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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 36572-3-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

ALDON ABERS and INESE ABERS, Appellant

and

FAWN LAKE MAINTENANCE COMMISSION, Respondents.

RESPONDENTS' TRIAL BRIEF

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ORIGINAL

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I. RESPONSE TO ASSIGNMENTS OF ERROR.

1. The Order Re: Partial Summary Judgment entered on February 12, 2007, granting partial summary judgment to the Plaintiff, Fawn Lake, was proper.

2. The Order Re: Motion for Summary Judgment on Remaining Claims of Fawn Lake entered on June 4, 2007, granting further relief to Fawn Lake was proper.

II. RESPONSE TO ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The governing documents of the Fawn Lake community make it clear all assessments are to be on a per lot basis as those lots were originally configured.

2. The obligations created by the governing documents are a servitude which runs with the land which cannot be unilaterally modified by a homeowner.

3. A "Declaration of Parcel Combination" does not eliminate, legally, either lot, and the lots remain two separate and distinct lots.

4. The Abers were on notice that their "Declaration of Lot Combination" was ineffectual for any purpose other than to allow siting of a residence across the common lot line.

5. No evidence exists from which a court could conclude the Abers talked with anyone authorized by Fawn Lake to commit Fawn Lake to anything, nor would any reliance thereon have been reasonable. The only evidence submitted by Abers was untimely, self-serving hearsay, which also violated the Statute of Frauds, properly objected to, and was inconsistent with Abers' prior assertions.

6. The decisions of Fawn Lake regarding the assessments of Abers were reasonable and proper, and within the sound discretion afforded to homeowners' associations.

7. Homeowners within Fawn Lake had a reasonable right to rely on the original scheme of development and not have it unilaterally changed in such a way as to shift financial burdens onto them which had been previously imposed on the Abers and others like them who are multiple lot owners and who have combined them or might seek to combine them.

8. The attempted actions of Abers, which they promote in this appeal, have the affect of unilaterally altering the contractual relationship between the parties without any notice to Fawn Lake or any opportunity for them to be heard.

9. The award of costs and attorney's fees was proper and should be awarded on appeal.

III. STATEMENT OF THE CASE

Fawn Lake is a planned unit development governed by a homeowner's association with a board of directors. CP 238-240.

As is the case with all homeowner's associations, funds are required to sustain the organization. Fawn Lake has it's own water system and private roads. It is gated and provides security. It has a private lake which it also maintains. CP 239.

Fawn Lake was developed in the 1960's, mainly in 1966 and 1968, with seven principle divisions. It has 510 lots. While each division has separate governing documents recorded, the documents are virtually identical for each division. CP 238-240.

Fawn Lake's budget for 2006, was $223,681.00. That budget was funded by assessing each lot an equal share. CP 239, 241.

Over the years, a number of owners have "combined" lots (what this means may vary depending on specifically what process is utilized). In each instance, the Board has determined the obligation to pay dues is unaffected and each lot is assessed based upon the original configuration of the development. Over the years, twelve owners have combined lots. In each case a determination was made, and the lot owners advised, that each lot still had to pay assessments for all lots. All complied. CP 241, 252-263.

In 1998, the Abers did a "Declaration of Parcel Combination" for two lots. CP 248-250. At the time of the submittal of the declaration they were advised, in writing, by Mason County of the following:

> "Once a DPC has been recorded the property owner will no longer be required to observe the affected property line(s) in regard to site development. The DPC does not affect the number of lots the applicants own or the number of water assessment fees, etc., assigned to a given lot. In many plats easements on all interior property lines are reserved for utility and drainage purposes. In such cases, the easements will have to be removed through a public hearing process prior to a DPC being recorded". CP 229-231.

After the declaration was recorded, the Abers refused to pay assessments from Fawn Lake for the second lot. CP 241-242. Fawn Lake advised them this was unacceptable and consistently assessed them for both lots. CP 241-242. They continued to refuse to pay. CP 241-242 (in addition, attention would be directed toward the significant correspondence at CP 132-210).

This litigation ensued. CP 564.

The Abers argue, in their Statement of the Case, that they had communication with Fawn Lake regarding this lot combination prior thereto, acted thereon, and were treated as a single lot owner for a period of time thereafter. That recitation of facts is not supported by the record. Fawn Lake will argue, in more detail below, that while the evidence submitted was inadmissible, it was also not as characterized by the Abers.

Fawn Lake has 107 lots in some form of common ownership. CP 241, 252-263. Were they all to be combined, and only one assessment paid, instead of 510 lots paying dues, only 455 would. CP 241. The assessments previously paid by those 55 lots would have to be paid by the remaining lot owners, causing a 12% increase in those assessments, with other possible lot combinations to follow with like effect over the years. CP 241.

Fawn Lake's governing documents consist of covenants, which are labeled "Declaration of Protective Restrictions (CP 264-268), Declaration of Charges, Assessments, and Liens" (CP 269-274) (hereinafter referred to as Covenants), Articles of Incorporation, and By-Laws. CP 275-492. These documents are lengthy, set out in the clerk's papers, and discussed at length in Fawn Lake's brief submitted to the Superior Court. CP 496-523. This lengthy and complete submittal was done to address the possible argument

that applicable provisions had changed over the years since we are discussing a nine year time frame. This argument was not made to the trial court, and therefore a complete discussion of all provisions is not made herein. It is only made by Abers before this court as it relates to attorney's fees, discussed below.

Article I, Section 1, of the Covenants provides:

> "Lots 1-135, inclusive, Fawn Lake, Division No. 6, according to the plat thereof, shall be subject to such charges, assessments and liens as shall from time to time be imposed by the commission ...". CP 269.

Section 3, thereof, provides:

> "Charges and assessments by the Commission shall be levied in equal proportions against each and every lot, ...". CP 270.

The assessments are implemented by Fawn Lake's by-Laws which provide, at Chapter 8, Section 1:

> "... the Board of Trustees shall be authorized to determine and levy from time to time charges and assessments against each and every residential lot." CP 466.

Chapter 8, Section 2,(b), provides that:

> "Charges and assessments shall be determined and levied in equal proportions against each and every residential lot, ...". CP 466.

The numbering of various By-Law sections has changed over the years, but the language remains intact.

Both parties moved for summary judgment. The trial court denied the Abers' Motion and granted Summary Judgment to Fawn Lake, and thereafter subsequently determined the amount owed, including costs and attorney's fees. CP 75-77, CP 5-8.

The trial court based its holding on three considerations:

1. Fawn Lake is entitled to assess based upon the lots as originally configured.
2. The Abers could not unilaterally modify their contract with Fawn Lake.
3. Fawn Lake and the other owners relied on the original configuration of Fawn Lake in agreeing to the payment of dues as such. RP 30-32.

IV. ARGUMENT

A. THE STANDARD OF REVIEW IS DE NOVO. HOWEVER, THE TRIAL COURT DECISION MAY BE AFFIRMED ON ANY BASIS.

Fawn Lake agrees with Abers view of the de novo standard of review, but would add that this court may affirm the trial court decision on any basis supported by the record. Int'l Brother of Elec. Workers Local Union No. 46 v. TRIG Elec. Constr. Co., 142. Wash.2d 431, 434-35, 13

P.3d 622 (2000).

B. THE ACTIONS OF GOVERNING BODIES OF HOMEOWNER'S ASSOCIATIONS ARE TO BE UPHELD UNLESS ARBITRARY, IN VIOLATION OF PUBLIC POLICY, OR ABROGATE SOME FUNDAMENTAL RIGHT.

Unless otherwise restricted, the governing bodies of homeowner's associations, through their inherent power, through the power granted them under the governing documents thereof, and under the authority granted under RCW Chapter 64.38, et. seq., have the authority to make determinations regarding all aspects relating to payment of dues and assessments, including the amount, manner and method of payment, and conditions relating thereto so long as their discretion is exercised reasonably. The Fawn Lake Maintenance Commission has for some 35 years or more maintained that lot combinations will not relieve a homeowner from paying full dues on lots as they were originally configured and as anticipated by the original developer. CP 241.

Homeowners' associations are subject to RCW Ch. 24.03, the Washington State Nonprofit Corporation Act; and RCW Ch. 64.38, the Washington State Homeowners' Association Act. The Nonprofit Corporation Act is more general. The more recent (1995) Homeowner's Association Act provides specifically for powers of homeowners'

associations, with checks and balances on those powers. In addition, case law provides direction regarding the powers of homeowners' associations, and limitations on those powers.

The single best non-statutory discussion of the powers of homeowners' associations, including case law and secondary sources, is the Supreme Court decision in Riss v. Angel, 131 Wn.2d 612, 627-33, 934 P.2d 669 (1997). The general facts in Riss v. Angel were common: a board denied approval of a building permit application. The specifics were uncommon as the board, according to the court's opinion, acted arbitrarily and capriciously. The board argued that it was immune from liability because it had acted in good faith. *Id.*, 131 Wn.2d at 627. The Supreme Court ruled that the test is of reasonableness, not simply good faith, *id.*, and what happened in that case was unreasonable.

The board of directors also argued that the business judgment rule should apply. After a thorough discussion of the rule, *id.*, 131 Wn.2d at 631-32, the court concluded, whether or not the business judgment rule should apply, the reasonableness test did apply, and it, by itself, compelled the court's ruling against the members. *Id.*

Two seminal cases which explain this reasonableness test are Hidden Harbor Estates, Inc. v. Norman, Fla.App. 309, So.2d 179 (1975), and

Hidden Harbor Estates v. Basso, Fla.App., 393 So.2d 637 (1981).

In the first case, a homeowners' association board of directors had passed a rule prohibiting the consumption of alcoholic beverages in the clubhouse. The court ruled that while reasonable minds might differ on the subject, as long as the decision was reasonable, it otherwise was not arbitrary and capricious, and therefore sustainable. The court recognized that by belonging to such an association, "...each owner must give up a certain degree of freedom ...", and that such an association can be more restrictive then might exist outside the association. In other words, a homeowners association may be more restrictive than government can be.

The second case clarified further. It stated there actually were two tests. The first applies to covenants running with the land. In that case, there is a very strong presumption of validity arising from the fact of constructive agreement, and actions will only be set aside when they are,

> "... wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional right."

In fact, a "certain degree of unreasonableness" is permitted.

The second category of cases is when a policy is not mandated by the covenants but by the board directors. In that case, the rule of reasonableness applies.

The present case is a hybrid between the two. The covenants at

Fawn Lake permit assessments and provide they are on a per lot basis, anticipating it is on the lots as originally configured. That would certainly be the reasonable expectation of other owners who would bear the financial brunt of lot combinations by having their assessments increased. Consequently, the determination of the Fawn Lake Board is, in fact, their interpretation of the existing covenants. Therefore, it is very arguable Fawn Lake's decision here falls into the first category, which strengthens its argument even further.

The result is a rule that requires, at the most, a degree of reasonableness, and, at a minimum, can be unreasonable as long as it is not wholly arbitrary. This is not inconsistent with the present state of Washington case law. See also Heath v. Uraga, 106 Wash.App. 506, 512, 24 P.3rd 413 (2001). See, RCW 64.38.025, setting out the standard of care by reference to RCW Ch. 24.03 (good faith belief in best interest of corporation, ordinarily prudent person, RCW 24.03.127).

If a homeowners' association meets this test, it can exercise those powers enumerated in RCW 64.38.020, which includes the following:

Unless otherwise provided in the governing documents, an association may:

(1) Adopt and amend bylaws, rules, and regulations;
(2) Adopt and amend budgets for revenues, expenditures, and reserves, and impose and collect assessments for common

expenses from owners;

(3) Hire and discharge or contract with managing agents and other employees, agents, and independent contractors;

(4) Institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more owners on matters affecting the homeowners' association, but not on behalf of owners involved in disputes that are not the responsibility of the association;

(5) Make contracts and incur liabilities;

(6) Regulate the use, maintenance, repair, replacement, and modification of common areas;

(7) Cause additional improvements to be made as a part of the common areas;

(8) Acquire, hold, encumber, and convey in its own name any right, title, or interest to real or personal property;

(9) Grant easements, leases, licenses, and concessions through or over the common areas and petition for or consent to the vacation of streets and alleys;

(10) Impose and collect any payments, fees, or charges for the use, rental, or operation of the common areas;

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

(12) Exercise any other powers conferred by the bylaws;

(13) Exercise all other powers that may be exercised in this state by the same type of corporation as the association; and

(14) Exercise any other powers necessary and proper for the governance and operation of the association.

Clearly, the governing documents and statute provide the board has the authority to exercise the powers of the association, including the powers

to set dues and assessments, lien delinquent accounts, and foreclose the same. The Fawn Lake Board of Directors, therefore has the power to follow a policy for imposition of assessments so long as the decisions are reasonable, nor wholly arbitrary.

Lot owners such as the Abers certainly have the right to challenge Fawn Lake's exercise of its discretion in these matters. However, a lot owner's remedies in such matters do not include withholding payment of assessments. "Lot owners' remedies are limited to making their wishes known to the association, casting their vote, and seeking declaratory relief if the association acts beyond its authority. Lot owners are not permitted to compound the Association's problems by unilaterally withholding assessments … ." Panther Lake v. Juergensen, 76 Wash.App. 586, 591, 887 P.2d 465 (1995).

The interpretation of such covenants (and restrictions) was discussed at length in Riss v. Angel, 131 Wn.2d 612, 934 P.2d 669 (1997). The rules for interpreting such covenants support the interpretation of Fawn Lake that its Covenants mean the homeowners' association charges are intended to apply to all of the original lots. According to the court, its "primary objective in interpreting restrictive covenants is to determine the intent of the parties. In determining intent, language is given its ordinary and common

meeting. The document is construed in its entirety. The relative intent, or purposes, is that of those establishing the covenants." *Id.* 131 Wn.2d at 612 (citations omitted). The court in Riss v. Angel added significantly to these canons of interpretation: "The court will place 'special emphasis at arriving at an interpretation that protects the homeowners' collective interests.'" *Id.* (citation omitted). This rule came out of a long history of decisions from courts in Washington and other states that struggled with principles of strict construction, and favored free use of land over restrictive covenants. The court in Riss v. Angel recognized that restrictive covenants "have been particularly important in the twentieth century when the value of property depends in large measure in maintaining the character of the neighborhood in which it is situated." *Id.*, 131 Wn.2d at 623, citing to Joselyn v. Pine River Dev. Corp., 116 N.H. 814, 367 A.2d 599, 601 (1976).

Certainly, the interpretation of the covenants that has been made by Fawn Lake, to assess all "platted residential lots" in the development as originally platted, even if two contiguous lots are combined, "protects the homeowners' collective interests."

The right to demand payment of the charges levied carries with it an obligation on the part of the commission to exercise the discretion vested in it fairly and within the scope of the corporate functions outlined in its charter

and bylaws. Abers, as members of the commission are bound by a sound exercise of that discretion. Panther Lake Homeowner's Ass'n v. Juergensen, 76 Wn.App. 586, 589, 877 P.2d 465 (1995). Lake Limerick Country Club v. Hunt Mfg. Homes, Inc., 84 P.2d 295 (2004).

In exchange for the benefits of an association with other owners, property owners agree to be bound by the reasonable decisions of the association. Shorewood West Condominium Ass'n v. Sadri, 140 Wn.2d 47, 992 P.2d 1008 (2000).

It is clear from a reading of the covenants and by-laws of Fawn Lake that the obligation to pay attached to "each and every residential lot". CP 269, 270, 466. The Abers assert that the term "lot" has not been defined in the governing documents. In fact it has. A lot is defined by Article I, Section I of the Covenants as being "Lots 1-135, inclusive, Fawn Lake Division No. 6, according to said plat thereof ...". CP 269.

The lots were defined by the plat. The plat has never been altered. As will be discussed below, the obligation as to each lot attached at the time of formation as to the lots in existence at that time.

It has been the position of Fawn Lake that the obligation could not be changed by the unilateral act of an owner to the detriment of the other owners. That position is not only not arbitrary, it is reasonable and therefore

the decision of Fawn Lake must be upheld.

C. THE OBLIGATION TO PAY ON BOTH LOTS AS ORIGINALLY CONFIGURED ATTACHED AT THE TIME OF FORMATION.

This case could be viewed as analogous to Brown v. Voss, 105 Wash. 2d 366, 715 P.2d 514 (1986). In that case a party had an easement across another parcel to access a county road. The dominant estate acquired a parcel adjacent to the first and attempted to use the same access to benefit that parcel.

The court held that was not permissible as the benefit only accrued to the first parcel and that benefit could not be expanded to the second parcel.

In the same view, Abers has a right to use two lots, to use Fawn Lake roads and water to benefit those lots. In exchange the Abers are obliged to pay for that benefit. By combining the lots and not paying an assessment for the second lot, the Abers seek to extend the benefits accruing to the first lot to the second lot in the same way. The dominant estate in Brown v. Voss, sought to similarly expand the rights it had. The rights and obligations appurtenant to one parcel are not appurtenant to another.

An obligation to pay dues is a servitude which runs with the land. Whether it is deemed a "real covenant" or an "equitable restriction" does not

seem to be important for our purposes. It becomes binding upon the lot (in our case, as to each lot, a distinction which should not be lost) upon the initial sale of the property after development. Lake Limerick Community Club v. Hunt Mfg. Homes, Inc., 120 Wn.App. 246, 84 P.2d 295 (2004).

The obligation attaches and is an effective lien from the time of it's initial recordation, not from the time monies become due. John M. Kelch, Inc. v. Don Hoyt, Inc., 4 Wn.App. 580, 483 P.2d 135 (1971).

D. THE "DECLARATION OF PARCEL COMBINATION" DID NOT ALTER THE PLAT AND HAD NO LEGAL EFFECT.

The property in question is a part of a recorded plat and is therefore governed by the provisions of RCW Chapter 58.17 et. seq. Plats may not be altered without following the procedures set for in RCW 58.17.215, which requires notice to all owners within the subdivision, a public hearing, approval of a majority of owners within the subdivision, and approval of the legislative body of the jurisdiction, in this case, Mason County. None of these acts occurred.

RCW 58.17.215, provides:

Alteration of subdivision – Procedure.

"When any person is interested in the alteration of any subdivision or the altering of any portion thereof, except as provided in RCW

58.16.040(6), that person shall submit an application to request the alteration to the legislative authority of the city, town, or county where the subdivision is located. The application shall contain the signatures of the majority of those persons having an ownership interest of lots, tracts, parcels, sites, or divisions in the subject subdivision or portion to be altered. If the subdivision is subject to restrictive covenants which were filed at the time of the approval of the subdivision, and the application for alteration would result in the violation of a covenant, the application shall contain an agreement signed by all parties subject to the covenants providing that the parties agree to terminate or alter the relevant covenants to accomplish the purpose of the alteration of the subdivision or portion thereof.

Upon receipt of an application for alteration, the legislative body shall provide notice of the application to all owners of property within the subdivision, and as provided for in RCW 58.17.080 and 58.17.090. The notice shall either establish a date for a public hearing or provide that a hearing may be requested by a person receiving notice within fourteen days of receipt of the notice.

The legislative body shall determine the public use and interest in the proposed alteration and may deny or approve the application for alteration. If any land within the alteration is part of an assessment district, any outstanding assessments shall be equitably divided and levied against the remaining lots, parcels, or tracts, to be levied equitably on the lots resulting from the alteration. If any land within the alteration contains a dedication to the general use of persons residing within the subdivision, such land may be altered and divided equitably between the adjacent properties.

After approval of the alteration, the legislative body shall order the applicant to produce a revised drawing of the approved alteration of the final plat or short plat, which after signature of the legislative authority, shall be filed with the county auditor to become the lawful plat of the property.

This section shall not be construed as applying to the alteration or replatting of any plat of state-granted tide or shore lands."

The only exception is RCW 58.17.040(6), which provides:

Chapter inapplicable, when.

The provision of this chapter shall not apply to:

. . .

> "(6) A division made for the purpose of alteration by adjusting boundary lines, between platted or unplatted lots or both, which does not create any additional lot, tract, parcel, site, or division nor create requirements for width and area for a building site;"

In order to accomplish this, a formal boundary line adjustment is required and must be accomplished in accordance with provisions of the Mason County Code.

This statute does not reference lot combinations. However, theoretically, if properly followed, a boundary line adjustment could, in effect, eliminate a lot. Boundary line adjustments are controlled by local ordinance. In 1998, Mason County provided for boundary line adjustments in the Mason County Code (MCC) at Section 16.40.40, as follows:

> "A division made for the purpose of adjusting boundary lines which does not create any additional lot, tract, parcel, site, or division which contains insufficient area and dimension to meet minimum requirements for width and area for a building site, provided that for lots within a recorded short subdivision, subdivision, nonplatted street division, or large lot subdivision, no boundary line adjustment shall be effective until:

(a) The proponent is issued a boundary line adjustment certificate from the Planning Department verifying that the proposed division conforms to the requirements of this subsection;

(b) The proponent has paid the fee prescribed by the approved fee schedule for review and issuance of the certificate;

(c) The proponent has filed an application which includes:

  (1) An adjusted legal description of the lots affected by the adjustment prepared and certified by a registered land surveyor or title company,

  (2) A scale drawing of the lots affected by the adjustment;

(d) The certificate, legal description, scale drawing, and notarized declaration have been recorded with the County Auditor by the Planning Department."

Such process required a specific application be filed for that purpose along with other requirements.

This is not what the Abers did, and therefore the plat was not changed in any way. CP 229-235. CP 493-495. Rather, the procedure used was an informal process which had the effect of allowing an owner to build across a property line which, otherwise, would not be permissible because of setback requirements.

There was no statute or ordinance in effect in 1998, authorizing this process. CP 229-234, CP 493-495. The parcels are still, legally, two parcels. This informal process was never codified until 2003, when Ord. 65-03 was passed enacting MCC 16.40.045, later amended by Ord. 128-04. CP 494.

Another reason this process cannot effect the plat relates to easements. Many plats have easements running along the common lines for purposes of utilities and, perhaps, drainage. If the discussion of the previous paragraph were not so, the right of a dominant estate holder would be impaired, unilaterally, without notice. There would be obvious constitutional issues such an interest holder would have with such a government edict, but also would be a violation of RCW 64.04.175, which provides:

> "Easements established by dedication – Extinguishing or altering. Easements established by a dedication are property rights that cannot be extinguished or altered without the approval of the easement owner or owners, unless the plat or other document creating the dedicated easement provides for an alternative method or methods to extinguish or alter the easement."

Recognizing this, Mason County advised the Abers their lot lines still, legally, existed and they continued to be subject to the easements along the common lines which could only be removed by altering the plat pursuant to RCW 58.17.217. CP 229-234.

E. NON-COMBINING LOT OWNERS RELIED ON THE ORIGINAL SCHEME OF DEVELOPMENT.

Non-combining property owners within an association acquire their

property interest in reliance on the governing documents and upon the plat as it originally existed. Such reliance has been judicially recognized. This is why, as an example, when platted streets are vacated, lots within those plats still maintain private easements over the platted roads. Capitol Hill Methodist Church v. City of Seattle, 52 Wn.2d 359, 324 P.2d 1113 (1958).

While a homeowners' association has significant discretion, it is without the power to affect the scheme of development. If a homeowners' association cannot do this, it goes without saying that an individual owner, by combining lots, cannot affect the scheme of development and thereby place a greater burden on other owners than they originally envisioned. Meresse v. Stelma, 100 Wash.App. 853, 999 P.2d 1267 (2000).

The acts of the Abers, combined with those owners who have acted similarly, and those who could have, could have the effect of shifting the obligations from those people to the other owners at Fawn Lake. Presently, over one-quarter of all lots within Fawn Lake are in that status, and potentially more could be. CP 241, 252-263. Dues for non-combing lot owners would increase 12%, and more. CP 241. In essence, the Abers are asking they be allowed to unilaterally reduce their obligation at the expense of the other owners within Fawn Lake. A party to a contract cannot just unilaterally change that contract. Tacoma Fixture Co., Inc. v. Rudd Co.,

Inc., _____ Wn.2d _____, 174 P.3d 721 (2008).

F. ANY SUCH ACTS OF THE ABERS HAS NO BINDING EFFECT ON FAWN LAKE.

Fawn Lake is not bound by the lot combination even if it were to have some legal effect. It, nor other owners at Fawn Lake, had any notice of the proceedings which the Abers now use to affect the substantive rights of the homeowner's association and its members. The relationship between Fawn Lake and the Abers is a contract based relationship. While there are additional real property attributes to the relationship, the relationship is a bilateral contract. The position of the Abers' is they should, in effect, be allowed to unilaterally change that contract. Tacoma Fixture, supra.

G. THE DECLARATION OF ABERS WERE UNTIMELY, HEARSAY, AND IN VIOLATION OF THE STATUTE OF FRAUDS.

The only facts opposing Fawn Lake's Motion for Summary Judgment were the two declarations of the Abers wherein they allege a discussion with some unknown person at Fawn Lake. Those declarations were properly objected to.

Fawn Lake filed its Motion for Partial Summary Judgment on September 29, 2006. CP 548-549. It was noted for hearing on October 30,

2006. CP 236. A supplemental declaration by Michael MacSems was filed October 17, 2006. CP 229. The parties agreed to a continuance until December 11, 2006 when the matter was heard. RP 1. CP 214-216.

Prior to December 7, 2006, no additional materials were submitted when Abers filed their Counter Motion for Summary Judgment, Memorandum Re: Summary Judgment, Declaration of Inese Abers, and Declaration of Aldon Abers. CP 108-130. Fawn Lake would candidly acknowledge these documents were faxed to counsel on December 4, 2006. Fawn Lake quickly responded and on December 7, 2006, filed an Objection to Declarations, Supplemental Memorandum, Declaration of Stephen Whitehouse, Declaration of Ted Strozyk, and Declaration of John Johnson. CP 132-225.

Fawn Lake objected to the submittals by Abers as:

1. Untimely.
2. Hearsay.
3. In violation of the Statute of Frauds.

The declarations were clearly untimely as they were filed four calendar days and two working days prior to the hearing. They were faxed to counsel seven calendar days and five working days prior to the hearing. CR 56(c), requires they be submitted eleven days before the hearing.

Hearsay is a statement by one other than the declarant offered to prove the truth of the matter asserted. ER 801(c).

The brief of Abers does not seem to assert the statement of this phantom declarant is being offered for the truth of the matter but is only asserted by way of estoppel.

Were it to be asserted as such, the only way it could be considered is under ER 801(d)(2), as an admission by a party. The rule requires:

> "(2) Admission by Party-Opponent. The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity of (ii) a statement of which the party has manifested an adoption or belief in its truth, of (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

First, it is difficult discussing any analysis as the alleged declarant's name and status are unknown.

Second, it is the duty of the offering party to establish the authority of the person to speak for the entity. W.E. Moses Land Scrip & Realty Co. v. Stack-Gibbs Lumber Co., 70 Wash. 121, 126 P. 103 (1912), Auditorium Theatre Co. v. Oregon?Washington Railroad & Navigation Co., 77 Wash. 277, 137 P. 489 (1914), Sullivan v. Associated Dealers, 4 Wn.2d 352, 103 P.2d 489 (1940), American Building & Loan Association v. Hart, 2 Wash.

594, 27 P. 468 (1891).

Third, quite obviously, in a corporate setting, any significant policy is established by the board of directors. If some person did, in fact, make any statement to the Abers, it would be a reflection of some statement or position of the board and is, therefore, inadmissible as an admission as it is double hearsay without proper foundation. Carden v. Westinghouse Electric Corp., 850 F.2d 996 (3d Cir. 1988).

The admission of any statement also contravenes the Statute of Frauds if the intent is to modify the terms of a contract.

RCW 64.04.010, requires that:

> "Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed: ..."

The covenants, as implemented by the by-laws, create an encumbrance. The effect of the assertions of the Abers is to assert an oral modification of that contract. Oral modifications of contracts required to be in writing are void. A.J. Hamilton, Inc. v. Atlas Freight, Inc., 184 Wash. 199, 50 P.2d 522 (1935), Consolidated Electrical Distributors, Inc. v. Gier, 24 Wash.App. 671, 602 P.2d 1206 (1979).

H. NO BASIS FOR ESTOPPEL OR WAIVER EXISTS, EITHER FACTUALLY OR LEGALLY.

"The very object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine and substantial, so that only the latter may subject to suit or to the burden of a trial." Hill v. Cox, 110 Wn.App. 394, 41 P.3d 495 (2002), citing Preston v. Duncan, 55 Wash.2d 678, 349 P.2d 605 (1960) (quoting Judge (later Justice) Cardoza in Richard v. Credit Suisse, 242 N.Y. 346, 152 N.E. 110, 45 A.L.R. 1041 (1926)."

Affidavits which contain unsupported conclusory statements of fact without adequate factual support are insufficient to defeat a motion for summary judgment. Guille v. Ballard Community Hosp., 70 Wn.App. 18, 851 P.2d 689, review denied, 122 Wash.2d 1010 (1993), Lambert v. Morehouse, 68 Wn.App. 500, 843 P.2d 1116, review denied, 121 Wash.2d 1022 (1993).

In the case of Hill v. Cox, 110 Wn.App. 394, 41 P.3d 495 (2002), a party denied ordering a logger to cut certain trees. The court held that sort of conclusory denial was not a sufficient basis to create an issue of material fact.

A review of the Abers' declarations show they rely on broad, unsupported, claims. CP 108-120. The extensive correspondence submitted

in evidence shows fairly clearly that the problems the Abers now face are directly related to their own recalcitrance and unwillingness to address the issues presented in a responsible fashion. CP 132-216.

Hearsay cannot be used to defeat a motion for summary judgment. Gunnar v. Brice, 17 Wn.App. 819, 565 P.2d 1212 (1977). The supposed discussion they allege with an alleged representative of Fawn Lake is hearsay.

Even if the statements were made by an authorized representative of Fawn Lake, they still are not sufficient to create an estoppel. Estoppel is not favored and must be proven by clear, cogent, and convincing evidence. Henderson Homes, Inc. v. City of Bothell, 124 Wash.2d 240, 877 P.2d 176 (1994), Gross v. Sunding, 139 Wash.App. 54, 161 P.3d 380 (2007).

The elements of estoppel are:

1. An act, admission, or statement inconsistent with a later claim.
2. Justifiable reliance.
3. Injury.

State Dept. of Ecology v. Campbell & Gwinn, LLC, 146 Wash.2d 1, 43 P.3d 4, reconsideration denied (2002).

When a contract governs the conduct of the parties, estoppel will not

lie. Spectrum Glass Company, Inc. v. Public Utility District No. 1 of Snohomish County, 129 Wash.App. 303, 119 P.3d 854 (2005).

Reliance must be reasonable. The relying party must have not been aware of the facts and had no means to discover them. Concerned Land Owner's of Union Hill v. King County, 64 Wash.App. 768, 872 P.2d 1017 (1992), rev. denied 119 Wash.2d 1008, Howard v. Dimaggio, 70 Wash.App. 734, 855 P.2d 335 (1993).

In Leonard v. Washington Employees, Inc., 77 Wn.2d 271, 461 P.2d 538 (1969), the court cited the following language with approval:

> "In order to create an estoppel it is necessary to prove that:
>
> "The party claiming to have been influenced by the conduct or the declaration of another to his injury, was himself not only destitute of knowledge of the state of facts, but was also destitute of any convenient and available means of acquiring such knowledge; and that where the facts are known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel." 11 AM. & Eng.Ency.Law (2dEd) p. 434."

No Washington case specifically discusses whether a person alleged to make a representation must have known the representation was incorrect. It is the majority view that the speaker must have such knowledge, and some states even hold proof of an intent to deceive must be shown. LeeJoice v. Harris, 404 N.W.2d 4 (Minn.App.1987); Wojahn v. Johnson, 297 N.W.2d 298 (Minn.1980); Summers v. Holder, 254 Or. 180, 458 P.2d

429 (1969); United States v. Wilcox, 258 F.Supp. 944 (N.D.Iowa1966); Faulkner v. Lloyd, 253 S.W.2d 972 (ky.1952); Production Credit Association v. Terra Vallee, Inc., 303 N.W.2d 79 (N.D.1981); Dodds v. Lagan, 595 P.2d 452 (Okl.App.1979); Rautenberg v. Munnis, 108 N.H. 20, 226 A.2d 770 (1967), appeal after remand 109 N.H. 25, 241 A.2d 375 (1968); See generally 2 Tiffany, Real Property Sec. 656 note 11 (3d ed. 1939).

In an analogous situation, there has been a shift in policy within the State of Washington by our Supreme Court. To some degree these types of cases rest on the balancing of to what degree people should be responsible for their own acts versus to what degree the courts should allow them to put the burden of their failing on someone else.

Alejandra v. Bull, 159 Wn.2d 674, 154 P.3d 864 (2007), and VanDinter v. Orr, 157 Wash.2d 329, 138 P.3d 608 (2006), stand for the proposition that reliance is not reasonable when the party asserting it has not exercised due diligence.

While the Alejandra case focuses on the economic loss rule, in addressing a fraud issue it states at page 698,

> "The "right to rely" element of fraud is intrinsically linked to the duty of the one to whom the representations are made to exercise diligence with regard to those representations." Citing Williams v. Joslin, 65 Wash.2d 696, 399 P.2d 308 (1965).

In the VanDinter case, reliance was also not found because it was not a case where the fact was such "... that it is not easily discoverable ..." by the relying party. In fact, at p.334, the court actually holds reliance is only appropriate when one party knows a material fact that is not easily discoverable by the party asserting reliance.

In this case, the Abers were put on actual notice by Mason County that they would still be subject to two sets of dues. CP 229-231.

In any such situation, estoppel is not reasonable and the Abers are bound by what a reasonable investigation would disclose.

Waiver can only occur by unequivocal acts or conduct. It will not be inferred from doubtful or ambiguous facts. Bill McCurley Chevrolet, Inc. v. Rutz, 61 Wash.App. 53, 808 P.2d 1167, review denied, 117 Wash.2d 1015 (1991). The intent to waive must clearly appear. O'Conner v. Tesdale, 34 Wash.2d 259 (1949).

The Abers would have us believe that they justifiably relied and were harmed by a self serving statement by some unnamed person over 15 years ago, that, even if existed, could not legally express the position of the Fawn Lake board.

Since the Abers cannot identify who made the statement they assert was made, and cannot with any degree of consistency advice the position of

the person who made the statement, it is impossible to evaluate to what degree any reliance on their part would have been reasonable.

The Abers assert they were treated as having one lot by Fawn Lake, but provide no proof of that. They assert Fawn Lake accepted dues for a single lot. However, the lot combination took place June 4, 1998. CP 170. By letter dated July 18, 1998, they were told they had to pay for two lots. CP 138. They stated they only received one ballot. They never requested a second ballot. CP 133.

They also, incidentally, claim they were not provides copies of recorded documents. They were, twice. CP 139, 202-204.

If the court will review the volumes of correspondence attached to John Johnson's declaration carefully, it shows the assertions of the Abers lack substance. CP 132-216.

The record shows the Abers claim to have had communication they relied on with some unnamed person at Fawn Lake between 1987 and 1992, RP 50. Yet, the Declaration of Parcel Combination was done in 1998. CP 234.

In a letter from the Abers' son, who acted for them throughout this matter, dated July 11, 1998, Fawn Lake was advised this person the Abers talked to was "the lady at the desk in the office ...". CP 52.

This exact same language was used in a letter dated March 3, 1999. CP 143.

In a letter dated August 21, 1999, the communication is now referred to as "Fawn Lake's instructions" without any specifics. CP 145.

In an undated note attached to an invoice of January 7, 2000, Mr. Abers refers to "Fawn Lake Maint. Comm's own instructions." CP 148.

In a letter dated October 14, 2000, Mr. Abers again refers generally to the Commission as authorizing this. This same reference occurs in a letter dated February 28, 2001. CP 158.

For the first time, on May 31, 2002, Mr. Abers refers to this discussion as having been with the "Fawn Lake Board". CP 172.

On June 5, 2002, Mr. Abers was advised he had provided no specifics to Fawn Lake and that no one could be found who had made such assurances. CP 173.

A good deal of the difficulty, during this period, was Mr. Abers refused to communicate with counsel for Fawn Lake despite being asked repeatedly to do so. Rather he would write to Fawn Lake directly.

This was after a total of fifteen letters had been written. CP 132-216.

Then, by declaration dated August 17, 2004, Mrs. Abers refers to a person they talked to as "... a gentleman who was representing the Fawn

Lake Maintenance Commission." CP 118.

Mr. Abers refers to this person as someone who he "believed" was the board president at the time. CP 109.

In Abers brief, this person is now referred to unequivocally as the "Board President", at p.3. Consequently, from hearsay a discussion, the substance of which occurred some 15 to 20 years ago, this person has morphed from a lady behind a desk at the office to a gentleman who was, without reservation, the President of Fawn Lake.

Fawn Lake has made what inquiry it could and can find no evidence any such conversation ever took place. CP 217-220.

After over nine years of correspondence, this is the first time the Abers ever asserted or advised that it was an actual board member and possibly the President they talked to.

Counsel would also add that in Abers' materials they suggest that somewhere, somehow, Fawn Lake changed it's policies regarding lot combinations. That is simply not the case and Abers have submitted no reference to the record establishing that fact.

I. FAWN LAKE WAS PROPERLY AWARDED ITS COSTS, EXPENSES AND ATTORNEY'S FEES.

A trial court's award of attorney's fees will not be disturbed absent a manifest abuse of discretion. The discretion is abused if it is manifestly unreasonable or based on untenable grounds or reasons, and occurs when no reasonable person would take the position adopted. Allard v. First Interstate Bank, 112 Wash.2d 145, 768 P.2d 998 (1989), Lay v. Hass, 112 Wash.App. 818, 51 P.3d 130 (2002), and Bowles v. Washington Dept. of Ret. Sys., 121 Wash.2d 52, 847 P.2d 448 (1993).

Abers argues that Fawn Lake offered up only an applicable statute as a basis for its request for attorneys fees. A review of Fawn Lake's memorandum submitted to the court will dispel that allegation. CP 91-94. Fawn Lake specifically asserted the language of its by-laws (Chapter 8, Sections 3(3) and 3(5), and Chapter 14, Sec. 6), Article II of its covenants, and RCW 64.38.050. CP 91-94. These by-law sections provide for:

"...costs and attorney's fees". Chapter 8, Sec. 3(3).

"...costs, expenses and attorney's fees". Chapter 8, Sec. 3(8).

"... all costs and expenses related thereto, ... any legal costs and fees ...". Chapter 14, Sec. 6. CP 91-94.

That discussion inadvertently omitted the language of Chapter 8, Section 1, which in all the versions of the By-laws applicable, 1998, 2000, 2001, and 2002, provides for "... cost of collection of, including legal fees

incurred." CP 364, 394, 428, 466.

Contract based fee awards fall under RCW 4.84.330. Such awards are mandatory. Singleton v. Frost, 108 Wn.2d 723, 742 P.2d 1224 (1989).

Ample authority exists for the imposition of fees.

In it's brief before the court, CP 69, Abers pointed out that Fawn Lake's trial brief only references the 2003 version of the by-laws. These were applicable to a portion of the time period in question. However, Abers failed to point out that a complete set of by-laws going back to 1971, were submitted to the court. CP 277-492. The 2001 version is virtually identical. CP 417-499. All but 1.7 hours of billed time was after that version of the by-laws was adopted. CP 83-90. The 2000 version does not have the language in Chapter 8, but does in Chapter 14. CP 378-416. The 1998 version is the same as the 2000 version. CP 357-377.

Throughout the covenants remained unchanged. They provide for an award of all "collection costs". CP 270.

The argument of Abers is disingenuous.

Abers argues the information submitted to the trial court was insufficient to support an award of fees but provides no indication of what they suggest would be adequate. Each timeline item indicates what was done during that time frame. CP 83-90, 30-38, 18-19. In addition, a good

many documents and exhibits submitted in evidence show the actual work product. See, as an example, CP 132-216. If Abers is suggesting the recitation need to provide more detail, then counsel may spend as much time justifying their fees as they do in the actual work itself.

It should be noted that while Abers generically made this argument to the trial court, CP 70-71, they never brought to the court's attention any specific item of work, charge, or hourly rate which in any way appeared inappropriate.

Washington first considered the application of what is termed a lodestar formula in Bowers v. Transamerica Title Insurance Company, 100 Wash.2d 581, 675 P.2d 193 (1983). That case addressed the issue of attorney's fees under RCW 19.86.090, and considered the holding in Linday Bros. Bldrs., Inc. v. American Radiator & Standard Sanitary Corp., 487 P.2d 161 (3d Cir. 1973).

That case recognized a two step process in developing a lodestar fee by multiplying a reasonable hourly rate to the number of hours reasonably expended, and then adjusting up or down based upon certain criteria.

The documentation need not be exhaustive or in minute detail but must show the hours worked, type of work and category of attorney who performed the work. Bowers, supra, at 597.

This was done although the category of attorney was not specifically directly addressed as, in the context of this case, it is illusory. This subject suggests the circumstances applied to the practice of law in a larger county by a large firm. It does not reflect practice in a small town such as Shelton, where Plaintiff's counsel has been a sole practitioner since 1976, and has been known to the court in one capacity or another for that entire time.

If the term category is talking about a category within a firm, that discussion simply does not apply.

In this regard, the court had a complete record of time spent to the tenth of an hour, what work each time period was for, accepted the hours billed, the hourly rate of $205.00, knowing that to be reasonable within the community, and did not adjust either up or down. The skill level involved is not anything that needs briefing or analysis because, in a summary judgment case, it is self evident from the work done. An attorney's established hourly rate will likely be considered as reasonable. Washington State Physicians Insurance Exchange & Association v. Fisons Corporation, 122 Wash.2d 299, 858 P.2d 1054 (1993).

While specific findings are the better practice, fee awards have been upheld when there is enough in the record to explain the fee award. Banuelas v. TSA Washington, Inc., 134 Wn.App. 607, 141 P.3d 652 (2006).

This would seem particularly true in a summary judgment context where the review is de novo.

The court in Bowers, supra, at 601, did note that remand was the proper remedy, if needed.

The Abers contend that they should not have to pay for Fawn Lake's attempt at serving process in Latvia.

First, Fawn Lake's efforts are inappropriately referred to as "flailing about". In fact, Fawn Lake went through a long history of frustrating attempts to address issues with the Abers to no avail. The lengthy correspondence attests to that. CP 136-216.

It is acknowledged the Abers were in Latvia during this time.

Service in foreign countries can be very difficult and expensive. In the case of Latvia, it is necessary to adhere to Chapter 1, Article 3 of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters developed at the Tenth Session of the Hague Conference on Private International Law in October, 1964 (the "Hague Convention"). This requires hiring an appointing agency in the United States to translate the documents into Latvian and to hire someone to serve process. CP_____. In Latvia, there is no such thing as process servers. You must hire an attorney. CP____. When the process server went

to serve the Abers on their farm we had located there, they were not there. Their son was. He refused to divulge their whereabouts. CP____. Consequently, Fawn Lake at that point had exercised due diligence and asked the court to allow service by mail, which motion was granted. The above information is presently not a part of the record provided by the Abers. Fawn Lake is supplementing the record.

It should be noted that Fawn Lake directly, and later through counsel, appraised the Abers of what Fawn Lake was doing, advised them it would be very expensive, and invited them to accept service. They refused. CP 173, 179, 187, 192, 196, 204, 208.

It was not until the service by mail was effected, a Motion for Default brought, and the Abers became cognizant of the rule the statute of limitation was not running while they were in Latvia, that their attempts to avoid service had no self serving benefit. CP_____. They then filed a responsive pleading. CR 552-556. While they asserted therein the issue of service of process, they have since abandoned that claim.

The Abers assert, without citation of authority, that RCW 4.89.010(2), does not permit the recovery of costs for unsuccessful attempts at service of process.

The discussion of that issue may be unnecessary as the bylaws, cited

above, provide for recovery of all expenses related to collection, in addition to costs and attorney's fees. CP 91-94. The covenants provide for recovery of all collection costs. CP 270. All monies expended in the reasonable effect to affect collection are thus recoverable.

The attempt at service was, per se, reasonable since it was required to effect substitute service. RCW 4.28.100, requires that before one may serve by publication, one must exercise due diligence, meaning an honest and reasonable effort to locate the defendants. It requires a plaintiff to "follow up" on any information. Pasena v. Heil, 126 Wash.App. 520, 108 P.3d 1253 (2005).

Plaintiff became aware the Defendants were in Latvia. They became aware of the location of their farm in Latvia. They attempted to serve them there but became aware they were not there but were elsewhere. Their son, who was integrally involved in their business, was in Latvia at the time and he refused to disclose their whereabouts.

It was at this point, Fawn Lake had exercised due diligence as they had followed their information to its conclusion. It was at this point, and not before, that Fawn Lake could effect service by mail.

As to RCW 4.84.010(2), that is a question of first impression as to whether attempts at service are permitted as costs under the statute. It is

common that process servers go to a residence several times before service is affected. This is a common occurrence and all such failed attempts are customarily allowed as costs. The attempts at service in Latvia were a prerequisite to the service by mail. Therefore, it can be stated that the costs expended on service in Latvia ultimately resulted in the Abers being served.

J. FAWN LAKE REQUESTS ATTORNEY'S FEES ON APPEAL.

Pursuant to RAP 18.1, Respondent requests attorney's fees on appeal. The basis for this request is upon the same basis as set forth in Section I, above, upon which the trial court granted fees.

V. CONCLUSION

The decision of the trial court should be affirmed in all respects and Fawn Lake should be awarded their costs and attorney's fees on appeal.

DATED this 12 day of March, 2008.

STEPHEN WHITEHOUSE, WSBA #6818
Attorney for FAWN LAKE

FILED
COURT OF APPEALS
DIVISION II
08 MAR 13 PM 1:37
STATE OF WASHINGTON
BY
DEPUTY

DECLARATION OF SERVICE

I, SANDRA L. BACA, state:

On the 12th day of March, 2008, I caused to be delivered by U.S. mail, postage prepaid to the Court of Appeals Division II and to John Frawley, Attorney at Law, 5800 236th Street SW, Mountlake Terrace, Washington 98043, a copy of the following document: RESPONDENT'S TRIAL BRIEF.

Declarant is a resident of the State of Washington and over the age of eighteen (18) years. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 12th day of March, 2008.

Sandra L Baca
SANDRA L. BACA