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NO. 62222-6

**COURT OF APPEALS, DIVISION I,  
STATE OF WASHINGTON**

Robert Carlson and Janet B. Carlson

Appellants/Cross Respondents

v.

James T. Staley and Sonja Staley, and their marital community;  
John J. Hollinrake, Jr. and Karen E. Hollinrake, and their marital  
community; Randal R. Jones and Vicki Jones, and their marital  
community; John Does 1-20 and Jane Does 1-20;

and

The Innis Arden Club, Inc., a Washington Corporation

Respondents/Cross Appellants

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**THE INNIS ARDEN CLUB, INC.'S REPLY BRIEF ON ITS  
CROSS APPEAL**

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**I. REPLY IN SUPPORT OF CROSS APPEAL**

**A. Abuse of Discretion is the Standard of Review With Respect to CR 11 and RCW 4.84.185, But Whether a Party is Entitled to Statutory Attorney Fees Under RCW 64.38.050 is Reviewed De Novo.**

The Carlsons incorrectly argue that all three of the bases upon which the trial court declined to award fees should be reviewed for an abuse of discretion. Appellants' Combined Reply Brief and Brief in Response to Cross-Appeals (hereinafter "Brief in Response to Cross-Appeals") at 14-15. The Club agrees that an order denying fees under RCW 4.84.185 and CR 11 is reviewed for an abuse of discretion.<sup>1</sup> However, whether the Club is entitled to attorney fees under the fee-shifting statute in the Washington Homeowner's Association Act, RCW 64.38.050, is a very different issue and is reviewed de novo.

The Carlsons argue that the Club was "incorrect" in citing Tradewell Group, Inc. v. Mavis, 71 Wn.App. 120, 126-27, 857 P.2d 1053 (1993) for the proposition that "the question of whether a party is entitled to attorney fees is an issue of law reviewed de novo." Brief in Response to Cross Appeals at 14-15. However, this Court itself cited Tradewell for

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<sup>1</sup> In fact, in the Club's brief on its cross appeal, the Club relied on Déjà Vu – Everett – Federal Way, Inc., v. City of Federal Way, 96 Wn.App. 255, 979 P.2d 464 (1999), *review denied by*, 139 Wn.2d 1027, 994 P.2d 844 (2000) and Quick-Ruben v. Verharen, 136 Wn.2d 888, 969 P.2d 64 (1998). *See* The Innis Arden Club Inc.'s Response Brief and Brief on Its Cross Appeal at 33-34. Those cases recognize that the standard of review regarding sanctions pursuant to CR 11 and RCW 4.84.185 is abuse of discretion.

the same proposition in its Carlson I opinion when evaluating the Club's entitlement to attorney fees under RCW 64.38.050: "The question of whether a party is entitled to attorney fees is an issue of law reviewed de novo." Carlson v. The Innis Arden Club, Inc. et al., Court of Appeals Division I Cause No. 59878-3 at 21.<sup>2</sup>

The Carlsons offer no contrary case law but instead inexplicably rely on Tradewell for the irrelevant proposition that "the amount of any award is reviewed under the abuse of discretion standard." Brief in Response to Cross Appeals at 15 (emphasis added). Here, the issue is not the amount of an award, but whether the Club is entitled to an award. That is clearly an issue of law reviewed de novo.<sup>3</sup>

**B. The Trial Court Abused Its Discretion When it Refused to Award the Club its Reasonable Attorney Fees Pursuant to CR 11 and RCW 4.84.185.**

The Carlsons contend that there is "literally nothing in the record to suggest that the trial court abused discretion, and the Cross-Appellants have made no effort to show abuse of discretion." Brief in Response to Cross Appeals at 14. Both contentions are incorrect.

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<sup>2</sup> A copy of the Carlson I opinion was previously attached as Appendix B to The Innis Arden Club Inc.'s Response Brief and Brief on Its Cross Appeal.

<sup>3</sup> The Carlsons cite to the language in RCW 64.38.050 and argue that it provides discretion. Not only do they fail to offer any authority for the proposition that the language of the statute modifies the applicable standard of review, but the Carlsons already litigated the applicability and scope of RCW 64.38.050 in Carlson I. This is yet another instance of the Carlsons inappropriately seeking to re-litigate decided issues.

Judge Lum himself recognized the egregiousness of what had occurred when, in declining to impose sanctions against the Carlsons, he acknowledged: “The Court notes that the issue of whether attorney fees should be awarded pursuant to CR 11 is a very close question. . .” CP 1243-1244. However the Judge did not articulate the factors militating against such an award, while the factors requiring one were very much a part of the record, having been articulated by the Judge himself in his Order vacating the default the Carlsons had obtained against the Staleys:

In obtaining the default judgment against Defendants Staley, Mr. Carlson failed to provide important information which undoubtedly should have been provided. Mr. Carlson failed to inform *Ex Parte* that another Department of this Court had previously entered, in Carlson v. Innis Arden Club, et al., King County Superior Court Cause No. 06-2-06819-0 SEA (“*Carlson I*”), final rulings and judgments adverse to the Carlsons on issues raised in this case. Mr. Carlson included provisions in the Staley default judgment which he presented to the *Ex Parte* Commissioner for entry that were contrary to the rulings entered against the Carlsons in *Carlson I*. Further, he obtained the default judgment without providing any notice to Defendants Hollinrake or Jones, who had appeared. Despite the fact that the Innis Arden Club, Inc. was not a party at the time the default judgment was entered and was not given notice of it, Mr. Carlson nonetheless drafted the default judgment and has since demanded that it be applied as an injunction against and binding upon the Club, its Directors, and members. Mr. Carlson did so even though, just minutes before he presented the default judgment for entry in *Ex Parte*, he had left this Department’s courtroom, where this Department had taken under advisement a motion for dismissal of Mr. Carlson’s entire action unless the Club was named as a necessary party defendant. Mr.

Carlson did not disclose to this Court that he would proceed immediately to *Ex Parte* and obtain entry of a default judgment which he would claim bound The Innis Arden Club, Inc. Nor did Mr. Carlson disclose to *Ex Parte* the procedural posture of the case as reflected in the motion hearing in which he had just participated. Accordingly, the Court hereby sets aside and vacates pursuant to CR 55(c)(1) and CR 60(b)(1),(4), and (11) the “Default Judgment” entered against Defendants Staley and the “Order on Plaintiffs’ Motion for Order of Default and Default Judgment” both dated October 26, 2007.

CP 495-496.

Despite having specifically found that Mr. Carlson, an attorney as well as a party, engaged in such a course of conduct, the trial court without providing any explanation refused to award the Club’s its reasonable attorney fees pursuant to CR 11.<sup>4</sup> This was an abuse of discretion given the egregious facts, which were far worse than the already-reprehensible act of presentation of pleadings to King County *Ex Parte* Department that were clearly not well grounded in fact or law. The Club understands the trial court’s reluctance to impose sanctions. But, respectfully, in this case, failure to do so -- with no reasons given -- was both an abuse of discretion and a disservice to the system. The trial court’s findings vacating the

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<sup>4</sup> The Carlsons state without providing any record citations that the “trial court twice denied the Club’s application for attorney fees; once after the CR 60(b) motion and once after dismissing the Complaint.” Brief in Response to Cross-Appeals at 18 (emphasis in original). This is incorrect. While the trial court entered two orders denying attorney fees after dismissal of the Complaint, only one pertained to the Club. CP 1243-44. There was no separate application for fees by the Club prior to dismissal of the Carlson Complaint.

default, quoted above, explain why better than any after-the-fact appellate brief.

The Carlsons' response in this court demonstrates all the more why sanctions should have been imposed. Rather than address the deceptive acts found by the trial court in its Order<sup>5</sup> vacating the Staley default, it ignores them. The Carlsons' response circles back to argue fruitlessly, as if the Order were never entered, that all required notice was given and that they were entitled to seek a default in *Ex Parte*. Brief in Response to Cross-Appeals at 18.

As the trial court Order reflects, the Carlsons did not give any notice to the parties who had appeared. In any event, the egregious lack of notice was not the only problem. The trial court found that Mr. Carlson withheld vital information from the *Ex Parte* commissioner and provided materials which were affirmatively misleading and incorrect in light of binding rulings entered against the Carlsons in Carlson I. Then, Mr. Carlson threatened the Club with the injunction Order he had obtained under false pretenses, asserting that it was binding on the Club.<sup>6</sup> Thus, the Club was forced to bring a motion to set aside the Staley default

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<sup>5</sup> As pointed out in the Club's initial brief, the Carlsons have only briefed an appeal of the trial court's summary judgment orders and have abandoned their appeal of all other orders in this matter, including the Order vacating the default. *See* The Innis Arden Club, Inc.'s Response Brief and Brief on Its Cross Appeal at 12.

<sup>6</sup> A copy of the Carlsons' threatening memorandum to the Club appears in the record at CP 176-77.

judgment.<sup>7</sup> CP 151-162. In pursuing these courses of action, Mr. Carlson unquestionably violated CR 11 and the duty of candor imposed under the Rules of Professional Conduct. *See* RPC 3.3.

The Carlsons assert, without any citation to the record, that the Staley's "defaulted again" after the trial court vacated the first default judgment. Brief in Response to Cross-Appeals at 18. This argument, irrelevant to the issues on appeal, misleads and therefore illustrates again why CR 11 sanctions were and are called for. The Carlsons did file a second (nearly identical) motion for default against the Staleys shortly after Judge Lum's Order vacating the first default was entered. CP 500-510. The Club was forced to respond to that motion as well. But, the motion was subsequently denied, contrary to the Carlsons' implication. CP 867-69.

In sum, the explicit findings in Judge Lum's Order vacating the Staley default alone compelled imposition of sanctions. Judge Lum's subsequent denial of sanctions, with no explanation, but with the acknowledgment that it was a "very close question" establishes an abuse of discretion.

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<sup>7</sup> The Carlsons allege without providing any support, that the Club was "acting as legal representative for the Staleys under CR 60(b)." Brief in Response to Cross-Appeals at 18. There is no basis for this assertion. While it is true that the Club generally represents the interests of all of its members, it did not appear on behalf of or represent the Staleys. The Club sought to have the Staley default set aside because the Carlsons were contending that the Club was bound by it.

The Club's argument for an award of attorney fees pursuant to RCW 4.84.185 is similar and shares common support in the case law with the Club's CR 11 argument. The Carlsons' lawsuit here is not supported by any rational argument based on the law or the facts in light of the preclusive effect of Carlson I. And, a reasonable and objective inquiry would have revealed that the lawsuit was frivolous.

Déjà Vu – Everett – Federal Way, Inc., v. City of Federal Way,<sup>8</sup> is directly on point.<sup>9</sup> In Déjà Vu, this Court held that Déjà Vu's lawsuit challenging Federal Way's ordinance that required exotic dancers to stay at least four feet away from patrons was precluded based on the res judicata and collateral estoppel effect of prior rulings. This Court went on to hold that the trial court abused its discretion in denying Federal Way's request for attorney fees:

Considering the entire record and resolving all doubts in favor of Déjà Vu, we find the present action is not supported by any rational argument based on the law or the facts. It is frivolous to argue that our Supreme Court intended to breathe life into further challenges. Relitigation of the four-foot rule is a waste of time. We remand for an award of attorney fees in favor of

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<sup>8</sup> Déjà Vu – Everett – Federal Way, Inc., v. City of Federal Way, 96 Wn.App. 255, 979 P.2d 464 (1999), *review denied by*, 139 Wn.2d 1027, 994 P.2d 844 (2000).

<sup>9</sup> The Club cited Déjà Vu in its initial brief. *See* The Innis Arden Club Inc.'s Response Brief and Brief on Cross Appeal at 34. The Carlsons have made no effort to distinguish Déjà Vu and cite no contrary authority.

Federal way for having to defend this suit below and on appeal.<sup>10</sup>

In doing so, this Court emphasized that discretion is abused if based on untenable grounds:

Discretion may be abused, however, if based on untenable grounds. *Layne v. Hyde*, 54 Wash.App. 125, 135, 773 P.2d 83 (1989). The court below rejected the City's request for attorney fees after deciding that Déjà Vu's "inevitable effects" claim was at least arguable under the state constitution. This was not a tenable basis for the ruling. *Ino Ino* and Judge Zilly's decision both precluded such argument.<sup>11</sup>

Déjà Vu stands for the proposition that where a lawsuit is clearly barred by res judicata and/or collateral estoppel, as is the case here, it is an abuse of discretion to not award attorney fees pursuant to CR 11 and/or RCW 4.84.185.

In arguing against sanctions, the Carlsons contend that the trial court was generally confused, but that (in what Carlsons would presumably label as an isolated moment of clarity) Judge Lum recognized that the Carlsons were not really trying to re-litigate issues when he stated, "we don't know, at this point, what the community process will turn up." Brief in Response to Cross Appeals at 16. The fact that Judge Lum

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<sup>10</sup> Déjà Vu – Everett – Federal Way, Inc., v. City of Federal Way, 96 Wn.App. 255, 264, 979 P.2d 464 (1999) (internal citations omitted), *review denied by*, 139 Wn.2d 1027, 994 P.2d 844 (2000).

<sup>11</sup> Id. at 263-64.

recognized that the community process had not concluded does not by any means indicate that he was confused regarding the Carlsons' causes of action or their obvious attempt to re-litigate issues regarding the Club process. This is apparent when Judge Lum's statement is viewed in context:

I think that collateral estoppel and res judicata is [sic] based on common sense, as well as legal doctrine and common sense, sensibility of res judicata [sic]. We shouldn't be chasing our tails, year after year. And as to this cloud on title and community process issue, those have been decided.

And I'm going to grant the motion here. I'm not saying that Mr. Carlson could in no circumstance challenger, prior to determination, some activity. But what he is challenging, in this particular lawsuit, is identical to what he has done before.

And this is not appropriate for relitigation. It has been decided. And it is [sic] community process whether or not it is valid. That is decided. And we don't know, at this point, what the community process will turn up. . . .<sup>12</sup>

RP 21:8 – 21:22.

The Carlsons argue that their lawsuit was appropriate because in Carlson I Judge Mertel indicated that the Carlsons "had the right to access the court at all times," Brief in Response to Cross Appeals at 17. The Club has already addressed this theory in its initial brief. See *The Innis*

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<sup>12</sup> As noted in the Club's initial brief, the Carlsons have provided the Court with a Report of Proceedings of the hearing before Judge Lum that is riddled with typographical errors and garbled phrases.

Arden Club Inc.'s Response Brief and Brief on Cross Appeal at 23-25. It ignores the fact that the claims brought here are precluded, i.e. they are the same claims that Carlsons litigated and lost in Carlson I. And, neither the Declaratory Judgment Act, nor the Covenants authorize the Carlsons to re-litigate issues or to file lawsuits against individuals whose only "crime" or action is that they contacted the Club Board about a potential covenant violation.

The fact that there are new parties to the lawsuit, does not change the nature of the Carlsons' claims, which argue that utilizing the Club's covenant compliance process creates a cloud on title warranting a remedy. Such claims entirely ignore the fact that the Club has an independent and recognized right to enforce the covenants on behalf of all Innis Arden residents. *See, e.g.*, CP 616 (Commissioner Ellis' October 29, 2007 Ruling at 2 in Carlson v. The Innis Arden Club, Inc. et al., Court of Appeals Division I Cause No. 59878-3-1).

Accordingly, if the Court upholds Judge Lum's ruling and agrees that the Carlsons' claims here are clearly precluded by res judicata and collateral estoppel, the Court should also award the Club its reasonable attorney fees pursuant to CR 11 and RCW 4.84.185.

**C. Attorney Fees Should Also be Awarded Pursuant to RCW 64.38.050 Because the Claims Are the Same Claims that Resulted in an Attorney Fee Award in Carlson I.**

The Carlsons devote only one page to their argument that the Club should not be awarded its reasonable attorney fees pursuant to RCW 64.38.050. Brief in Response to Cross-Appeals at 19-20. Their argument is that the Carlson I litigation “included an explicit claim that the Club Process violated the HOA Act” whereas this litigation, Carlson II, did not. Brief in Response to Cross-Appeals at 19. Of course, it should not surprise anyone that the second time the Carlsons decided to sue regarding the same claims, they made a strategic decision not to expressly allege a violation of the HOA Act. However, that does not change the nature of their actual claims.

The Carlsons’ claims in this lawsuit are virtually identical to their claims in Carlson I. In both lawsuits, the Carlsons sought to derail the Club’s covenant compliance process and the Club’s ability to impose fines pursuant to that process.<sup>13</sup> These are powers expressly granted to the Club under the HOA Act. Specifically, RCW 64.38.020 (11) provides homeowners’ associations may:

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<sup>13</sup> Paragraph 8.1 of the Carlsons’ Prayer for Relief seeks, *inter alia*, to stay “arbitration”, to prevent assessment of fines or liens, and to preclude any non-judicial decision regarding the Carlsons’ trees. CP 10.

. . . after notice and an opportunity to be heard by the board of directors or by the representative designated by the board of directors and in accordance with the procedures as provided in the bylaws or rules and regulations adopted by the board of directors, levy reasonable fines in accordance with a previously established schedule adopted by the board of directors and furnished to the owners for violation of the bylaws, rules, and regulations of the association;

The Carlsons assert that they only added the Club as a party because the trial court required it. Brief in Response to Cross-Appeals at 19. However, even when the Club was absent from the litigation, the claims and relief requested by the Carlsons focused on the Club process authorized by the HOA Act and would have directly impacted the Club. In fact, the common characteristic of those that the Carlsons sued here was that they had the audacity to invoke the Club's covenant compliance process. In other words, the only controversy centered on the Club's covenant compliance process.

Whether the Carlsons explicitly alleged that the actions of the Club violated the HOA Act or not, that was the unquestionable thrust of their claims. And, attorney fees should be awarded to the Club on that basis.

Finally, if this Court agrees with the Club on the merits and upholds Judge Lum's ruling that all of the claims in this lawsuit are precluded by res judicata and collateral estoppel, it would be entirely

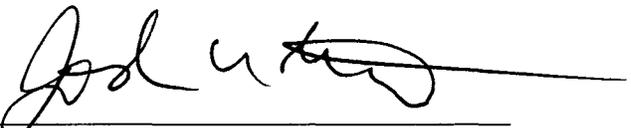
incongruous to disallow attorney fees now when they were granted in the prior litigation.<sup>14</sup>

## II. CONCLUSION

The Club respectfully requests that the trial court's summary judgment order dismissing the Carlsons' Complaint with prejudice be affirmed and that the Carlsons' appeal be denied in its entirety. The Club further requests that the trial court's decision denying the Club's motion for reasonable attorney fees and/or sanctions be reversed and that the Club receive an award in connection with the litigation below. Finally, the Club requests that it be awarded fees and sanctions on appeal.

Respectfully submitted this 19<sup>th</sup> day of October, 2009.

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<sup>14</sup> In fact, even if the trial court had discretion under RCW 64.38.050, it would be an abuse of discretion to deny a homeowners' association its reasonable attorney fees in a case precluded by the res judicata and collateral estoppel effect of earlier litigation that resulted in an award pursuant to the statute.

**CERTIFICATE OF SERVICE**

I, Deniece Bleha, do hereby certify that I am over the age of eighteen, and am not a party to this lawsuit.

On this 19<sup>th</sup> day of October, 2009, I caused to be served a true and correct copy of the foregoing in the manner described upon the following

parties:

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1450 NW 186th St.  
Shoreline, WA 98177

John Hollinrake  
1048 NW Innis Arden Drive  
Shoreline, WA 98177

Via First Class Mail, Postage  
Prepaid

Via First Class Mail, Postage  
Prepaid

Randal Jones  
17777 13<sup>th</sup> Avenue NW  
Shoreline, WA 98177

James and Sonja Staley  
18545 Springdale Ct. NW  
Shoreline, WA 98177

Via First Class Mail, Postage  
Prepaid

Via First Class Mail, Postage  
Prepaid

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

DATED this 19<sup>th</sup> day of October, 2009 at Seattle, Washington.

  
\_\_\_\_\_  
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