
NO. 59211-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SANDRA LAKE,
Appellant,

v.

WOODCREEK HOMEOWNERS ASSOCIATION, a Washington
homeowners association; GLEN R. CLAUSING, a single man,
Respondents.

RESPONDENT WOODCREEK HOMEOWNERS
ASSOCIATION'S SUPPLEMENTAL BRIEF REGARDING
REMAINING ISSUES ON APPEAL

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Pursuant to this Court's order dated May 3, 2011, Respondent Woodcreek Homeowners Association ("Woodcreek") submits this supplemental memorandum regarding the issues remaining on appeal.

The critical question is what assignments of error remain for consideration after the Supreme Court disposed of Appellant's first assignment of error and determined that nothing in the Horizontal Property Regimes Act, nor the Woodcreek Declaration, prohibit the combining of units, such as co-defendant Clousing's, and common areas. The Supreme Court's ruling terminated review of this assignment of error and affirmed the trial court's dismissal of Appellant's claims against the defendants in this lawsuit. However, the Supreme Court acknowledged that Appellant had raised other assignments of error on appeal that had not been decided by the Court of Appeals during the initial intermediate appeal. Thus,

I. PROCEDURAL POSTURE

This matter is before the Court of Appeals on remand by the Supreme Court. In its decision dated April 15, 2010, the Supreme Court held that neither the Horizontal Properties Regimes Act nor the Woodcreek Declaration barred the Association's approval of a second-story addition on a unit owner's condominium. *Lake v. Woodcreek Homeowners Association, et al.*, 169 Wn.2d 516, 243 P.3d 1283 (2010). Reversing the Court of Appeals, the Supreme Court remanded the appeal

to this Court for consideration of Appellant's remaining assignments of error. *Id.*, 169 Wn.2d at 536.

By way of procedural history, on December 5, 2005, Appellant Sandra Lake filed suit against Woodcreek and Glen Clausing. (CP 1-10). On December 23, 2005, Woodcreek appeared in the lawsuit. (CP 11-12). On May 4, 2006, Woodcreek filed an Answer, including a crossclaim against Mr. Clausing. (CP 13-23). On June 21, 2006, Mr. Clausing answered the Complaint, including a counterclaim against Appellant and a crossclaim against Woodcreek. (CP 24-31).

On September 13, 2006, Appellant filed a motion for partial summary judgment against Woodcreek and Mr. Clausing and noted it for hearing on October 11, 2006. (CP 46-52).

On September 27, 2006, the undersigned law firm filed a Notice of Withdrawal and Substitution of Counsel for Woodcreek. (CP 86-87)

On October 8, 2006, Mr. Clausing filed his response to plaintiff's motion for partial summary judgment and cross-moved for summary judgment and dismissal. (CP 101-23). On October 25, 2006, Woodcreek joined in Mr. Clausing's motion for summary judgment and dismissal of plaintiff's claims and Complaint. (CP 664-5).

On November 1, 2006, Woodcreek filed a motion for leave to amend its Answer. (CP 617-37) Plaintiff opposed the motion for leave to

amend, (CP 638-49). On November 16, 2006, the trial court granted the motion, noting there was ample time to complete discovery before trial in June of 2007 and imposing \$1,000 in terms for the late motion to amend. (CP 720-22).

On November 22, 2006, the trial court heard oral argument on plaintiff's and defendants' cross-motions for summary judgment. (RP 1-11). At the outset of the hearing, the trial court had the following exchange with plaintiff's counsel regarding the hearing on the motions and the effect of Woodcreek's amended Answer:

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 refile it if you want to do that.

MS. JONES: Okay. I ask leave to refile. Here is my take on that. If the 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 refile 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.

MS. JONES: There's factual issues.

THE COURT: It probably makes more sense for you to go ahead and go first, because I have a pretty good idea of the arguments on both sides at this point.

(RP 2-3) Of note, at no time did plaintiff's counsel indicate that she needed additional time, information or discovery in order to respond to the defendants' motion for summary judgment and dismissal.

The trial court granted summary judgment and dismissal in favor of the defendants on November 22, 2006. (CP 777-81) On November 27, 2006, plaintiff filed her Notice of Appeal. (CP 782-91). On February 7, 2006, plaintiff filed her Amended Notice of Appeal. (CP 995-1008) Plaintiff did not identify the trial court's order on Woodcreek's motion to amend in either her Notice of Appeal or her Amended Notice of Appeal.

This Court reversed the trial court and remanded the matter for trial. *Lake v. Woodcreek Homeowners Association, et al.*, 142 Wn.App. 356, 174 P.3d 1224 (2009). Woodcreek and Clausing subsequently appealed the matter to the Washington Supreme Court.

II. STATEMENT OF FACTS

This appeal arises out of the summary judgment and dismissal of Appellant's claims against the Woodcreek and Glen Clausing. Appellant

Sandra Lake and Mr. Clausing are homeowners of adjacent units, separated by a greenbelt, at Woodcreek. Appellant has challenged the propriety of the approval and construction of a bonus room over the garage of Mr. Clausing's unit.

Per its original Declaration, Woodcreek was created in 1972 under the Horizontal Property Regimes Act, RCW 64.32. (CP 218-266) It consists of 150 townhouses built on approximately 23 acres of land and built in three phases. In each phase, there were floor plans that included an optional "bonus room." (CP 221-22; 342-43; 385-86). The optional bonus room was typically available to only certain floor plans within each phase. However, in phase 3, where plaintiff's and Mr. Clausing's respective units are located, the bonus rooms were available to all floor plans. (CP 395; 376).

In May of 2004 Mr. Clausing applied to the Woodcreek Homeowners Association Board for permission to construct the optional bonus room over the garage of his unit, Unit 109, (CP 159-60). The Board considered and approved Mr. Clausing's request to add the bonus room (CP 161) just as it had considered and approved bonus rooms on several other occasions, starting as early as 1978. (*See, e.g.*, CP 182-83; 179; 144; 139) In June of 2006, at the Woodcreek Homeowners Association's Annual Meeting, the homeowners ratified and approved all prior actions

of the Board in approving owner-constructed bonus rooms by an affirmative vote of 95.79% of votes cast (91/95) and 60.67% of all possible votes (91/150). (CP 137).

Despite the fact there are 42 bonus rooms constructed at Woodcreek, the Declaration and Survey reflect only a fraction of these rooms. According to the Declaration, there are four unit models in division 3: J, K, L, and M. (CP 386). Of note, models L and M are two-story units, regardless of whether the unit has a bonus room. (CP 386). As such, the survey for division 3, when listing units, says nothing about whether a unit has a bonus room. For example, the survey indicates “N/A” in the column for second story for units 104, 114, 122, 137 and 139. (CP 375). In the notes with the Survey drawings, the Survey reflects that certain units were built with bonus rooms, for example 104, 114, 122, 137 and 139. (CP 376). Of note, unit 134 is also identified as having a bonus room in the notes for the Survey drawings. (CP 376). The Declaration was then amended to identify those units in division 3 that had bonus rooms. (CP 395). Significantly, units 104, 108, 11, 114, 118, 122, 127 and 134, all of which are identified in the Survey drawing notes as having bonus rooms, are not mentioned in the amendment to the Declaration. (CP 395). Additionally, nowhere in the Declaration or

recorded Survey is there any indication which units in division 1 or division 2 were built with bonus rooms.

In light of the Supreme Court's rejection of Lake's argument regarding Woodcreek's ability to authorize bonus rooms, on December 8, 2010, Woodcreek amended its Declaration to reflect all 42 of the bonus rooms that exist at Woodcreek. (Dec. of Counsel, Ex. A).

The Supreme Court's ruling definitively ended Appellant's challenge to Mr. Clausing's bonus room and Woodcreek's approval of the construction of that bonus room. The amendment of the Declaration formalizes that approval and concludes any further challenge that the decision to permit the construction of the bonus room was not authorized by the Woodcreek Homeowners Association.

III. STATEMENT OF REMAINING ISSUES PRESENTED¹

1. With the Supreme Court's resolution of the Appellant's first assignment of error relating to the trial court's entry of summary judgment in favor of the defendants, is the remanded appeal limited to Appellant's remaining assignments of error?

2. Under circumstances in which the trial court employed the correct standard for evaluating a motion to amend pleadings and imposed

¹With respect to Appellant's third assignment of error regarding the trial court's award of fees and costs to co-defendant Clausing as the prevailing party in the underlying action, Woodcreek takes no formal position.

terms in conjunction with permitted the proposed amendment, did the trial court properly exercise its discretion when it permitted the amendment?

IV. ARGUMENT AND AUTHORITIES

Despite Appellant's improper effort to revive issues decided by the Washington Supreme Court, the scope of the remaining appeal was specifically defined by the Supreme Court:

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 arguments. [Emphasis added.]

Lake v. Woodcreek Homeowners Association, 169 Wn.2d 516, 536, 243 P.3d 1283 (2010).

Based on the clear language of the Supreme Court's decision, the remand of this case is limited to Appellant's remaining arguments regarding *assignments of error* that were not addressed in the Court of Appeals' prior decision. Thus, this residual appeal is limited to Appellant's remaining assignments of error.

In Appellant's Revised Opening Brief to this Court, Appellant made only three 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 and 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 Clausing against Plaintiff Sandra Lake.

(App. Revised Opening Brief, p. 1).

Assignment of error no. 1, was addressed and decided by the Supreme Court. This leaves assignment of error nos. 2 and 3, which involve the trial court's decision to allow Woodcreek to amend its answer and the trial court's award of fees and costs to Respondent Clausing. Other than these assignments of error, there are no other remaining issues before this Court on remand.

A. The Trial Court Properly Permitted Woodcreek to Amend its Answer.

Assignment of error no. 2, which was not addressed in the Court of Appeal's initial decision, takes issue with the trial court's Order granting Woodcreek leave to amend its Answer to Appellant's Complaint. However, Appellant is unable to overcome her burden of demonstrating that the trial court abused its discretion in permitting the amendment of Woodcreek's Answer, particularly in the face of well-established

Washington authority supporting the liberal amendment of pleadings when justice so requires.

1. Leave to Amend Pleadings should be Freely Given when Justice so Requires.

The order granting Woodcreek leave to amend its Answer establishes that the trial court was aware of the standard for evaluating a request for leave to amend a pleading and affirmatively exercised its discretion in weighing the potential prejudice to other parties and imposing terms for the later amendment to the pleadings. (CP 720-22).

The standards surrounding the amendment of pleadings are governed by CR 15(a), which provides that where more than 20 days had elapsed since an Answer was filed and there was no written consent of other parties, “a party may amend his pleadings only by leave of the court ...; and leave shall be freely given when justice so requires.”

The trial court’s exercise of discretion to permit amendment cannot be overturned by this Court unless the trial court abused its discretion.

The amendment of pleadings is addressed to the sound discretion of the trial court, whose determination will be overturned on review only for abuse of such discretion. *Lincoln v. Transamerica Inv. Corp.*, 89 Wn.2d 571, 573 P.2d 1316 (1978). An abuse of discretion is “discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State ex*

rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482
P.2d 775 (1971).

Walla v. Johnson, 50 Wn.App. 879, 882, 751 P.2d 334 (1988).

In *Walla, supra*, the Court of Appeals held that the trial court abused its discretion in denying the defendant's motion for leave to amend the answer under facts that are similar to those in this case. *Id.*, at 885. In *Walla*, the plaintiff filed suit in September of 1984, and the defendant appeared on October of 1984. Approximately five months later, in March of 1985, the defendant filed his Answer. In this case, the initial counsel for Woodcreek filed the Answer Woodcreek sought to amend approximately five months after Woodcreek appeared.

In *Walla*, counsel for the defendant withdrew approximately five months after the Answer was filed. In this case Woodcreek had two counsel withdraw and had the undersigned firm appear within approximately four months of the original Answer having been filed. In *Walla* the defendant sought leave to amend his Answer in October of 1986, some two years after it appeared, some 14 months after it substituted counsel and just three months before trial. In this case, Woodcreek sought to amend its Answer approximately six months after it was filed, a little over one month after counsel undersigned substituted as counsel for Woodcreek, and seven months before trial.

One distinction between the present case and *Walla* is that Appellant had a pending motion for summary judgment based upon the Answer Woodcreek was seeking to amend. However, that issue was decided in favor of the party seeking leave to amend in *Tagliani v. Colwell*, 10 Wn.App. 227, 517 P.2d 207 (1973), which was relied upon by the court in *Walla*. In *Tagliani*, the plaintiff sought to amend the complaint to add causes of action after the defendant's motion for summary judgment had been argued, and the trial court had ruled orally on the motion, but before the trial court had entered its written order. In reversing the trial court's denial of leave to amend, the *Tagliani* court quoted the United States Supreme Court in *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962):

Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded.... If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason-such as undue delay, bad faith or dilatory motive on the part of the movant, ... the leave sought should, as the rules require, be "freely given."

Tagliani v. Colwell, *supra* 10 Wn.App. at 233, 517 P.2d 207.

Walla, 50 Wn.App. at 883.

In this case, plaintiff's motion for summary judgment had not yet been considered by the trial court, and the basis for plaintiff's motion was essentially premised upon the Answer originally filed by Woodcreek. There was no bad faith or dilatory motive on behalf of Woodcreek. Furthermore, there was no undue delay, and there was little or no prejudice to plaintiff.

Although undue delay is a legitimate ground for denying leave to amend the pleadings, such delay must be accompanied by prejudice to the nonmoving party. *Appliance Buyers Credit Corp. v. Upton*, 65 Wn.2d 793, 399 P.2d 587 (1965).

Walla, 50 Wn.App. at 883.

In *Elliott v. Barnes*, 32 Wn.App. 88, 92, 645 P.2d 1136 (1982), the Court of Appeals found no abuse of discretion on the basis of undue delay when the trial court denied plaintiff leave to amend a complaint a year after it was filed but less than one week before trial. However, the plaintiff in *Caruso v. Local 690*, 100 Wn.2d 343, 670 P.2d 240 (1983), was allowed to amend a complaint to add a cause of action more than five years after the original complaint was filed.

The court in *Walla v. Johnson*, analyzed *Caruso* as follows:

The *Caruso* court held that delay in and of itself is insufficient to deny leave to amend: The touchstone for denial of an amendment is the prejudice such amendment would cause the nonmoving party.

Caruso, at 350, 670 P.2d 240.

The *Caruso* court noted that the nonmoving party filed an affidavit that it would suffer undue prejudice because of lack of prior knowledge, making it difficult to prepare a defense, but the affidavit set forth no specific objections relating to actual prejudice. The *Caruso* court held that this was an insufficient showing to find that the trial court abused its discretion. *Caruso*, at 351, 670 P.2d 240.

Walla, 50 Wn.App. at 884.

The *Walla* court then concluded that a motion to amend an answer that was brought three months before trial allowed sufficient time to conduct discovery and prepare for trial. *Id.*, at 884. The *Walla* court also opined it was within the trial court's discretion to continue the trial were it concerned about the time necessary to prepare for trial. *Id.*, at 885, citing *Quackenbush v. State*, 72 Wn.2d 670, 434 P.2d 736 (1976).

Denial of the motion to amend would have severely prejudiced Woodcreek's ability to defend itself. However, there is nothing in the record to indicate that amendment caused prejudice to the Appellant. There had been little done in the way of discovery at the time the trial court granted Woodcreek leave to file its amended Answer, and there was ample time to conduct discovery had it been necessary for all parties to be prepared for a trial that was still seven months away.

Appellant does not dispute that leave to amend “shall be freely given when justice so requires.” Further, Appellant cites no case for the proposition that Woodcreek’s retraction of admissions made in the original Answer was improper, particularly given Mr. Clausing’s contrary pleadings, and the ample time to conduct discovery, if needed, to address the amendments. Rather, Appellant relies on authority where amendment was not allowed on the basis of prejudice to the non-moving parties. For example, in *Eaton v. General Compressed Air & Vacuum Machinery Co.*, 62 Wn. 373, 375, 113 P. 1091 (1911), the trial court apparently denied leave to amend given the untimely nature of the request, coming after a jury had already been empaneled.

In *Del Guzzi Constr. Co., Inc. v. Global Northwest, Ltd., Inc.*, 105 Wn.2d 878, 888, 719 P.2d 120 (1986), the trial court denied leave to amend “on the basis that the amendment would unduly prejudice the non-moving parties.” The facts in that case suggest the matter had been pending for approximately 3 ½ years and the motion to amend came little more than one week before summary judgment. The reasoning of the *Del Guzzi* court is also instructive in this case:

The purpose of pleadings is to “facilitate a proper decision on the merits,” *Conley v. Gibson*, 355 U.S. 41, 48, 2 L.Ed.2d 80, 78 S.Ct. 99 (1957), and not to erect formal and burdensome impediments to the litigation

process. Rule 15 of the Federal Rules of Civil Procedure, from which CR 15 was taken, “was designed to facilitate the amendment of pleadings except where prejudice to the opposing party would result.” *United States v. Hougham*, 364 U.S. 310, 316, 5 L.Ed.2d 8, 81 S.Ct. 13 (1960). CR 15 was designed to facilitate the same ends.

* * * * *

Because the trial judge based his decision upon the “touchstone for denial of an amendment,” *i.e.* prejudice, the trial court’s denial was not a manifest abuse of discretion or a failure to exercise discretion, and therefore should not be disturbed on appeal.

Del Guzzi, 105 Wn.App. at 888-89. The same should hold true if the trial court bases its decision on the touchstone for denial, *i.e.*, prejudice, but concludes, as an exercise of discretion, leave to amend should be granted.

In the present case, the record reflects that the trial court considered potential prejudice to Appellant when evaluating Woodcreek’s motion to amend its answer. However, there was no prejudice to Appellant, as allowing the requested amendments did no more than require that Appellant prove her case against Woodcreek. To the extent Appellant believed additional discovery may have been required, it was incumbent upon her to request such additional time. This request was never made despite an invitation from the trial court.

The trial court properly recognized that Woodcreek should be allowed to have its day in court and to have its factual positions tested by the trial court for legality. The Board believed it had authority to act when it approved defendant Clausing's bonus room, and it should have been allowed to have the trial court evaluate the propriety of its actions, notwithstanding the legal admissions contained in its original Answer. Moreover, plaintiff's claims against defendant Clausing and his response thereto raise the same issues that are addressed in the Amended Answer filed by Woodcreek.

If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, ... the leave sought should, as the rules require, be “freely given.”

Tagliani v. Colwell, supra 10 Wn.App. at 233, 517 P.2d 207.

Walla, 50 Wn.App. 879, 883, 751 P.2d 334 (1998).

The record demonstrates that the trial court applies the proper standard to Woodcreek's motion to amend its Answer. The trial court weighed the rules favoring amendment against the potential prejudice to Appellant. In light of the trial court's proper exercise of its discretion,

Woodcreek respectfully requests this Court affirm the trial court's decision to grant Woodcreek leave to amend its Answer.

2. Appellant did not Properly Request a Continuance in Response to the Amendment of Woodcreek's Answer.

On appeal, for the first time, Appellant argues she should have been afforded the opportunity to conduct discovery prior to summary judgment given Woodcreek's amended Answer. "[G]enerally, a contention by an opposing party that he was not given sufficient time to present matter in opposition cannot be successfully made for the first time on appeal." *Turner v. Kohler*, 54 Wn.App. 688, 694, 775 P.2d 474 (1989) quoting 6 J. Moore, *Federal Practice* at 56-820 to 56-821 (2d ed. 1988).

The amendment of Woodcreek's Answer may have undermined the factual basis and arguments in Appellant's motion for partial summary judgment. However, it had no effect on Mr. Clausing's motion for summary judgment in which Woodcreek had joined even before it had been given leave to amend its Answer. The evidence and arguments that support the trial court's grant of summary judgment and dismissal are wholly independent of Woodcreek's original Answer. Further, regardless of whether Woodcreek had been given leave to amend its Answer, Appellant had to respond to the evidence and arguments presented by Mr. Clausing in support of his motion for summary judgment.

Had Appellant actually needed additional time to conduct discovery before the hearing on defendants' motion for summary judgment, she could have sought relief under CR 56(f). That rule provides a party with an opportunity to delay a motion for summary judgment if she cannot present evidence necessary to establish her opposition. It is not enough, however, to simply request more time, the party must also demonstrate a good reason for delay in obtaining evidence, what evidence would likely be established by additional discovery, and that the evidence would raise a genuine issue of material fact. *Mannington Carpets, Inc. v. Hazelrigg*, 94 Wn.App. 899, 903, 973 P.2d 1103 (1999) quoting *Coggle v Snow*, 56 Wn.App. 499, 507, 784 P.2d 554 (1990).

Appellant cannot cite to anything in the record demonstrating that she made a request to the trial court for relief under CR 56(f). Further, Appellant is unable to establish what evidence, if any, she would have found had she been permitted to conduct additional discovery or that such evidence would have raised a genuine issue of material fact with respect to Woodcreek's motion for summary judgment. In the absence of this proof, any claim regarding additional discovery falls far short of the mark.

It is clear from the Appellant's colloquy with the trial court during the hearing on November 22, 2006, that she did not believe she needed more time or discovery to *respond* to the defendants' motion. Rather, she

seemed to take for granted the defendants' motion would be denied, focusing instead on whether Appellant's motion would be granted *sua sponte* or would need to be reworked to "include, you know, the proper argument and change that." (RP 2-3) Appellant never suggested she needed additional time to oppose defendants' affirmative motion for summary judgment and dismissal.

B. Appellant's Attempts to Reargue Issues Decided by the Supreme Court Should Not be Permitted.

Despite the clear directive from the Supreme Court regarding the issues on remand, Appellant persists in attempting to reargue issues that were decided by the Supreme Court, specifically Appellant's assignment of error no. 1 relating to the trial court's entry of summary judgment in favor of Woodcreek and Clausing. However, Appellant offers no supportable basis for this Court to revisit the Supreme Court's ruling on this issue and potentially reverse that decision.

1. Lake's First Assignment of Error has been Decided.

The King County Superior Court granted summary judgment and dismissal of Appellant's claims against Woodcreek and Clausing. Appellant, in turn, sought review of that decision by this Court. Therein, she sought review of only three issues – whether the trial court erred in granting summary judgment, whether the trial court erred in allowing

Woodcreek to amend its Answer, and whether the trial court erred in awarding attorneys' fees and costs to Clausing.

On appeal, this Court decided the first assignment of error in favor of Lake, reversed the trial court's grant of summary judgment, and remanded the case for trial. Woodcreek and Clausing sought review of this Court's decision by the Supreme Court. The Supreme Court reversed the decision of this Court, thereby reinstating the grant of summary judgment in favor of Woodcreek and Clausing. The Supreme Court also remanded this case to this Court to consider those assignments of error that were not previously addressed. *Lake v. Woodcreek Homeowners Association*, 169 Wn.2d 516, 536, 243 P.3d 1283 (2010).

The Supreme Court has determined that neither the Horizontal Property Regimes Act, nor the Woodcreek Declaration, prohibit the combining of units, such as Clausing's, and common areas, such as the air above Clausing's garage. Clausing's bonus room was approved by the necessary voting power at Woodcreek when Woodcreek ratified the consent of the Board. To eliminate any further controversy over this issue, on December 8, 2010, Woodcreek amended its Declaration to approve all bonus rooms at Woodcreek, including Mr. Clausing's bonus room.

2. Lake Cannot Make New Arguments of Appeal.

One of the fundamental principles of appellate practice is that a party cannot make new arguments on appeal as the trial court was never given the opportunity to consider the appellant's argument. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983); *Demelash v. Ross Stores, Inc.*, 105 Wn.App., 508, 527, 20 P.3d 447 (2001) (“We generally will not review an issue, theory or argument not presented at the trial court level. The purpose of this rule is to afford the trial court an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials.” [Footnotes omitted.]

Until this appeal was remanded by the Supreme Court, Appellant has unequivocally taken the position that Clausing's bonus room was unlawful because: the bonus room combined a unit and common or limited common area, any such combination necessarily altered the percentages of ownership, and unanimous consent of the homeowners was required to alter the assigned percentages. Indeed, Appellant framed these as the issues for her first assignment of error to this Court. (App. Revised Opening Brief, pp. 1-3).

Prior to remand, Appellant never suggested the issue was one of timing, *i.e.*, the Declaration had to be amended *before* Clausing could build his bonus room. Such an argument would necessarily have been a

concession that Woodcreek could approve the construction of bonus rooms, so long as the proper procedure was followed, a concession that would have been fatal to her arguments on appeal. That was never Appellant's position, and her shift in position now, before this Court, following remand from the Supreme Court, should be summarily rejected.

3. Pre-construction Amendment is not Required.

In accordance with the requirements of the Horizontal Property Regimes Act, RCW 64.32.090(10) and (13), the Woodcreek Declaration provides a procedure for combining and subdividing units, common area and limited common area and also a procedure for amending the Declaration, sections 12 and 19 respectively. (CP 232-3; CP 240). Nothing in the Woodcreek Declaration requires the Declaration to be amended before a bonus room can be constructed. Further, nothing in the Horizontal Property Regimes Act establishes such a requirement, either.

As the Supreme Court recognized, 169 Wn.2d at 532, the Declarant, in 1977, filed amendments to the Declaration and Survey to reflect construction that had already been completed. The Declarant did not, nor was there any requirement for it to, file a pre-construction amendment to the Declaration. There was, and is, no requirement for pre-construction amendment of the Declaration in the Declaration or statute, and the Supreme Court did not create such a requirement.

The Supreme Court did *not* hold or intimate the Clausing bonus room was unlawful because the Declaration had not yet been amended. Appellant's argument to that effect is made from whole cloth. Had the Supreme Court determined that there was a requirement for pre-construction amendment of the Declaration, then the outcome of this appeal would have been dramatically different. It was undisputed that a pre-construction amendment had not occurred. Thus, regardless of its determination of the other arguments on appeal, the Supreme Court would necessarily have affirmed the Court of Appeals' decision reversing summary judgment in favor of the defendants had it decided that pre-construction amendment of the Declaration was necessary. The fact that the Supreme Court reversed the Court of Appeals represents a stark rejection of the Appellant's flawed, new premise on timing.

V. CONCLUSION

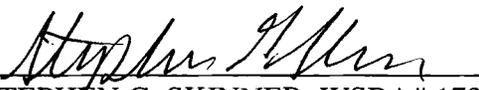
The Supreme Court reversed the decision of this Court and reinstated the grant of summary judgment by the trial court in favor of Woodcreek and Clausing. The Supreme Court remanded the case to this Court to address the assignments of error that had not been previously considered.

Appellant's efforts to reset this appeal to address the summary judgment entered in favor of Woodcreek and Clausing is not supported by

Washington authority or the law of this case. Assignment of error no. 1, including any and all arguments that were made or could have been made by Appellant, has been decided. The only remaining issues for this Court on remand involve the trial court's decision to permit amendment of Woodcreek's answer, which should be affirmed, and the trial court's decision to award fees and costs to Clausing. This litigation has been pending for more than five years. Appellant has had ample opportunity to present her arguments at the trial court and on appeal. Appellant should not be afforded a fourth bite at the apple to overturn the decision of the Washington Supreme Court or the popular will of the Woodcreek Homeowner's Association.

DATED this 1st day of June, 2011.

ANDREWS • SKINNER, P.S.

By: 
STEPHEN G. SKINNER, WSBA# 17317
Attorneys for Respondent Woodcreek
Homeowners Association

CERTIFICATE OF SERVICE

I hereby certify that I arranged to have copies of RESPONDENT WOODCREEK HOMEOWNERS ASSOCIATION'S SUPPLEMENTAL BRIEF REGARDING REMAINING ISSUES ON APPEAL to be served on the following attorneys of record in the manner noted:

<p>Marianne K. Jones Mona Kathleen McPhee JONES LAW GROUP, PLLC 11819 NE 34th St Bellevue, WA 98005 <i>Via email with approval:</i> <u><i>mlaw@joneslawgroup.com</i></u>, <u><i>mkm@joneslawgroup.com</i></u> <i>and US Mail</i></p>	<p>Christopher I. Brain Tousley Brain Stephens, PLLC 1700 7th Ave, Suite 2200 Seattle, WA 98101 <i>Via email: <u>cbrain@tousley.com</u></i> <i>and ABC Messenger</i></p>
<p>Charles E. Watts Oseran, Hahn, Spring & Watts, P.S. 10900 NE 4th St, Suite 1430 Bellevue, WA 98004 <i>Via email with approval:</i> <u><i>tedwatts@ohswlaw.com</i></u> <i>and US Mail</i></p>	

DATED this 1st day of June, 2011, at Seattle, Washington.



JANE JOHNSON

NO. 59211-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SANDRA LAKE,

Appellant,

v.

WOODCREEK HOMEOWNERS ASSOCIATION, a Washington
homeowners association; GLEN R. CLAUSING, a single man,

Respondents.

DECLARATION OF COUNSEL IN SUPPORT OF RESPONDENT
WOODCREEK HOMEOWNERS ASSOCIATION'S
SUPPLEMENTAL BRIEF REGARDING REMAINING ISSUES ON
APPEAL

ANDREWS ■ SKINNER, P.S.
Stephen G. Skinner, WSBA# 17317
Attorneys for Respondent Woodcreek
Homeowners Association

645 Elliott Ave. West, Ste 350
Seattle, WA 98119
206-223-9248

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STATE OF WASHINGTON
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ORIGINAL

I, STEPHEN G. SKINNER, hereby declare as follows:

1. I am over the age of 18 years, a resident of the State of Washington, and competent to act as a witness herein.

2. I am the attorney of record for Respondent Woodcreek Homeowners Association.

3. Attached hereto as Exhibit A is a true and correct copy of the "Amendment of Declaration" of the Woodcreek Condominiums, which was recorded in the King County Auditor's Office on December 16, 2010, under King County Auditor's File No. 20101216000765.

4. As set forth in Exhibit A, the "Amendment of Declaration" was approved and adopted by the affirmative vote of over sixty percent (60%) of the combined voting power of the members of the Woodcreek Homeowners Association at a Special Meeting of the homeowners that was held on or about December 8, 2010. The "Amendment of Declaration" identifies all forty three (43) units at the Woodcreek Condominiums that have bonus rooms.

DATED this 1st day of June, 2011 at Seattle, Washington.


STEPHEN G. SKINNER

CERTIFICATE OF SERVICE

I hereby certify that I arranged to have copies of the DECLARATION OF COUNSEL IN SUPPORT OF RESPONDENT WOODCREEK HOMEOWNERS ASSOCIATION'S SUPPLEMENTAL BRIEF REGARDING REMAINING ISSUES ON APPEAL to be served on the following attorneys of record in the manner noted:

<p>Marianne K. Jones Mona Kathleen McPhee JONES LAW GROUP, PLLC 11819 NE 34th St Bellevue, WA 98005 <i>Via email with approval:</i> <i>mlaw@joneslawgroup.com,</i> <i>mkm@joneslawgroup.com</i> <i>and US Mail</i></p>	<p>Christopher I. Brain Tousley Brain Stephens, PLLC 1700 7th Ave, Suite 2200 Seattle, WA 98101 <i>Via email: cbrain@tousley.com</i> <i>and ABC Messenger</i></p>
<p>Charles E. Watts Oseran, Hahn, Spring & Watts, P.S. 10900 NE 4th St, Suite 1430 Bellevue, WA 98004 <i>Via email with approval:</i> <i>tedwatts@ohswlaw.com</i> <i>and US Mail</i></p>	

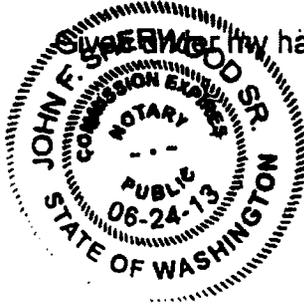
DATED this 1st day of June, 2011, at Seattle, Washington.



JANE JOHNSON

EXHIBIT A

Woodcreek Homeowners Association, who executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said association for the uses and purposes therein mentioned, and on oath stated that they are authorized to execute said instrument.



Witness my hand and official seal this 8th day of December 2010.

John F. Shenwood Sr.

Printed Name: John F. Shenwood, Sr.
NOTARY PUBLIC in and for the state of
Washington residing at Bellevue
My commission expires 6/24/2013

Tax Parcel Identification Numbers

- 9511000010, 9511000020, 9511000030, 9511000040, 9511000050, 9511000060,
- 9511000070, 9511000080, 9511000090, 9511000100, 9511000110, 9511000120,
- 9511000130, 9511000140, 9511000150, 9511000160, 9511000170, 9511000180,
- 9511000190, 9511000200, 9511000210, 9511000220, 9511000230, 9511000240,
- 9511000250, 9511000260, 9511000270, 9511000280, 9511000290, 9511000300,
- 9511000310, 9511000320, 9511000330, 9511000340, 9511000350, 9511000360,
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- 95110001330, 95110001340, 95110001350, 95110001360, 95110001370, 95110001380,
- 95110001390, 95110001400, 95110001410, 95110001420, 95110001430, 95110001440,
- 95110001450, 95110001460, 95110001470, 95110001480, 95110001490, 95110001500.

Legal Description

Apartments No. 001 through 150 inclusive, Woodcreek Division Nos. 1, 2 and 3, a Condominium intended for residential use according to the Condominium Plan and Survey Map, delineating said Apartments, recorded in Volume 5 of Condominiums, Pages 26 through 30 under King County Recording No. 7210190518, and amended in Volume 6 of Condominiums, Pages 95 and 96, under King County Recording No. 7310040344, and in Volume 8 of Condominiums, Pages 23 through 27, under King County Recording No. 7403280420, and in Volume 9 of Condominiums, Pages 17 and 18, under King County Recording No. 7409040523, and in Volume 11 of Condominiums, Pages 27 through 31, under King County Recording No. 7603100585, and in Volume 14 of Condominiums, Pages 49 through 53, under King County Recording No. 7711080802, in Bellevue, Washington;

TOGETHER WITH the respective undivided interest of each Apartment in the common areas and facilities appertaining to said apartments;

AND TOGETHER WITH those limited common areas and facilities so appertaining, according to the Condominium Declarations recorded in King County Recording No. 7210190519, and amended by King County Recording Nos. 7307160399, 7308220621, 7310040345, 7310290296, 7403280421, 7603100586 and 7711080804; 871008108; and 9207271761.

Situate in the City of Bellevue, County of King, State of Washington.

**Woodcreek Homeowners Association
Resolution and Amendment of
Woodcreek Condominiums Declaration Divisions I, II and III**

BE IT REMEMBERED:

WHEREAS, The Woodcreek Homeowners' Association ("Woodcreek") was a defendant in that certain lawsuit filed December 5,2005 entitled *Lake vs. Woodcreek Homeowners' Association, et al* under King County Cause No. 05-2-39460-9; and,

WHEREAS, Summary judgment was granted in favor of Woodcreek on November 22, 2006; and,

WHEREAS, Plaintiff Lake appealed the summary judgment to the Washington State Court of Appeals; and,

WHEREAS, the Court of Appeals reversed the trial court and remanded the case for trial by opinion dated December 31,2007 and reported at 142 Wn. App. 356; and,

WHEREAS, Woodcreek appealed the decision of the Court of Appeals to the Washington State Supreme Court; and,

WHEREAS, the Supreme Court of the State of Washington reversed the Court of Appeals by opinion dated April 15,2010 and reported at 168 Wn.2d 694; and,

WHEREAS, the Supreme Court issued an amended opinion September 15,2010, reported at 169 Wn 2d 516, and remanded the case to the Court of Appeals, concluding: "We reverse the Court of Appeals. The HPRAs and Woodcreek's declaration do not bar the division of a condominium's common areas. The HPRAs 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;" and,

WHEREAS, "Bonus Rooms" are referred to in the Woodcreek Condominium Declaration recorded under recording numbers) 7210190519, in King County, Washington, and as Woodcreek Divisions 1, 2 And 3 (being phases I, II and III), a Condominium, Survey Map And Plans Recorded in Volume 5 of Condominiums, Pages 26 Through 30, Inclusive; Amended In Volume 6, Pages 95 And 96; Amended In Volume 8, Pages 23 Through 27, Inclusive; Amended In Volume 9, Pages 17 And 18; Amended In Volume 11, Pages 27 Through 31, inclusive; amended In Volume 14, Pages 49 Condominium Declarations recorded in King County under Recording No. 7210190519, and amended by King County Recording Nos. 7307160399, 7308220621, 7310040345, 7310290296, 7403280421, 7603100586 and 7711080804; 8710081081 and 9207271761 through ~~53~~, inclusive; and,

Resolution page 1

WHEREAS, in the Condominium Declaration as heretofore amended only six (6) units are shown as having bonus rooms and in the recorded Survey Map and Plans only thirteen (13) units are shown as having bonus rooms although there are forty three (43) units at Woodcreek with bonus rooms; and,

WHEREAS, during the pendency of the lawsuit, individual members of the Woodcreek Homeowners' Association, purchasers, and prospective purchasers have encountered hardship in financing and/or refinancing Woodcreek units based upon FHA, VA and conventional financing requirements; and

WHEREAS the members of the Woodcreek Homeowners' Association desire to amend the Declaration to identify the 43 units in Woodcreek Divisions I, II and III that have bonus rooms and to confirm that all of these bonus room are in conformity with the Declaration, and recorded Survey Map and Plans;

THEREFORE, IT IS HEREBY RESOLVED that the Woodcreek Condominium Declaration is amended to identify the following units as having bonus rooms:

Division I Units 2,3,6,8,12,13,17,22,26,31,35,38,43,45, and 48.

Division II Units 54,55,65,67,68,71,72,73,75,76,96, and 97.

Division IIIA Units 104,108,109,111,114,118,119,122,123, and 127.

Division IIIB Units 130, 134,137,139,146, and 149.

IT IS ALSO RESOLVED that each of the above bonus rooms is determined to be in conformance with the Declaration and recorded Survey Maps and Plans that set forth the design and square footage of the units and the bonus rooms for Divisions 1,2 and 3; and,

IT IS FURTHER RESOLVED that this amendment to the Woodcreek Declaration does not revoke any authority of the Board in respect to its approval of combining any common area, limited common area and or apartment area.

Dated: December 8th, 2010.

Resolution Page 2