

ORIGINAL

No. 35536-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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ALPINE QUALITY CONSTRUCTION SERVICES, INC.  
a Washington corporation,

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COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY DEPOSIT  
Appellant

and

STEVEN A. WEISS and LINDA I. MILLER,  
husband and wife, and their marital community,

Appellants,

v.

BRETT JOHNSON and TERESA JOHNSON,  
husband and wife, and their marital community,

Respondents.

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REPLY BRIEF OF APPELLANTS  
ALPINE QUALITY CONSTRUCTION SERVICES, INC.  
AND  
STEVEN A. WEISS AND LINDA I. MILLER

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities .....	ii
A. INTRODUCTION .....	1
B. REPLY TO THE JOHNSONS’ COUNTERSTATEMENT OF THE CASE.....	2
C. ARGUMENT IN REPLY .....	4
(1) <u>Standard of Review</u> .....	4
(2) <u>The Trial Court Erred In Finding Alpine         and the Weiss-Millers Acted in Bad Faith</u> .....	5
1. <u>The cases upon which the Johnsons             rely are inapplicable</u> .....	5
2. <u>The Johnsons improperly equate Alpine             and the Weiss-Millers’ failure of             proof with a finding of bad faith</u> .....	8
(3) <u>The Trial Court Erred In Awarding the         Johnsons an Unreasonable and Excessive         Amount of Attorney Fees</u> .....	13
(4) <u>Even Assuming the Johnsons Are the         Prevailing Party, They Are Not Entitled to         Their Attorney Fees In the Absence of Bad Faith</u> .....	17
D. CONCLUSION .....	17

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

*Alpine Quality Const. Servs., Inc., et al. v. Johnson*,  
134 Wn. App. 1029, \_\_\_ P.3d \_\_\_ (2006).....1, 10, 16, 17  
*Biggs v. Vail*, 124 Wn.2d 193, 876 P.2d 448 (1994) .....16  
*Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869,  
787 P.2d 507 (1990).....7  
*Day v. Santorsola*, 118 Wn. App. 746,  
76 P.3d 1190 (2003).....6, 8  
*In re Marriage of Mangiola*, 46 Wn. App. 574,  
732 P.2d 163 (1987), *overruled on other grounds*,  
*In re Marriage of Jannot*, 149 Wn.2d 123,  
65 P.3d 664 (2003)..... 9, 11-12  
*Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998) .....13  
*McCausland v. McCausland*, 129 Wn. App. 390,  
118 P.3d 944 (2005), *reversed on other grounds*,  
159 Wn.2d 607, 152 P.3d 1013 (2007).....16  
*Pham v. City of Seattle*, 159 Wn.2d 527,  
151 P.3d 976 (2007).....15  
*Riss v. Angel*, 131 Wn.2d 612, 934 P.2d 669 (1997) .....6, 7, 8  
*Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141,  
859 P.2d 1210 (1993).....13  
*Svendsen v. Stock*, 143 Wn.2d 546, 23 P.3d 455 (2001).....13

Federal Cases

*Scribner v. WorldCom, Inc.*, 249 F.3d 902 (9th Cir. 2001) .....8

Statutes

RCW 4.84.185 .....9

Rules and Regulations

CR 11 .....9  
RAP 9.11.....11

## A. INTRODUCTION

The original dispute between the parties in this case centered on respondents Brett and Teresa Johnson's (collectively the Johnsons) purchase of a lot and subsequent construction of a home in the Riverview Meadow subdivision in Skamania County, Washington. The subdivision, developed by appellant Alpine Quality Construction Services, Inc. (Alpine), is subject to covenants, conditions, and restrictions (CC&Rs). After Alpine sued the Johnsons to enforce the CC&Rs, Steve Weiss and Linda Miller (collectively the Weiss-Millers)<sup>1</sup> intervened to protect their property interests.

This Court interpreted the disputed CC&Rs in *Alpine Quality Const. Servs., Inc., et al. v. Johnson*, 134 Wn. App. 1029, \_\_\_ P.3d \_\_\_ (2006) (Alpine's first appeal), and determined that nearly all of them were ambiguous. It affirmed the trial court's conclusion that the Johnsons did not violate the CC&Rs relating to the modular nature of the home, set back requirements, lot maintenance, and landscaping; however, the Court reversed the trial court's conclusion that the Johnsons did not violate the CC&Rs by leaving a rusted orange bulldozer on their property and ordered them to remove it. The Court remanded the Johnsons' attorney fee award

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<sup>1</sup> The Weiss-Millers and the Johnsons will be referred to by their first names for clarity and ease of reading; no disrespect is intended.

to the trial court because that court did not enter any formal findings of fact or conclusions of law related to attorney fees or bad faith. *Id.* at \*15. Under the applicable CC&Rs, a finding of bad faith is a prerequisite to an award of attorney fees to the prevailing party.

The only remaining dispute between the parties is whether the trial court erred on remand by reinstating its earlier attorney fee award. Lacking substantial evidence of bad faith, the trial court's award of attorney fees to the Johnsons was error. Even if Alpine and the Weiss-Millers instituted their lawsuits in bad faith, the amount of fees awarded to the Johnsons was unreasonable. Moreover, the trial court's deliberate decision to reinstate its earlier fee award *to the penny* only further reinforces the fact the trial court here abused its discretion, as it could not be fair on the fee issue.

B. REPLY TO THE JOHNSONS' COUNTERSTATEMENT OF THE CASE

The Johnsons begin their statement of the case by claiming the trial court's review on remand included a litany of actions by Alpine and the Weiss-Millers, which they then proceed to list in an attempt to cast aspersions on Alpine and the Weiss-Millers. Br. of Resp'ts at 2. The Court should disregard this list because it is misleading, incomplete, and mischaracterizes what actually happened before the trial court.

For example, the Johnsons failed to distinguish between the major issues specifically brought up and litigated at trial and those that were not. Br. of Resp'ts at 2-3. They also conveniently forget to mention that both this Court and the trial court found the majority of the contested CC&Rs to be ambiguous when ruling the Johnsons did not violate them. *See Alpine*, 134 Wn. App. at \*6, 8, 10. Moreover, they make no reference to their own conduct during the trial and fail to mention the counterclaims they brought against Alpine and the Weiss-Millers which were later dismissed at trial. RP 32.

The Johnsons then attempt to downplay the significance of this Court's previous finding that the Johnsons' bulldozer violated the CC&Rs by relegating that information to a footnote. Br. of Resp'ts at 3 n.1. They also mischaracterize what occurred on appeal in that footnote by claiming Alpine and the Weiss-Millers only prevailed on one issue before this Court. *Id.* Besides persuading this Court to reverse the trial court's decision regarding the Johnsons' bulldozer, Alpine and the Weiss-Millers obviously prevailed on the attorney fee issue as well. *Alpine*, 134 Wn. App. at \*14-15.

The Johnsons contend the trial court had a clear recollection on remand of this case and of the bad faith they claim was exhibited by Alpine and the Weiss-Millers during the trial. Br. of Resp'ts at 4. In fact,

the trial court's memory was so clear that the court specifically recalled that bad faith was not an issue at the time of trial. RP 43. Instead, the Johnsons argued they were entitled to recover attorney fees at trial based on an existing contract.

Finally, the Johnsons apparently misunderstand the bad faith provision contained in the CC&Rs because they focus on the bad faith they claim Alpine and the Weiss-Millers allegedly *displayed during the trial*. Br. of Resp'ts at 4. But the applicable CC&Rs permit an award of attorney fees to the prevailing party only for actions *instituted* in bad faith. Ex. 7.

The statement of the case offered by Alpine and the Weiss-Millers is more inclusive than the one presented by the Johnsons; accordingly, it is the more appropriate presentation of the facts and should be the statement relied upon by this Court.

#### C. ARGUMENT IN REPLY

##### (1) Standard of Review

The Johnsons have not completely identified the appropriate standard of review applicable to this case. *Compare* Br. of Resp'ts at 6 *with* Br. of Appellants at 9-10.

As Alpine and the Weiss-Millers note in their opening brief, this Court engages in a two-step process when reviewing an award of attorney

fees. Br. of Appellants at 9. The Court must first determine whether the prevailing party is entitled to attorney fees and then consider whether the amount of fees awarded is reasonable. *Id.* While the Johnsons have correctly stated that this Court will review the amount of an attorney fee award under an abuse of discretion standard, br. of resp'ts at 6, they fail to acknowledge that the question of whether a party is entitled to attorney fees is a legal one that this Court reviews de novo. *Compare id. with* Br. of Appellants at 9.

(2) The Trial Court Erred In Finding Alpine and the Weiss-Millers Acted in Bad Faith

1. The cases upon which the Johnsons rely are inapplicable

As Alpine and the Weiss-Millers note in their opening brief, the applicable CC&Rs provide that the prevailing party at trial is entitled to recover attorney fees only if the action is *instituted* in bad faith. Br. of Appellants at 10-11.<sup>2</sup> The trial court erred in finding Alpine and the Weiss-Millers acted in bad faith because there is no evidence they brought their claims in bad faith. The declarations of their trial counsel evidence

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<sup>2</sup> Article 4, ¶ 5 provides: "In the event suit or action is *instituted* to enforce any terms of this Declaration or to collect unpaid assessments. The prevailing party shall be entitled to recover from the other party such sum as the court or tribunal may adjudge reasonable as attorney fees and costs incurred." Ex. 7 (emphasis added). Article 4, ¶ 3 provides: "The Lot Owners shall not be liable to any person for act[s] or omissions done in good faith in the interpretation, administration, and enforcement of this Declaration." *Id.*

the fact they engaged in the appropriate due diligence to determine the facts were as their clients represented, and the claims were based on arguable interpretations of law. CP 18-22. Also, the record reflects they successfully established the Johnsons violated at least one of the challenged CC&Rs and demonstrated the Johnsons were prompted to comply with several other CC&Rs by the filing of the underlying complaints.<sup>3</sup> Moreover, both the trial court and this Court considered the majority of the challenged CC&Rs to be ambiguous, meaning they were susceptible to more than one *reasonable* interpretation.

The Johnsons attempt to chide Alpine and the Weiss-Millers for failing to cite to CC&R cases in their opening brief. Br. of Resp'ts at 5. Yet a search of Washington cases reflects few reported cases analyzing bad faith in the context of a dispute involving the interpretation of CC&Rs, and none more recently than *Day v. Santorsola*, 118 Wn. App. 746, 76 P.3d 1190 (2003) and *Riss v. Angel*, 131 Wn.2d 612, 934 P.2d 669 (1997). As discussed below, those cases are inapplicable here.

The applicable CC&Rs permit the prevailing party to recover attorney fees if the other party instituted the action in "bad faith"; however, the CC&Rs do not define the term "bad faith." CP 32.

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<sup>3</sup> For example, Alpine and the Weiss-Millers presented evidence that the Johnsons most likely would not have finally landscaped their property, cleaned up construction debris, or attempted to hide their bulldozer without this lawsuit.

Typically, this Court would look to a standard English dictionary to determine the ordinary meaning of an undefined term. *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 877, 787 P.2d 507 (1990). Yet the term “bad faith” does not have a standard dictionary meaning. Br. of Appellants at 11. Thus, the Court must look elsewhere for guidance when interpreting the term. Although the Johnsons argue Alpine and the Weiss-Millers have acted in bad faith, they do not define the term for the Court or provide any guidance to the Court in addressing this issue. More importantly, they fail to distinguish the cases Alpine and the Weiss-Millers rely on to argue the common characteristic in cases interpreting bad faith is the reasonableness of and motive for each party’s conduct. Br. of Appellants at 12-15.

Without authority, the Johnsons next argue that “it seems that all ‘unreasonable’ enforcement actions are deemed to have been made in ‘bad faith.’” Br. of Resp’ts at 6 n.3. This is simply not the case, as demonstrated by *Riss*. There, the Supreme Court clearly indicated a distinction between the two terms by declining to consider the good or bad faith of the homeowners where their decision must have been reasonable. *Riss*, 131 Wn.2d at 627 (stating: “[r]egardless of the good or bad faith of the homeowners, however, a decision under a consent to construction covenant must be reasonable.”). The Court then went on to identify a

number of factors that would demonstrate unreasonable decision-making. *Id.* Having determined the homeowners acted unreasonably, the Court found it unnecessary to further address the issue of the good or bad faith of the homeowners.

In their opening brief, Alpine and the Weiss-Millers point out that *Riss, Day, and Scribner v. WorldCom, Inc.*, 249 F.3d 902 (9th Cir. 2001), present materially different circumstances than those presented here, are easily distinguishable, and therefore inapposite. Br. of Appellants at 20-26. Yet the Johnsons fail to respond to these arguments. Instead, they simply regurgitate the holdings and lengthy quotes taken from those cases (and inserted into their trial memorandum) without providing additional analysis as to how or why those cases apply here. Br. of Resp'ts at 7-12. Where Alpine and the Weiss-Millers have already demonstrated that *Scribner, Day, and Riss* have nothing to do with the concept of bad faith to which the CC&Rs here are addressed, they will not do so again. Br. of Appellants at 20-27.

2. The Johnsons improperly equate Alpine and the Weiss-Millers' failure of proof with a finding of bad faith

Regardless of the definitions and analogies provided, this Court must still decide what bad faith means in the context of the CC&Rs in effect here because the term is undefined. Where the Johnsons have failed

to provide the Court with any definition of bad faith in this context, the Court should rely on the uncontested definition suggested by Alpine and the Weiss-Millers, which is a mixture of the definitions and treatments found in CR 11 and RCW 4.84.185. In other words, bad faith requires a finding that Alpine and the Weiss-Millers filed their lawsuits with no basis in fact or law, without a reasonable inquiry, and for dishonest and improper purposes. Alternatively, the Court must find their actions were instigated for a bad faith purpose. *See Mangiola*, 46 Wn. App. at 579.

Here, there is no evidence that Alpine or the Weiss-Millers instituted their lawsuits in bad faith or without a reasonable inquiry. Among their many claims of bad faith, the Johnsons contend Alpine and the Weiss-Millers made no claims about erosion control while those activities were taking place and that they continued to litigate this issue even after it was clear no erosion problem existed. Br. of Resp'ts at 31. Like their other claims of bad faith, this one lacks merit. Alpine and the Weiss-Millers' claims about erosion control were well documented and surfaced almost immediately. *See, e.g.*, CP 313-14, 324-25. The geo-technical survey Devry Bell performed for the Johnsons in 2000 stated that additional erosion control measures were needed to protect the existing landslide area on the Johnsons' property from *further erosion*. Ex. 73. Alpine informed the Johnsons of the need for proper erosion

control. CP 325. Yet the Johnsons were still not adequately controlling erosion on their property in 2001, when engineer William Weyrauch observed no silt and/or erosion control measures during his second geo-technical survey of the property. CP 326-28.

Alpine and the Weiss-Millers also supplied the trial court with photos of the Johnsons' lot before and during the trial, which showed the condition of the Johnsons' property, the impaired drainage, the excessive excavation, and the damage to the road serving the development. CP 315, 330-65. This is just a fraction of the evidence that supports Alpine and the Weiss-Millers' claims that they instituted their lawsuits in good faith to force the Johnsons to comply with the CC&Rs and not for a dishonest or improper purpose.

Alpine and the Weiss-Millers also presented uncontroverted evidence on remand that their complaints were based in law and in fact. RP 2; CP 18-22. Their trial counsel testified they performed the appropriate due diligence before filing their clients' respective complaints. *Id.* The Johnsons presented no evidence to contradict this testimony. More importantly, the attorneys' due diligence is supported by the fact that Alpine and the Weiss-Millers proved the Johnsons violated the CC&Rs by keeping an unsightly orange bulldozer on their property and successfully reversed a portion of the judgment entered against them. *Alpine*, 134 Wn.

App. at 13. Moreover, the trial court found the Johnsons had corrected several violations of the CC&Rs that were no longer at issue at the time of trial. The violations had to have existed to be corrected in the first place.

Alpine and the Weiss-Millers also raised colorable issues concerning the parties' interpretation of the CC&Rs, as both this Court and the trial court acknowledged by finding several of the challenged CC&Rs ambiguous. In attempting to avoid this fact, the Johnsons create an inventory of what they claim is evidence of Alpine and the Weiss-Millers' bad faith. Br. of Resp'ts at 12-36.<sup>4</sup> But a close look at the Johnsons' claims reveals that they have improperly equated Alpine and the Weiss-Millers' failure of proof with a finding of bad faith. Alpine and the Weiss-Millers provided evidence to support their contentions and legal authority to support recovery had they established a prima facie case. That they did not prevail on the merits of every claim is not enough to find that they instituted their lawsuits in bad faith. *See In re Marriage of Mangiola*, 46 Wn. App. 574, 579, 732 P.2d 163 (1987), *overruled on*

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<sup>4</sup> When discussing the modular home claim, the Johnsons refer the Court to Exhibit 53 for the promotional material and other documents pertaining to their home that they claim they showed to Alpine's president, Terry Ryan, on April 22, 2000. Br. of Resp'ts at 20 n.7. As an initial matter, the TLC sales representative who prepared the computer-generated rendering that allegedly was a part of exhibit 53 testified he likely did not prepare the drawings until August 2000, long after the April 2000 meeting. More importantly, as mentioned throughout this case, the trial court *never* admitted this exhibit into evidence nor was it presented to this Court pursuant to RAP 9.11. As the Johnsons concede, it was only an illustrative exhibit. Br. of Resp'ts at 20 n.7. Accordingly, the Court should not consider it.

*other grounds, In re Marriage of Jannot*, 149 Wn.2d 123, 65 P.3d 664 (2003) (declining to award attorney fees where the wife's modification petition was inadequate but not brought in bad faith).

The Johnsons next contend the letter from mediator Brad Andersen (Andersen) is further proof of Alpine and the Weiss-Millers' bad faith. Br. of Resp'ts at 40. Yet Andersen believed the parties' dispute was based on an unfortunate miscommunication and not on either party's bad faith. More importantly, he placed the blame for the current situation *equally* on Alpine and the Johnsons, stating: "both of you must accept some responsibility for the current situation." CP 42.

The Johnsons' response, br. of resp'ts at 37, to Alpine and the Weiss-Millers' claims that there cannot be a finding of bad faith where this Court determined a majority of the challenged CC&Rs were ambiguous overlooks the fact that the CC&Rs only permit an award of attorney fees if the lawsuit is *initiated* in bad faith. Only after viewing the Johnsons' property at the request of the parties and *weighing the evidence* did the trial court rule the Johnsons did not violate the CC&Rs. As noted above, the mere failure of proof at trial is not sufficient to justify the imposition of fees that are only permitted if the action is instituted in bad faith. Simply stated, the Johnsons are not entitled to attorney fees just because they successfully defended a number of claims at trial.

The CC&Rs provide that the prevailing party at trial is entitled to recover attorney fees only on the basis of the other party's bad faith. Lacking substantial evidence of bad faith, the trial court's award of attorney fees to the Johnsons was error.

(3) The Trial Court Erred In Awarding the Johnsons an Unreasonable and Excessive Amount of Attorney Fees

Even if an award of fees is justified here on the basis of bad faith, the trial court's award was unreasonable. Washington law commands the trial court to take an active role in the calculation of attorney fees. *See Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998). The courts should not simply be the instrumentality of the successful party. *See Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993) (reducing award of \$180,914 to \$22,454.28). Billings by attorneys are only a starting point for a court's decision on a fee award. *Id.* at 156. The trial court must enter findings of fact and conclusions of law articulating how it calculated the fee award. *Mahler*, 135 Wn.2d at 435; *see also Svendsen v. Stock*, 143 Wn.2d 546, 560, 23 P.3d 455 (2001) (same). The trial court has again failed to do so.

Here, the trial court erred by awarding an unreasonable and excessive amount of attorney fees to the Johnsons because the award is not based on contemporaneous time records, and does not exclude any

wasteful or duplicative hours or any hours pertaining to unsuccessful theories or claims. The Johnsons did not refile their fee request on remand; instead, they referred to the attorney fee statements submitted at the conclusion of the trial to support their request for fees based on bad faith. CP 604-12. Those fee statements are inadequate to calculate a lodestar award.

In particular, the Johnsons supplemental statement for attorney fees is inadequate because it is not a contemporaneous time record. Instead, it is an attempt to recreate the time the Johnsons' attorney allegedly spent on the case without providing the actual invoices. CP 604-05; RP 37. The exhibit the Johnsons' attorney submitted with his fee statement does not indicate precisely how the time he spent on the case secured his clients' successful recovery and does not adequately explain how the time was spent beyond overly broad explanations such as "telephone call to Brett," "call to Brett," and numerous other entries described as "meet with Brett" or "conf. w[ith] Brett." CP 606-12; RP 38. It is impossible to distinguish a "telephone call to Brett" regarding the Johnsons' unsuccessful counterclaims from a "telephone call to Brett" relating to their successful defense of the vinyl siding issue because the descriptions accompanying the time entries are so general. Attorney fees for unsuccessful motions, settlement discussions, and other unproductive

time must be excluded. *Pham v. City of Seattle*, 159 Wn.2d 527, 538-39, 151 P.3d 976 (2007). Similarly, the Johnsons essentially concede they did not segregate any attorney fees related to their unsuccessful attempt to defend against the bulldozer claim. Br. of Resp'ts at 48. Accordingly, there is no way the trial court could have excluded from the fee award any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims.

Despite the inadequacy of the Johnsons' fee request, the trial court nevertheless reinstated the original judgment against Alpine and the Weiss-Millers. CP 270; RP 46-47. This was error. As mentioned in the opening brief, the trial court's entire lodestar analysis boils down to the following brief statement given during the oral ruling:

I had previously addressed this issue on other argument as far as the reasonableness of the attorneys' fees.

Considering the amount of time that was involved in this case, the amount of preparation that was involved, I reviewed Mr. Hughes' attorneys' fees billings and I found them to be appropriate. Under the Lodestar method, I believe he accounted for his hours appropriately and with sufficient specificity to satisfy the Court that his attorneys' fees are reasonable.

RP 47. The trial court's mere reinstatement of an earlier fee decision subsequently overturned on appeal is presumptively unreasonable. *See*

*McCausland v. McCausland*, 129 Wn. App. 390, 118 P.3d 944 (2005), *reversed on other grounds*, 159 Wn.2d 607, 152 P.3d 1013 (2007); *Biggs v. Vail*, 124 Wn.2d 193, 876 P.2d 448 (1994). The trial court was tone deaf to the arguments made by Alpine and the Weiss-Millers below. It had made up its mind not to take such arguments seriously. It even asked their trial counsel if he was the one who made the successful argument to this Court. RP 43. The trial court fully intended to snub this Court's direction on remand.

Finally, the Johnsons argue the Weiss-Millers made no objection to the attorney fee award at trial and should not be afforded that opportunity now. Br. of Resp'ts at 43. This argument is not merited. As this Court is aware, both Alpine and the Weiss-Millers objected to any award of attorney fees to the Johnsons in the first appeal. *Alpine*, 134 Wn. App. at 15. This Court subsequently remanded the attorney fee award to the trial court to develop a record for addressing the appropriateness of the award. *Id.* Alpine and the Weiss-Millers then objected to the attorney fee award on remand. It is disingenuous for the Johnsons to claim the reasonableness of the fee award is not at issue on remand when they put that issue into play by claiming the award was reasonable. Moreover, Alpine and the Weiss-Millers objected to both the award itself and the amount awarded during the remand hearing. RP 1-5, 36-40. Alpine and

the Weiss-Millers' arguments concerning the fee award are properly before this Court.

The trial court abused its discretion by awarding the Johnsons an unreasonable and excessive amount of attorney fees (the same amount to the penny it had previously awarded) where the court was unable to exclude time spent on unsuccessful counterclaims or other matters having nothing to do with the results achieved because the exhibits submitted in support of the fee request were inadequate.

(4) Even Assuming the Johnsons Are the Prevailing Party, They Are Not Entitled to Their Attorney Fees In the Absence of Bad Faith

This Court previously concluded the prevailing party is entitled to recover attorney fees and costs *only where the other party has acted in bad faith*. *Alpine*, 134 Wn. App. at \*15. Accordingly, the Johnsons are not entitled to their attorney fees and costs if the Court does not find that Alpine and the Weiss-Millers acted in bad faith.

D CONCLUSION

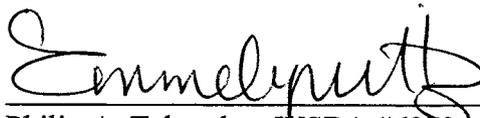
The Johnsons are not entitled to attorney fees simply because they are the substantially prevailing party; instead, they are entitled to attorney fees pursuant to the applicable CC&Rs *only* if Alpine and the Weiss-Millers instituted this action in bad faith. Where there is no evidence that Alpine or the Weiss-Millers acted in bad faith or that they failed to present

debatable issues supported by the facts and the law, the trial court erred by awarding the Johnsons their attorney fees.

The trial court's order granting supplemental findings of fact and conclusions of law finding that Alpine and the Weiss-Millers acted in bad faith should be vacated. Alternatively, the Court should reduce the amount of attorney fees awarded because the trial court's mere reinstatement of an earlier fee decision subsequently overturned on appeal is presumptively unreasonable. Moreover, the amount of fees awarded was excessive because the record does not contain substantial evidence to support the amount of fees awarded.

DATED this 14<sup>TH</sup> day of January, 2008.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below I deposited in the U.S. Mail the following document: Reply Brief in Court of Appeals Cause No. 35536-1-II to the following:

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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: January 14, 2008, at Tukwila, Washington.

Christine Jones  
Christine Jones, Legal Assistant  
Talmadge Law Group