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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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LAKELAND HOMEOWNERS ASSOCIATION, a Washington non-  
profit corporation,

Appellant,

v.

ALAN WHITE and ERIKA WHITE, husband and wife,

Respondents.

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APPELLANT'S BRIEF

---

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Homeowners Association

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## I. ASSIGNMENTS OF ERROR

The trial court erred when it:

A. Granted summary judgment in favor of respondents Alan White and Erika White in holding that the Lakeland Master Declaration's one-year lease restriction does not apply to condominium units; and

B. Awarded the entirety of respondents' legal fees when the Whites prevailed on only some claims and when a portion of respondents' fees were incurred in pursuing settled claims against a separate defendant.

## II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

All issues arise from Summary Proceedings and are subject to *De Novo* review.

A. Issues Pertaining to Assignment of Error A:

1. Whether extrinsic evidence should be used to interpret language contained within a homeowners' association's covenants, conditions and restrictions (commonly referred to as "CC&Rs" or "declaration").

2. Whether the doctrine of *contra proferentem* has been expressly rejected when interpreting a homeowners' association's declaration in a dispute not involving the drafter of the declaration.

3. Whether in determining the intent of the drafter of a homeowners' association's declaration, a court should examine the homeowners' collective interests.

B. Issues Pertaining to Assignment of Error B:

1. Whether a party who prevails on one claim on summary judgment but who has other claims dismissed on a cross-motion for summary judgment should not be deemed the prevailing party.

2. Assuming a party is deemed a prevailing party, whether they should be awarded only those fees and costs incurred in obtaining judgment, and not awarded costs and fees incurred in pursuing claims against a settled third-party.

### III. STATEMENT OF THE CASE

A. **Factual Background**

Lakeland Homeowners Association ("Lakeland HOA" or "master community") is a master planned unit development community in Lakeland, Washington, which includes 31 separate sub-associations. CP 182. Of the 3,094 homes within Lakeland HOA, 1,405 are condominium units; thus, 45.4 percent of the master community is comprised of condominium units. *Id.* Carrara at Lakeland Condominium Association ("Carrara Condominium") is one of the sub-associations that falls within the jurisdiction of Lakeland HOA. *Id.*

Plaintiffs Alan and Erika White purchased a condominium unit at the Carrara Condominium. Both Carrara Condominium and Lakeland HOA have their own sets of CC&Rs, as Carrara Condominium and Lakeland HOA are separate and distinct legal entities. CP 120-125.

The Carrara Condominium CC&Rs do not place any restrictions on an owner's ability to rent or lease their unit. CP 105-119. However, Lakeland HOA's CC&Rs contain the following restriction:

An Owner may not rent or lease a Single-Family Home in any manner whatsoever for one year after the date of closing of their purchase without the prior written approval, [*sic*] of the Board of Directors.

CP 93.

Plaintiffs admit that they reviewed Lakeland HOA's CC&Rs in advance of the purchase of their home:

Prior to purchasing their condominium Plaintiffs learned that the Declaration for Carrara at Lakeland Condominium and the Declaration of Covenants, Conditions and Restrictions of Lakeland contained conflicting provisions, regarding Plaintiffs' ability to rent their condominium within the first year after purchase. Specifically, Paragraph 6.10.3 of the Lakeland Declarations prohibited an owner from renting a condominium within the first year of purchase."

CP 2.

Prior to closing on their condominium unit, the Whites also received a copy of the Carrara CC&Rs. The Carrara CC&Rs, as a subdivision of

the master community, are explicitly subordinate to Lakeland HOA's CC&Rs:

11.17 Master Association. CARRARA AT LAKELAND is specifically subject to the Master Declaration, including all amendments thereto.

CP 33.

In addition to the Lakeland HOA's Declaration, the master community also adopted "Lakeland's Community Rules and Regulations and Architectural Review Guidelines" (hereinafter "Rules") that were in effect at the time the Whites purchased their unit. The Rules are consistent with the provisions of Lakeland HOA's CC&Rs and complement the CC&Rs in order to uphold the standards for community living within the master community. In Section 3.2.4, the Rules state that the Carrara Condominium community is expressly part of the Lakeland master community. CP 150.

Even with knowledge of Lakeland HOA's one-year restriction on renting or leasing, shortly after purchasing the condominium, the Whites proceeded to lease their unit. CP 2. In response, Lakeland HOA sent notice of violation letters which led to eventual fining and assessment against the Whites. CP 131-132.

**B. Procedural Background**

The Whites filed a declaratory judgment action in King County Superior Court to enjoin Lakeland HOA from pursuing fines that resulted from violation of Section 6.10.3's one-year leasing restriction. CP 1-3. The Whites also brought negligence and negligent misrepresentation claims against Lakeland HOA and a third-party management company. *Id.*

On summary judgment, the trial court ruled in the Whites' favor and found that the one-year rental restriction within Lakeland HOA's Declaration did not apply to respondents' condominium unit. CP 297-299. No damages were pled nor awarded; however, the Court did award all of respondents' attorneys' fees and costs in the amount of \$24,774.98. CP 416-417. On cross-motion for summary judgment, the court ruled in Lakeland HOA's favor by dismissing respondents' claims for negligence and negligent misrepresentation. CP 300-302.

Both parties have cross-appealed both trial court rulings. This appeal is limited to the Order granting respondents' summary judgment and award of attorneys' fees and costs.

## IV. ARGUMENT

### A. Standard of Review.

The appropriate standard of review for an order granting or denying summary judgment is *de novo*, and the appellate court performs the same inquiry as the trial court. *Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006). “The court should grant summary judgment only if reasonable persons could reach but one conclusion.” *Retired Public Employees Council of Washington, v. Charles*, 148 Wn.2d 602, 613, 62 P.3d 470 (2003) (citation omitted). Consequently, this court should review the trial court’s summary judgment rulings under a *de novo* standard of review.

### B. The One-Year Leasing Restriction Applies to Condominium Units.

The Lakeland HOA’s CC&Rs, or Declaration (also referred to herein as the “Master Declaration”), prohibits leasing of all types of domiciles coming under the definition of “Single Family Home” in Section 6.10.3, which provides:

An Owner may not rent or lease a Single-Family Home in any manner whatsoever for one year after the date of closing of their purchase without the prior written approval, of the Board of Directors. . . .

CP 93. The sole issue for the Court is whether Lakeland’s developers intended to include condominium units within the one-year restriction, or whether, despite the strong value-preservation policy it supports, they intended for the restriction not to apply to almost half of the residences within the Lakeland community.

The trial court committed error when it relied upon the interpretive canon of *contra proferentem*<sup>2</sup> to find for the Whites because that doctrine has been explicitly rejected in the homeowner association context. When the context rule of *Berg v. Hudesman*<sup>1</sup> is applied to determine the intent of the drafter with a focus on the “collective interests of the homeowner,” as required by *Riss v. Angel*,<sup>2</sup> it is clear that the intent was to include condominium units within the leasing restriction.

**1. The Trial Court Erred in Holding that the Definition of “Single Family Home” Did Not Include Condominium Units.**

*a. Community Association Declarations are Interpreted Like Contracts but with Key Distinctions.*

A condominium or homeowner association declaration is not a contract, but a set of covenants or servitudes upon land. However, Washington courts have generally applied the same interpretive tools to

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<sup>1</sup> 115 Wn.2d 657, 667-68, 801 P.2d 222 (1990).

<sup>2</sup> 131 Wn.2d 612, 623-24, 934 P.2d 669 (1997).

covenants as they have to contracts with some key distinctions discussed below. Under the modern “context” rule of *Berg v. Hudesman*, the parties are no longer limited to the four corners of the document to determine the meaning of terms within the contract or covenant. Extrinsic evidence is allowed to determine the intent of the parties. *Berg*, 115 Wn.2d at 667-68. Extrinsic evidence is allowed in interpreting covenants and community declarations as well, but, as discussed in more detail below, the intent to be divined is that of the drafter of the declaration – the community’s developer. *Riss* 131 Wn.2d at 621. Even under the “context rule” of *Berg*, however, certain extrinsic evidence remains inadmissible, including one party’s subjective understanding of a term. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 693, 974 P.2d 836 (1999).

In examining the language of the covenants and the extrinsic evidence, Washington courts have found a number of the canons of contractual construction equally applicable to covenants as to contracts and have therefore applied them to aid in the interpretation of community association declarations. *See, e.g., Roats v. Blakely Island Maint. Comm’n, Inc.*, 169 Wn. App. 263, 273–75, 279 P.3d 943 (2012) (interpreting homeowners’ association articles of incorporation, bylaws and covenants); *Jensen v. Lake Jane Estates*, 165 Wn. App. 100, 105, 267 P.3d 435 (2011) (interpreting restrictive covenants). But the distinctions between covenants and contracts render certain of these doctrines patently

inapplicable, including the single canon applied by the trial court in this case.

b. *The Trial Court Improperly Relied Upon **Contra Proferentem** in Finding that Condominium Units were not Single Family Homes.*

The trial court inexplicably and erroneously held that Lakeland HOA should bear the burden of the ambiguity in reliance upon the interpretive canon of *contra proferentem* – interpretation against the drafter:

The plain language to me suggests that the – that the single-family home language, if that’s what you meant, could have been spelled out by Lakeland but is not there.

I believe, secondly, that the ambiguity is, in this instance, to be construed against the drafter. I think it does indicate that there is a restriction on the property use there of the -- of the plaintiffs. And I don't think it's appropriate. I think that Lakeland has an opportunity -- had an opportunity to spell that out. They didn't. They spelled out everything else, and that makes me wonder whether or not the plaintiff should have to bear that.

So I am concluding, on this record, that the restriction on an owner's renting or leasing single-family home does not apply to the plaintiffs in this instance. And I am granting on that point the Whites' motion for summary judgment.

RP 5.

The trial court's ruling demonstrates the fundamental unfairness of the applicability of this contractual interpretation doctrine when the document in question was not drafted by either party. Lakeland did not, in

fact, have an “opportunity to spell out” the definition of Single Family Home or to include the word “condominium” within that section. Instead, the drafter of the document – the developer – did; which is why it would be fundamentally unfair to apply the doctrine of *contra proferentem* against the master community. This is exactly why the Washington Supreme Court expressly rejected the applicability of this particular canon under these circumstances.

In *Riss*, the court clarified that due to the key differences between contracts and covenants and the parties involved, not all rules of contract construction should apply to covenant interpretation:

Washington courts have begun to question whether rules of strict construction should be applied where the meaning of a subdivision’s protective covenants are at issue and the dispute is among homeowners. Construction against the grantor who presumably prepared [a] deed is quite a different matter from construction of covenants intended to restrict and protect all the lots of a plat and future owners who buy and build in reliance thereon.

*Riss*, 131 Wn.2d at 621-22 (quoting *Mains Farm Homeowners Ass’n v. Worthington*, 121 Wn.2d 810, 815, 854 P.2d 1072 (1993)). The *Riss* court specifically concluded that the doctrine is patently inapplicable in this context:

The time has come to expressly acknowledge that where construction of restrictive covenants is necessitated by a dispute not involving the maker of the covenants, but rather among homeowners in a subdivision governed by the restrictive covenants, rules of strict construction against the

grantor or in favor of the free use of land are inapplicable. The court's goal is to ascertain and give effect to those purposes intended by the covenants.

*Riss*, at 623. The *Riss* pronouncement makes sense where, as here, the declaration was created by the developer unilaterally and without input from the homeowners. It would make little sense to penalize one of the parties for any alleged ambiguous drafting.

As discussed in greater detail below, instead of defaulting to the “construction against the drafter” doctrine, if the trial court found the term ambiguous, it should have analyzed extrinsic evidence under *Berg*, and the declaration as a whole under *Riss*, to divine an interpretation that reflects the intent of the drafter that protects the homeowners’ “collective interests.” *Riss*, 131 Wn.2d at 623-24.

The trial court in this case erred when it relied solely upon an inapplicable doctrine of construction to find for the respondents on summary judgment.

**2. The Context of the Declaration Demonstrates that Condominium Units Were Intended to be Included Within the Lease Restriction.**

When the Court analyzes the extrinsic evidence and applies appropriate canons of construction, it should become clear that the drafter's intent, and the result that best serves the collective interests of the homeowners, is that condominium units be included within the one-year

leasing restriction. As is well established under the context rule of *Berg v. Hudesman*, it is no longer necessary to find a term ambiguous before resorting to extrinsic evidence to determine the meaning of terms. *Hearst Communications, Inc. v. Seattle Times Co.*, 120 Wn. App. 784, 791, 86 P.3d 1194 (2004) (citing *Berg*, 115 Wn.2d at 667–68). If relevant, such evidence may include the subject matter of the contract, the circumstances under which the agreement was made, the parties’ conduct thereafter, and the reasonableness of the interpretations urged by each party. *Id.*

Again, in disputes within community associations where, as here, *neither party* was the drafter of the declaration, restrictive covenants are interpreted to carry out the purpose for which the covenants were created. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999); *Riss*, 131 Wn.2d at 621 (citing Restatement (Third) Of Property: Servitudes § 4.1 (2000)). As explained in *Riss*, the modern view is that the drafter’s intent in this context is to be viewed with an eye towards serving the homeowners’ collective interests:

The court’s goal is to ascertain and give effect to those purposes intended by the covenants. Ambiguity as to the intent of those establishing the covenants may be resolved by considering evidence of the surrounding circumstances. The court will place “special emphasis on arriving at an interpretation that protects the homeowners’ collective interests.”

*Riss*, 131 Wn.2d at 623-24.

As demonstrated below, numerous contextual factors support the interpretation that condominium units were intended to be included within the Master Declaration's one-year leasing restriction. In *Berg*, the Supreme Court set forth five such factors for a court to review in determining the "intent" of the drafters of a contract:<sup>3</sup> (1) the contract as a whole; (2) its subject matter and objective; (3) the circumstances surrounding its making; (4) the subsequent acts and conduct of the parties; and (5) the reasonableness of the interpretations advocated by the parties. Analysis of each of these factors supports an interpretation that condominiums were intended to be included within the master community's leasing restriction.

*a. The Declaration as a Whole Demonstrates an Intent to include Condominium Units Within the Leasing Restriction.*

Review of the entirety of Lakeland HOA's Declaration demonstrates that the one-year leasing restriction should apply liberally to all residences within Lakeland. Section 1.1 of the Master Declaration provides: "The provisions of this Declaration shall be liberally construed

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<sup>3</sup> Courts shall apply principles of contract interpretation to interpret provisions in CC&Rs and other governing documents relating to real estate developments.

to effectuate its purpose of creating a *uniform plan* for the operation and maintenance of the Property.” CP 82.

Notably, both the Master Declaration as a whole, and the leasing restriction, contain remarkably similar purposes – protecting the overall value, investment value and attractiveness of the homes. Restricting rentals of *all* residences within the Lakeland community encourages home ownership in lieu of a community of transient renters, which leads to higher property values and harmonious community living. Thus, the overall purpose of the Declaration would be circumvented by exempting over 45% of the Lakeland community that is comprised of condominium units. Thus, enforcement of Section 6.10.3 to all residences within the master community protects the collective interests of all of the homeowners within Lakeland.

There is nothing in the overall purpose of the Master Declaration or in any of the governing documents that would give a reason for excluding condominium units from the leasing restrictions. Thus, a determination that Section 6.10.3 excludes condominium units would be inconsistent with the subject matter and objective of the Lakeland HOA’s Declaration’s expressly stated intent.

*b. The Declaration's Subject Matter and Objective Demonstrates an Intent to Include Condominium Units within the Leasing Restriction.*

As a Master Declaration covering hundreds of homes spanning over two dozen residential subassociations, the subject matter of the Master Declaration demonstrates an intent to include condominiums within the leasing restriction. Each of the subassociations has its own set of governing documents tailored to its own community. As implied in the broad policy statements referenced in the section above, the role of the Master Declaration is to set extremely broad covenants applicable to *all* residences within Lakeland.

In this context, it makes no sense that the master declaration would include a provision applicable to only some of its subdivisions. It would be far more consistent with the overall scheme of the Declaration to leave such provisions to the subassociations' declarations.

*c. The Circumstances Surrounding the Drafting of the Declaration Support Including of Condominiums within the Leasing Restriction.*

While the exact circumstances of creation of the Master Declaration are unknown, it is known that conformity and uniformity are the bedrock of the residential development. CP 144-172. Applying the restrictive covenant against one class of homeowner, and not applying it to another class, would defeat the drafters' manifest purpose of "enhancing the

resources of the whole community.” CP 149. Thus, this factor supports an interpretation that condominium units would be included within Section 6.10.3.

*d. Lakeland’s Rules and Other Materials Demonstrate Consistent Interpretation of the Leasing Restriction Against Condominium Units.*

For the entire time the homeowners controlled the master community, Lakeland HOA has consistently, publicly and uniformly interpreted the leasing restriction to include condominium units. CP 265-67; 268-69. During this period, the master community simultaneously explained the value of the one-year leasing restriction in terms of the overall purpose of maintaining property values. CP 180-224. This evidence demonstrates universal and long-standing acceptance of the application of the term to condominium units, which is not only admissible, but persuasive.

The Rules describe the Master Declaration as “enhancing and protecting the value, desirability, and attractiveness of Lakeland and all for the benefit of the Owners thereof. . . .” CP 149. The purpose of the CC&Rs is “[t]o continually preserve and improve the Lakeland lifestyle and assist homeowners in maintaining their investment for the benefit of all who live, visit or work in our community.” CP 146. The Rules are explicitly designed “to assist the Lakeland HOA Association Manager and

the Lakeland HOA residents in maintaining quality neighborhoods with high standards of yard and home maintenance and responsive resident behavior.” CP 203.

Lakeland HOA’s Rules supplement and clarify the leasing restriction contained in the Lakeland Declaration and contain the following illuminating provision:

**Section 6.1.16 Renting and Leasing Restrictions**

(Declaration 6.10)

Why do we have restrictions?

- The restrictions exist for the purpose of enhancing and protecting the value, desirability, and attractiveness of Lakeland.
- .....
- Because these covenants exist to protect ***each resident in Lakeland***, it is important that ***all*** residents comply with all regulations.

**6.1.16.1 Leasing Policy**

This Declaration bars ***all owners*** from renting or leasing until one year after closing;

CP 206 (emphasis added). The Rules explain that the leasing restriction has the purpose of “enhancing and protecting the value, desirability, and attractiveness of Lakeland. . .” CP 157.<sup>4</sup>

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<sup>4</sup> Notably, the Rules also contained a preamble regarding the effect of the Rules:

“The Board, pursuant to CC&Rs Section 4.2, has adopted the following Rules and Regulations. The Rules and Regulations have the same force and effect as the Use restrictions contained in the CC&Rs, and each homeowner should carefully review both documents.” CP 203.

The Rules are compelling evidence of Lakeland HOA's understanding, and all past owners' understanding and acceptance, of the inclusion of condominium units within the one-year leasing restriction. Thus, the homeowners' collective interests are protected by this interpretation, as well. Consequently, this Court should overturn the trial court's granting of summary judgment in favor of respondents.

*e. Lakeland's Interpretation that Condominium Units were Intended to be Included is Far More Reasonable than the Opposite Conclusion.*

Respondents failed to articulate, and the trial court similarly did not give a rationale for why the developer would intend to exclude condominium units within Lakeland from the one-year leasing restriction. If the expressly stated purpose of the restriction is "protecting the value, desirability, and attractiveness of Lakeland," then there is no reason why condominium units should be treated differently than other types of residences.

As referenced above, the explicitly stated purpose of the Lakeland Declaration and Rules is served by inclusion of condominium units. Lakeland HOA and its numerous residents has been operating under this interpretation since its inception. Moreover, the restriction itself is relatively limited – no one is arguing that the Whites can never rent their unit – only that leasing during the first year was prohibited.

Section 6.10.3 should be uniformly applied for each and every residential dwelling within the master community. Not only is it reasonable to rely upon the written evidence in the form of Section 6.10.3 and the pertinent definition sections of the Declaration, it is also reasonable to rely on the stated purpose and rationale for the restrictions articulated in the Lakeland HOA Rules.

When viewed in context of extrinsic evidence with an eye towards the “collective homeowners’ interests”, it should be clear that the one-year leasing restriction was intended to include condominium units. Thus, the trial court’s granting of summary judgment in favor of the Whites should be reversed.

**B. The Trial Court Erred When it Awarded to Respondents All of their Attorneys’ Fees.**

**1. Respondents Did Not Substantially Prevail.**

Lakeland HOA does not dispute that Section 8.1.2 of the Declaration of Lakeland Covenants, Conditions and Restrictions allows for attorneys’ fees and costs to be awarded to “the prevailing party” in a legal action arising from the underlying CC&Rs violation dispute. CP 97. However, the master community disputes the applicability of the provision in this case, since both parties prevailed on cross-motions for summary judgment.

An attorneys' fee award must be authorized by contract, statute, or equitable grounds. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 271, 138 P.3d 943 (2006) (quoting *Bowles v. Dep't of Ret. Sys.*, 121 Wn.2d 52, 70, 847 P.2d 440 (1993)). When a contract provides that attorneys' fees and costs shall be awarded to one of the parties, "the prevailing party . . . shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements." RCW 4.84.330.

The term "prevailing party" is not defined in Section 8.1.2, or anywhere else in the Lakeland Declaration. Thus, the Court must determine its meaning. In general, a prevailing party is one who receives an affirmative judgment in its favor. *Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 164, 795 P.2d 1143 (1990). If neither party wholly prevails, then the party who substantially prevails is the prevailing party, a determination that turns on the extent of the relief afforded the parties. *Rowe v. Floyd*, 29 Wn. App. 532, 535 n. 4, 629 P.2d 925 (1981); *Marine Enterprises*, 50 Wn. App. at 772 (a successful defendant should be permitted to recover as a prevailing party). However, if both parties prevail on major issues, an attorneys' fee award is not appropriate. *American Nursery Prods. v. Indian Wells Orchards*, 115 Wn.2d 217, 235, 797 P.2d 477 (1990) (citing *Sardam v. Morford*, 51 Wn. App. 908, 756 P.2d 174 (1988)); *Rowe v. Floyd*, 29 Wn. App. at 535; *Puget Sound Serv.*

*Corp. v. Bush*, 45 Wn. App. 312, 320-21, 724 P.2d 1127 (1986). Accordingly, when both parties to an action are afforded some measure of relief and there is no singularly prevailing party, neither party may be entitled to attorneys' fees. *Phillips Bldg. Co., Inc. v. An*, 81 Wn. App. 696, 702-03, 915 P.2d 1146 (1996).

In their Complaint, the Whites alleged:

13. Plaintiffs seek declaratory relief per RCW 7.24 as to which provision applies, under the set of facts herein, the provision in the Declaration for Carrara. . . or the Declaration of Covenants, Conditions and Restrictions of Lakeland. . . .”

14. Plaintiffs also seek declaratory relief as to whether, under the circumstances of this case, and given the representations of Rea Blake, Plaintiffs may rent out their condominium during the first year after purchase without penalty.

15. In the event the court rules that Plaintiffs may not rent out the condominium within the first year after purchase without penalty, Plaintiffs seek a judgment against Lakeland Homeowners Association and American Management on the basis of negligence and negligent misrepresentation.

CP 3.

Similarly, in their Motion for Summary Judgment, the Whites included, in part, the following Requests for Relief:

A. Plaintiffs seek a ruling on summary judgment that the Defendant Lakeland HOA, negligently allowed Plaintiffs to reasonably believe the rental restriction did not apply to their condominium . . . [and] by misrepresenting

that there were no rental restrictions on Plaintiffs' condominium.

\* \* \*

C. Plaintiffs also seek a ruling on summary judgment that Lakeland HOA had abandon [*sic*] enforcement of the rental restriction.

3. For attorneys' fees against Lakeland HOA per Article 8 of the Declaration of Covenants, Conditions and Restrictions for Lakeland ("Lakeland Declaration").

CP 10.

Based on the allegations in their Complaint, and relief sought on summary judgment, respondents intertwined their request for equitable relief with claims of negligence. If the Whites had simply sought a declaratory judgment from the Court seeking a determination that Section 6.10.3 of the Lakeland Declaration did not apply to their condominium unit, then Lakeland HOA would concede that they would have been the prevailing party based on the trial court's summary judgment rulings. However, that is not what respondents pled in their Complaint, nor sought on summary judgment, nor conducted comprehensive discovery upon. Respondents also alleged claims of negligence and negligent misrepresentation against Lakeland HOA. Moreover, the Whites claimed on summary judgment that the master community had abandoned enforcement of the rental restriction.

Following oral argument, the trial court granted in part Lakeland HOA's Motion for Summary Judgment and dismissed respondents' claims of negligence and negligent misrepresentation.<sup>5</sup> The trial court also found in Lakeland's favor by ruling that the master community did not abandon enforcement of Section 6.10.3. Consequently, both parties were afforded some measure of relief and there is no singularly prevailing party. See *Phillips Bldg. Co., Inc.*, 81 Wn. App. at 702-03; *American Nursery Prods.*, 115 Wn.2d at 235; *Sardam*, 51 Wn. App. at 908; *Rowe*, 29 Wn. App. at 535; *Puget Sound Serv. Corp.*, 45 Wn. App. at 320-21. This Court should therefore overturn the trial court's award of \$24,774.98 in attorneys' fees and costs.

Respondents may argue for a "proportionality approach" under *Marassi v. Lau*, 71 Wn. App. 912, 859 P.2d 605 (1993), *overruled on other grounds by Wachoria SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 490-92, 200 P.3d 683 (2009), but applying the "proportionality approach" in this case would be difficult because neither party was awarded monetary damages. Neither this Court nor the trial court could balance the monetary value of one party's claims over the other party's claims. Respondents prevailed on their request for declaratory relief and Lakeland

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<sup>5</sup> Respondents have filed a cross-appeal, which has been consolidated with this appeal, but will be briefed separately.

HOA prevailed on dismissing the negligence, negligent misrepresentation and abandonment claims. Because both parties prevailed on major issues, an attorneys' fee award is not appropriate and this Court should overturn the \$24,774.98 judgment entered in favor of respondents.

**2. Respondents' Fee Request was Overly Broad.**

Based on the foregoing case authority, the trial court should not have awarded respondents any amount of legal fees and costs. Assuming *arguendo* that this Court were to uphold the summary judgment award in favor of respondents, and also reject the case authority on attorneys' fees cited in the preceding section, then at a minimum, this Court should remand the matter for reduction of the attorneys' fee award because only a portion of those fees and costs were incurred in proving Section 6.10.3 of the Declaration did not apply to respondents' condominium unit. The fee award should, at a minimum, be reduced because the attorneys' fees were:

- 1) Commingled relating to the dismissed defendants;
- 2) Independently relating to the dismissed defendant; and
- 3) Related to the cross-motion for summary judgment wherein Lakeland prevailed.

- a. *Respondents' attorney's billing entries included comingled billing between work relating to Defendants American Management and Lakeland.*

Numerous line item time entries in respondents' attorney's invoices include emails and telephone calls with Whitney Smith, attorney for American Management Services Northwest, LLC. Respondents' attorney failed to break out separate time entries for each conversation or email; alternatively, there were single emails or telephone calls to both attorneys, which means commingled time was spent and fees incurred related to the Whites' separate claims against each defendant on a single billing line item.

For example, see time entries dated: 4/18/13, 6/6/13, 8/28/13, 8/30/13, 10/2/13, 11/30/13, 12/5/13, 12/11/13, 12/17/13, 1/29/14, 2/10/14 and 2/11/14. CP 328-343. The foregoing is a sample of entries and does not include each and every comingled billing entry involving both American Management Services Northwest, LLC and Lakeland HOA. The Court should remand for further analysis of respondents' fee petition.

- b. *Respondents requested fees for work solely relating to claims against American Management Services Northwest, LLC.*

In addition to the comingled time described above, in their request for attorneys' fees against Lakeland, the Whites included attorney billable time relating exclusively to their claims against American Management Services Northwest, LLC., a defendant who settled and was dismissed

from the action shortly before the summary judgment hearing. For example, see time entries dated: 5/14/13, 7/16/13, 9/19/13, 9/26/13, 9/27/13, 1/17/14, 2/25/14, 2/27/14, and 2/28/14. CP 329-343. The foregoing is a representative list and does not include each and every billing entry involving only American Management Services Northwest, LLC. The Court should remand for further analysis of respondents' fee petition.

*c. Respondents requested fees for objecting to Lakeland's motion for summary judgment, wherein Lakeland prevailed.*

Respondents requested and were awarded attorneys' fees for time spent researching and drafting briefing in opposition to Lakeland's Motion for Summary Judgment, a motion in which Lakeland prevailed in part. For example, see time entries dated: 3/17/14, 3/18/14, 3/20/14, 3/21/14 and 3/27/14. CP 345-46.

In summary, respondents bore the burden of reasonably supporting their request for attorneys' fees and costs. Their attorney's billing records include numerous commingled entries and multiple entries that indisputably should not be charged to Lakeland HOA. The disputed amount equates to many thousands of dollars, if it can be segregated at all.

Since the trial court granted both parties cross-motions for summary judgment, there was no "prevailing party" and attorneys' fees should not

have been awarded. Even under the “proportionality approach,” fees should not have been awarded because neither party suffered substantive monetary damages. Consequently, this Court should vacate the judgment of attorneys’ fees and costs awarded by the trial court. In the event this Court were to affirm an award of fees and costs, due to the significant breadth and scope of comingled and incorrect billing entries, this Court should remand to the trial court to determine the actual amount of time and fees respondents incurred in proving its declaratory judgment claim. Under this interpretation, as noted in the consolidated appeal, this Court should also award Lakeland HOA its attorneys’ fees in prevailing on its cross-motion for summary judgment.

## **V. CONCLUSION**

For the foregoing reasons, appellant Lakeland Homeowners Association respectfully requests that this Court determine that the Lakeland homeowners’ collective interests are best protected by a finding that the one-year leasing restriction contained within section 6.10.3 of the Master Declaration includes condominium units, and reverse the trial court’s granting of the White’s Motion for Summary Judgment.

Lakeland HOA also requests that this Court overturn the award of attorneys’ fees and costs to respondents. Alternatively, the amount of fees and costs should be remanded to the trial court for a determination of fees

and costs incurred exclusively in prevailing on the White's declaratory judgment action against the master community.

Respectfully submitted this 14<sup>th</sup> day of July, 2014.

A handwritten signature in black ink, appearing to read "Dan Zimberoff", written over a horizontal line.

Daniel Zimberoff, WSBA No. 25552  
Attorneys for Appellant Lakeland  
Homeowners Association