

No. 35536-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
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ALPINE QUALITY CONSTRUCTION SERVICES, INC.,
a Washington corporation

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.

AMENDED BRIEF OF RESPONDENTS
BRETT JOHNSON and TERESA JOHNSON

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A. INTRODUCTION

In this Court's unpublished opinion in *Alpine Quality Const. Servs., Inc., et al. v. Johnson*, 134 Wn. App. 1029, 2006 WL 2262027 (2006), Cause Nos. 32153-0-II and 33093-8-II, this Court ruled:

1. the Johnsons are the prevailing party at trial and on appeal,
2. the Weiss-Millers' appeal of the trial court's denial of their CR 60 motion was in bad faith, and was also frivolous under RAP 18.9, and that the Johnsons were entitled to their attorney fees for that appeal, and
3. as the prevailing party at trial and on appeal the Johnsons were entitled to their attorney fees against Alpine and the Weiss-Millers if, on remand, the trial court found that Alpine and/or the Weiss-Millers had acted in bad faith at trial, and the trial court made written findings and conclusions that the attorney fees awarded at trial were reasonable.

On remand, the trial court on October 12, 2006 issued its written findings of fact and conclusions of law, ruling that Alpine and the Weiss-Millers had acted in bad faith at trial, and that the attorney fees awarded to the Johnsons at trial were reasonable under the lodestar analysis, and entered its final judgment accordingly.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- (1) Was there substantial evidence before the trial court that Alpine and/or the Weiss-Millers had not acted in good faith at trial in enforcing the CC&Rs?
- (2) Did the trial court abuse its discretion by awarding to the Johnsons the attorney fees it found to be reasonable under the lodestar standard?

C. STATEMENT OF THE CASE

The trial was not limited to just the few claims mentioned in the Amended Brief of Appellants. Thus, the trial court's review on remand included the actions exhibited by Alpine and the Weiss-Millers in all of the claims they actually pursued and of the claims they actually litigated.

Those claims included:

1. Violation of Setbacks – Alpine and the Weiss-Millers claimed that the Johnsons placed their home in violation of setback requirements and that their 2-story daylight basement home must be moved to another location on the lot. For the first three (3) years of this litigation Alpine and the Weiss-Millers had demanded that the Johnsons move their home further *south*. Then on the first day of trial, Alpine and the Weiss-Millers reversed themselves, and demanded that the Johnsons move their home further *north* instead.
2. Modular Home – Alpine and the Weiss-Millers alleged that the Johnsons' home is forbidden by the CC&Rs because the top floor was of modular construction.
3. Vinyl Siding – Alpine and the Weiss-Millers alleged that the CC&Rs prohibited vinyl siding.
4. Square Footage – Alpine and the Weiss-Millers alleged that the Johnsons' home violated the CC&Rs because it did not have the required square footage.
5. Erosion Control – Alpine and the Weiss-Millers alleged that the Johnsons' construction activity violated the CC&R erosion control requirements.

6. Garage Positioning – Alpine and the Weiss-Millers alleged that the positioning of the Johnsons’ garage violated the CC&Rs.
7. Road Damage – Alpine alleged that the Johnsons violated CC&Rs by damaging the gravel road during construction.
8. Blockage of the Culvert – Alpine alleged the Johnsons violated the CC&Rs by allowing a culvert on their driveway to become blocked.
9. Licensed and Bonded Contractor – Alpine and the Weiss-Millers alleged that the Johnsons violated the CC&R requirement to have a licensed and bonded contractor.
10. Home Value – Alpine and the Weiss-Millers alleged the Johnsons violated the CC&Rs because the value of the Johnsons’ home was too low for the standard required of homes in the subdivision.
11. Landscaping – Alpine and the Weiss-Millers alleged that the Johnsons violated the CC&Rs because they had not sufficiently landscaped their property.
12. Appearance and Upkeep – Alpine and the Weiss-Millers alleged that the Johnsons violated CC&Rs relating to appearance and upkeep of their property, due to
 - (A) lot maintenance: because there were piles of clearing debris, trash barrels, and weeds on the lot during construction.
 - (B) keeping a bulldozer on site.

At trial, the Johnsons prevailed on all of these claims. On appeal, the Johnsons prevailed on all but one of these claims ¹

¹ The Johnsons prevailed on all these issues at trial, and on appeal were affirmed on issues 1 through 12 (A).

Alpine and Weiss-Millers lost on all these issues at trial, and on appeal lost on issues 1 through 12 (A), and prevailed only on issue 12 (B).

On remand, the Johnsons submitted their Memorandum in Support of Additional Findings and Conclusions on Remand (Johnsons' Memorandum on Remand). CP 46-255. This reviewed the evidence of the bad faith exhibited by Alpine and the Weiss-Millers in their prosecution of these claims, and addressed attorney fee issues. In order to assist the trial court's determination on remand, Johnsons' Memorandum on Remand included pages of the verbatim reports of proceedings from the trial, which were attached as Exhibit A to the Declaration of Robert M. Hughes In Support of Motion On Remand. CP 79-255.

The bad faith and attorney fee issues were further addressed by the Johnsons in their oral argument at the remand hearing. RP 10-31.²

Judge Reynolds' comments at the remand hearing show that he had a clear memory of this case, and of the bad faith exhibited by Alpine and the Weiss-Millers at trial, as his recollections went beyond the materials that were submitted by the parties for the remand hearing. RP 39-45.

D. SUMMARY OF ARGUMENT

There was more than ample evidence for the trial court to find that Alpine and the Weiss-Millers had acted in bad faith. Alpine and the Weiss-Millers pursued numerous claims of CC&R violations against the Johnsons that had no substance in fact and were clearly not violations of the CC&Rs.

² "RP" refers to the verbatim report of proceedings from the hearing on remand, which occurred on October 12, 2006. Johnsons' Memorandum on Remand, which included copies of those pages of the verbatim report of the proceedings for trial that were cited and submitted to Judge Reynolds at the remand hearing, is included here in "Appendix A".

"CP" refers to the Clerk's Papers designated by Appellants and Respondents for this appeal. Where the Clerk's Papers designated by Respondents in this appeal include those that were cited or referenced in Johnsons' Memorandum on Remand (CP 46-255), they are renumbered to match the numbers associated with the designation numbers for this appeal.

Alpine and the Weiss-Millers pursued these claims without thoroughly investigating the facts, and without providing the Johnsons with timely notice of their claims. And some of the claims Alpine and the Weiss-Millers pursued against the Johnsons were on matters for which the Johnsons had already received specific prior approval.

These claims often became moving targets, as Alpine and the Weiss-Millers kept redefining the meaning of the CC&Rs and changed the very nature of their claims during the litigation, and even during the trial. Alpine and the Weiss-Millers repeatedly contradicted their own prior declarations and their own prior deposition testimony in order to support these claims, or to support new arguments and new theories of CC&R violations when their original claims were proved to be without merit. As the six (6) days of trial unfolded it became quite clear to the trial court that Alpine and the Weiss-Millers were not pursuing CC&R violations reasonably and in good faith.

Alpine and the Weiss-Millers Authorities Are Not on Point

Alpine and the Weiss-Millers do not cite CC&R cases at all. Nor do they cite any contract cases which describe “good faith” in the context of the performance of parties. Alpine and the Weiss-Millers cite only cases where attorney fees are recoverable under CR 11, or for frivolous lawsuits under RCW 4.84.185. Those cases are inapplicable. Alpine and the Weiss-Millers concede that CR 11 and RCW 4.84.185 are inapplicable, except, they hope, by analogy. Amend. Brief of Appellants, ftns. 11,12, and pages 15-16.

On the other hand, the Johnsons cite *Scribner v. WorldCom, Inc.*, 249 F.3d 902 (9th Cir. 2001), for the analysis of “good faith” in the context of Washington contract cases.

The Johnsons also cite *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). Both are Washington cases which describe actions to enforce CC&Rs that were found to be unreasonable (*Riss*³) and brought in bad faith (*Day*).

Paragraphs from the *Scribner*, the *Riss* and the *Day* cases are quoted below that well describe the type of bad faith that was exhibited by Alpine and the Weiss-Millers in their actions to enforce the CC&Rs—actions that the trial court found to be in bad faith.

E. ARGUMENT

(1) Standard of Review

For the review of the trial courts findings of fact on the bad faith issue, the substantial evidence test applies. *Schmidt v. Cornerstone Investment, Inc.* 115 Wn2d 148; 795 P.2d 1143 (1990).

For the amount of fees awarded, the abuse of discretion test applies. *Schmidt v. Cornerstone Investment, Inc.* 115 Wn2d 148; 795 P.2d 1143 (1990).

The trial court may be affirmed on any ground established by the

³ In *Riss*, the trial court had not addressed the issue of the “bad faith” of the HOA. The HOA argued they could not be found liable without such finding. The *Riss* court disagreed, finding it unnecessary to address that issue since the HOA had acted unreasonably in their CC&R enforcement actions, which was all that was necessary to make the Risses the prevailing party. It seems though, from reviewing the CC&R cases, that when courts have said the CC&Rs must, as *Riss* said, “be exercised *reasonably* and in *good faith*”, those courts have used the terms “reasonably” and “in good faith” interchangeably, and always taken together. I have found no case where a distinction is made— it seems that all “unreasonable” enforcement actions are deemed to have been made in “bad faith”.

proof, even if the trial court did not consider that ground or proof in its decision. Thus, if the trial court had an opportunity to rule on that ground or proof, then whether the trial court actually did, or did not consider that point, it will be affirmed on appeal. *Adcox v. Children's Orthopedic Hosp.*, 123 Wn2d 15, 864 P.2d 921 (1993).

(2) “Good Faith” vs. “Bad Faith” in Washington Contract Cases

Scribner v. WorldCom, Inc., 249 F.3d 902 (9th Cir. 2001) provides a good analysis of what constitutes “good faith” in the context of Washington contract cases. In *Scribner*, WorldCom had terminated Scribner “for cause” under its interpretation of the employment contract. The issue was whether WorldCom had acted in good faith in terminating Scribner.

In examining what constitutes “good faith” in Washington contract law the *Scribner* court, (1) rejected WorldCom’s argument that Scribner must prove that WorldCom acted with malice, (2) rejected WorldCom’s argument that WorldCom could not be found to have acted in bad faith if it actually did believe that it was acting lawfully, and (3) rejected WorldCom’s argument that it could not be found to have acted in bad faith if it actually did believe that it was treating Scribner fairly.

The *Scribner* court examined the determination of “bad faith” in the context of Washington contract cases, stating,

“[13] WorldCom contends that Scribner has not presented any evidence that the Committee acted in bad faith in deciding that his termination had been “with cause.” This argument fails. *WorldCom misunderstands the concept of good faith. Scribner need not show that the Committee acted with malice towards him, or even that it knew its decisions were inappropriate when it made them. The Committee could breach the duty of good faith and fair dealing simply by disregarding Scribner’s justified*

expectations under the stock option contracts. (Scribner at 909)

[14] The thrust of WorldCom's argument that there is no evidence of bad faith is that Scribner must show that WorldCom did not have a good reason for terminating him, or that the Committee acted without "honesty or lawfulness of purpose." *Tank v. State Farm Fire & Casualty Co.*, 105 Wash.2d 381, 715, P.2d 1133, 1136 (1986) (en banc). *We do not question that the Committee felt it was treating Scribner fairly and lawfully by allowing him to exercise some of his options, or that it honestly felt it was acting in the best interests of the company....*

That a party can breach the duty of good faith and fair dealing by acting dishonestly or unlawfully does *not* mean that dishonesty or an unlawful purpose is a necessary predicate to proving bad faith. (Scribner at 910)

...In *Tank*, for instance, the Washington Supreme Court stated that the *duty of good faith implies more than honesty and lawfulness of purpose.*

[15-17] Commentary to the *Second Restatement of Contracts* refutes WorldCom's argument. The comments provide that "[g]ood faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." RESTATEMENT (SECOND) OF CONTRACTS §§ 205, cmt. a (1979). The commentary also states that "[s]ubterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified . . . [F]air dealing may require more than honesty." *Id.* at cmt. d. It also provides that "*evasion of the spirit of the bargain will constitute bad faith.* *Id.* at cmt. d. The Oregon Supreme Court has adopted this commentary, holding that *the good faith doctrine exists to "effectuate the reasonable contractual expectations of the parties."* *Best v. United States Nat'l Bank of Oregon*, 303 Or. 557, 739 P.2d 554, 558 (1987).

...Good faith *limits* the authority of a party retaining discretion to interpret contract terms; it does not provide a blank check for that party to define terms however it chooses. (Scribner at 910)

...Thus, Scribner has presented ample evidence demonstrating that rather than making a good faith effort to determine whether his termination had been "with cause" or "without cause" based on language of the Plan and his justified expectations, *the Committee chose its desired result, and then applied the label necessary to bring that result about. Nothing more is required to show a lack of good faith, (Scribner at 911-912)*

... *the Committee's discretion to construe the contract did not give it the authority to redefine its terms or undermine Scribner's justified expectations as to what those terms meant."* Scribner at 912 .

(3) "Good Faith" vs "Bad Faith" in Washington CC&R Cases

In *Day v. Santorsola*; 118 Wn. App. 746; 76 P.3d 1190 (2003) the Days had purchased a lot in a subdivision which had restrictive covenants (CC&Rs) that required a committee's prior review and consent before

construction of a house. The committee rejected the Days' house due to its potential to obstruct views. The Days sued the committee, alleging the committee acted unreasonably and in bad faith. The *Day* court agreed with the trial court that the committee's rejection of the Days' plans was not reasonable and not in good faith in several respects. First, because the court found that the primary purpose of the CC&R in question was to limit the height of the homes, not to prevent the obstruction of views.

“The record supports the trial court's findings and conclusions that view preservation is not the *primary purpose* of the covenants. The strongest evidence of this is the Committee's prior approval of plans that called for houses that would impact other homeowners' views. The covenants clearly state that a house can be up to two stories high. The record does not show that the Committee ever exercised its authority to limit a house to fewer than two stories, even if the house impacted views. Substantial evidence supports the trial court's finding that the covenants emphasize height, not view.” *Day* at 758

The *Day* Court then noted that the inadequacy of the committee's investigation also indicated that the Committee had acted in bad faith.

...The trial court concluded that, rather than independently evaluate the Days' proposed plans, the Committee relied on investigations performed by the Santorsolas. One example was a pole and balloon structure the Santorsolas built to demonstrate the impact of the Days' proposed house. The trial court found that the structure was inaccurate and misleading and overstated the impact of the house on the Santorsolas' views. The Committee does not dispute that it used information prepared by or for the Santorsolas rather than information gathered from its own independent investigation. But it argues that the information it relied on accurately depicted the impact of the Days' proposed house on the Santorsolas' views. The Committee does not, however, challenge the trial court's finding that it "did not at any point evaluate or review the accuracy of the pole and balloon structure."(fn24).” *Day*, at 758-59

“Other evidence supports the trial court's conclusion that the Committee's investigation was unreasonable and in bad faith. For instance, Mr. Day testified that no member of the Committee ever told him that the Committee actually measured the heights of the Santorsolas' and others' houses and compared those heights to the height of the Days' proposed house. Dr. Heimbach, a member of the Committee, also testified that the Committee did not measure other houses to compare their heights with the

height of the Days' proposed house.

The trial court found, in an unchallenged finding, that the Days' architect informed the Committee by letter that the proposed house needed to have a 98-foot main floor elevation in order to provide drainage. The trial court found in another unchallenged finding that the Committee failed to respond to this information and continued to complain that the Days' proposed house was too high.” *Day* at 759

Then, citing the Washington Supreme Court’s ruling in another CC&R case, *Riss v. Angel*, 131 Wn.2d 612, 934 P.2d 669 (1997), the *Day* court stated,

“In *Riss v. Angel*,(fn26) the Court concluded that the Board's investigation of the lot owner's proposed plans was inadequate. The Board in *Riss* did not visit the site, relied on inaccurate and misleading evidence, and made no objective comparisons of existing homes and the proposed home with respect to size and height, even though size and height were the primary reasons the plans were rejected. *As in Riss, the trial court here properly concluded that the Committee's investigation was inadequate.*(fn27)”. *Day*, at 759-60

The *Day* court then discussed the committee’s *change of its own definition* as to what constitutes a “story”, resulting in a definition not consistent with its prior definition, as another example of bad faith,

“In its review and approval of the plans for the Gruhns' proposed house in December 1998, the Committee relied on an opinion solicited from its lawyer that if the floor of a house is substantially below ground, it is a basement, not a story.
....But, when it subsequently considered the Days' plans, the Committee *for the first time used the definition of "story" from an architectural dictionary* supplied by Santorsola and determined that a daylight basement does constitute a story. This evidence supports the trial court's findings of fact, which, in turn, support the trial court's conclusion that the Committee's decision to disapprove the Days' original plans because the daylight basement constituted a story was unreasonable and not made in good faith.” *Day*, 760-61

The *Day* court then noted that because the committee’s *trial testimony conflicted with its deposition testimony*, this entitled the trial court to question the good faith and reasonableness of the committee’s actions with respect to the review of those plans,

“At their depositions, the Committee members testified that they received the Days' letter on June 30, 1999, the same day they received the Days' revised plans. At trial, however, the Committee members testified that they did not receive the letter until the Committee's October 4, 1999, meeting.

The trial court concluded:

[T]he Committee members' trial testimony to the effect that they did not receive Mr. Days' [sic] June 30 letter, which was submitted with the Revised Plans, until October 1999 is contradicted by their deposition testimony, is not credible, and raises doubt about the reasonableness and good faith of the Committee's actions with respect to the Days and their building plans.(fn37)

The Committee argues that the timing of the receipt of the letter is irrelevant because the Days and the Committee discussed the matters addressed in the letter during a June 19, 1999, meeting. Even if this is true, we will not disturb the court's conclusion. The trial court is entitled to make credibility determinations (fn38) and, in light of its finding that the testimony was not credible, the court was entitled to conclude that this raised doubts about the Committee's good faith and reasonableness.”
Day, at 764-65

The *Day* court also agreed with the trial court that the committee's rejection of the Days' compromised plans, which had corrected two (2) of the committee's four (4) prior objections, was not made in good faith, because there were no valid reasons for its objections,

“The Committee fails to offer a valid reason for its rejection of the compromise plans. The evidence supports the trial court's conclusion that the Committee's failure to approve the compromise plans was unreasonable and not in good faith.” *Day*, at 766-67

The *Day* court then agreed with the trial court's refusal to admit a computer graph and three-dimensional visualizations prepared by an architect depicting the size of the Days' proposed house and its impact on views, since it was prepared about a week before trial, not allowing the Days a reasonable time to respond. Quoting the trial court's oral opinion:

“Trials are not by ambush in our civil system.

...In this case where the plaintiff learned of the illustrative photographs at the deposition which was conducted only a short time ago, barely a week ago, and the illustrative exhibits are clearly based on, among other things, computer programs which the plaintiff cannot examine at this late date, and fairly read interrogatory 21 and considering requests for production asked

for precisely this type of exhibit long, long ago, back in December of 2000, I have both a violation of the discovery requirements, because that interrogatory and request for production was never supplemented with Mr. DePape's proposed illustrative exhibits.

Nor can I say that there's not prejudice here. In fact, it seems there's overwhelming prejudice to the plaintiffs in the sense that the plaintiff cannot prepare to meet this evidence at this late date. (fn46) ”
Day, 767-68

(4) Alpine's and the Weiss-Millers' Claims of CC&R Violations Were Not Brought in Good Faith

The actions taken by Alpine and the Weiss-Millers in pursuing their numerous claims of CC&R violations were far more obvious examples of bad faith than those actions found to have been unreasonable and in bad faith in the *Riss v Angel* and *Day v. Santorsola* cases. The evidence before the trial court of the bad faith exhibited by Alpine and the Weiss-Millers in the pursuit of their claims is set out in detail below at (A) - (P). In summary, those actions taken by Alpine and the Weiss-Millers from which the trial court could find the claims were brought in bad faith include the following:

- Alpine and the Weiss-Millers tried to redefine the terms of the CC&Rs in order to support claims that obviously were not violations;
- Alpine and the Weiss-Millers pursued claims of CC&R violations on matters for which the Johnsons had already received specific approval;
- Alpine and the Weiss-Millers pursued claims of CC&R violations that contradicted their formerly stated positions, as well as their own prior sworn testimony;
- Alpine and the Weiss-Millers pursued claims of CC&R violations

without adequately investigating the facts;

- Alpine's and the Weiss-Millers' claims of CC&R violations were made so late in the construction process the Johnsons could not have responded without incurring substantial damages; and some claims were made without any notice before trial;

(A) Claim That the Johnsons Home Was Placed in Violation of Setback Requirements and Must Be Moved Further South on the Lot

For the first three (3) years of the litigation Alpine and the Weiss-Millers had demanded that the Johnsons move their home further *south* to comply with setback requirements. Then on the first day of trial, without prior notice, Alpine and the Weiss-Millers demanded that the Johnsons move their home further *north* instead.

Alpine has known where the house would be placed at least since October 2000, when the daylight basement shelf was excavated. CP 64. Terry Ryan (Alpine's owner/ president) admitted to being there again in November 2000, the month after the daylight basement ledge had already been excavated. CP 463-64. He also admitted to being there when the forms for the footings were in place, prior to them being poured. CP 467-68. Ryan was also at the site on January 4, 2001, after footings were poured, at which time he talked pleasantly with Brett Johnson, having no complaints. CP 64. Ryan also admitted that he saw the daylight basement walls being poured. CP 467-68.

Ryan admitted he never talked to the Johnsons about the placement of their home while the stick-built daylight basement was being built, or even later when the modular portions were set on February 13th, 2001. CP

63. CP 468-70. So the Johnsons did not know of Alpine's claim that their home must be moved further *south* on the lot until the Complaint was filed in May 2001. CP 285.

The determining factor as to the placement of the house was the very steep 60 foot escarpment (drop-off) that cuts through the middle of the Johnsons' lot on the south half of their property. CP 59. CP 378-9. Because of serious sliding in the area in 1996, Skamania County building ordinances required that all lots in Riverview Meadows have a geo-tech survey done for each individual lot to determine the proper placement of houses in relation to this escarpment. CP 59. The Johnsons submitted the geo-tech survey for their lot to Skamania County. CP 59. It required that the closest point of their house be at least twice the vertical depth, plus ten (10) feet away from the "toe", or bottom, of the steep escarpment on the south. CP 59. CP 379. Thus, the Johnsons' home was placed 130 feet north of the toe of the southern escarpment. CP 59.

Skamania County ordinances also required the house be placed no closer than 50 feet from the centerline of the road on the north. CP 59. The Johnsons placed their house 57 feet from the centerline. CP 59.

Alpine's Complaint alleged that the Johnsons' home was placed in violation of the CC&Rs because it was within 100 feet of the seven (7) foot high road embankment on the north, which Alpine described in paragraph 18 of Complaint, as "*..the northern hillside..*". CP 60. CP 285. CP 379.

Alpine's Motion For Summary Judgement filed October 15, 2001 again argued that the Johnsons must move their home further *south* in order to comply with the CC&Rs. CP 306-10. In his Supplemental

Declaration in Support of Summary Judgment (Ex 72), Ryan again described the seven (7) foot road embankment on the north as a “hillside”, and argued the Johnsons’ house could be placed 100 feet *further south* of where it was placed to comply with the CC&Rs, stating,

“...nor had Mr. Johnson indicated to me that the house would be placed so close to the *upper hillside and road*.” Ex 72, p. 3, lines 19-20.
“.....The plot plan shows approximately *100 feet of additional space to the south* of the placement of the home where the home could have been placed and comply with the CC&R’s.” Ex 72, p. 2, lines 21-22.
“....Given the length of Mr. Johnson’s lot, his home *could have been placed south* of where it was placed to meet with the CC&R’s, the local building ordinances and engineering recommendations.” Ex 72 (page 6, lines 4-6).

In Alpine’s Memorandum In Support of Motion For Summary Judgment, its second (2nd) attorney, Steven C. Andersen, argued,

“The Covenants further require that homes be situation [sic] 100 feet from hillsides. Since Johnson situated their home less than 50 feet from the *hillside supporting the road*, Johnson undeniably violated this restriction.” CP 310.

In their opposition to Alpine’s motion for summary judgment, the Johnsons pointed out that while virtually the entire subdivision was on a hillside, the real hillside to be concerned about was the very steep 60 foot escarpment that cuts through the middle of their lot on the south, not the seven (7) foot road embankment on the north. After all, it was due to historical slides associated with this escarpment that Skamania County had a specific ordinance requiring a geo-tech survey for each proposed house to ensure that all buildings be located a safe distance away from this southern escarpment. CP 378-80. The only county ordinance associated with the road on the north was a 50 foot setback from the center of the road, which the Johnsons clearly complied with. CP 60-61. But the

Johnsons could not have moved their house any further south, as Alpine demanded, due to the dangers associated with locating it too close to the historical slide area at the southern escarpment. CP 379.

Alpine's response to that, in Alpine's Reply Memorandum, was,

“ Irrespective of whether a geological survey or other engineering sources required placement of the home where it was, Defendants purchased the lot knowing full well what the CC&Rs required.” CP 61. CP 392.

In essence, Alpine demanded that the Johnsons ignore the county ordinances, as well as the geo-tech engineers, and instead move the house about 75 feet further *south* anyway, to comply with how Alpine *then* interpreted the CC&Rs. This was Alpine's consistent litigation position for three (3) years. Even on the day trial began, Alpine's Complaint and the Weiss-Millers' Complaint (a copy of Alpine's) still alleged that the Johnsons' house was placed in violation of the CC&Rs because “18. *Defendant Johnsons' home is placed within 100 feet of the northern hillside...*” (the road embankment), i.e., demanding that the Johnsons move their home further *south* on the lot. CP 285. CP 409.

(B) Alpine and the Weiss-Millers Reverse Themselves at Trial and Demand That Johnsons Move Their Home Further North

On the first day of trial, with its first witness, surveyor Richard Bell, Alpine attempted to elicit testimony to prove that the Johnsons' had placed their house too far *south* on the lot to comply with the CC&Rs, and that it must therefore be moved further *north*, in order to be at least 100 feet away from the *top* of the southern escarpment. CP 61. Ex 2.

Before Bell's testimony, the Johnsons had never heard that their home had to be moved further *north*. In the three (3) years of litigation

prior to that day, Alpine and the Weiss-Millers had always demanded they move their house further *south* from where it was placed. CP 61-62.

In order to make this new argument that the house actually needed to be moved *north*, instead of *south*, Alpine had to abandon its prior position of requiring Johnsons' home to be at least 100 feet south from the road embankment, or the "*northern hillside*" as Alpine *used* to call it for the first three (3) years of the litigation. Instead, at trial, Alpine's newest counsel, Mr. Knappenberger, argued,

"Your Honor, for the record, we've never maintained a violation of the CC&Rs by 100-foot setback from the northern hillside." CP 62.

And later in the trial, in reference to the northern road embankment, Alpine's counsel told the court, "*...there is no hillside there...*". CR 62.

Being that the "*northern hillside*" was no longer there, Alpine now argued that the Johnsons' home could be placed in an area about 75 feet *north* of where, for the prior three (3) years, Alpine had claimed the house must be south of. CP 63. Ex 2. But Alpine failed to prove the Johnsons' house was placed in violation of any ordinances, or that it could have been placed anywhere other than where it was.⁴

Ryan admitted that he (Alpine) had never told the Johnsons that

⁴Alpine now claimed the Johnsons home could be moved to within 50 feet south of the center of the road easement (which was less than 50 feet from the center of the roadway, as the ordinance required), rather than 100 feet south of the road embankment. CP 62. Ex 2. Then, in order to reconcile moving the house this far further north, and still being at least 50 feet south of the road easement on the north, Alpine offered Ex 2 to show that this could be accomplished if: (1) the Johnsons' house was made much smaller, and (2) it was moved to within twenty (20) feet from the eastern edge of the 2-acre lot. CP 63. Ex 2.

But on cross-exam, Mr. Bell admitted that in drawing Ex 2, he had no knowledge of what the relevant ordinances or setbacks were for the road, or for the steep escarpment on the south. CP 63. He also admitted the proposed smaller house depicted in Ex 2 could not actually be placed where it is shown on Ex 2, because of errors in how that exhibit was drawn. CP 63.

their home needed to be moved further north until after the trial began, claiming that he did not know until the 2004 trial where the Johnsons' home was placed in relation to the southern escarpment until trial. CP 63.

First, even if that were true, which it clearly was not, this would be an enforcement action taken in bad faith. As the *Day v. Santorsola* case holds, allegations of CC&R violations made without an adequate investigation are deemed to have been made in bad faith.

Secondly, it is not true that Ryan did not know where the house was placed in relation to the escarpment. Ryan (Alpine) developed the subdivision, and had testified extensively about the earlier geotech studies he had done in 1997 due to the slumping of the escarpment. And Ryan was constantly at the site during the Johnsons' construction of the stick-built daylight basement, and also later when the modular upper sections were brought in February of 2001. Yet Ryan never complained about where the Johnsons were placing the house, even though he was a frequent visitor at the site when it was obvious from the construction activity where the house was going to be placed. CP 64.

The bad faith was obvious when Ryan admitted that he had never talked to the Johnsons about the placement of their home at any time before they set the modular portions on the stick-built daylight basement, such that the Johnsons did not know of Alpine's claim that their home must be moved further *south* until the Complaint was filed.

The bad faith was even more obvious when Alpine and the Weiss-Millers also failed to notify the Johnsons until the first day of trial that they had changed their positions on that, and were then demanded for the first

time that the Johnsons' home be moved further *north* instead of *south*. The trial court then heard Ryan's excuse— his false claim that he never knew until trial where the house was placed in relation to the escarpment. CP 63-64. The Weiss-Millers joined in with this reversal of position. CP 62.

And then, Alpine had the audacity to tell the trial court that it had never taken the position that the Johnsons' home must be moved south. That these were misstatements to the trial court is obvious. After all, the Complaints filed by Alpine and the Weiss-Millers stated just the opposite, as did all the sworn declarations and deposition testimony prior to the first day of trial. And this same trial court had heard Alpine's claim that the Johnsons' home had to be moved *south* in Alpine's 2001 motion for summary judgment.

This just further illustrates Alpine and the Weiss-Millers' absolute disregard for fair dealing, or the truth, with respect to what they would allege was a violation of the CC&Rs. Alpine and the Weiss-Millers were quite willing to just make it up as they went along. First, they filed suit alleging CC&R setback violations against the Johnsons demanding they move their home further *south*. Then without any prior notice, they claimed on the first day of trial that the Johnsons' were violating a different CC&R setback requirement and demanded the Johnsons home be moved further *north*. And then, they tried to tell the trial court that they had never held the prior position.

Had the Johnsons complied with the demands of Alpine and the Weiss-Millers, they would have moved their house twice by now. This was not a reasonable or good faith attempt to enforce the CC&Rs.

(C) Claim that the Johnsons' Violated the CC&Rs by Placing a "Modular" Home

Weiss testified that he had first seen the Johnsons' modular home when only the first half (1/2) was there, or when the first one-half (1/2) was being put in place (around February 12, 2001), at least when he first testified to that point in his deposition on March 10, 2003.⁵ CP 52. CP 491-92. Weiss immediately complained to Alpine's realtor, Ginger Townsend⁶, who was also at the site when the first half (1/2) of the modular unit was brought in on February 12, 2001. CP 52.

Weiss also complained immediately to Ryan about the Johnsons' home, saying it looked like a manufactured home. CP 52. CP 492-93. But Ryan replied to Weiss that it would be a nice finished house and would look fine when it was completed. CP 52. CP 497-500. This response was obviously based upon the plans Ryan had seen in his meeting with the Johnsons on April 22, 2000, since the house the Johnsons built was virtually a mirror image of the modular home depicted in the TLC package⁷

⁵ This was *inconsistent with his later testimony at trial* that he had not actually seen the Johnsons' home on the lot until after he closed his own lot on April 6, 2001, because by that time the Johnsons had already moved into their home on a temporary occupancy permit by March 2001— it was not just being put into place. CP 52.

⁶ Alpine's realtor, Ginger Townsend had sold Lot 9 to Weiss by an earnest money signed September 17, 2000, and which closed on April 6, 2001. CP 52

⁷ The TLC package was shown in Plaintiff Alpine's Ex 53, consisting of the drawings, elevations, the floor plan and the materials list for the TLC home the Johnsons' built. It was extensively testified to by the key witnesses, but was never formally offered at trial. However, what Ex 53 would prove as an exhibit (that Alpine had reviewed such documents in April 2000, and thereafter) was still testified to by the witnesses while holding Ex 53 in hand. Thus, even if it was technically only an illustrative exhibit, or a document used to refresh memory, the same point was proven — Alpine saw documents that described what the Johnsons were proposing to build in April 2000, when the earnest money was signed. CP 53

Also, those same documents were admitted with other exhibits. Ex. 103, Appraisal Report, pages 12, 23, 24. See also Ftn. 15, below.

shown to Alpine on April 22, 2000, and was built to the exact same building specifications. CP 53.

In fact, over time Alpine took a number of conflicting positions as to whether a modular home, and in particular, the Johnsons' modular home, was acceptable (and as to when Alpine knew of the Johnsons plan to put a modular home on top of the stick-built daylight basement). The trial court heard the following testimony revealing how Alpine's had continually changed its position as to whether the Johnsons' modular home violated the CC&Rs:

1. Ryan approved the specific modular house the Johnsons showed him on April 22, 2000 (the TLC package), and encouraged the Johnsons to get it under construction so as to help in lot sales. CP 53.
2. When the Johnsons' modular units arrived in February of 2001, and Weiss complained to Ryan and his realtor, Ginger Townsend, about it looking like a "manufactured home", Ryan assured Weiss then that the Johnsons' home would look nice when the home was completed. CP 53. Thus, when the modular home first arrived, Ryan essentially told Weiss that the Johnsons' modular home was not in violation of the CC&Rs.
3. On the other hand, the day after the house arrived, Ryan sent his February 13, 2001 letter to the Johnsons, objecting to the home, but *not* complaining about it being "modular". CP 299. CP 54.
4. In Ryan's October 2001 Declaration In Support of Motion for Summary Judgment, he claimed that the Johnsons had first asked about putting a "prefabricated home" on the lot only *after* the July 14, 2000 closing, and that he (Ryan) had told Brett Johnson then (*after closing*) that,

“....he could place a *prefabricated* home, as long as it appeared site built and was of high quality.”. Ex 71, page 2.

5. Ryan was then faced with irrefutable evidence that this event had occurred much earlier, at the time the April 22, 2000 earnest money was signed. The Johnsons’ Memorandum In Opposition pointed out that the CC&Rs had been changed in May 2000 and in June of 2000 specifically to allow some prefabricated homes⁸. Ryan then corrected himself about when he had first discussed with the Johnsons their plan to put a “*modular*” home on the lot, admitting that they must have discussed putting the “*modular*” home on the lot at sometime before closing. Ex 72. CP 395.

6. In his deposition taken August 7, 2002, Ryan finally admitted that in his April 22, 2000 meeting with the Johnsons, they had indeed discussed the Johnsons’ plan to place a “*modular*” home, which he also referred to then as a “*prefabricated*” home (making no distinction between the terms), and that he had told the Johnsons then that it would be acceptable if indistinguishable as a “*modular*”. CP 54. CP 460-62.

7. Yet at trial, Alpine told the trial court in its opening statement (March 2004) that the CC&Rs absolutely banned all prefabricated homes of any kind (including modular homes), and that there could be no exceptions

⁸ To counter Ryan’s Declaration that it was not until after the closing of the lot, i.e., after July 14, 2000, that the Johnsons first asked to put a prefabricated home on the lot, the Johnsons’ Memorandum in Opposition pointed out that the CC&Rs were changed to allow prefabricated homes just after their April 22, 2000 meeting with Ryan, and that those were recorded on May 18, 2000 and June 9, 2000, before they closed. In Reply, Alpine submitted the ‘Supplemental Declaration of Terry Ryan’, in which Mr. Ryan admitted that he needed to correct his Declaration, and that he was indeed told prior to closing that Johnsons would be placing a ‘modular’ home, stating, “As an initial matter, I need to correct two statements made in my first declaration. First, Brett Johnson and I discussed Defendants’ placement of a *modular* home on the lot prior to closing of the sale of the lot. Second, I did not see that Defendants moved into their *manufactured* home until approximately March 25, 2001.” Ex 72, page 1.

whatsoever. Alpine argued that an *amendment* to the CC&Rs would be required for any type of prefabricated home to be placed in the subdivision.⁹ CP 54.

8. Later in the trial (May 2004), Alpine's theory changed again, with its new "modular" versus "prefabricated" distinction. Alpine's new argument was that the CC&Rs recorded on May 18, 2000 (Ex 63) and on June 9, 2000 (Ex 21) included changes to allow exceptions for certain "prefabricated" homes, but not for "modular" homes, and that those changes to the recorded CC&R were made on behalf of the Prebans (Lot 11), not the Johnsons. That was proven to be false.

First, Mr. Preban testified that they had never discussed a prefabricated house with Ryan in 2000, since when they bought Lot 11 in 2000 the Prebans had no plans to build a prefabricated house— that decision came later and was never discussed with Ryan until 2002. CP 55, fn. 6. In fact, on cross-exam, Ryan himself admitted that he never saw the Prebans' building plans until 2002, some two (2) years after the draft CC&Rs had been changed to allow prefabricated homes. CP 55, fn. 6.

Secondly, Ryan had never made a distinction between a "modular", as opposed to a "prefabricated", or a "manufactured" home, until late in the trial. In his previous testimony Ryan used those terms interchangeably with reference to the Johnsons' home. CP 55.¹⁰ Through the first three (3)

⁹ This ignored the language of the recorded CC&Rs, at Art. 1, ¶ 10, which specifies that "*An exception for prefabricated homes can be considered*". Ex 21.

¹⁰ In his October 2001 Declaration in Support of Summary Judgment (Ex 71), Ryan called the Johnsons' home a "prefabricated home" five (5) times, and called it a "manufactured home" four (4) times, but never referred to it as a "modular" home. In his October 2001 Supplementary Declaration in Support of Summary Judgment (Ex 72), Ryan called the Johnsons' home a "modular home", and also called it a "manufactured

years of litigation, and through Alpine's first two (2) attorneys, no such distinction was made. This was apparent in both of the declarations Ryan filed in support of Alpine's 2001 motion for summary judgment in 2001 (Ex 71. Ex 72), and also in Ryan's 2002 deposition testimony (CP 55. CP 460-62), where Ryan used the terms "modular", "prefabricated" and "manufactured" interchangeably in describing the Johnsons' home.

And third, Ryan specifically admitted in his 2002 deposition that the Johnsons were talking to him about a "modular" home on April 22, 2000 (when the earnest money was signed) when they showed him the TLC package. As Mr. Ryan recalled in his 2002 deposition about the discussion he had with the Johnsons on April 22, 2000,

"Mr. Johnson assured us that he would put one in, and it would be of the quality where it wouldn't --- you wouldn't be able to tell it was a *modular home*." CP 462.

9. Finally, Alpine's last position as to whether "modular" homes could be allowed was expressed near the end of trial in answering a hypothetical question from the trial court. Ryan said that even if the Johnsons' home looked exactly like a stick-built home, with cedar siding, he would still object to it anyway. CP 56.

And when the Johnsons' home was finished it was indistinguishable from a stick built home with cedar siding in the view of both Ginger Townsend, Alpine's realtor, and the trial court. CP 56.

As the trial testimony revealed all these changing positions as to whether a modular home would be allowed, it is most illustrative to

home". Both documents were drafted by Alpine's attorney Steve Andersen. Ryan also referred to the Johnsons' home both as a "modular" and a "prefabricated" home in his August 2002 deposition. CP 462-63. (then represented by attorney Dack).

compare Alpine's position # 4 and # 6 to positions #7, # 8 and # 9. They are totally opposite.

First, Ryan admitted in his declarations and in his deposition that he had told the Johnsons on April 22, 2000 that a prefabricated home *and a modular* home would be allowed if it was indistinguishable as a prefabricated home *or modular home* (positions # 4 and # 6).

Then Alpine told the trial court in its opening statement (March 2004) that the CC&Rs absolutely banned all prefabricated homes of any kind (including modular homes) (position # 7).

Later in the trial (May 2004), Alpine's theory changed again with the new "modular" versus "prefabricated" distinction, arguing that the CC&Rs recorded on May 18, 2000 (Ex 63) and on June 9, 2000 (Ex 21) included changes to allow exceptions for certain "prefabricated", but not "modular" homes (position # 8).

Then near the end of trial, Ryan answered the trial court's hypothetical question by saying that even if a modular home appeared to be stick built and was indistinguishable as a modular it would still not be acceptable. (position # 9).

Weiss went even further than Alpine's position # 9. He testified that *all* prefabricated homes (not just modulars) were essentially mobile homes, or "trailers, without the wheels", and thus all were objectionable under the CC&Rs. CP 56.

(D) The "Modular" vs "Prefabricated" Distinction Was a Last Minute Fabrication of Alpine and Weiss-Millers' and Indicative of Their Bad Faith

The new distinction made late in the trial between "prefabricated"

and “modular” homes was Alpine and the Weiss-Millers’ attempt to *redefine* the CC&Rs late in the trial to create a violation. All the experts had testified that a modular home is just one type of prefabricated home. CP 57. But rather than admit this, Alpine and Weiss-Miller decided to draw this new distinction which made sense only to themselves, and was even contrary to their own prior testimony.¹¹

Before the last days of trial (May 2004), neither Alpine nor the Weiss-Millers had ever recognized such a distinction. It was as if Ryan and his third (3rd) attorney (Mr. Knappenberger) had forgotten that Ryan himself had called the Johnsons’ home a “prefabricated” home in his 2001 Declarations, and that in his October 2001 deposition Ryan specifically admitted that he had told the Johnsons on April 22, 2000, the day the earnest money was signed, that they could place a “modular” home on the lot. CP 58. CP 460-62.

While Steven Weiss had sought to support the distinction between a “modular” versus a “prefabricated” home at trial, he did not really need to. After all, Weiss had testified at trial that all prefabricated homes were objectionable, no matter what they were called, and that in his view the Johnsons’ home was basically a “trailer”. CP 58.

But Weiss had not even reviewed the recorded CC&Rs until long after he filed suit. CP 58. CP 495-96. Weiss did not know that the recorded CC&Rs allowed some prefabricated homes, because he never

¹¹ After first supporting Alpine’s distinction between a “modular” and a “prefabricated” home at trial, even Weiss-Millers’ trial counsel finally agreed with the experts, admitting that a “modular” home is a type of “prefabricated” home, and that the only relevant distinction in the statutes is between a “modular” and a “manufactured” (or mobile) home, not between a “modular” and a “prefabricated” home. CP 57.

read them— at least not close enough to see the provisions allowing prefabricated homes.¹²

The trial court specifically found that the parties had never distinguished between a “prefabricated” and “modular” home, and that the change in the CC&Rs allowing exceptions for “prefabricated” homes was made on behalf of the Johnsons, not the Prebans, as Alpine had falsely claimed. CP 55 fn. 6, CP 57. It was clear to the trial court that late in trial Alpine and the Weiss-Millers were attempting to create a distinction that did not exist in order to claim that the Johnsons’ home was in violation of the CC&Rs.

(E) Vinyl Siding Was Not Prohibited By Alpine Until After Weiss Complained

This Court in Cause No. 32153-0-II agreed with the trial court that, as a matter of law, vinyl siding was not prohibited by the CC&Rs.

Alpine itself did not initially consider the Johnsons’ horizontal lap vinyl siding to be prohibited by the CC&Rs. When the Johnsons’ modular home first arrived in February of 2001 Steven Weiss complained to Ryan about the vinyl siding. Ryan did not tell Weiss then that the vinyl siding was prohibited by the CC&Rs. Instead, Ryan told Weiss the vinyl siding would appear nice when the house was finished. CP 66. CP 502-05.¹³

¹² Weiss had seen only the draft unrecorded CC&Rs, which absolutely banned all prefabricated homes of every kind. Even at the time of his March 2003 deposition Weiss did not know that the recorded CC&Rs had modified the draft CC&Rs he had seen in order to remove the absolute ban on prefabricated homes. CP 58. CP 495-96.

¹³ Judge Reynolds was also reminded that, at trial, Weiss first said he could not remember whether he objected to Ryan about vinyl being a violation of the CC&R’s, but on cross-exam, when confronted with his deposition testimony, he did remember complaining about it to Ryan. CP 66.

Thus, Alpine did not initially act as if it believed vinyl siding was prohibited. And Ryan was correct when he told Weiss that the Johnsons' vinyl siding would look fine when the home was completed. In fact, from just viewing the Johnsons' home, neither Alpine's own realtor, Ginger Townsend, nor the trial court could tell that the horizontal lap vinyl siding was not made of cedar. CP 66.

Yet, by the time of trial, Ryan told the trial court that even if the Johnsons' vinyl siding did look exactly like cedar to him, he would still object to it anyway. CP 66.

Again, no valid purpose could have been served by Alpine and the Weiss-Millers' attempt to enforce the secret CC&R prohibition on vinyl siding. Ryan and Weiss had described to the trial court that this should be a subdivision of "high class homes" and "exclusivity", but these concepts were not mentioned in the CC&Rs, nor to the Johnsons when they bought their lot. CR 66. Under the rule of *Riss v Angel*, and *Day v. Santorsola*, reading restrictions into the CC&Rs that are not there, and then seeking to enforce those restrictions, constitutes bad faith.

Though this Court agreed with the trial court that, as a matter of law, vinyl siding was not prohibited, it is also important to note the trial court also ruled that Alpine was estopped to claim that the Johnsons' vinyl siding was prohibited – even if the CC&Rs were to be read as Alpine and the Weiss-Millers had wished. This was because Alpine totally ignored its own responsibility to give the Johnsons reasonably timely notice to comply

with its secret prohibition on vinyl.¹⁴ Thus, even if the CC&Rs were interpreted to read as Alpine *now* reads them, Alpine knew, or should have known, that the Johnsons' home would be clad with vinyl siding long before the modular units arrived. Alpine had ample time to object, but did not do so in a timely. The Weiss-Millers waited even longer, not bringing their suit which also alleged vinyl siding violated the CC&Rs until two (2) years after the Johnsons had moved in, even though the Weiss-Millers had purchased their lot in 2000. And while it would obviously have caused great damage to the Johnsons if they were required to change the vinyl siding, there was virtually no countervailing benefit to Alpine or the Weiss-Millers. The trial court could properly conclude that this was not fair dealing and was not a CC&R violation pursued in good faith.

(F) Claim that the Johnsons' Home Violated the CC&Rs For Not Having The Required Square Footage

Alpine's Complaint and the Weiss-Millers' Complaint both alleged

¹⁴On Remand, the trial court was reminded of the evidence that:
(1) On April 22, 2000, Ryan was told about the vinyl siding, and was shown the TLC materials list that specified the vinyl siding. CP 67.
(2) He had also reviewed the materials list in Sept. 2000 at Johnson's office. CP 67
(3) He reviewed the materials list again in September 2000, and he had the opportunity to review the blueprints that specified vinyl siding, which were always at the site after October 2000 and Johnsons had invited Ryan to review them there. CP 67-68
(4) Ryan never asked for the blueprints until January 2001. Even then, when Brett Johnson offered to bring him a copy then, Ryan refused them. Finding of Fact No. 11.
(5) The Johnsons would have incurred a \$25,000 loss to replace the vinyl siding with cedar siding. CP 68.
(6) Ryan never asked what type of siding would be used. Cp 68.
(7) Ryan admitted that he never told anybody that vinyl could not be used. In fact, he told Weiss the Johnsons' vinyl siding would look nice when the house was finished. CP 501-05.
(8) If Ryan ever had a question or any curiosity at all about the siding, he could have merely asked the Johnsons at any time since the April 22, 2000 earnest money was signed. But he testified that he did not do that either. CP 68.
(9) The Johnsons' horizontal lap vinyl siding was indistinguishable from horizontal lap cedar siding.

that the Johnsons' home violated the CC&Rs in not having the required square footage. CP 285. CP 407- 408. The CC&Rs require two-story homes to be at least 1,800 sq. ft. in total, with a minimum of 900 sq. ft. on the first floor. Ex 7. (Art. 2, ¶ 2). The undisputed testimony was that the Johnsons' house is 3,472 sq. ft., with 1,736 sq. ft. on the top floor, and with 1,736 sq. ft. in the daylight basement, and that it clearly complied with the requirements stated in the CC&Rs. CP 68-69.

Weiss admitted on cross-exam that he had never checked the measurements, and that he had no knowledge or basis for bringing that claim. Instead, he relied only on his "best estimate" of the square footage by viewing the home from the road before filing that claim, and only on cross-examination at trial did he learn that he was incorrect. CP 69.

Alpine was aware of the size of the home since April 22nd of 2000, as it was discussed when Ryan met with the Johnsons that day, and that Ryan had also admitted seeing plans in September of 2000 that showed the Johnsons' main floor would be 1,736 sq. ft., with a 1,736 sq. ft. daylight basement underneath, *and that he then approved that plan as "close enough"*. CP 69. CP 471. Ryan was asked on cross-exam why Alpine had sued the Johnsons over this, since they were so obviously in compliance, and since Alpine had admittedly approved the square footage in September of 2000. Ryan's only answer was to blame his first attorney for including that claim in the Complaint. CR 69.

Nevertheless, the claim that the Johnsons' home violated the CC&Rs because it did not have the required square footage was never withdrawn before trial by either Alpine, or by the Weiss-Millers. CP 69.

(G) The Claim that the Johnsons Created Erosion Control Problems

The Skamania County inspector, Marlon Morat, testified that he never found any erosion control problems at all at the site. CP 58. And even though the major excavation activities had occurred in October and November of 2000 (which Ryan even took pictures of), Ryan never complained about any erosion control concerns until after the top portions of the home arrived in February of 2001. CP 58.

In June 2001 (after the suit was filed) Alpine hired engineer Wyrauch to make a report on erosion conditions on the Johnsons' lot due to its alleged concern about erosion control on the Johnsons' property. But Wyrauch testified on cross-exam that there had never been any erosion damage due to the Johnsons' construction activity, nor evidence of any blockage of a culvert that Alpine had complained of. CP 59. Ryan also had to admit on cross-exam that there was never any erosion damage caused by the Johnsons activities. CP 58. CP 465. CP 479-481. Nevertheless, Alpine tried to bill the Johnsons for the engineer's report anyway. CP 59.

That Alpine and the Weiss-Millers made a major issue of the alleged erosion control violations at trial, but had not made any such complaints while those excavation activities were actually taking place was an indication of their bad faith. And even after it was clear that no erosion problem existed, and that no damage had ever been done, they continued to litigate this issue. That was further indication of their bad faith.

(H) Claim that the Placement of the Garage Violated the CC&Rs

The garage was rotated a full 90° from what the initial plans

showed in the TLC package. This change was made at Ryan's request. CP 65. In his deposition, Ryan admitted that he had agreed to this very positioning when he and Johnson discussed it on February 12, 2001, the very day the first half (1/2) of the modular home arrived,

Q. Did you talk to Mr. Johnson about it, then?

A. Yes. And I asked to see his plans, and he took me to his pickup and showed me the plans.

Q. And what was said about that?

A. That was the first time I had seen where the garage was going to be placed on the plans. And I told him that he couldn't have the garage facing the road.

Q. Was that later changed?

A. We discussed that, yes.

Q. Was it later changed to not face the road?

A. It was changed. Well, it still faces the road, but it doesn't come in from the front.

Q. So that is objectionable now, the garage location.

A. It's objectionable, *but I agreed to it.*" CP 485-87.

So after Ryan specifically approved the placement of the garage with the 90° change of direction, the Johnsons laid the garage foundation, and then had it stick-built in accordance with the positioning that Ryan admittedly had approved. Yet, at trial, Alpine argued that the Johnsons were in violation of the CC&Rs for placing the garage in that very manner. CP 430. The garage opens perpendicular to the front road, and the trial court found that the house did not "directly face the road". CP 65.

Alpine and the Weiss-Millers both waited until trial to assert that the positioning of the garage was a CC&R violation – they did not even include that claim in their Complaints. Yet they spent much time trying to convince the trial court that the Johnsons had violated the CC&Rs for placing the garage in the exact position that Alpine had approved in February 2001. CP 65-66.

(I) Claims of Road Damage

Ryan admitted that he never witnessed the Johnsons' equipment damaging the road, and that he never complained to the Johnsons about any road damage until after Alpine had filed this lawsuit. CP 70.

Alpine's expert witness on the "road damage", Mr. Sullivan, testified on cross-exam that the only "road damage" he witnessed after the Johnsons' house was placed was the normal movement of gravel that one would expect when building a house on this type of gravel road that Alpine had built. CP 70-71. This was just another claim brought without any notice or complaint made to the Johnsons at the time of the alleged occurrence, and with no evidence of any damage.

(J) Blockage of the Culvert

Alpine also complained about alleged blockage of the culvert on the Johnsons' side of the driveway culvert. Johnsons' side of the culvert was not blocked, but to cool Ryan off, Johnson had a special concrete catch basin built for their end of the culvert. This was the only catch basin ever built in the subdivision. At trial, the Johnsons' end was still clear, but Alpine's end of that same culvert was mostly blocked, as were all the culverts on Alpine's lots and other owners lots, none of which had the catch basins that Alpine demanded that Johnsons build. CR 69-70. Ex 107. Ex 108. Again, Alpine alleged a problem that did not exist, and the CC&Rs were being selectively applied only to the Johnsons.

(K) Claim that the Johnsons Did Not Have a Licensed and Bonded Contractor

Both Alpine and Weiss-Miller spent considerable time at trial

claiming the Johnsons had violated the CC&Rs because they allegedly did not have a licensed and bonded contractor on the project, and were hiding this from the county and bank. CP 71.

The Johnsons did have a licensed, bonded contractor, BMD Construction, Inc. (BMD). BMD did a considerable amount of work in addition to supervising the work the Johnsons were doing themselves. The county building inspector, Marlon Morat testified that the Skamania County building department knew of this arrangement. CP 71.

Riverview Bank was also specifically aware that Brett Johnson was going to do much of the work himself, with BMD's supervision. This was shown in the bank's appraisal, Exhibit 103¹⁵, which documented this arrangement and the bank's knowledge and approval of it. Notably, *Alpine objected to the admission of Ex 103*, as it proved that there was a licensed, bonded general contractor supervising the project, and that nothing was hidden from Riverview Bank, or Skamania County. *Alpine* wanted the trial court to believe that the Johnsons were hiding this, but Riverview Bank's own records proved just the opposite. CP 71-72.

¹⁵ The Riverview Bank appraisal that *Alpine* objected to being introduced into evidence (Ex 103) showed that the bank knew full well that Brett Johnson would be handling most construction - "*Owner (Johnson) to handle all draws and overseeing Building*", and that the licensed "*Builder*" (BMD) would be merely signing as general contractor, and reviewing each completed portion for code compliance. Ex 103, page 16.

There was another reason *Alpine* did not want Ex 103 in evidence. At trial, *Alpine* had claimed that the Johnsons had not even picked a house plan until late in the summer of 2000, therefore, *Alpine* argued, the TLC package with the materials list, could not have been shown to Ryan on April 22, 2000. CR 67, Ftn 12. However, the TLC documents, including the materials list, were submitted to Riverview Bank when the Johnsons applied for a construction loan on April 26, 2000, just two (2) business days after signing the earnest money agreement. Ex 8. The materials list, the floor plan and the elevations, showed up as exhibits to Riverview Bank's loan appraisal, which was delivered back to the bank in June of 2000. Ex 103 (at pages 12, 23, 24). That appraisal, at page 18, also shows that on May 12, 2000, TLC gave the final bid price for the house to Brett Johnson. Ex 103. CR 67, Ftn 12.

As usual, neither Alpine nor the Weiss-Millers complained of this during the construction of the home. CP 72. And neither Alpine nor the Weiss-Millers had ever investigated the truth of their claims. If they had even bothered to look at the building permit they would have notice that it was taken out by BMD, a license, bonded general contractor. CP 72. Instead, they waited until trial to claim that the Johnsons were in violation of the CC&Rs for not having a licensed, bonded contractor. Once again, without investigating the facts, they pursued a bogus claim – and once again, their complaint was made too late to have responded to, had it actually been a valid claim.

(L) Claim the Value of the Johnsons' Home Was Too Low for Homes in the Subdivision

The Johnsons' house was the first completed in the subdivision (2001), completed about two (2) years before the Prebans' (May 2003). No other homes were completed by the time of trial in 2004. Yet Alpine and the Weiss-Miller argued at trial that the Johnsons' home was substandard for the community and did not fit in with what they saw as the "exclusive" nature of the subdivision. Alpine's own realtor, Ginger Townsend, testified that there were no promotional materials or ads which suggested a minimum price range for houses to be considered appropriate, and that the promotional materials advertised only the prices of the lots themselves, not the minimum characteristics for homes. CP 71.

But by Alpine's and the Weiss-Millers' own internal assessments, the Johnsons' home was substandard for the neighborhood. So they again read into the CC&Rs restrictions that were not there– by inserting into the

CC&Rs their own concepts of “exclusivity” as well as homes that were “higher end”. But these requirements that were nowhere stated in the CC&Rs. As *Riss v. Angel*, and *Day v. Santorsola* hold, where the CC&Rs do not contain a certain prohibition, a suit or action filed which tries to read such prohibition into the CC&Rs is an action filed in bad faith.

(M) Claims of CC&R Violations for the Condition of the Property and Landscaping

The Johnsons’ landscaping was completed on time. The front yard grass and shrubs were planted within a couple months after the garage was completed, although planting grass in the backyard was put off until early 2002, after the backyard upper decks were completed. CP 70. CP 381-86.

At trial, Ryan tried to make a negative comparison of the Johnsons’ landscaping with that of the Prebans, the only other homeowners in the subdivision at the time of trial. Ryan had falsely testified that the Prebans had planted grass and shrubs within the first 50 feet of their house, when it was clear even from pictures that Ryan took himself that that was not true. CP 70. Ex 76. The Prebans never did plant any grass or plants, as they favored a more natural look, without any grass, and the Johnsons also thought the Prebans’ place looked nice that way. CP 70. Ex 105. The trial court was reminded on remand that Ryan’s false testimony was given in an attempt to draw a distinction against the Johnsons, who actually had planted grass and shrubs. CP 70. Ex 76.

Alpine and the Weiss-Millers both argued that the Johnsons’ lot was untidy and not properly maintained. Yet the Weiss-Millers’ vacant lot had been full of tall noxious weeds ever since they bought it and up to the

time of trial, and the lots that Alpine still owned were full of noxious weeds and large, old, dry brush piles that had been there for years, even up to the time of trial. CP 70. Ex 109. Alpine had even left its large backhoe on a lot it still owned in full view for months, without using or moving it, even after it had filed this suit complaining about the Johnsons' bulldozer. Ex 110. The Johnsons' concern again was that Alpine complained only about the upkeep and landscaping of their lot, and applied standards that were unreasonable considering that they were still under construction. CP 70.

(N) Alpine and Weiss-Millers Defense Regarding Ambiguous CC&Rs

Alpine and the Weiss-Millers seem to argue in their Amended Brief of Appellants that bad faith cannot be shown because the CC&Rs *that Alpine created* are so ambiguous and confusing that nobody really knows what they mean. Apparently they were just trying them out on these folks. But it was their frantic zeal to enforce their own ambiguous CC&Rs that has put the Johnsons through more than six (6 years of litigation – *all* because they built a nice home that the trial judge and *even Alpines' own realtor* could not tell wasn't stick built with cedar siding from viewing it.

As the trial court said on remand, recalling his visit to the premises during the time of trial,

“....I was requested to go up and view the site.

And when I did so, I was astounded at why these complaints were even made. As I said on the record, I believe that this was a good looking house, that could not be, in my untrained eye, and in the eye of the realtor, who is more trained than I am, could not even tell this house from a stick built house. Nicely located on the lot, nice landscaping around it, the kind of house that would fit in, that I think anybody would be pleased to live next to. And, then I came back here and I just again could not really believe why this lawsuit was even brought originally, and certainly why there would be so many other issues thrown into this thing, other than what the original complaint was as to whether or not this modular or

prefabricated house could be built.” RP 43-44.

(O) Alpine’s Assistance In Weiss-Millers Post-trial CR 60 Motions Was Further Evidence of Alpine’s Bad Faith

Months after the trial, Alpine (Ryan) and the Weiss-Millers attempted to present the trial court with “newly discovered evidence” to justify the Weiss-Millers’ CR 60 motion for relief from judgment. CP 72. Their efforts here show once again their desperate attempt to conjure up a CC&R violation out of nothing. Part of this “newly discovered evidence” concerned allegations in Ryan’s February 5, 2005 post-trial affidavit that “*Recently, I have observed . . . accumulating debris.....*”. CP 589-92. This allegation of *post-trial* matters had nothing to do with the 2004 trial. Furthermore, it was also untrue. CP 597-600. Ex 109. CP 72.

Then there was the “newly discovered evidence” of “*activities as an unauthorized car dealer*”. These were allegations Weiss and Alpine had been trying to work up more than ten (10) days prior to the end of the trial (May 26, 2004). It was the subject of a May 17, 2004 letter to the Oregon Dept. of Transportation from Alpine’s attorney, Mr. Alan Knappenberger, looking to establish evidence of unlicensed car dealing. Weiss-Millers CP 577-88. This exercise in pure speculation did prove that for some time before the trial ended Alpine and Weiss had already begun their search for “*activities as an unauthorized car dealer*”. Weiss’s affidavit indicates he was the instigator of that speculation. The trial resumed ten (10) days after Knappenberger’s letter, yet this issue was never mentioned at trial by either Ryan or Weiss. CP 73.

The Weiss-Millers’ Memorandum supporting their CR 60 motion for

relief from judgment had less than two (2) pages concerning the “newly discovered evidence” that there “...*may* be new evidence of Mr. Johnson’s violation of the CC&Rs.” CP 514-35. In addition to the Knappenberger letter, Weiss’s speculation was supported by his “internet research”, and e-mail received. CP 577-88. It also proved nothing. But to Weiss, what he had “*ascertained*” from all this, was that “.. *several of the vehicles parked at the Johnson residence were not held in their names*” and therefore “...*Mr. Johnson may be an unlicensed auto dealer*”. CP 578.

Brett Johnson’s Affidavit proved this was not true. All the vehicles were all for the personal use of Brett and Teresa Johnson, and their daughter and son, and they all had Washington plates by the time of the CR 60 hearing. CP 597-600. The trial court understandably could not be too concerned with the Johnsons parking their own family cars in their own driveway.

The Weiss-Millers’ wild speculations, supported by Alpine, were based only upon their assumptions, and wishes, that a couple of cars with temporary tags in the Johnsons’ driveway must mean that there is an illegal car lot there. The Weiss-Millers failed to establish any reasonable suspicion as to the truth of these allegations. And they failed to show that they, or Alpine, had ever questioned, made any demands upon the Johnsons, or even notified the Johnsons that they believed they may be involved in activities considered to be in violation of the CC&Rs. If Alpine, or the Weiss-Millers, had actually bothered to ask anybody about that, they might have found out the truth. But they did not make that effort. Rather, they eagerly ran to Skamania Superior Court with their

misinformation in an attempt to prove some kind of CC&R violation as a basis for their CR 60 motion – once again without any investigation actually seeking the truth, and without asking any questions, or giving any prior notice, or even making any complaint to the Johnsons.

(P) Brad Anderson's Letter Regarding the Mediation IS Further Proof That Alpine's Subsequent Litigation Was In Bad Faith

That Alpine's action was filed was in bad faith is also confirmed by Exhibit B to the Declaration of Emmelyn Hart-Biberfeld, the March 14, 2001 letter from mediator Brad Anderson memorializing the mediation session. CP 41-43. It was sent to Alpine, to Alpine's attorney (Tim Dack), and to the Johnsons just six (6) weeks before the suit was filed by Alpine. As one might expect of a mediator offering to further assist in settlement talks, Brad Anderson's letter had nice words to say about each party. But it discussed only pre-litigation matters. It does not prove that Alpine was reasonable in later filing this lawsuit. In fact, it proves just the opposite.

The important point that Exhibit B confirms is that just six (6) weeks before filing suit, and *after* the Johnsons had already moved in, Alpine had accepted the Johnsons' house as being in compliance with the CC&Rs in all respects, with only two (2) issues to be reserved, those being (1) the positioning of the stick-built garage, which was still to be built, and (2) the vinyl siding. As Mr. Anderson states in his March 14, 2001 letter,

"This confirms that Terry [Ryan], on behalf of Alpine Construction, is satisfied, except as noted below, that the development of the home and other improvements is, so far, consistent with the subdivision's covenants, conditions and restrictions (CCR's) and that he has now received the necessary information and documents about the development. Terry also indicated that he is satisfied that if the Johnsons are in compliance with the County's requirements under the Uniform Building Code and the

Geotech's Report that he is also satisfied. The parties were also able to work out the issue with regard to the maintenance of the site and the subdivision road during construction. In short, Alpine has no objections, except as will be noted in the following paragraphs, to the Johnsons' continuing to progress towards the completion of their home consistent with their building application and permit. *The only two issues left to be resolved* are: (1) the position of the garage (i.e., whether the garage door should face northeast or northwest); and (2) the material to be used for the siding." CP 41-42.

The Johnsons did position the garage in the exact manner Ryan had approved. Thus, Exhibit B confirms that just before Alpine filed its lawsuit it had acknowledged that the Johnsons' home was in compliance with the CC&Rs in every respect, reserving only the issue of the vinyl siding. And this was after Alpine (Ryan) had already told Weiss that the vinyl siding would be fine when the house was completed. CP 66. CP 501-05.¹⁶

Yet, Alpine later went forward with its lawsuit, claiming the Johnsons were in violation of all those other matters for which Alpine had just told Brad Anderson (and Weiss) the Johnsons were in compliance with. Exhibit B is just further confirmation of the bad faith exhibited by Alpine.

On remand the trial court recalled how this case was prosecuted, beginning its discussion of the numerous claims the plaintiffs had made, "However, when I did sit on this matter at the time of trial, I do remember well, I had to go back and sort of search my memory and look back at my notes, I was really astounded at the pettiness of the plaintiffs." CP 41.

(5) The Trial Court's Attorney Fee Award Was Reasonable Under the Lodestar Standard

¹⁶ Judge Reynolds was also reminded that, at trial, Weiss first said he could not remember whether he objected to Ryan about vinyl being a violation of the CC&R's, but on cross-exam, when confronted with his deposition testimony, he did remember complaining about it to Ryan. CP 66, Ftn. 11.

The Johnsons' Memorandum In Support of Findings and Conclusions on Remand reviewed the fee request submitted by the Johnsons at the conclusion of the trial and the trial court's ruling regarding the attorney fee issues.

After the trial, the Johnsons submitted with their motion for an award of attorney fees the Supplemental Statement for Attorney Fees For Defendants, which included as "Exhibit A" the detailed, itemized account showing the actual time, the dates, the type of services, and the hourly rates charged for those services. CP 75-77. CP 604-614. Appendix B.

The trial court considered the motion and oral arguments on the Johnsons' attorney fee request, and on July 16, 2004, after a 1½ hour hearing, found that (1) the fee petition was sufficiently itemized, (2) that the requested hourly rate of \$150/per hour was lower than usual in this area for this type of case, and was under the norm, and (3) that the number of hours expended was reasonable given the complexity and how it was pursued. CP 75-76. The trial court noted that, although the case was set for three (3) days of trial, Alpine had not even rested its case after three full days (March 28th, 2004), so the trial had to be continued to May 24, 2004. It ended on May 26, 2004, after six (6) full days of trial. CP 77.

The trial court also offset from the Johnsons' fee request the discounts the Johnsons' had received from their attorney and were not actually requesting from Alpine, and secondly, another offset for Alpine's claimed attorney fees incurred on the counterclaim that Johnsons chose not to pursue. Thus, from the \$53,685 statement of fees, the net judgment against Alpine was \$47,705. CP 39. CP 76.

Alpine failed to prove that there were any “duplicate fees” charged. The trial court was aware that the Johnsons had extra fees due to Alpine’s shenanigans after trial¹⁷, and that the Johnsons’ attorney fees did not include all the actual time spent preparing for the first trial date. CP 77.

The trial court’s original decision discussed these factors and the lodestar analysis in determining that the attorney fees requested by the Johnsons were reasonable. CP 76. However, due to the lack of formal written findings of fact and conclusions of law on attorney fees, this Court ruled “we remand the award to the trial Court to develop such a record.”

The Weiss-Millers made no objections to the attorney fees, and should not be afforded that opportunity now. CP 76.

On remand the Johnsons cited the same Exhibit A to Supplemental Statement for Attorney Fees For Defendants. This was the original July 2004 contemporaneous record filed with the court that detailed the attorney fees requested and was compiled from the actual billings themselves. CP 39-40. CP 75 -77.¹⁸

Alpine and the Weiss-Millers now complain that (1) the trial court on remand did not rule on the reasonableness of the Johnsons’ fee request, and that (2) the Supplemental Statement For Attorney Fees For Defendants

¹⁷ Even after the Court’s ruling, and *after* a hearing for attorney fees and form of judgment had been set, the Johnsons were swamped with Alpine’s last minute and untimely requests for production, subpoenas, and notices for depositions of the settlement judge, the mediator, and Brett Johnson, all on one (1) or two (2) days notice, and on issues that were not related to the fees requested. The Johnsons had to file a *post-trial* precautionary protective order regarding those requests, notices and subpoenas. CP 76.

¹⁸ Supplemental Statement for Attorney Fees For Defendants is included in the Appendix B.

did not contain “contemporaneous” time records.

In fact, on remand Alpine and the Weiss-Millers told the trial court those matters were not proper issue on remand, stating at page 8 of their Response In Opposition to Defendants’ Motion for Order and Reply In Support of Motion Pursuant to RAP 7.2 that

“The Johnsons improperly try again to revise history by seeking to supplement this Court’s previous findings of fact and conclusions of law on attorney fees. Johnsons’ Mem. at 31: Johnsons’ Prop. Ord. Granting Supplemental Findings at 2-3. Yet the focus on remand is *not* the reasonableness of attorney fees. *Instead, the Court of appeals limited the issue on remand to a determination of whether Alpine or the Weiss-Millers acted in bad faith.* Alpine, at *1 (“Because we do not have a record of whether Alpine and/or the Weiss-Millers acted in bad faith in bringing their claims at trial,..., we remand the award for an entry of findings of fact and conclusions of law.”) Accordingly, the Johnsons’ argument on reasonableness is inappropriate on remand and the Court should disregard it.” CP 263

So Alpine and the Weiss-Millers failed to squarely address either of these issues on remand, other than to object to these issues being raised at all. And neither Alpine or the Weiss-Millers raised any challenge to the contemporaneousness of the time records at the trial, or in anything they submitted to the trial court on remand. They should not be able to argue these issues for the first time on this appeal.

When this “contemporaneous” issue was first raised in oral argument at the remand hearing, the Johnsons reminded the trial court that this issue of contemporary billings had been addressed at the July 16, 2004 hearings, but not because the billings were challenged then on that particular basis. Alpine’s counsel at the time (Knappenberger) had speculated, incorrectly, that the billings shown in Supplemental Statement For Attorney Fees For Defendants might have been paid by someone else, and not actually been

charged to the Johnsons. The Johnsons corrected Alpine as to that false premise, and in the process showed that the Supplemental Statement For Attorney Fees For Defendants was an accurate record of the actual billings that had been sent to the Johnsons. CP 39-41. So that same document that was submitted in July 2004 in support of the Johnsons' request for reasonable attorney fees award and was resubmitted on remand had already been established as the contemporaneous record of the actual fees and charges, and the trial court knew that to be so. The Johnsons did not recreate this July 2004 document that was already in the trial court file in order to stick a 2007 "contemporaneous" date on it.

In any event, the Supplemental Statement For Attorney Fees For Defendants, submitted to the trial court in July 2004, was established as the contemporaneous record, and was also a sworn statement of the actual fees charged and the time spent and the services rendered. The Weiss-Millers did not object it, or to the attorney fee award at all in July 2004. And Alpine did not then challenge that this was not the contemporaneous record, since it was a compilation of the actual billings that Alpine's attorney (Knappenberger) had received copies of to prove that the billings had actually been sent to the Johnsons. CP 39-41.

At the October 12, 2007 remand hearing, on the issue of the reasonableness of the attorney fees, the trial court stated,

"...I had previously addressed this issue, and other arguments as far as the reasonableness of the attorney's fees, considering the amount of time that was involved in this case, the amount of preparation that was involved, I have reviewed Mr. Hughes attorney fee billing, and I have found them to be appropriate under the Lodestar method, I think he had accounted for his hours appropriately, and it is sufficient specificity to satisfy the Court that his attorney fees are reasonable." RP 44 - 45.

The trial court then made its written findings of fact and conclusions of law that the attorney fees requested by the Johnsons were reasonable, again applying the lodestar standard, finding that,

- (a) the hourly rate charged of \$150.00 was under the norm for this area,
 - (b) the amount of time spent in defending the case was reasonable considering the complexity of the case and how it was prosecuted by Alpine and the Weiss-Millers,
 - (c) that no duplicate fees were charged,
 - (d) that the fees were sufficiently itemized for the work performed.
- CP 269-70.

The trial court on remand also applied the same offset from the Johnsons' fee request that were made on July 16, 2004. First by the discounts the Johnsons' had received from their attorney and were not actually requesting from Alpine, and secondly, another offset for Alpine's claimed attorney fees incurred on the counterclaim that Johnsons chose not to pursue. Thus, from the \$53,685 statement of fees, the net judgment was again \$47,705. CP 52.

Alpine and the Weiss-Millers failed to squarely address these issue at the remand hearing, believing that the reasonableness of the Johnsons' fees were not at issue on remand. They certainly failed to prove that the trial court was incorrect in any of these findings, or had abused its discretion in determining that the requested attorney fees were reasonable.

(6) Johnsons Are the Prevailing Parties

This Court's prior decision clearly states that the Johnsons are the prevailing parties and that they would be entitled to their attorney fees at trial and on appeal if the trial court found on remand that Alpine and/or Weiss-Miller acted in bad faith in bringing their actions, even though this Court did find that storing the bulldozer was a CC&R violation.

Thus, this Court adopted the ruling in the *Riss* and *Day* cases, where the prevailing party is the party which substantially prevails, not the party that wins every point of the litigation. The Court of Appeals in *Riss v. Angel*; 80 Wn. App. 553; 912 P.2d 1028, 1996, found that even though Risses did not win on every claim, they were the substantially prevailing party, and thus entitled to their attorney fees, stating,

“Here, the trial court concluded that the Risses were the prevailing parties on all material issues because the litigation centered around their right to build the home for which they sought approval. The case did not turn on the validity of the covenants, an issue on which the homeowners prevailed. The court also concluded that, although the Mercia homeowners had the right to control exterior finish, *that aspect of the litigation was a minor issue* and had no significant impact on the expense of the trial.” *Riss v. Angel*; 80 Wn. App. at 564

On review, the Supreme Court affirmed this point in *Riss v. Angel*, 131 Wn.2d 612, 934 P.2d 669 (1997), where it ruled,

“The homeowners also point out that under the covenants attorney fees are awardable only to a prevailing party. *They argue that they are substantially prevailing parties because the trial court upheld the validity of the covenants and their decision that plaintiffs had to change the exterior finish of the proposed structure from Dryvit to some natural material acceptable to the homeowners.*

...In general, the prevailing party is one who receives an affirmative judgment in his or her favor. [cite] If neither wholly prevails, then the determination of who is a prevailing party depends upon who is the substantially prevailing party, and this question depends upon the extent of the relief afforded the parties.[citations] “Plaintiffs will essentially be able to build the house they sought to have approved. The trial court correctly concluded that [sic] Plaintiffs are prevailing parties. ”

As stated in *Day v. Santorsola*, 118 Wn. App. 746; 76 P.3d 1190 (2003), using the “substantially prevailing party” test set out in *Riss*,

“The trial court concluded that the Days were prevailing parties and therefore entitled to an award of attorney fees. The Committee argues that this was error because the Days did not prevail on their claim for damages and because the Committee prevailed on other matters, such as whether it must approve the revised or compromise plans.

...The issue under the covenants is whether the Days’ lawsuit was a

“successful action.” It is reasonable to apply by analogy *case law* construing “prevailing party” to determine whether the Days were successful. Under that case law, the trial court’s conclusion was correct. In *Riss*, the covenants provided that the prevailing party was entitled to an award of attorney fees.

...As in *Riss*, the trial court allowed the Days to build a house *nearly in accordance* with the house they sought to have approved. The Days were thus the substantially prevailing parties and their action can fairly be called “successful” even though they did not prevail on their claim for damages. The trial court properly awarded them attorney fees pursuant to the attorney fee provision in the covenants.” *Day* at 769-70

As was discussed above, the Johnsons prevailed on all 11 issues at trial, and on 10 of 11 issues on appeal. Thus, on appeal, there was only one minor victory for Appellants, the bulldozer issue. There was so little time spent on that issue it would be highly impracticable, if not impossible, to determine an allocation of any attorney fees specific to that issue. The Johnsons spent virtually no time on it and *no attorney fees were charged associated with that issue* (RP 40). The Johnsons spent their time on more important issues— they were trying to save their home, and not be forced to relocate it twice. The bulldozer was going away anyway when all the construction and final landscaping was done. And the Johnsons prevailed on the construction and landscaping issues for which the bulldozer was used. Where the issues and evidence on the defenses of the various claims are so interrelated or there is no practical way to make a division, the courts do not make a deduction in the attorney fee award. *Kastanis v. Educational Employees Credit Union*, 122 W2d 483, 865 P2d 507 (1994); *Blair v. WSU*, 108 W 2nd 558, 740 P2d 1379 (1987); *Sing v. John L. Scott*, 83 Wn App 55, 920 P2d 589 (1996).

Alpine and the Weiss-Millers want this Court to believe that there were other “victories” for them based on other “violations” that would not

have been corrected save for their complaints. Those are empty claims that nobody bothered to develop a record on, because those claims were never at issue. If they had been, Alpine and the Weiss-Millers' proof would have been just as empty as on the claims that were tried. But those other issues were never tried. There certainly were no findings that the Johnsons had violated any other CC&Rs. Whatever Alpine and the Weiss-Millers may have claimed regarding the other "violations", the trial court noted that those claims were not part of this suit, and so whatever those unspecified claims were "Many of these have been corrected prior to trial, **and are not at issue**". CP 10. This Court must look to the entire record, but not to issues that were never tried.

F. JOHNSONS REQUEST THEIR ATTORNEY FEES ON APPEAL

Should Johnsons prevail on this appeal, they request an award from the Court of Appeals for their reasonable attorney fees for both appeals, per the terms of the CC&Rs (Article 4 , ¶ 5), this Court's prior rulings and pursuant to RAP 18.1 (fees on appeal allowed to a party if authorized by applicable law).

G. CONCLUSION

The trial court had more than substantial evidence before it that Alpine and the Weiss-Millers acted in bad faith in pursuing the claims of CC&R violations.

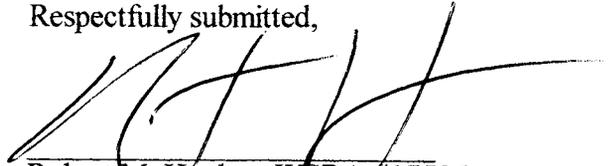
The trial court did not abuse its discretion by awarding the Johnsons the attorney fees it found to be reasonable under the lodestar standard.

The trial court's order granting the supplemental findings of fact and conclusions of law and its final judgment should be affirmed.

The Johnsons should be awarded their reasonable attorney fees
incurred on the appeals.

Dated this 30th day of July, 2007.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. Hughes', is written over a horizontal line.

Robert M. Hughes, WSBA #17786
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DECLARATION OF SERVICE

On said day below I had served by U.S. Postal Service a true and accurate copy of the following document: Amended Brief of Respondents in Cause No. 35536-1-II, to the following:

Philip A. Talmadge
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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: July 30, 2007, at Vancouver, Washington.



Robert M. Hughes, WSBA #17786
Attorney for Respondents Brett and Teresa Johnson

DECLARATION OF SERVICE