

No. 73715-5-I

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

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MOSES H. MA and KRISTINE S. MA-BRECHT-MA, husband and wife,

Appellants,

vs.

JAMES LARSON and PATRICIA A. LARSON, husband and wife, and  
ANTONETTE SMIT LYSEN,

Respondents.

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BRIEF OF APPELLANTS MA

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Gerald Robison, WSBA #23118  
Attorney at Law  
648 S. 152<sup>nd</sup> Street, Suite 7  
Burien, WA 98148-1195  
(206) 243-4219

Sidney Tribe, WSBA #33160  
Talmadge/Fitzpatrick/Tribe  
2775 Harbor Ave. SW  
Third Floor, Suite C  
Seattle, WA 98126  
(206) 574-6661

Attorneys for Appellants Moses H. Ma and Kristine S. Ma-Brecht-Ma

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## A. INTRODUCTION

When a restrictive covenant is truly ambiguous and reasonable minds can differ as to its meaning, it benefits all members of the community to interpret that covenant in a way that elevates substance over form, does not insert new language into the provision, and does not result in absurd, unfair, or inequitable advantages to some homeowners at the expense of others.

Moses and Kristine Ma wanted to add a half story to their house, which has one story completely above ground level and has a daylight basement. They obtained a permit from the City of Burien, and their plans complied with local zoning restrictions. Their neighbors objected, saying that despite complying with the zoning code, the addition would violate the Covenants, Conditions, and Restrictions (“CC&Rs”) that govern their community. The CC&Rs provide that no home may be more than “two and a half stories in height.”

The Mas believed that the addition would comply with the covenant, both because their basement is not a story and because their daylight basement was not a “story,” and because the small addition complied with the “half story” requirement. They also noted that in the event the CC&Rs and zoning code conflicted, the CC&Rs stated that the zoning laws would take precedence.

Their neighbors, James and Patricia Larson and Antoinette Lysen, disagreed with the Mas, asserting that their basement was a full story and that their addition would only be a “half story” if it was half the height of the lower stories. The trial court found the “two and a half stories in height” restriction to be unambiguous, and on summary judgment concluded that the Mas’ proposed project violated the covenant and would impede the Larsons’ and Lysen’s views.

However, under the trial court’s interpretation of the covenant, the Mas would be permitted tear down their existing house and build a house of the *exact same height as the one they currently propose, and even greater width*, without violating the covenant. This absurd result is not dictated by the language of the covenant, and should be reversed. At the least, a trial should be had to resolve factual issues relating to the intent of the drafters in creating the covenants.

## B. ASSIGNMENTS OF ERROR

### (1) Assignments of Error

1. The trial court erred in granting the defendants’/counterclaimants’ summary judgment motion, denying the plaintiffs’/counterdefendants’ summary judgment motion, and entering a permanent injunction in its order dated June 8, 2015.

2. The trial court erred in ordering the plaintiffs to pay the defendants'/counterclaimants' attorney fees in its order dated July 15, 2015.
3. The trial court abused its discretion in setting the amount of the attorney fee award in its order dated July 15, 2015.
4. The trial court erred in granting final judgment in favor of the defendants/counterclaimants in its order dated July 15, 2015.

(2) Issues Related to Assignments of Error

1. Is a restrictive covenant that allows a single family home to be "two and a half stories in height" ambiguous when it neither specifies the height of a "story," nor defines the meaning of a "half story?" (Assignments of Error 1, 4)
2. Should an ambiguous restrictive covenant relating to height be read to avoid strained or absurd results, such as forbidding one home that is 35 feet tall but permitting another home that is 35 feet tall, simply based on the relative height of the lower stories, particularly when the covenant states that in the case of a conflict the zoning code should prevail? (Assignments of Error 1, 4)
3. Does ambiguity as to the intent of the drafters regarding the goals of a restrictive covenant and the meaning of the terms within the covenant create an issue of material fact for trial? (Assignments of Error 1, 4)
4. Is a declaratory judgment action regarding the meaning of a restrictive covenant sufficiently similar to intentional bad acts, such as slander of title or malicious prosecution, such that one neighbor should be required to pay another

neighbor's attorney fees? (Assignments of Error 2, 3, 4)

5. Does Washington law permit a trial judgment to enter a blanket \$25,000 attorney fee award without scrutiny, explanation, or detailed findings of fact in support of the award? (Assignments of Error 2, 3, 4)

C. STATEMENT OF THE CASE<sup>1</sup>

The Mas live at 12843 Shorecrest Drive SW in Burien, Washington. They have a one-story house with a daylight basement. *Id.* This dispute began because they wanted to add a half story, only 39% of the floor space of the floor below, to their house. CP 83. The main floor of the plaintiffs' house (the level over which the addition would be placed) covers 2,340 square feet. The half story addition would be about 925 square feet, or 39% of the main floor area. The house, with the addition, would be less than 35 feet tall, which complies with Burien zoning restrictions. The City of Burien has approved the building plans and permits. *Id.*

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<sup>1</sup> The trial court entered what it called "Statement of Reasons Supporting Permanent Injunction and Award of Attorney Fees and Costs to Larsons and Lysen." CP 316. This order contains language supporting the trial court's reasons for granting the injunction as required by CR 65(d), but should not be mistaken for findings of fact after trial. CP 317-19. The trial court granted summary judgment. CP 231-32, 317. Thus, as relates to the substantive issues regarding the covenant at issue, these findings are superfluous and should be disregarded by this Court. *Redding v. Virginia Mason Med. Ctr.*, 75 Wn. App. 424, 426, 878 P.2d 483 (1994).

The CC&Rs governing the community, first adopted in 1947 and amended in 1967, prohibit any house from being more than “2 and ½ stories in height.” CP 41, 43. The document does not fix the height of a story in feet and inches. *Id.* It also does not define the term “half story.” *Id.* The 1967 amendment to the CC&Rs states that a daylight basement that is “more than 50% exposed” counts as a story. It does not define how to measure “exposure.” *Id.*

The CC&Rs do not make any reference to views, nor do they permit a challenge to a project on the basis that it impedes views. *Id.* at 41-44. The CC&Rs also state that in the event of “conflict between these and County Zoning Restrictions, the County restrictions shall take precedence and be enforced.” CP 44. Burien’s zoning code allows single family homes to be 35 feet in height. Burien Municipal Code 19.15.005.1.

The Larsons and Lysen (collectively, “the Larsons”)<sup>2</sup> opposed the Mas’ proposed addition, stating that it violated the height covenant. CP 138. They claimed that (1) the Mas’ basement was sufficiently “exposed” to constitute a “story,”<sup>3</sup> and that the term “half story” in the CC&R height

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<sup>2</sup> For the sake of simplicity and readability, the Mas will refer to the defendants/counterclaimants collectively as “the Larsons.” No disrespect to Ms. Lysen is intended.

<sup>3</sup> Because the Mas believed that their addition would be a “half story,” for the purposes of the summary judgment motions they assumed *arguendo* that their daylight basement was a story. CP 148. However, the term is undefined and results in another

covenant meant a story that is half the height of the lower stories, rather than half the floor space. CP 90-95. Thus, the Larsons claimed, the addition would violate the covenant. *Id.*

Given their neighbors concerns and threats of suit, the Mas did not proceed with their project. Instead, they filed a declaratory judgment action to have a court determine the meaning of the covenant and the propriety of their addition. The Larsons counterclaimed for declaratory judgment in support of their own interpretation of the covenant, and for a permanent injunction against the Mas' addition.

The parties brought cross-summary judgment motions. CP 23, 88. Because the CC&Rs were drafted many decades ago, there was no direct evidence of the intent of the drafters in creating the covenant at issue. The Mas relied on the language of the CC&Rs and the general context of the neighborhood, zoning laws, and the like, to demystify the meaning of the phrase "two and a half stories in height." CP 23. The Larsons first claimed that the provision was clear and the trial court should not resort to extrinsic evidence, CP 93, but later relied on the same contextual evidence as the Mas, such as the zoning code. CP 156-58.

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ambiguity. Also, this disputed factual issue cannot be resolved on summary judgment.

The trial court denied the Mas' summary judgment motion and granted the Larsons', including entering a permanent injunction against the Mas. CP 231.

The trial court invited the Larsons to request an award of attorney fees. CP 231-32. The CC&Rs did not provide a contractual basis for an attorney fee award, but the Larsons requested attorney fees as damages on equitable grounds, equating the Mas' declaratory judgment action to a slander of title or malicious prosecution action. CP 236-37. The court also entered a "statement of reasons" in support of the injunction, in which it explained the basis for its summary judgment ruling and for the fee award. The Larsons had requested \$51,199 in fees. CP 236. The trial court awarded \$25,000, without explanation for that amount or any reference to the lodestar calculation.

#### D. SUMMARY OF ARGUMENT

The covenant at issue is unambiguous. This Court has already stated that "half story" is a construction industry term referring to floor space, not height. Also, the CC&Rs unambiguously state that in the event they conflict with local zoning laws, the zoning laws prevail.

Even if the covenant is ambiguous, it does not serve the collective interests of the community property owners to interpret the covenant absurdly. If the Mas would be permitted to tear down their house and

build a new one to the exact height of the current proposed addition, and make the top story *even wider* without running afoul of the covenant or zoning laws, then the trial court's ruling has not fulfilled the claimed intent of the drafters nor served the community's interests. If this Court does not believe that the facts and circumstances allow the covenants to be construed as a matter of law, then the many ambiguities in the language of the covenant here merit a trial as to the intent of the drafters.

An award of attorney fees on equitable grounds is not supported in law here. A declaratory judgment action regarding the meaning of a restrictive covenant is not in any way comparable to a malicious slander of title action. First, there is no intentional bad action in bringing to court a genuine dispute over an ambiguous covenant. Second, an action regarding the meaning of a restrictive covenant does not implicate the title to property.

Finally, even if attorney fees were somehow warranted in law, the trial court abused its discretion in failing to (1) scrutinize the Larsons' attorney fee request, (2) consider the Mas' many objections, (3) enter detailed findings of fact and conclusions of law regarding the request, and (4) offer any explanation for the seemingly random \$25,000 award imposed.

#### E. ARGUMENT

(1) The Trial Court Erred in Granting Summary Judgment to the Larsons Because a “Half Story” Refers to the Amount of Floor Space, and Because the CC&Rs Unambiguously State that Zoning Laws Control in the Event of a Conflict

(a) Standard of Review

This Court reviews an order granting summary judgment dismissal of a plaintiff's claims *de novo*. *Twelker v. Shannon & Wilson, Inc.*, 88 Wn.2d 473, 564 P.2d 1131 (1977). The defendants bear the burden of establishing there are no genuine issues of material fact, and they are held to a strict standard. *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 502-03, 834 P.2d 6 (1992). Any doubt as to the existence of a genuine issue of material fact will be resolved against the movant, and all inferences from the evidence must be construed in the light most favorable to the nonmoving party. *Magula v. Benton Franklin Title Co.*, 131 Wn.2d 171, 930 P.2d 307 (1997). The moving party bears the burden of showing that the plaintiff may not recover, as a matter of law, as to any of the claims or causes of action brought and that there is no genuine issue for trial on any such claims. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 77 P.2d 182 (1989).

(b) The Covenant Is Unambiguous, a “Half Story” Refers to the Amount of Floor Space of a Story and Not the Height of the Story

The trial court ruled on summary judgment that the Mas' proposed addition, which was less than 40% of the floor space of the story below, violated the restrictive covenant. CP 231. Thus, the trial court concluded that "half-story" unambiguously refers to the height of the story, e.g., if the story below is 10 feet tall then the "half story" is one that is 5 feet tall.

The trial court clearly erred in concluding that "half story" refers to the height of the story and not the floor space. In fact, this Court has noted that experts in the construction industry agree "half story" refers to the amount of floor space of a story compared with the story below. *Foster v. Nehls*, 15 Wn. App. 749, 751, 551 P.2d 768 (1976). This Court observed that the term "half story" is a "*floor space description* common in the construction and real estate business..." *Id.* Although the *Foster* court declined to assign a specific height designation to the term "one and a half stories" and prohibited the building of a shorter two story home, there was no dispute on appeal that "half story" referred to the floor space of the story, not its height. *Id.*

Other courts agree with this Court that the term "half story" is a term of art referring to the floor space of the story. In *Madden v. Zoning Bd. of Review of City of Providence*, 48 R.I. 175, 136 A. 493, 494 (1927), the Rhode Island Supreme Court grappled with the meaning of the term "half story." The zoning code permitted the building in that case to be

“two and one-half stories in height.” *Madden*, 136 A. at 494. The first and second stories were eight feet nine inches in height; the third floor was of the same height, but its floor area was substantially less than the others. *Id.* The court observed that “What is a story or a half story is not determined by definition, in the statute or zoning ordinance, nor is the height of either fixed by law.” The court consulted the dictionary and expert testimony and concluded a “half story” meant half of the floor space of the other stories. *Id.*

Washington and Rhode Island are not alone in concluding that the term “half-story” refers to floor space. In *O’Connell v. City of Brockton Bd. of Appeals*, 344 Mass. 208, 212, 181 N.E.2d 800 (1962), the court observed that the local code defined a “half story” as “a story which is situated in a sloping roof, the floor area of which does not exceed *two-thirds*<sup>4</sup> of the floor area of the story immediately below it and which does not contain an independent apartment.

In *Johnson v. Linton*, 491 S.W.2d 189, 196–97 (Tex. Civ. App. 1973), the trial court after a bench trial imposed a permanent injunction prohibiting the improvement of a house, finding that the improvement violated a restrictive covenant of “one and a half stories in height.”

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<sup>4</sup> The fact that the word “half” in the Massachusetts code could actually mean “two thirds” is notable.

*Johnson*, 491 S.W.2d at 191. In that instance, as in *Madden*, the additional story was the same height as the first story but only half the floor space. *Id.* The Texas Court of Appeals reversed the injunction. *Johnson*, 491 S.W.2d at 197-198. Noting that doubt was to be resolved “in favor of appellants’ free use of their premises,” despite the trial court’s findings of fact and conclusions of law, the appellate court reversed the injunction as a matter of law. *Id.* at 198.

Here, there is no evidence to support the Larsons’ interpretation of the term “half story” to mean “a full story half the height of the other stories.” Their position also goes against logic. It turns what is ostensibly a height restriction into a windfall for those lucky enough to already have at least one tall floor. For example, a homeowner with two 10-foot floors who wanted to build an addition would be restricted to a “half story” five feet tall, which is useless as living space, despite the fact that the resulting house would only be 25 feet tall. In contrast, a homeowner with 14-foot floors would be able to build an addition with 7-foot ceilings, still low, but livable, even though the resulting home would be 35 feet tall. The Larsons’ interpretation of the covenant’s height restriction would allow a 35-foot home but preclude a 30-foot home, based on the happenstance of the home’s design.

The Larsons' interpretation creates a morasse of unfair results for homeowners, because it incorrectly presumes that any given floor of a home is a uniform height, and that all floors are the same height. If the floors of a home are of varying height, how does any homeowner interpret a "half story in height" restriction? Do they measure from the lowest point on the story directly below, or the highest point? What if they have a loft, and the first floor ceiling is vaulted and 35 feet high? What if they have a sunken living room? The possibilities are endless, and do not make sense.

Also, assuming *arguendo* that the height restriction was intended to preserve views,<sup>5</sup> all things being equal a half story judged by floor space would obstruct less of a neighbor's view than a half story judged by height. Imagine two homes, one is two stories and 35 feet tall, and one is two and a half stories and also 35 feet tall, with the half story being less than half the floor space. The upland neighbor of the half story home would retain more of a view and be looking at "less wall" than the upland neighbor of the two story home, because the home with the half story would be more narrow.

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<sup>5</sup> There is no direct evidence or language in the CC&Rs indicating that they are intended to be view protection covenants, as explained *infra*.

The Mas' proposed addition constitutes a half-story. It is far less than half the floor space of the floor below. Even assuming *arguendo* that their daylight basement counts as a full "story" under the CC&Rs, the Mas' proposed addition complies with the CC&Rs. Summary judgment in their declaratory judgment action is proper.

(c) In Any Conflict Between the CC&Rs and the Zoning Code, the Code Prevails

Even assuming the Larsons' are correct about the meaning of "half story," the trial court should have granted the Mas' motion. The CC&Rs provided that when the County Zoning Restrictions conflict, "the County restrictions shall take precedence and be enforced." CP 44. The trial court should have enforced this unambiguous provision and grant the Mas' summary judgment motion.

The Larsons below argued that there was no "conflict" between the zoning code and the CC&Rs, and thus the "precedence" provision of the CC&Rs was inapplicable. CP 164.

If one applicable law permits conduct, and the other prohibits the same conduct, then the two are in conflict. *See, e.g., Williams v. State*, 76 Wn. App. 237, 241, 885 P.2d 845 (1994) (tort claim permitted in Washington but barred in Oregon is "actual conflict"). Put another way, "if the result [in the case] is different" under the two different laws, then a

conflict exists. *Seizer v. Sessions*, 132 Wn.2d 642, 649, 940 P.2d 261 (1997).

The Larsons' claim that there is no "conflict" is unsustainable. Even assuming that the Mas project violated the CC&Rs, the project was allowed under the zoning code, and was in fact permitted by the City of Burien. If a project is not allowed under the CC&Rs, but allowed under the zoning code, then the two rules "conflict" by definition. *Seizer*, 132 Wn.2d at 649.

The Mas project complies with the height restriction in the zoning code which, unlike the CC&Rs, does express a height limit in feet and inches. The CC&Rs unambiguously state that the zoning code takes precedence. Thus, under the plain language of the CC&Rs, the zoning code should prevail, and the Mas' project should be permitted.

(2) If the Covenant Is Ambiguous, It Must Be Interpreted in Accordance with Contract Principles, the Intent of the Drafters, and the Best Interests of All the Community Members

For almost a century, the consistent law in Washington was that a restrictive covenant should be strictly construed. *Jones v. Williams*, 56 Wash. 588, 591, 106 P. 166 (1910); *Miller v. American Unitarian Ass'n*, 100 Wash. 555, 557, 171 Pac. 520 (1918); *Granger v. Boulls*, 21 Wn.2d 597, 599, 152 P.2d 325 (1944); *Sandy Point Improvement Co. v. Huber*,

26 Wn. App. 317, 320, 613 P.2d 160 (1980); *Riss v. Angel*, 131 Wn.2d 612, 621, 934 P.2d 669 (1997). “It is well settled in this jurisdiction that words in a deed of conveyance or any instrument restricting the use of real property by the grantee are to be construed strictly against the grantor and those claiming the benefit of the restriction.” *Sandy Point*, 26 Wn. App. at 320.

Historically, strict construction of restrictive covenants protected the public policy favoring the free use of one’s own land. *White v. Wilhelm*, 34 Wn. App. 763, 772-73, 665 P.2d 407, 412 (1983). Imposed restrictions will not be aided or extended by judicial construction, and doubts will be resolved in favor of the unrestricted use of property. *White*, 34 Wn. App. at 772-73; *Gwinn v. Cleaver*, 56 Wn.2d 612, 615, 354 P.2d 913 (1960). Restrictions on the free use of land would not be implied unless they necessarily followed from clear language of written restrictions. *White*, 34 Wn. App. at 772; *Bersos v. Cape George Colony Club*, 4 Wn. App. 663, 666, 484 P.2d 458 (1971); see *Weld v. Bjork*, 75 Wn.2d 410, 451 P.2d 675 (1969).

More recently, our Supreme Court has softened the strict construction rule as it relates to successors in interest to the drafters of covenants, putting emphasis on “arriving at an interpretation that protects the homeowners’ collective interests.” *Viking Properties, Inc. v. Holm*,

155 Wn.2d 112, 120, 118 P.3d 322 (2005). The rationale for this softening is an evolving view that restrictive covenants enhance the collective good, rather than restrict the individual's rights. *Id.*

However, despite any desire to advance this reasonable public policy goal, courts are still constrained by the traditional rules of contract interpretation when construing covenants. Courts may not rewrite contracts, nor interpret them in a way that results in an absurd or strained reading. *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wn.2d 241, 250, 327 P.3d 614, 619 (2014). Extrinsic evidence is used to "illuminate what was written, not what was intended to be written." *Id.*

In construing such covenants, courts are to determine the drafter's intent by examining the language. *Burton v. Douglas County*, 65 Wn.2d 619, 621–22, 399 P.2d 68 (1965). They must consider the instrument in its entirety and, when the meaning is unclear, the surrounding circumstances that tend to reflect the intent of the drafter and the purpose of a covenant that runs with the land. *Lenhoff v. Birch Bay Real Estate, Inc.*, 22 Wn. App. 70, 72, 587 P.2d 1087 (1978). When the covenant is ambiguous, a landowner cannot be held to strict compliance with an uncertain prohibition. *Holmes Harbor Water Co. v. Page*, 8 Wn. App. 600, 604, 508 P.2d 628 (1973).

(a) A Covenant that Both Restricts the Height of a Building In Terms of the Number of Stories, and that Refers to “Half Stories” Without Defining that Term, Is Ambiguous as to the Height Allowed

This Court has already ruled that a covenant which purports to be a “height” restriction but refers to the height in “stories,” without specifying how tall a “story” is, can be ambiguous. *Foster*, 15 Wn. App. at 751. In *Foster*, this Court examined a covenant with virtually the same wording as the covenant here, a restriction of “one and one-half stories in height.” This Court concluded that the covenant was ambiguous because of “the use of a floor-space description common in the construction and real estate business (‘one and one-half stories’) to describe a height restriction (‘one and one-half stories in height’).”

The finding of ambiguity in *Foster* is not an aberration, nor is it restricted to the circumstances of that case; courts from numerous other jurisdictions have similarly concluded that describing a height restriction in terms of undefined “stories” is ambiguous. *Metius v. Julio*, 27 Md. App. 491, 342 A.2d 348, 353 (1975) (“We are persuaded that the meaning of the express ‘three stories in height’ used in this particular equitable restriction, is ambiguous.”); *Johnson v. Linton*, 491 S.W.2d at 196–97 (concluding that phrase “one and one-half stor[ies] in height” is ambiguous because it is “reasonably susceptible to more than one

meaning”); *Hiner v. Hoffman*, 90 Haw. 188, 193, 977 P.2d 878, 883 (1999).

The Hawai’i Supreme Court’s analysis in *Hiner* is particularly astute. In that case, property owner Hoffman built a three story house that descended down a hillside in a “terrace” design. *Hiner*, 90 Haw. at 189. The restrictive covenant stated that “no dwelling shall be erected...which exceeds two stories in height.” *Id.* *Hiner*, an uphill neighbor, sought and received an injunction to have the top floor of Hoffmans’ residence removed. *Id.* The *Hiner* court observed that if the purpose of the covenant was to restrict the height of homes to preserve views, then phrase “two stories in height” was meaningless. *Id.* at 191. A “story” can be of widely varying heights. *Id.*

The Court found the “two stories in height” provision ambiguous on several grounds. First, the court compared two development proposals to illustrate the ambiguity. *Id.* It noted the phrase “two stories in height” would seemingly permit a two story house that consists of twenty-five foot high stories, but preclude a three story residence where each story is only ten feet high. *Id.* Second, the court pointed out that the absurdity that Hoffmans’ residence would comply with the “height” restriction if one of the lower terraces were removed instead of the top terrace. *Id.* Third, the Court found it notable that the Hoffmans’ residence complied with local

zoning restrictions. Thus, the court concluded that the phrase “two stories in height” was ambiguous in the absence of precise dimensions for a “story.” *Id.* Without such dimensions, the Court could not determine whether the Hoffmans’ structure exceeded the height restriction intended by the covenant. *Id.*

Having determined the language of the covenant ambiguous, the Hawai’i Supreme Court considered the effect of its finding of ambiguity on the trial court’s injunction. *Id.* at 194. Noting that the rule emanated from the need to conduce the “careful drafting of covenants” and a “long-standing” policy that favored the “unrestricted use of property” in cases where a covenant is found to be ambiguous, the Court reiterated that doubt in a covenant is to be resolved against the person seeking its enforcement. *Id.* at 193-94. The Court concluded that the Hoffmans were allowed to keep the third story of their house. *Id.* at 196.

Despite the Larsons’ insistence below that the phrase “in height” clarifies the meaning of the term “half story,” or that the covenant constitutes any kind of clear direction regarding how tall “two and a half stories” might be, the phrase is ambiguous.

(b) If the Covenant Here Is Ambiguous, It Should Be Construed to Allow the Addition, Particularly Where the Larsons' Interpretation Would Lead to Absurd Results, Allowing the Mas to Build an Even Taller Home if they Tear Down Their Existing Home

If this Court concludes that the covenant here is ambiguous, the Mas' request for declaratory judgment allowing their half-story addition should be granted.

First, the parties disagree about the meaning of the term "half story." One party believes it means "half the floor space," and the other believing it means "half the height." The Mas' interpretation is the more logical from any homeowner's perspective. Even assuming *arguendo* that the covenant was intended to preserve views, the Mas' interpretation of "half story" as a smaller square footage addition than the floor below serves to preserve views by decreasing the amount of the view that may be impeded. The Larsons' interpretation – allowing a full story that is half the height of the story below – could actually serve to block a neighbor's view completely because it would allow a much wider top story.

Second, the Larsons admit that the phrase "two and a half stories in height" does not constitute any real, concrete height restriction, even if they do so unintentionally. They assert that a story can be "10 feet or 20 ft." in height, and that a "half story" is a story that is half the height of the

other stories. CP 164. Thus, according to the Larsons, the Mas could tear down their existing house, build a 50-foot “two and a half story” house that would completely block the Larsons’ view, and not violate the covenant.<sup>6</sup> Yet the Larsons claim the Mas’ planned project of less than 35 feet in height is prohibited by the “height” restriction. Accepting the Larsons’ interpretation of the covenant leads to absurd and contrary results, exactly as the Hawai’i Supreme Court observed in *Hiner*.

Third, the Mas’ proposed half story complies with the Burien zoning restrictions. The covenant states that if there is a conflict between the covenant provisions and the zoning code, the code should prevail. CP 44. Note that the drafters did not say that the covenant would only prevail if it permitted a building *taller* than zoning restrictions. It says the zoning code prevails when there is a “conflict.” This indicates that the drafters of the covenant trusted the judgment of zoning regulators to set reasonable limits, rather than insisting that the covenant always trump the zoning in favor of shorter homes.

Fourth, there is no evidence in the covenant that it was intended to protect views, as opposed to imposing a height restriction. The word “view” appears nowhere in the document. CP 43-44. The Larsons argued

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<sup>6</sup> Of course, a 50-foot house would violate the Burien zoning code, which allows a maximum of 35 feet. However, the purpose here is to construe the language of the covenant. Also, zoning codes can change over time.

below that the only possible reason for a height restriction would be to protect views. CP 92. Zoning codes routinely impose height restrictions to preserve the “existing character of the...neighborhood” without any reference to views. *See, e.g., Victoria Tower P'ship v. City of Seattle*, 59 Wn. App. 592, 602, 800 P.2d 380 (1990). Also, this Court has previously held that when the covenant does not mention view protection, and instead merely has a story limit, then interpreting the covenant to emphasize height, rather than view protection, is appropriate. *Day v. Santorsola*, 118 Wn. App. 746, 758, 76 P.3d 1190, 1197 (2003) (fact that covenant was never interpreted to prohibit two-story home, even when that home blocked views, indicated it was height restriction and not a view protection covenant).

If the covenant is ambiguous, and that the Larsons do not dispute that a home of the exact same height would be acceptable under the covenants even if it blocked the Larsons’ views, this Court should construe the covenant to allow the Mas’ project. Their proposed addition creates a one and a half story<sup>7</sup> home that complies with the height limits imposed by the local zoning laws. If they would be permitted to tear

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<sup>7</sup> There was a fact dispute below regarding whether the Mas’ basement constituted a story, but for purposes of summary judgment the Mas argued that even assuming the basement was a “story,” their remodeled home would only be two and a half stories. If this Court remands this case for trial, the Mas reserve their right to dispute this fact issue at trial.

down their home and rebuild it to the exact same height without running afoul of the covenant, then the trial court's injunction should be reversed and they should be allowed to proceed.

(c) In the Alternative, This Case Should Be Remanded for Trial on the Questions of Fact, Including the Question of a Basement as "Story" and What Constitutes a "Half Story"

While the interpretation of a restrictive covenant is a question of law, intent is a question of fact. *Day*, 118 Wn. App. at 756, 76 P.3d 1190 (citing *Mariners Cove Beach Club v. Kairez*, 93 Wn. App. 886, 890, 970 P.2d 825 (1999)); *Foster*, 15 Wn. App. at 750–51. Extrinsic evidence of intent is admissible if relevant to interpreting the restrictive covenant. In *Hollis v. Garwall*, 88 Wn. App. 10, 945 P.2d 717, *aff'd*, 137 Wn.2d 683, 974 P.2d 836 (1999), the Supreme Court applied the *Berg v. Hudesman*<sup>8</sup> context rule to interpreting restrictive covenants. Under this rule, evidence of the “surrounding circumstances of the original parties” is admissible “to determine the meaning of the specific words and terms used in the covenants.” *Bauman v. Turpen*, 139 Wn. App. 78, 88-89, 160 P.3d 1050 (2007).

When there is an issue of material fact in dispute, summary judgment is inappropriate, and the case must be set for trial. *Young*, 112

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<sup>8</sup> *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990).

Wn.2d at 225. Here, many material facts are in dispute, including the following:

- Whether the drafters of covenant meant for view protection, rather than height restriction, to be the primary purpose of the covenant;
- Whether the drafters of the covenant meant the term “half story” to refer to floor space or height;
- Whether the Mas’ basement is “more than 50% exposed” and is thus a “story” under the terms of the covenant; and
- Whether construing the covenant to allow homeowners to tear down their home and build new, taller, and wider homes, but not to allow narrower improvements of the same height, protects the collective interests of the community.

Here, the trial court ruled on the declaratory judgment and injunction claims as a matter of law at the summary judgment stage. This was error, as reasonable minds may certainly differ as to the many ambiguities and uncertainties in this case. Reversal and remand for trial is appropriate.

(3) The Trial Court Erred in Awarding the Larsons Equitable Attorney Fees Based on “Slander of Title” Principles, and Abused Its Discretion in Failing to Conduct a *Berryman* Fee Analysis

(a) Standard of Review

The question of whether there is a statutory, contractual, or equitable basis in law for an award of attorney fees is reviewed *de novo*.

*Niccum v. Enquist*, 175 Wn.2d 441, 446, 286 P.3d 966 (2012); *Gander v. Yeager*, 167 Wn. App. 638, 646, 282 P.3d 1100, 1104 (2012).

If this Court determines there is a proper legal basis for an attorney fee award, an order granting a particular amount of attorney fees should be reversed if it reflects manifest abuse of discretion. *Chuong Van Pham v. City of Seattle*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007). Discretion is abused when the trial court exercises it on untenable grounds or for untenable reasons. *Id.*

(b) There Is No Legal Basis for the Larsons' Attorney Fee Request

The CC&Rs allow a party prosecute an action for violation *or* allows them to recover “damages resulting from such violation [of the covenants].” CP 44. Thus, these options are given in the alternate. *Id.* The CC&Rs do not authorize an award of attorney fees, nor do they identify attorney fees as recoverable “damages.” Acknowledging this, the Larsons sought an award of fees as damages on equitable grounds. CP 237.

Washington courts traditionally follow the American rule in not awarding attorney fees as costs absent a contract, statute, or recognized equitable exception. *City of Seattle v. McCready*, 131 Wn.2d 266, 273-74, 931 P.2d 156 (1997). Our Supreme Court has explicitly recognized four

equitable exceptions to the American rule: (1) the common fund theory, *Grein v. Cavano*, 61 Wn.2d 498, 505, 379 P.2d 209 (1963); (2) actions by a third person subjecting a party to litigation, *Wells v. Aetna Ins. Co.*, 60 Wn.2d 880, 882–83, 376 P.2d 644 (1962); (3) bad faith or misconduct of a party, *Miotke v. City of Spokane*, 101 Wn.2d 307, 338, 678 P.2d 803 (1984); and (4) dissolving wrongfully issued temporary injunctions or restraining orders, *Cecil v. Dominy*, 69 Wn.2d 289, 291–94, 418 P.2d 233 (1966); *Alderwood Assocs. v. Washington Envtl. Council*, 96 Wn.2d 230, 247, 635 P.2d 108 (1981). See generally Philip A. Talmadge, *Attorney Fees in Washington* pt. 5 (1995).

While the traditional American rule relates to attorney fees as *costs*, certain recognized equitable exceptions award attorney fees as *damages* when the actions of another party are wrongful or malicious. See, e.g., *Cecil*, 69 Wn.2d at 291, 418 P.2d 233 (attorney fees as damages in dissolving a wrongfully issued temporary injunction); *Wells*, 60 Wn.2d at 882, 376 P.2d 644 (attorney fees as damages in wrongful action by a third person subjecting a party to litigation). Our Supreme Court has also authorized the award of attorney fees as damages in slander of title and wrongful garnishment actions. *Rorvig v. Douglas*, 123 Wn.2d 854, 873 P.2d 492 (1994) (slander of title action); *James v. Cannell*, 135 Wash. 80, 82–83, 237 P. 8 (1925) (wrongful garnishment action), *aff'd*, 139 Wash.

702, 246 P. 304 (1926). “Thus, a more accurate statement of Washington’s American rule is attorney fees are not available as *costs or damages* absent a contract, statute, or recognized ground in equity.” *McCready*, 131 Wn.2d at 275.

The trial court awarded the Larsons attorney’s fees on equitable grounds. CP 320. The trial court cited *Rorvig*, the slander of title exception, in support of this equitable award. *Id.* The trial court said that “enforcement of CC&Rs” are “essential attributes of title to real estate,” and that the Mas should pay the Larsons’ fees because they have more resources. *Id.* The trial court also faulted the Mas for not naming the homeowners’ association in the matter, even though the Mas had no dispute with the association, the Larsons and Lysen did not implead them, and the association chose not to intervene, instead remaining neutral after the Larsons requested their support.<sup>9</sup> *Id.*

*Rorvig* is a slander of title case in which a party wrongfully, intentionally, and maliciously recorded a false document that caused a potential buyer of property to withdraw an offer of purchase. *Rorvig*, 123 Wn.2d at 857. The Washington Supreme Court was asked to overrule old precedent which held that attorney’s fees were not recoverable in a slander

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<sup>9</sup> It is questionable to force a plaintiff to sue a party with whom that plaintiff has no dispute in order to avoid imposition of attorney fees incurred by the real party in interest.

of title action. *Id.* at 861. The *Rorvig* court held that Washington has long recognized the American rule that states absent contract, statute or recognized ground in equity, the prevailing party does not recover attorney's fees. *Id.* However, the Court went on to note that "in malicious prosecution and wrongful attachment or garnishment, we have held attorney's fees are recoverable as special damages." *Rorvig*, 123 Wn.2d at 862. The *Rorvig* court explained that when a party has no choice but to litigate to defend against another party's malicious and wrongful conduct, attorney fees should be recoverable:

A malicious prosecution, has long been the rule that damages include the attorney's fees for the underlying action made necessary by the defendant's wrongful act. *Aldrich v. Inland Empire Tel. & Tel. Co.*, 62 Wn. 173, 176-77 (1911). Similarly, in wrongful attachment or garnishment actions, and in actions to dissolve a wrongfully temporary injunction, attorney's fees are a "necessary expense incurred" in relieving the plaintiff of the wrongful attachment or temporary injunction and are recoverable. *James v. Cannell*, 135 Wn. 80, 83 (1925), affirmed 139 Wn. 702 (1926); *Cecil v. Dominy*, 69 Wn.2d 289, 294 (1966).

*Id.* at 862. The *Rorvig* court held that since these type of claims require a party to litigate, they should be entitled to attorney's fees as an element of damages. *Id.*

The Mas request for declaratory judgment did not slander the Larsons' title, nor is it malicious. This Court has long held that an action

for declaratory judgment regarding the meaning of a restrictive covenant “has no effect on title.” *Foster*, 15 Wn. App. at 753, 551 P.2d at 772. Also, a genuine dispute over the meaning of a restrictive covenant bears no similarity to an “intentional and calculated action” to publish “an injurious falsehood.” *Rorvig*, 123 Wn.2d at 862-63.

Thus, *Rorvig* is completely inapplicable. It offers no equitable grounds for the Larsons to recover attorney fees from the Mas. In fact, to the Mas’ knowledge, no Washington court has ever found that a party seeking a judicial declaration regarding the meaning of a restrictive covenant was entitled to attorney fees on equitable grounds.

Without a recognized statutory, contractual, or equitable basis for attorney fees, the trial court erred in granting them. *Saunders v. Meyers*, 175 Wn. App. 427, 446, 306 P.3d 978 (2013). The attorney fee award should be reversed.

(c) The Trial Court Manifestly Abused Its Discretion by Failing to Properly Follow the *Berryman*<sup>10</sup> Procedure for Assessing Fee Requests and Failed to Enter Findings of Fact and Conclusions of Law in Support of the Amount of the Award

Even if this Court concludes that *Rorvig* applies, the trial court abused its discretion in awarding the Larsons \$25,000 in attorney fees

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<sup>10</sup> *Berryman v. Metcalf*, 177 Wn. App. 644, 312 P.3d 745 (2013), *review denied*, 179 Wn.2d 1026, 320 P.3d 718 (2014).

without (1) adequate scrutiny of the fee request, (2) any reference to a lodestar calculation, and (3) adequate and specific findings of fact and conclusions of law to support the award.

The starting point for calculating a reasonable fee is the lodestar method. *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S. Ct. 1933 (1983); *Mahler v. Szucs*, 135 Wn.2d 398, 433-34, 957 P.2d 632 (1998). In essence, under that method, a court must multiply a reasonable number of hours by a reasonable hourly rate. The request must be based on contemporaneous billings of counsel. *Mahler*, 135 Wn.2d at 434.

Reviewing an attorney fee request should not be a rubber stamp process. *Id.* Instead, the trial court must “take an active role in assessing the reasonableness of fee awards” rather than “simply accept[ing] unquestionably fee affidavits from counsel.” *Id.*

This Court’s most recent reaffirmation of the procedure a trial court must follow when awarding attorney fees is described in *Berryman*. This Court in *Berryman* acknowledged the continued vitality of our Supreme Court’s *Mahler* rule that attorney fee requests should be carefully scrutinized. *Berryman*, 177 Wn. App. at 657.

Because Washington courts must carefully scrutinize fee requests, this Court in *Berryman* was understandably frustrated by a trial court’s truncated treatment of the issue. *Berryman*, 177 Wn. App. at 658. In that

case, the trial court just accepted at face value the plaintiff's fee request, doubled it with a 2.0 multiplier, and signed the plaintiff's proposed findings and conclusions without any explanation of the two parties' positions, or any analysis of why it was finding the fees reasonable:

The trial court signed Berryman's proposed findings of fact and conclusions of law *without making any changes except to fill in the blank for the multiplier of 2.0*. The findings related to the calculation of the lodestar amount did not address Farmers' detailed arguments for reducing the hours billed to account for duplication of effort and time spent unproductively. The court simply found that the hourly rate and hours billed were reasonable....

While the trial court did enter findings and conclusions in the present case, they are conclusory. There is no indication that the trial judge actively and independently confronted the question of what was a reasonable fee. We do not know if the trial court considered any of Farmers' objections to the hourly rate, the number of hours billed, or the multiplier. The court simply accepted, unquestioningly, the fee affidavits from counsel.

*Berryman*, 177 Wn. App. at 657-58.

The proper method for trial court consideration of an attorney fee award was demonstrated in *Banuelos v. TSA Wash., Inc.*, 134 Wn. App. 607, 608, 141 P.3d 652 (2006). In that case, the dispute was over a car dealer's failure to return timely a buyer's down payment check and trade-in vehicle. *Banuelos*, 134 Wn. App. at 608. After the trial court ruled in favor of the buyers on summary judgment, it entered a total damage award of \$19.04. *Id.* The buyer's counsel then submitted detailed billing records

and requested fees for 448.67 hours of billed time. *Id.* at 657-58. The trial court reviewed the detailed billing records submitted by the buyer's counsel, and reduced the amount based on detailed reasoning stated in a letter opinion, and awarded \$90,125 in attorney fees, which included a 1.5 multiplier. *Id.*

On appeal in *Banuelos*, Division Three of this Court rejected the dealer's request for an additional reduction in the buyer's fee award. Although the dealer claimed that the fee award was excessive, and that the trial court miscalculated the hours reasonably spent on the matter, this Court said that the trial court had responsibly undertaken its duty to consider the billing records, and that its decision was based upon substantial evidence and supported by proper findings. *Id.*

Here, the trial court's fee award is almost indistinguishable from the unacceptable fee award that this Court rejected in *Berryman*. CP 320-21. Although the trial court ostensibly entered "findings of fact," those findings relate solely to the trial court's view of the *basis* for fees, rather than the amounts. The order contains no scrutiny of the billing submissions, or any analysis of why the amount chosen was an accurate reflection of the lodestar calculation.

Instead, the trial court apparently selected \$25,000 at random and proclaimed it to be “reasonable.” CP 320-21. The court’s entire finding regarding the amount of fees is as follows:

Given the quality, amount and complexity of the briefing on summary judgment, the non-discovery investigation of the issues of the case, and the requirements of obtaining an injunction (such as the preparation of these statement of reasons), efforts related to obtaining a defense for the defendants from the title companies, I find that the hourly rates used by the Clausen Law Firm are reasonable, The court hereby awards 25,000 in attorney’s fees to the Larsons and Lysen.

*Id.*

These findings are wholly inadequate under *Mahler* and *Berryman*. In addition to reflecting no scrutiny of the Larsons’ billing submissions, the order does not address the many objections to the deficiencies of the submissions that the Mas raised, including the following:

- (1) The request sought recovery of fees that were either unrelated to the summary judgment motions, unsuccessful, or unnecessary;
- (2) The request appeared to seek an award for many fees outside the scope of the declaratory judgment/injunction action, and expenses outside the scope of the statutory costs allowable under RCW 4.84.010;
- (3) The redactions made it impossible to determine the subject of many of the attorney fee entries;
- (4) Extensive time was devoted to an attempt to get the defendants’ title insurance company to defend against the plaintiffs action, even though the title was not implicated;

- (5) There was extensive research into areas of basic law that were not directly related to the summary judgment motions;
- (6) There were extensive charges for public records requests, a clerical task that was likely unnecessary since everything presented could be obtained on-line;
- (7) Well over 40 hours was put into writing their motion, an amount that is questionable given the nature of the issues and record in this case; and
- (8) The Larsons claimed as costs copying, postage charges, and online printing charges that are not costs recoverable under the statute.

CP 248-98, 310-11.

The trial court should not have awarded attorney fees, and certainly abused its discretion in entering the award that it did. The award of attorney fees should be reversed.

- (4) If This Court Finds that Attorney Fees Are Awardable to the Prevailing Party, then the Mas Are Entitled to Fees Under RAP 18.1 Should They Prevail

Although the Mas believe that there is no basis for prevailing party attorney fees in this case, this Court has the final word on that issue. The Mas were forced to file this declaratory judgment action in order to secure their property rights, and defended against the Larsons' and Lysens' counterclaims and requests for permanent injunction. Thus, if fees are available to a party who defends such an action, then those fees should be available to a party that is forced to bring such an action. If this Court

concludes that the prevailing party is entitled to attorney fees, the Mas hereby request such fees as required by RAP 18.1.

F. CONCLUSION

The ambiguous injunction here should be interpreted based on the total facts and circumstances, logic, and common sense. It should not be interpreted in a way that results in an absurd and strained reading that elevates form over substance. The judgment should be reversed and judgment entered in favor of allowing the Mas' half-story addition. In the alternative, a trial should be ordered.

An attorney fee award here is not supported by any known grounds in law, statute, contract, or equity. Attorney fees are only allowed as damages when one party's malicious and intentional action damages the other and leaves the other no choice but to litigate. This case involves an honest dispute over the meaning of an ambiguous covenant.

DATED this 13<sup>th</sup> day of November, 2015.

Respectfully submitted,



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Sidney Tribe, WSBA #33160  
Talmadge/Fitzpatrick/Tribe  
2775 Harbor Ave. SW  
Third Floor, Suite C  
Seattle, WA 98126  
(206) 574-6661

Gerald Robison, WSBA #23118  
Attorney at Law  
648 S. 152<sup>nd</sup> Street, Suite 7  
Burien, WA 98148-1195  
(206) 243-4219  
Attorneys for Appellants Ma

DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited in the U.S. Postal Service for service a true and accurate copy of the Brief of Appellants in Court of Appeals Cause No. 73715-5-I to the following:

Gerald Robison  
Attorney at Law  
648 S. 152<sup>nd</sup> Street, Suite 7  
Burien, WA 98148-1195

Mark Clausen  
Morgan R. Blackburn  
Clausen Law Firm PLLC  
701 5<sup>th</sup> Avenue Suite 7230  
Seattle, WA 98104-7042

Original E-filed with:  
Court of Appeals, Division I  
Clerk's Office  
600 University Street  
Seattle, WA 98101-1176

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

DATED: November <sup>13<sup>th</sup></sup>\_\_\_\_, 2015, at Seattle, Washington.



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Matt J. Albers, Paralegal  
Talmadge/Fitzpatrick/Tribe