced meaning that leads to absurd results. *Allstate Ins. Co. v. Hammonds*, 72 Wn. App. 664, 667, 865 P.2d 560 (citing *Eurick v. PEMCO Ins. Co.*, 108 Wn.2d 338, 341, 738 P.2d 251 (1987)), *review denied*, 124 Wn.2d 1010 (1994). If only one reasonable meaning can be attributed to the contract when viewed in context, that meaning necessarily reflects the parties' intent. *Martinez v. Miller Indus. Inc.*, 94 Wn. App. 935, 943, 974 P.2d 1261 (1999) (quoting *Interstate Prod. Credit Ass'n v. MacHugh*, 90 Wn. App. 650, 654, 953 P.2d 812, *review denied*, 136 Wn.2d 1021 (1998)). We harmonize clauses that seem to conflict; our goal is to interpret the agreement in a manner that gives effect to all the contract's provisions. *Nishikawa v. U.S. Eagle High, LLC*, 138 Wn. App. 841, 849, 158 P.3d 1265 (2007), *review denied*, 163 Wn.2d 1020 (2008).

In *McClure*, the case on which Judith and Stephen heavily rely, a group of investors formed a limited partnership and signed an agreement containing an arbitration clause that stated:

> 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.

McClure, 77 Wn. App. at 314 (emphasis added). McClure was a partner who sued Lewison,

another partner, for failing to disclose his financial and business history. *McClure*, 77 Wn. App. at 313-14. McClure also sued Davis Wright Tremaine (DWT), charging the firm with breach of fiduciary duties for failing to disclose information that it reasonably could have known about Lewison's finances. *McClure*, 77 Wn. App. at 314. DWT sought to compel arbitration under the partnership agreement, the trial court ordered arbitration, and McClure appealed the order. *McClure*, 77 Wn. App. at 314. Division One of this court held that the agreement permitted DWT to compel arbitration, even though DWT did not sign the agreement, because the phrase "any party involved" appeared to refer to any party involved in a controversy "relating to" the agreement. *McClure*, 77 Wn. App. at 315. Because McClure's controversy with DWT related to the agreement, DWT had authority as a "party involved" to compel arbitration. *McClure*, 77 Wn. App. at 315.

Judith and Stephen's reliance on *McClure* is misplaced. *McClure* stands for the proposition that DWT could compel arbitration as a non-party under an agreement that allowed "any party involved" to request arbitration for a "controversy or claim . . . relating to" the agreement. *McClure*, 77 Wn. App. at 315. Applying *McClure*'s reasoning directly to the Agreement's attorney fee clause, however, is not logical because the attorney fee clause does not define the scope of "party" as "any party involved" like the arbitration clause in *McClure* did. CP at 402; *McClure*, 77 Wn. App. at 314. In fact, not even the Agreement's arbitration clause explicitly expands the scope of "party" because the arbitration clause never mentions the term. CP at 402.

Attempting to overcome the Agreement's silence in defining the scope of "party" as "any

party involved," Judith and Stephen read the arbitration clause and the attorney fee clause together to argue that any party related to the controversy can recover attorney fees. Although the two clauses relate insofar as permitting attorney fees for "[a]ny controversy or claim . . . relating to this Agreement," the arbitration clause language, "[a]ny controversy or claim," does not apply to the attorney fee clause to mean that any party may collect attorney fees. CP at 402. To do so would be to make an inferential leap that "[a]ny controversy or claim" entails a controversy among those who are not parties to the Agreement. CP at 402. *McClure* made this leap only because the arbitration clause it considered stated that "any party involved" could request arbitration. *McClure*, 77 Wn. App. at 314-15. We decline to read "[a]ny controversy" as meaning "any party," as doing so would change the terms of the contract.

Public policy also tempers broadly reading the Agreement's arbitration and attorney fee clauses as allowing non-parties to collect attorney fees. *McClure* addressed whether to apply *arbitration* to a non-party, while the issue in this case is whether to award *attorney fees* to a non-party. In doing so, *McClure* correctly acknowledged that Washington has a strong public policy that favors arbitration. *McClure*, 77 Wn. App. at 317 (Washington has a "'strong public policy . . . favoring the arbitration of disputes.'") (quoting *ML Park Place Corp. v. Hedreen*, 71 Wn. App. 727, 737, 862 P.2d 602 (1993), *review denied*, 124 Wn.2d 1005 (1994)).

On the other hand, the starting point for this court is not a public policy favoring attorney fees; instead, we start with the general rule that the prevailing party cannot recover attorney fees absent a contract, a statute, or a recognized ground in equity. *Rettkowski v. Dep't of Ecology*, 128 Wn.2d 508, 514, 910 P.2d 462 (1996). The public policy differences between arbitration and

attorney fees further supports our decision not to apply *McClure*'s reasoning to cases beyond the scope of its narrow holding.[7]

[7] We decline to address Judith's and Stephen's arguments that they were prevailing parties because they were not parties to the Agreement.

II. Not Entitled to Attorney Fees Under Equity

A. Equitable Estoppel is Inapplicable

Judith and Stephen next argue that we should invoke the doctrine of equitable estoppel to allow them to collect attorney fees under the Agreement, even though they are not parties to it. We decline to do so.

Judith and Stephen rely on *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993), *cert. denied*, 513 U.S. 869 (1994), to argue that the Mountjoys should be equitably estopped from asserting that they (Judith and Stephen) are not entitled to attorney fees under the Agreement. In *Sunkist*, the court considered whether Sunkist was equitably estopped from asserting that Del Monte, a non-party to the contract at issue, could not compel arbitration under that contract. *Sunkist*, 10 F.3d at 757. The court did not find the fact that Del Monte was a non-party to the contract dispositive; instead, the court focused its inquiry on the nature of the underlying claims that Sunkist asserted against Del Monte to determine whether those claims fell within the scope of the arbitration clause contained in the contract. *Sunkist*, 10 F.3d at 757-58. The court reasoned that Sunkist's claims against Del Monte fell within the scope of the arbitration clause because, although its claims sounded in tort, the crux of Sunkist's theory was that Del Monte's actions (i.e., the alleged tortious conduct) violated the terms of the contract. *Sunkist*, 10 F.3d at 758. The court held that because Sunkist's tort claims were "intimately founded in and intertwined with" the contract, Sunkist was equitably estopped from asserting that, as a non-party to the contract, Del Monte could not compel arbitration. *See Sunkist*, 10 F.3d at 757-58.

Distinguishable from the present case, *Sunkist* addressed whether a non-party to a contract

could compel arbitration under the contract, not recover attorney fees. Policy demands that courts favor arbitration, and, as in *Sunkist*, when a party to a contract asserts tort claims that are intertwined with the contract against a non-party to the contract, the party to the contract might be equitably estopped from arguing that the non-party cannot compel arbitration under the contract. Similar to how *Sunkist* focused on the nature of Sunkist's underlying tort claims to determine whether those claims fell within the scope of the contract's arbitration clause, Washington courts have taken a related approach in deciding to award attorney fees for tort claims that were intertwined with a contract. *See Seattle-First Nat'l Bank v. Washington Ins. Guar. Ass'n*, 116 Wn.2d 398, 413, 804 P.2d 1263 (1991) (awarded attorney fees in an action based on a contract when the tort action arose out of the contract and the contract is central to the dispute). Nevertheless, although Judith and Stephen have provided one federal case that has applied equitable principles to allow a non-party to a contract to compel arbitration, they have not proffered any Washington caselaw that has allowed a non-party to compel attorney fees based solely on the notion that the tort action is intertwined with a contract that contains an attorney fee clause.

The Mountjoys never sued for breach of contract, but rather sought to void the contract under various theories, including tort theories. Judith and Stephen have not cited any authority to suggest that, as non-parties to the Agreement, they are entitled to attorney fees even though the tort actions against them might have arisen out of the Agreement. *See, e.g., Seattle-First Nat'l Bank*, 116 Wn.2d at 413 (party to a contract can recover attorney fees under the contract for an action when that action was based on the contract); *Brown v. Johnson*, 109 Wn. App. 56, 58, 34

P.3d 1233 (2001) (party to purchase and sale agreement can recover attorney fees under agreement for tort action when tort action is based on agreement); *cf.*, *Tradewell*, 71 Wn. App. at 130 (party to a lease extension barred from recovering attorney fees under lease for a tort action when tort action is not based on the lease). We decline to address the issue of whether the tort claims arose out of the Agreement because we hold that Judith and Stephen, as non-parties to the Agreement, cannot recover attorney fees under the Agreement solely because the Mountjoys' tort claims are related to the Agreement.

B. Mutuality of Remedy is Inapplicable

Judith and Stephen also argue that the equitable doctrine of "mutuality of remedy" supports their award for attorney fees. Judith's Br. at 31; Stephen's Reply Br. at 7-9, 11. The crux of their argument is the notion that we should award them attorney fees under the Agreement because the Mountjoys had sought to collect attorney fees from them personally under the Agreement. This argument also fails.

Mutuality of remedy is a "'well recognized principle of equity'" in Washington. *Kaintz v. PLG, Inc.*, 147 Wn. App. 782, 789, 197 P.3d 710 (2008) (quoting *Mt. Hood Beverage Co. v. Constellation Brands, Inc.*, 149 Wn.2d 98, 121, 63 P.3d 779 (2003)). Washington courts have applied mutuality of remedy to allow a prevailing party to collect attorney fees authorized under a contract even though that party prevailed by establishing the invalidity or unenforceability of that contract. In other words, mutuality of remedy preserves attorney fees for a prevailing party even though that party prevails in voiding the contract. *E.g.*, *Mt. Hood*, 149 Wn.2d at 121 (holding that a party who prevails in voiding a statute is not precluded from obtaining attorney fees under

that statute); *Kaintz* 147 Wn. App. at 789 (holding that mutuality of remedy authorizes attorney fees when a party prevails in an action brought on a contract containing a bilateral attorney fee clause by establishing the contract is void). The rationale underpinning the doctrine of mutuality of remedy is that a party who prevails in invalidating a contract ought to be entitled to attorney fees just the same as a party who prevails in validating a contract is entitled to attorney fees.

Mutuality of remedy does not apply to this case because Judith and Stephen were not parties to the Agreement. As non-parties to the Agreement, they can neither invalidate nor validate the Agreement. Corollary to their status as a non-party, Judith and Stephen are not entitled to attorney fees based on the Agreement just as they are not personally liable for attorney fees based on the Agreement. Absent being parties to the Agreement, Judith and Stephen have no basis for a mutuality of remedy argument.

III. Not Entitled to Attorney Fees Under Statute

Stephen also argues that RCW 4.84.330 authorizes him to collect attorney fees under the Agreement. His argument fails.

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 . . . . Any provision in any such contract or lease which provides for a waiver of attorney's fees is void.

RCW 4.84.330 applies only to contracts with unilateral attorney fee provisions. *Kaintz*, 147 Wn.

App. at 786. As Division One of this court noted, "[W]here, as here, the agreement already contains a bilateral attorneys' fee provision, RCW 4.84.330 is generally inapplicable." *Hawk v. Branjes*, 97 Wn. App. 776, 780, 986 P.2d 841 (1999); *accord Walji v. Candyco, Inc.*, 57 Wn. App. 284, 288, 787 P.2d 946 (1990) (the statutory "prevailing party" provision of RCW 4.84.330 does not control over the plain language of a contract that contains a bilateral attorney fee clause). Because the Agreement at issue here contained a bilateral attorney fee clause, RCW 4.84.330 does not apply.

IV. Context of Subsequent Acts does not Change the Agreement

Judith and Stephen finally argue that we should interpret the Agreement as allowing them to recover attorney fees under the *Berg* context rule. *Berg*, 115 Wn.2d at 667. They maintain that the Mountjoys' subsequent acts and conduct exemplify the Mountjoy's understanding that the Mountjoys could receive attorney fees from Judith and Stephen under the Agreement. Accordingly, Judith and Stephen's argue that under the *Berg* context rule, attorney fees would also flow to them.

Extrinsic evidence may not be used (1) to establish a party's unilateral or subjective intent about the meaning of a contract word or term; (2) to show an intention independent of the instrument; or (3) to vary, contradict, or modify the written word. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999).

Judith and Stephen use the Mountjoys' second amended complaint to support their contention that the Mountjoys intended the attorney fee provision to apply to any controversy between the Mountjoys and Judith and Stephen. In that complaint, the Mountjoys prayed for

attorney fees against the "defendants." CP at 116. Although "defendants" connotes all of the parties the Mountjoys sued, including Judith and Stephen personally, we cannot say that the complaint's inclusion of such a general term, alone, unequivocally establishes that the Mountjoys intended to apply the attorney fee clause to Judith and Stephen personally. CP at 116. Instead, consistent with the analysis above, to extend the Agreement's attorney fee provision to Judith and Stephen—both non-parties to the Agreement—would require us to vary, contradict, or modify the written word of the Agreement; this we decline to do. Therefore, we hold that the subsequent acts and conduct of the parties do not, in this case, entitle Judith and Stephen to attorney fees.

ATTORNEY FEES

The Mountjoys request attorney fees for this appeal, arguing that we should award them attorney fees and costs for defending against a frivolous appeal. We decline to award attorney fees to the Mountjoys.

Under RAP 18.1(a), a party on appeal is entitled to attorney fees if a statute authorizes the award. RAP 18.9 authorizes an award of compensatory damages against a party who files a frivolous appeal. *See, e.g., Kearney v. Kearney*, 95 Wn. App. 405, 417, 974 P.2d 872, *review denied*, 138 Wn.2d 1022 (1999). 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 success." *In re Recall of Feetham*, 149 Wn.2d 860, 872, 72 P.3d 741 (2003) (quoting *Millers Cas. Ins. Co. of Texas v. Briggs*, 100 Wn.2d 9, 15, 665 P.2d 887 (1983)).

This appeal is not frivolous. Although Judith and Stephen were non-parties to the

Agreement and although they failed to show how they were intended to be third-party beneficiaries under the Agreement, they did put forth a creative, even if unpersuasive, argument based on *McClure*. We cannot say that they failed to present a debatable point of law, that their appeal lacks merit, or that they had no reasonable possibility of success. Therefore, we decline to award the Mountjoys attorney fees for defending this appeal.

Affirmed.

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

Bridgewater, P.J.

We concur:

Hunt, J.

Quinn-Brintnall, J.