IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GFI-WENATCHEE INVESTMENTS LIMITED PARTNERSHIP, a Utah limited partnership,	)	**No. 28636-3-III**
Respondent,	)	**Division Three**
v.	)	
FOR THE LOVE OF IT, LLC, a Washington limited liability company; JACOB AND LALANI PURDOM, and the marital community thereof,	)	**UNPUBLISHED OPINION**
Defendants,	)	
JAMES AND CLAIRE HASSETT, and the marital community thereof,	)	
Appellants.	)	

Kulik, C.J. — GFI-Wenatchee Investments Limited Partnership developed a shopping center known as the K-Mart Plaza in Wenatchee, Washington. James and Claire Hassett own a commercial building in the development that they lease to For the Love of It, LLC, an adult boutique store (the Store). Jacob and Lalani Purdom operate

the Store. GFI sought an injunction against the Hassetts and the Store, asserting that the Store violated the covenants, conditions, and restrictions and grant of easements (CCRs). The CCRs do not allow adult bookstores in the shopping center. The trial court denied the preliminary injunction, concluding that the Store did not fall within the definition of an adult bookstore. GFI moved for, and the court granted, a voluntary dismissal. The CCRs contained a bilateral attorney fee provision awarding the successful party its fees.

The trial court denied the Hassetts and the Store attorney fees and costs. The Hassetts appeal, asserting the trial court erred by failing to award attorney fees and costs. We conclude that the contract provision entitles the Hassetts, the successful party, to attorney fees. Therefore, we reverse the trial court and remand for a determination of fees.

FACTS

GFI acquires, improves, develops, sells, and leases real property. GFI executed and recorded CCRs to create a uniform plan for a shopping center in Chelan County. James and Claire Hassett own one or more lots in the shopping center. The Hassetts leased one lot to the Store, which was operated by Jacob and Lalani Purdom. The Store is an adult store that sells novelties, videos, books, and other adult items.

The CCRs allow retail businesses but do not allow "adult book stores." Clerk's

Papers (CP) at 77. The CCRs do not define "adult book store."

On January 7, 2009, GFI filed a lawsuit against the Store, the Purdoms, and the Hassetts for violating the CCRs' restriction on adult bookstores. GFI also moved for a preliminary injunction to stop the Store from conducting business. The trial court found that for purposes of the preliminary injunction hearing, the Store did not fall within the common definition of an "adult book store" and denied GFI's motion for a preliminary injunction.

On October 2, 2009, GFI offered a stipulation to the Hassetts, the Store, and the Purdoms. GFI proposed that it would seek dismissal with prejudice and without any award of fees or costs to any party. The Purdoms agreed to the stipulation. The Store and the Hassetts did not.

On October 19, 2009, the Hassetts filed a motion to dismiss and for an award of attorney fees. The Store joined the Hassetts' motion. On November 2, 2009, GFI filed its own motion to dismiss pursuant to CR 41(a)(1)(B) and CR 41(a)(4).

The trial court denied the Hassetts' and the Store's motion to dismiss and award of attorney fees, but granted GFI's motion to dismiss without prejudice. The trial court's order explained that the voluntary dismissal of GFI's claims did not create a successful party and that each party was to bear its own costs and expenses.

The Hassetts appeal, asserting that the trial court erred by failing to award attorney fees and costs provided by the CCRs.

ANALYSIS

This court reviews the legal basis for an award of attorney fees de novo. *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 126, 857 P.2d 1053 (1993). The reasonableness of the amount of an award is reviewed for an abuse of discretion. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 147, 859 P.2d 1210 (1993).

The Hassetts assert that the trial court erred by failing to award fees and costs following GFI's voluntary dismissal of the lawsuit. They argue that the trial court did not enforce the plain meaning of the contractual provision awarding fees and costs to the successful party. The applicable contract provision reads:

> 10.04. In the event that any suit is brought for the enforcement of any provision of this Declaration or as the result of any alleged breach thereof or for a declaration of rights and duties hereunder, *the successful party or parties to such suit shall be entitled to collect reasonable attorneys' fees* from the losing party or parties and any judgment or decree rendered shall include an award thereof.

CP at 107 (emphasis added).

The Hassetts agree that RCW 4.84.330 is not applicable here because the CCRs contain a bilateral attorney fees clause.[1]

[1] RCW 4.84.330 controls the award of attorney fees when an attorney fees clause

Two Washington cases provide guidance to our analysis here. In *Walji v. Candyco, Inc.*, 57 Wn. App. 284, 787 P.2d 946 (1990), Walji took a nonsuit and the court awarded attorney fees to Candyco based on the parties' bilateral attorney fees contractual provision. The contract read, "'*the prevailing party shall be entitled to a reasonable attorneys' fee and all costs and expenses* expended or incurred in connection with such default or action.'" *Id.* at 287. The trial court determined that there was no reason to believe the parties intended to incorporate the statutory meaning of "prevailing party" as contemplated in RCW 4.84.330. Under RCW 4.84.330, there is no prevailing party when a lawsuit is voluntarily dismissed.

The *Walji* court affirmed the award of attorney fees, stating:

> The reason that an order of voluntary dismissal is not a final judgment is for the protection of plaintiffs by allowing the litigation to continue under certain circumstances. It is not for the purpose of precluding attorney fees to a defendant who has "prevailed" as things stand at that point.

Id. at 289.

In *Hawk v. Branjes*, 97 Wn. App. 776, 778, 986 P.2d 841 (1999), the Hawks moved for voluntary dismissal and the Branjeses requested attorney fees pursuant to the

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in a contract is unilateral. The statute provides that the prevailing party is entitled to attorney fees. "Prevailing party" is defined as "the party in whose favor final judgment is rendered." RCW 4.84.330.

contractual provision which read:

> "In the event either party employs an attorney to enforce any terms of this agreement and is successful, the other party agrees to pay a reasonable attorney's fee. In the event of a trial, the amount shall be as fixed by the court."

The *Hawk* court cited *Walji* and stated that it was clear that the parties did not intend to adopt the statutory definition of prevailing party because they used the phrase "successful party" instead of "prevailing party." The court applied the plain meaning of the phrase "successful party" and affirmed the award of attorney fees to the Branjeses. *Id.* at 781-82.

In interpreting a contract, the court looks to the intent of the parties. *Walji*, 57 Wn. App. at 288. Here, the contractual provision is similar to *Walji* and virtually identical to *Hawk*. Both cases awarded attorney fees under the contract to the prevailing or successful party after the other party voluntarily dismissed or took a nonsuit. The court in those cases found no reason to conclude that the parties intended to incorporate the statutory meaning of prevailing party.

Likewise, here, there is no indication that the parties intended to incorporate the statutory meaning of prevailing party, particularly because, as in *Hawk*, the parties used the phrase successful party as opposed to prevailing party. Here, the contract provides that the successful party is entitled to collect reasonable attorney fees. The successful

party is the Hassetts.

We conclude that the Hassetts are entitled to attorney fees and costs as the successful party. Accordingly, we reverse the denial of attorney fees and remand for a determination of the amount of fees. We also grant the Hassetts' request for attorney fees and costs on appeal pursuant to RAP 18.1.

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

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Kulik, C.J.

WE CONCUR:

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Sweeney, J. Siddoway, J.