

NO. 59211-4-1

King County Superior Court Cause No. 05-2-39460-9 SEA

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

SANDRA LAKE, INDIVIDUALLY
Plaintiff/Appellant

v.

WOODCREEK HOMEOWNERS ASSOCIATION,
A Washington Homeowners Association;
GLEN R. CLAUSING, a single man
Defendants/Respondents

2011 MAY 27 PM 1:17

COURT OF APPEALS
DIVISION I
FILED
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RESPONDENT CLAUSING'S SUMMARY OF ARGUMENTS ON
MATTERS NOW BEFORE THE COURT
ON REMAND FROM THE SUPREME COURT

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I
Summary/Introduction

In accordance with the Order of this Court entered May 3, 2011, Respondent Clausing submits this summary of his arguments on matters now before the court. Clausing argues:

- The issues before this court for review are those Lake raised on appeal that the Supreme Court *did not* decide. These “remaining issues” are: (A) whether the trial court erred in granting Woodcreek leave to amend its Answer (Lake’s Assignment of Error 2); and (B) whether the trial court erred in awarding Clausing attorney fees and costs against Lake (Lake’s Assignment of Error 3).
- Lake’s Assignment of Error 1, that the trial court erred in granting Clausing and Woodcreek summary judgment, was decided by the Supreme Court. This “decided issue” is not before the court to review.
- On remand Lake has presented an issue she did not raise before the trial court, Court of Appeals, or Supreme Court. Her “new issue” is that an amendment to Woodcreek’s declaration is required before a bonus room can be built. This new issue is not properly before this court to review as it cannot be raised now, RAP 2.5.

II

The Prior Proceedings Determine “Remaining Issues”

A short review of the prior proceedings clarifies which issues are before the court (the “remaining issues”) and which are not because they were decided by the Supreme Court.

Trial Court.

Lake filed suit against Woodcreek and Clausing (December 2005) claiming defendants had violated the Horizontal Property Regimes Act (RCW 64.32) and Woodcreek’s declaration. Woodcreek admitted liability to Lake in its original Answer and cross-claimed against Clausing. Clausing denied liability, counter-claimed against Lake and cross-claimed against Woodcreek seeking dismissal of their claims and attorney fees.

Clausing moved for summary judgment against Lake and Woodcreek. Thereafter, Woodcreek sought leave to amend its Answer to retract its admissions of liability to Lake and joined in Clausing’s summary judgment against Lake. Woodcreek’s motion to amend its Answer was granted on November 16, 2006.

Clausing’s (and Woodcreek’s) motion for summary judgment dismissing all of Lake’s claims was granted on November 22, 2006. Immediately following entry of the summary judgment (as part of the same hearing) Woodcreek withdrew its cross-claims against Clausing.

Clausing then moved for an award of attorney fees and costs against Lake and Woodcreek. The trial court awarded Clausing attorney fees and costs against Lake on January 7, 2007.

Court of Appeals.

Lake appealed asserting three errors by the trial court: (1) The trial court erred in granting Clausing summary judgment; (2) The trial court erred by allowing Woodcreek to amend its Answer; and (3) The trial court erred by awarding Clausing attorney fees and costs.

As to Lake's first assignment of error (the summary judgment) the Court of Appeals reversed the trial court and remanded the case for trial. The Court of Appeals did not rule on Lake's second and third assignments of error -- Woodcreek being allowed to amend its Answer and the award of attorney fees and costs -- because these assignments of error became moot as a result of the Court of Appeals reversing the summary judgment and remanding the case for trial. These are the "remaining issues" that the Supreme Court referred back to the Court of Appeals after it reversed the Court of Appeals on the first issue.

Supreme Court.

Clausing and Woodcreek sought discretionary review of the Court of Appeal's reversal of the trial court's entry of Summary Judgment. Clausing's and Woodcreek's Petitions for Discretionary Review did not

address Lake's assignments of error 2 or 3 (Woodcreek being allowed to amend its answer (2) / the award of attorney fees and costs to Clausing (3)) because the Court of Appeals had not addressed those assignments of error in its decision. Lake's Combined Answer to the Petitions also did not address these issues. The Supreme Court reversed the Court of Appeals (thereby affirming the trial court's summary judgment) and remanded the case to the Court of Appeals to consider any of Lake's "remaining issues."

"Lake, in her appeal, made assignments of error that were not raised in the petitions for review or Lake's answer. We remand to the Court of Appeals for consideration of any of Lake's remaining issues." *Lake vs. Woodcreek*, 169 Wn.2d 516, 243, P.3d 1283 (2010) at 1293.

The words "remaining issues" have to be read in light of the procedural history of this case and in the context of the entire decision of the Supreme Court that precedes them. So read, it is clear "remaining issues" means those issues Lake raised on appeal that the Court of Appeals did not decide because it reversed the trial court's summary judgment. "Remaining issues" cannot mean issues the Supreme Court decided – the "law of the case" doctrine prevents that. "Remaining issues" does not mean new issues that Lake is now (on remand) presenting for the first time as RAP 2.5 prevents that. The "remaining issues" are those that were

before the Court of Appeals from the beginning and which would have been decided if it had affirmed the summary judgment of the trial court.

III

Lake's Assignments of Error 1 and Related Issues are "Decided Issues" (Not "Remaining Issues") and Not before this Court

The "Assignments of Error" portion of Lake's "Revised Opening Brief" is attached as Appendix A and is reproduced (in the text box) below:

**I. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING
TO ASSIGNMENTS OF ERROR**

A. Assignments of Error

1. The trial court erred when it granted Defendants Glen Clausing and Woodcreek Homeowners Association summary judgment and dismissed Plaintiff Sandra Lake's claims.

2. The trial court erred when it permitted Defendant Woodcreek Homeowners Association to amend its Answer, which Plaintiff Sandra Lake relied on for her motion for summary judgment, one week before holding a joint hearing on Ms. Lake's, Mr. Clausing's and Woodcreek Homeowners Association's Motions for summary judgment.

3. The trial court erred when it ordered an award of attorney fees and costs to Defendant Glen Clausing against Plaintiff Sandra Lake.

Lake's Assignment of Error 1, "The trial court erred when it granted summary judgment," was decided by the Supreme Court, *Lake vs.*

Woodcreek, supra. This is proved by examining the “Issues Pertaining to Assignments of Error” portion of Lake’s Revised Opening Brief and the Supreme Court’s decision. Lake’s “Issues Pertaining to Assignments of Error” portion of her brief is reproduced (in the text box) below and on the following page. It is also attached as Appendix B.

B. Issues Pertaining To Assignments of Error

1. Whether the board’s approval of Mr. Clausing’s construction of a bonus room were unlawful and prohibited because statutory law and the Woodcreek declaration do not authorize the board’s approval. (Assignment of Error No.1) The standard of review for this issue is de novo.

(a) Whether the addition of Mr. Clausing’s Bonus Room violated state law and the Woodcreek Declaration by creating new common area and increasing the common expenses and obligations of all Woodcreek homeowners without the required unanimous consent of all homeowners. (Assignment of Error No. 1) The standard of review for this issues is de novo.

(b) Whether the Woodcreek Declaration only authorizes the addition of a Bonus Room by a “purchaser” and Mr. Clausing is prohibited from adding a bonus room because he is

not a “purchaser” under the Declaration (Assignment of Error No. 1). The standard of review for this issues is de novo.

(c) Whether the Board and Mr. Clausing acted outside the authority of the Woodcreek Declaration by converting common area to limited common area for Mr. Clausing’s exclusive use. (Assignment of Error No. 1) The standard of review for this issue is de novo.

2. Whether the restrictions of the Woodcreek declaration are on title and run with the land, and cannot be changed without unanimous approval of the homeowners. (Assignment of Error No. 1) The standard of review for this issue is de novo.

All of Lake’s issues related to her Assignment of Error 1, (entry of the summary judgment) involve a claimed violation of statute and/or a claimed violation of Woodcreek’s declaration. To prevail at the Supreme Court level all Lake needed to show was that any statute or any portion of Woodcreek’s declaration had been violated¹. This she did not do.

¹ The Petitions for Review, Answers to the Petitions, and the briefs submitted to the Supreme Court cited and argued RCW 64.32, 64.32.010(14) 64.32.050(1), 64.32.080, 64.32.090(6), 64.32.090(10), 64.32.090(12), 64.32.090(13), 64.32.140, 64.32.250, 64.34, 64.34.010, 64.34.228(3), and 64.34.455. The entire Woodcreek Declaration [CP 205-209, 211-12, 218-266, 276-326, 328-332, 334-335, 341-364, 366-370, 372-376, 381-393, 395-396, and 398-405] was before the Supreme Court and the parties cited and specifically argued paragraphs 3, 4, 12, 13, and 19 of the declaration.

The Supreme Court's review of the trial court's summary judgment was *de novo*:

"In this case we review an order for summary judgment involving the interpretation of a statute and a condominium declaration. 'We review petitioners' motion for summary judgment *de novo*, engaging in the same inquiry as the trial court.'" [*Lake vs. Woodcreek, supra*, at 525-6, quoting *Berrocal v. Fernandez*, (citation omitted)]

The scope of the Supreme Court's review was Lake's claimed violations of the HPRA and/or Woodcreek's declaration.

"Lake claims that the association's board of directors violated the HPRA or Woodcreek's declaration when it approved Clausing's request for permission to build a second-story addition on his townhouse-style condominium apartment." [*Lake vs. Woodcreek, supra*, at 521]

Based on its *de novo* review of Lake's Assignment of Error 1 and issues related thereto the Supreme Court decided the case really turned on the answer to two questions:

"Two questions are presented. Does the HPRA or Woodcreek's declaration bar the division of a condominium's common areas? Does the HPRA or Woodcreek's declaration require the unanimous consent of condominium owners to combine a portion of the common area with the owner's apartment? We answer no to both questions." [*Lake vs. Woodcreek, supra*, at 521. Underscore emphasis added]

After stating the answers to these pivotal questions, the Supreme Court wrote a lengthy analysis of the HPRA and Woodcreek's declaration. It then concluded its opinion with the following:

“We reverse the Court of Appeals. The HPRA and Woodcreek’s declaration do not bar the division of a condominium’s common areas. The HPRA and Woodcreek’s declaration do not require the unanimous consent of condominium owners to combine a portion of the common area with the owner’s apartment.” [*Lake vs. Woodcreek, supra*, at 536]

All of Lake’s issues related to Assignment of Error 1 (the summary judgment), whether framed in terms of a claimed violation of a statute and/or Woodcreek’s declaration were decided by the Supreme Court. None of Lake’s issues related to Assignment of Error 1 are “remaining issues” for review by this court on remand; all of these issues are “decided issues.”

IV

Lake’s New Argument, an Amendment to Woodcreek’s Declaration is Required, is Prohibited by RAP 2.5. Her New Argument is not a “Remaining Issue” before this Court for Review

In her post-remand Motion on the Merits Lake argues that Clausing and Woodcreek violated the Woodcreek declaration because an amendment to the Woodcreek declaration is required before a bonus room can be built and based on the record, no amendment to the Woodcreek declaration has been made. Lake further argues that the Supreme Court held such an amendment is required before a bonus room can be built.

Procedurally, this argument is not properly before the court and

substantively it is wrong. Lake's new issue as stated in her Motion on the Merits is reproduced (in the text box) below:

ISSUE PRESENTED

Whether Clausing and the Woodcreek Board violated the Woodcreek Declaration because the Washington Supreme Court's decision clearly controls in its conclusion that an amendment to the Declaration is necessary before Clausing's bonus room is permissible and no amendment has been adopted. *Lake v. Woodcreek Homeowners Ass'n*. 168 Wn.2d 694, 710, 229 P.3d 791 (2010); *see generally* CP ali.

A copy of this portion of Lake's Motion on the Merits is also attached as Appendix C

Lake did not raise this issue (an amendment to Woodcreek's declaration is required) before the trial court, the Court of Appeals or the Supreme Court. This is a "new issue" and RAP 2.5 prohibits a party from raising an issue, argument or theory for the first time on appeal. The only exception to this rule is "issues of manifest error affecting a constitutional right." *State v. Cooley*, 48 Wn.App. 286, 738 P.2d 705 (Wash.App. Div. 1 1987)² Lake's new issue is not within the exception to the rule.

² "Except as to issues of manifest error affecting a constitutional right, we will not consider an issue or theory that was not raised in the trial court. RAP 2.5(a)(3);

An undisputed fact in this case is that the Woodcreek Declaration was not amended before Clausing's bonus room was built. The Supreme Court acknowledged this (undisputed) fact in its decision:

“After the Woodcreek development was completed, several owners approached the Woodcreek board over the years to request its permission to build second-story additions to their one-story apartments, and the board liberally granted permission. . . . [Clausing] requested the Woodcreek board's permission to construct a second story addition of his own. Without putting the matter to a vote of the condominium owners or seeking an amendment to the declaration, the Woodcreek board granted Clausing permission to go forward with his construction plans.”
[*Lake vs. Woodcreek, supra* at 524, underscore emphasis added]

The Supreme Court did NOT hold an amendment is needed before a bonus room is approved or before it is built. Rather, the Supreme Court pointed out that amendments to condominium declarations and related survey maps and plans can be made after construction is completed.³

“Once the construction of Woodcreek was complete, however, the developer submitted amendments [to the previously recorded Declaration] in 1977, along with revisions to the survey and building plans, which gave a final accounting of the condominiums.” [*Lake v. Woodcreek, supra* at 532.]

Buchseib/*Danard, Inc. v. Skagit County*, 98 Wash.2d 577, 581, 663 P.2d 487 (1983); *Wilson v. Steinbach*, 98 Wash.2d 434, 440, 656 P.2d 1030 (1982). The purpose of this rule is to allow the trial court the opportunity to consider all issues and arguments and correct any errors, in order that unnecessary appeals will be avoided. *Smith v. Shannon*, 100 Wash.2d 26, 37, 666 P.2d 351 (1983).” [*State vs. Cooley*, at 290]

³ Post construction amendments are authorized generally by RCW 64.32.090(13) and specifically contemplated by RCW 64.32.100.

Lake's new issue/theory/argument, raised for the first time at this point in the proceedings, should be rejected as it violates RAP 2.5. Further, her new issue/theory/argument is without merit as it is predicated on her misstatement of what the Supreme Court held in this case. Had the Supreme Court held an amendment to the declaration was required before Clausing's bonus room could be built, it would have so stated and it would not have affirmed the trial court's summary judgment in his favor.

V

Lake's Assignment of Error 2 – Woodcreek Amending its Answer Is A "Remaining Issue" before this Court on Remand

Lake's assignment of error 2, that the trial court erred in allowing Woodcreek to amend its Answer, is one of the "remaining issues" for this court to decide. The standard of review of this claimed error is "manifest abuse of discretion."

"CR 15 provides that leave to amend, [S]hall be freely given when justice so requires. The decision to grant leave to amend the pleadings is within the discretion of the trial court. *Wilson v. Horsley*, 137 Wash.2d 500, 505, 974 P.2d 316 (1999). Therefore, when reviewing the trial court's decision to grant or deny leave to amend, courts apply a manifest abuse of discretion test. *Id.* The trial court's decision will not be disturbed on review except on a clear showing of abuse of discretion, this is, discretion manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Id.*" [*Matsyuk v. State Farm Fir & Cas. Co.*, 155 Wn.App. 324, 229 P.3d 893 (Wash. App.Div. I 2010)]

Clausing and Lake filed their respective summary judgment motions before Woodcreek sought leave to amend its Answer. Lake filed her motion for summary judgment on September 13, 2006 [CPA 46] and Clausing filed his cross summary judgment motion on October 23, 2006 [CP 101]. Woodcreek sought leave to amend its Answer on November 1, 2006 [CP 617] and the trial court granted Woodcreek's motion to amend its Answer on November 16, 2006 [CP 720].

Lake had responsibility to defend against Clausing's summary judgment motion. The fact the trial court permitted Woodcreek to amend its Answer after Clausing had cross-moved for Summary Judgment did not change (much less relieve Lake) from that responsibility. The trial court on November 22, 2006, granted summary judgment in favor of Clausing and dismissed all of Lake's claims based on the pleadings Clausing and Lake filed before Woodcreek was allowed to amend its Answer.

Lake claims prejudice because she was not afforded an opportunity to conduct additional discovery before the summary judgment hearing in light of Woodcreek being allowed to amend its Answer. Lake did not ask for additional time. At the outset of the summary judgment hearing Judge North asked Lake's counsel if she wanted to proceed with the hearing. Lake's counsel answered that she would like to go ahead with the hearing. The exchange between Lake's counsel and Judge North at the beginning

of the summary judgment hearing follows: [CP 792 underscore emphasis added]

“The Court: We’re here on Lake and Clausing. Ms. Jones would you like to go ahead?

Ms. Jones: Yes, your honor. I received your message yesterday regarding an order regarding the motion to amend, and I’d like to know whether the court is basically instructing me to refile my motion pending or to revise it, and so is that the court’s instruction to me –

The Court: I wasn’t sure about exactly what you wanted to do in light of the amendment. You can go ahead and argue the motion anyway, if you want, at this point. Obviously you no longer have what you viewed as an admission by Woodcreek in dealing with it. If we can go ahead and argue it based on the record you’ve got, or re-file it if you want to do that.

Ms Jones: Okay. I ask leave to re-file it. Here is my take on that. If Defendants’ motion is denied, then the court on its own motion could essentially grant the – my relief anyway. If that’s not going to happen, then I could re-file my motion to include, you know, the proper argument and change that. So we may want to proceed that way, because a denial of their motion, you know, basically may do the same thing. Because – well, it depends.

The Court: Right”

As set forth in the foregoing exchange, Lake only asked to re-file her motion for summary judgment. She did not ask for additional time to respond to Clausing’s (and Woodcreek’s) motion for summary judgment.

It was within the discretion of the trial court to allow Woodcreek to amend its answer. The standard of review is the “manifest abuse of discretion test.” *Matsyuk v. State Farm, supra*. Lake has made no

showing that the trial court's discretion was exercised in a manner that was manifestly unreasonable, on untenable grounds, or for untenable reasons.

VI
**The Trial Court's Award of Attorney Fees to Clausing Is a
"Remaining Issue" before this Court on Remand**

The trial court awarded Clausing attorney fees and costs against Lake. Findings of Fact and Conclusions of Law [CP 1009-1013] were entered by the trial court in respect to its award.⁴ Clausing respectfully requests Judge North's award of attorney fees and costs be upheld.

The basis for Judge North's award of attorney fees was RCW 64.34.455.⁵ That statute provides:

"If the declarant or any other person subject to this chapter fails to comply with any provision hereof or any provision of the declaration or bylaws, any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief. The court, in an appropriate case, may award reasonable attorney fees to the prevailing party."

The standard of review of a trial court's award of attorney fees is "abuse of discretion," *McGreevy v. Oregon Mut. Ins. Co.*, 90 Wn. App.

⁴ The Findings of Fact and Conclusions of Law were entered by Judge North after Appellant Lake filed her opening brief.

⁵ RCW 64.34.455 is one of the sections of the Condominium Act that applies to all condominiums and their owners, including condominiums built before its effective date, July 1, 1990, such as Woodcreek. See RCW 64.34.010.

283, 951 P.2d 978 (1998) and it is within the broad discretion of the trial court to determine whether a case is an “appropriate” one for an award of attorney fees. *Condo Owners v. Coy*, 102 Wn.App. 697, 9 P.3d 898 (2000).⁶

Matters within the trial court’s discretion will not be overturned unless the trial court exercised its discretion on untenable grounds or for untenable reasons.⁷ Stated differently, matters within a trial court’s discretion will not be overturned unless no reasonable person would adopt the same position as the trial court adopted.⁸ Finally, the provisions of RCW 64.34.455 are to be liberally construed:

“[T]he Act also directs the court to administer its remedies liberally ‘to the end that the aggrieved party is put in as good a position as if the other party had fully performed.’ RCW 64.34.100. A statute’s mandate for liberal construction includes a liberal construction of the statute’s provision for an award of reasonable attorney fees.” [*Condo Owners v. Coy*, *supra* at page 713, citing

⁶ “To require trial courts to follow Marassi when awarding attorney fees under the Condominium Act to aggrieved purchasers would frustrate the statutory goal of putting them in as good a position as if the defendant had fully performed. It would undermine the statutory purpose of encouraging active enforcement of the warranties. And such a requirement would be inconsistent with the broad discretion afforded by the statute to the trial court to decide whether an award of fees is ‘appropriate’ in a particular case.” [*Condo Owners v. Coy*, *supra* at page 713, underscore added]

⁷ See *State ex rel. Carroll v. Junker*, 79 Wn. 2d 12, 482 P.2d 775 (1971); *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 738 P.2d 665 (1987); and *Hope v. Larry’s Mkts.*, 108 Wn. App. 185, 29 P.3d 1268 (2001).

⁸ See *Somsak v. Criton Techs/Heath Tecna, Inc.*, 113 Wn. App. 84, 52 P.3d 43 (2002), and *Hope v. Larry’s Mkts.*, 108 Wn. App. 185, 29 P.3d 1268 (2001).

Progressive Animal Welfare Soc.'y v. University of Washington, 114 Wn.2d 677, 183, 790 P.2d 604 (1990)]

Judge North in the exercise of his discretion determined the amount of attorney fees that were “reasonable.” In doing so Judge North took into consideration the services (nature, time and value) rendered by attorney Glen Clausing in assisting his attorney of record, Charles E. Watts. Ms. Lake argues that Judge North abused his discretion because Glen Clausing did not actually pay attorney fees to himself and because he had not filed a notice of appearance in the case. Lake further argues that the findings of fact and conclusions of law entered by Judge North are “unclear” and “confusing.”

Ms. Lake is simply wrong that actual payment of fees and/or filing a notice of appearance are prerequisites to being entitled to an award of reasonable attorney fees. The appellate courts of Washington, California, Colorado, Michigan, Montana, New Jersey, New York, and Oklahoma have held that attorneys who are not paid, either because they rendered their services for free or because they represented themselves, are entitled to reasonable attorney fees: fees based on time spent and prevailing billing

rates in the community.⁹ The same result has been reached in the 5th, 9th and 11th Circuit Court of Appeals.¹⁰ In all these cases, the award of reasonable attorney fees upheld in a situation where the attorney actually performing the services was not paid and/or the client was not billed.

In the Washington case, *Metropolitan Mortgage v. Becker*, 64 Wn. App. 626, 825 P.2d 360, (1992) the court upheld an award of reasonable attorney's fees (fees calculated based on time spent and hourly billing rates in the community -- the Lodestar method) even though the prevailing party was represented by salaried in-house counsel. In the 9th Circuit case, *Ellis v. Cassidy*, 625 F. 2d 227 (9th Cir. 1980), the court examined recovery of attorney fees not actually paid by the prevailing party and also the issue of whether an attorney providing services on his/her own case is entitled to recover those fees. The award was affirmed.

It is inescapable that if Glen Clausing had not performed the work he did, it would have been necessary for another attorney to perform that

⁹ *Metropolitan Mortgage v. Becker*, 64 Wn. App 626, 825 P.2d 360 (1992); *Garfield Bank v. Folb*, 31 Cal Rptr.2d 239, 25 Cal. App.4th 180 (1994); *Leaf v. City of San Mateo*, 198 Cal. Rptr. 447, 150 Cal. App.3d 1184 (1984); *Renfrew v. Loysen*, 175 Cal. App.3d 1105, 222 Cal.Rptr. 413 (1985); *Zick v. Krob*, (Colorado Court of Appeals, Div. III) 872 P.2d 1290; *Wells v. Whinery*, 34 Mich. App 626, 192 NW2d 81 (1971); *Winer v. Jonal Corp.* 169 Mont. 247, 545 P.2d 1094 (1976); *Brach v. Ezekwo*, (Superior Court of New Jersey, Appellate Div.) 783 A.2d 246 (2001); *Rutherford v. Semenza*, 254 NY Supp. 876 (1932); and *Weaver v. Laub* (Supreme Court Oklahoma) 1977 OK 242, 547 P.2d 609 (1977).

¹⁰ *Fariley v. Patterson*, 493 F.2d 598 (5th Cir. 1974); *Ellis v. Cassidy*, 625 F.2d 227 (9th Cir. 1980); and *Duncan v. Poythress*, 777 F.2d 1508 (11th Cir. 1985).

work. Judge North did not manifestly abuse his discretion by considering Glen Clausing's legal services in assisting his attorney of record in light of cases cited above and the materials presented to him. Clausing requested an award of \$57,286 in attorney fees. Judge North exercised his discretion and decided \$30,000 represented reasonable attorney fees.

Judge North's Findings of Fact and Conclusion of Law [CP 1009-1013] are not confusing or unclear, and the reduced amount he awarded (\$30,000) is set forth consistently in the Judgment Summary [CP 990], Order of Judgment [CP 991-992], and the Findings of Fact and Conclusions of Law. Remand of this case to enter new Findings of Fact and Conclusions of Law because counsel for Appellant Lake believes better grammar or language could have been employed is totally unwarranted and makes wasteful use of judicial resources.

Finally, Appellant Lake should not be able to avoid being assessed reasonable fees and receive a windfall because Glen Clausing is a practicing attorney. As stated by the Supreme Court of Montana:

“***It can make no difference to the defeated party, who is by law bound to pay the costs of the attorney of the prevailing party *** whether that attorney is the prevailing party himself or another attorney employed by him.”
[*Winer v. Jonal Corporation*, (Supreme Court of Montana), 169 Mont. 247, 545 P.2d 1094 (1976).]

VII
Proper Record For Review

The proper record for review of the “remaining issues” consists of the parties’ submissions to the Court of Appeals and the Supreme Court that pre-date October 5, 2010, the date the Supreme Court issued its Certificate of Finality. If Lake is permitted to argue her new issue that an amendment to Woodcreek’s declaration is required, an issue she did not raise or argue at the trial court, Court of Appeals, or Supreme Court levels, would the record be required to be expand to include evidence submitted after the Certificate of Finality was issued.

VIII
Attorney fees on Appeal

The Supreme Court in its original April 15, 2011 decision held that Glen Clausing was the prevailing party entitled to award of attorney fees on appeal. Accordingly, Clausing submitted to the Supreme Court his request for an award of attorney fees on appeal. Subsequently, the Supreme Court modified its decision and held that an award of attorney fees on appeal should be deferred until after consideration of the “remaining issues.” The Supreme Court thereupon forwarded to the Court of Appeals Clausing’s application for attorney fees on appeal. (See letter from Supreme Court dated September 21, 2010, attached as Appendix D)

As he has done at each stage of this appeal, Clausing requests an award of reasonable attorney fees and costs in accordance with RCW 64.34.455, RAP 18.1, and the cases cited herein and in the briefs previously submitted. Clausing further requests that he be allowed to update his earlier filed fee request to reflect the additional work performed after the Supreme Court proceedings were concluded.

IX Conclusion

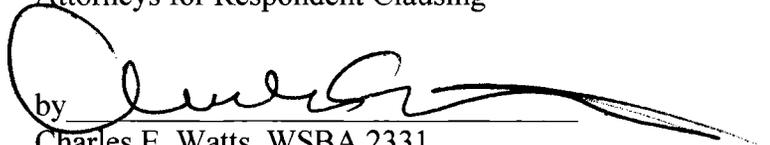
Lake's Assignment of Error 2 that the trial court abused its discretion in allowing Woodcreek to amend its Answer, and her Assignment of Error 3 that the trial court abused its discretion in awarding attorney fees and costs to Clausing, are the issues Lake raised on appeal that were not decided by the Supreme Court. They are the only "remaining issues" the Supreme Court remanded to the Court of Appeals to review.

Lake's new issue, claiming that an amendment of the Woodcreek declaration is required, was never presented to the trial court, Court of Appeals or Supreme Court. An issue that was never presented does not "remain" for consideration upon remand.

Dated May 24th 2011, and respectfully submitted,

[Signature on following page]

OSERAN, HAHN, SPRING & WATTS, P.S.
Attorneys for Respondent Clausing

by 
Charles E. Watts, WSBA 2331
Attorney for Respondent Glen R. Clausing

CERTIFICATE OF MAILING/SERVICE

The undersigned, Joy Griffin, certifies that on the 27 day of May, 2011, she caused to be served via e-mail and U.S. Mail, postage prepaid, a copy of the attached Respondent Clausing's Summary of Arguments on Matters Now before the Court on Remand from the Supreme Court to the following:

Marianne K. Jones
Jones Law Group, PLLC
11819 NE 34th Street
Bellevue, WA 98005

Christopher Brain
Tousle Brain Stephens
1700 7th Ave., Suite 2200
Seattle, WA 98101-4416

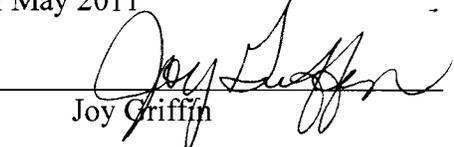
Steven Skinner
Andrews & Skinner, P.S.
645 Elliott Ave., W, Suite 350
Seattle, WA 98119.

The original copy of the attached pleading was delivered to ABC Legal Messengers for delivery, on or before May 27, 2011, to:

The Court of Appeals/State of Washington, Division I
One Union Square
600 University Street
Seattle, WA 98101-4170

I certify under penalty of perjury under the laws of the State of Washington the foregoing is true and correct.

Dated this 27th day of May 2011



Joy Griffin

Appendix A

Assignments of Error Portion of
Lake's (Revised) Opening Brief

(From Page 1 of Lake's Revised Opening Brief filed 4-12-07)

**I. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING
TO ASSIGNMENTS OF ERROR**

A. Assignments Of Error

1. The trial court erred when it granted Defendants Glen Clausing and Woodcreek Homeowners Association summary judgment and dismissed Plaintiff Sandra Lake's claims.

2. The trial court erred when it permitted Defendant Woodcreek Homeowners Association to amend its Answer, which Plaintiff Sandra Lake relied on for her motion for summary judgment, one week before holding a joint hearing on Ms. Lake's, Mr. Clausing's, and Woodcreek Homeowners Association's motions for summary judgment.

3. The trial court erred when it ordered an award of attorney fees and costs to Defendant Glen Clausing against Plaintiff Sandra Lake.

B. Issues Pertaining To Assignments Of Error

Appendix B

Issues Portion – Assignment of Error 1

From Lake's (Revised) Opening Brief

(From pages 1 and 2 of Lake's Revised Opening Brief filed 4-12-07)

~~Woodcreek Homeowners Association to amend its Answer, which Plaintiff Sandra Lake relied on for her motion for summary judgment, one week before holding a joint hearing on Ms. Lake's, Mr. Clausing's, and Woodcreek Homeowners Association's motions for summary judgment.~~

3. ~~The trial court erred when it ordered an award of attorney~~

~~fees and costs to Defendant Glen Clausing against Plaintiff Sandra Lake.~~

 **B. Issues Pertaining To Assignments Of Error**

1. Whether the board's approval and Mr. Clausing's construction of a bonus room were unlawful and prohibited because statutory law and the Woodcreek declaration do not authorize the board's approval. (Assignment of Error No. 1) The standard of review for this issue is de novo.

(a) Whether the addition of Mr. Clausing's Bonus Room violated state law and the Woodcreek Declaration by

creating new common area and increasing the common expenses and obligations of all Woodcreek homeowners without the required unanimous consent of all homeowners. (Assignment of Error No. 1) The standard of review for this issue is de novo.

(b) Whether the Woodcreek Declaration only authorizes the addition of a Bonus Room by a “purchaser” and Mr. Clausing is prohibited from adding a bonus room because he is not a “purchaser” under the Declaration. (Assignment of Error No. 1) The standard of review for this issue is de novo.

(c) Whether the Board and Mr. Clausing acted outside the authority of the Woodcreek Declaration by converting common area to limited common area for Mr. Clausing’s exclusive use. (Assignment of Error No. 1) The standard of review for this issue is de novo.

2. Whether the restrictions of the Woodcreek declaration are on title and run with the land, and cannot be changed without unanimous approval of the homeowners. (Assignment of Error No. 1) The standard of review for this issue is de novo.

~~3.~~

Appendix C

Issue Portion of Lake's Motion on the Merits

(From Page 1 of Lake's Motion on Merits filed 11-4-10)

ISSUE PRESENTED

Whether Clausing and the Woodcreek Board violated the Woodcreek Declaration because the Washington Supreme Court's decision clearly controls in its conclusion that an amendment to the Declaration is necessary before Clausing's bonus room is permissible and no amendment has been adopted. *Lake v. Woodcreek Homeowners Ass'n*, 168 Wn.2d 694, 710, 229 P.3d 791 (2010); *see generally* CP all.

THE SUPREME COURT

STATE OF WASHINGTON

RONALD R. CARPENTER
SUPREME COURT CLERK

SUSAN L. CARLSON
DEPUTY CLERK / CHIEF STAFF ATTORNEY



SEP 22 2010

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September 21, 2010

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Re: Supreme Court No. 81873-8 - Sandra Lake v. Woodcreek Homeowners Association, et al.
Court of Appeals No. 59211-4-I

Counsel:

As the parties are aware, this Court on September 15, 2010, filed an "ORDER CHANGING OPINION", which in part provides: "Clausing requests attorney fees. Because this case is not fully resolved, however, we leave it to the Court of Appeals to consider an award for the work related to our review." Also, it is noted that pursuant to RAP 14.1(a), RAP 12.3(a)(2) [which defines a "decision termination review"], and RAP 14.1(b), at this juncture, any award as to costs must be left to the Court of Appeals. Accordingly, no action will be taken by this Court as to the pending motion for an award of attorney fees, related declarations, and the cost bill. However, copies of all of the pleading in our file related to such will be forwarded to the Court of Appeals in due course.

Sincerely,

Ronald R. Carpenter
Supreme Court Clerk

RRC:alb

Appendix D
Page D-1

