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**State of Washington**  
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Court of Appeals No. 52486-4-II

**IN THE COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON**

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LANA CHANEY HARMON and SUNSHINE HARMON, husband and  
wife,

Appellants/Defendants,

vs.

BENJAMIN A. THOMAS, JR. and LINDA KAE FERRIS, Co-Trustees  
of the Benjamin A. Thomas, Sr. Credit Shelter Testamentary Trust,

Respondents/Plaintiffs.

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**APPELLANTS' OPENING BRIEF**

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Cowlitz County Superior Court No. 16-2-00203-1

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## **I. INTRODUCTION**

Appellant/Defendant Lana Chaney Harmon is the owner of real property commonly known as 446 Hansen Road, Woodland, Washington (the “Property”) where she resides with her spouse Appellant/Defendant Sunshine Harmon (collectively, “Appellants”). The Property was purchased in September 2014 from Respondents/Plaintiffs Benjamin A. Thomas, Jr., and Linda Kae Ferris as Co-trustees of the Benjamin A. Thomas, Sr. Credit Shelter Testamentary Trust (“Respondents”). Respondents sued Appellants in Cowlitz County Superior Court seeking injunctive relief to enforce certain restrictive covenants pertaining to the Property. The trial court granted Respondents partial summary judgment against Appellants holding that a barn located on the Property violated the restrictive covenants and ordered Appellants to either re-clad or remove the barn. The trial court awarded judgment in favor of Respondents for attorney fees in the amount of \$21,871.94 and permanently enjoined Appellants from erecting temporary structures on the Property. This appeal follows.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court abused its discretion in awarding Respondents attorney’s fees and costs in the amount of \$21,871.94.

2. The trial court abused its discretion in granting Respondents a permanent injunction.

3. The trial court erred in granting Respondents' motion for partial summary judgment.

### **III. STATEMENT OF ISSUES RELATED TO ERRORS**

I. Whether the trial court abused its discretion in awarding attorney's fees to Respondents as against both Appellants where Respondents failed to satisfy the prerequisites for attorney's fees set forth in the restrictive covenants.

II. Whether the trial court abused its discretion in awarding attorney's fees to Respondents as against Appellant Sunshine Harmon where Sunshine Harmon was neither an owner of the Property nor a party to the restrictive covenants.

III. Whether the trial court abused its discretion in awarding permanent injunctive relief to Respondents where there was no well-grounded fear the Appellants would violate the restrictive covenants in the future and even if they did, money damages would be adequate to compensate Respondents for their loss in property value.

IV. Whether genuine issues of material fact exist as to whether Appellant's pole-barn violates the restrictive covenants.

#### IV. STATEMENT OF THE CASE

##### A. The Purchase and Restrictive Covenants

On or about September 30, 2014 Appellant Lana Chaney Harmon purchased real property of what is now commonly known as 446 Hansen Road, Woodland, Washington (the “Property”) from Respondents/Plaintiffs Benjamin A. Thomas, Jr. (“Thomas”), and Linda Kae Ferris as Co-trustees of the Benjamin A. Thomas, Sr. Credit Shelter Testamentary Trust. CP 9-12. At the time of purchase, there were no structures on the Property as Appellants/Defendants intended to construct their home. CP 215. The Property was conveyed to Appellant “Lana Chaney Harmon, a married woman, as her separate estate ...” CP 9.

The Trustee’s Deed conveyed the Property subject to certain restrictive covenants (“Restrictive Covenants”). CP 13-19. Paragraph 3 of the Restrictive Covenants entitled “Permitted Uses” stated:

Except as otherwise provided herein, no parcel or lot shall be used for any purpose other than the construction of a single-family dwelling; except that barns, garages, and recreational vehicle storage buildings shall be allowed provided that any outbuildings shall be constructed in a permanent fashion ... Any outbuilding construction shall be completed within one (1) year of the start of construction. All outbuildings must compliment (i.e. be similar to) the house style in material, color and design, which shall include siding and roofing materials.

CP 13, at ¶ 3.

Paragraph 6 of the Restrictive Covenants entitled “Temporary Structures” stated:

Mobile homes, modular homes or factory built homes of any kind shall not be allowed. No shacks, garages, barns or other out buildings of structures of a temporary character shall be used on any lot or parcel at any time. All structures must be built on a permanent foundation. Motorhomes or Recreational Vehicles may be used for limited family use for periods not to exceed ten (10) days.

CP 14, at ¶ 6.

Paragraph 13 of the Restrictive Covenants entitled “Enforcement” stated: The restrictive covenants also contained an “Enforcement” provision for attorney’s fees that provided:

The Grantor ... shall be entitled to bring any suit or action to enforce these Covenants. Should any suit or action instituted by the Grantor ... to enforce any of said reservations, conditions, agreements, covenants and restrictions, or to restrain the violation of any thereof, after the demand for compliance therewith or for the cessation of such violation, and failure to comply with such demand, then and in either of said events and whether such suit or action be reduced to decree or not, the parties instituting such suit or action shall be entitled to recover attorney’s fees in such suit or action, in addition to statutory costs and disbursements.

CP 15-16, at ¶ 13.

**B. The Pre-Suit Letters**

Immediately following the purchase, Appellants began the process of constructing their home. CP 215. They moved into a trailer on the Property in late September 2014. CP 215. They were told by Thomas that their home would not be completed within six months and that they could keep a container on the Property during construction and live in their trailer until the house was done. CP 215. Notwithstanding this statement, on October 27, 2014, Respondent Thomas sent the first of three letters to Appellant Lana Chaney Harmon stating that her use of the trailer and the parking of “multiple business trucks” violated Paragraphs 6, 7 and 8 of the Restrictive Covenants. CP 124.

Appellants responded on November 13, 2014 that they were living in the recreational vehicle while their home was being constructed, which was permitted by the Restrictive Covenants. CP 77, at ¶ 8, 126. Respondents also stated that their non commercial truck and van were discussed with Thomas prior to their purchase, that they used those vehicles to advertise their home based business and that Thomas had no issue with the vehicles but recommend they store their work trailer in their future pole barn and/or garage. CP 126. In or around September 2014 Appellants also told Thomas they wanted to build a pole barn on the

Property for storage at some point after construction of their home. CP 118. Thomas told Appellants they did not have to use the same siding as the house and that it just needed to be similar. CP 118.

The house went up quickly: after six weeks to obtain an electrical permit, the foundation was poured in January 2015 and a temporary occupancy for the home was granted in September 2015. CP 215.

The pole barn construction began in October 2015. CP 215. On October 7, 2015, the second of three letters to Appellant Lana Chaney Harmon was sent by Respondent Thomas' attorney Earl W. Jackson. CP 130-131. The October 7, 2015 letter asserted that Appellant Lana Chaney Harmon had "been living in a trailer on your property for longer than [sic] the six months allowed by the Covenants" and that "you have constructed numerous temporary structures and placed a drop box on the property for a long period of time in violation of the Covenant prohibition against temporary structures." CP 130. Respondents, however, were constructing the pole-barn in a "permanent fashion" as allowed under the Restrictive Covenants. CP 6, 13, at ¶ 3.

On December 14, 2015, the final letter to Appellant Lana Chaney Harmon was sent by Respondent Thomas' attorney Earl W. Jackson. CP 133-134. Much like the October 2015 letter, the December 14, 2015 letter asserted that Appellant Lana Chaney Harmon had "been living in a trailer

on your property for longer than the six months allowed by the Covenants” and that “[y]ou have also constructed numerous temporary structures and placed a drop box on the property for a long period of time.” CP 133. The December 2015 warned that Paragraph 6 of the Restrictive Covenants prohibited temporary structures and motorhomes and that Paragraph 8 allowed owners to live in a motorhome for six months, which Appellant Lana Chaney Harmon had exceeded. CP 133.

On December 31, 2015, Appellant Lana Chaney Harmon responded stating that Appellants had complied by removing their storage container, despite Respondent’s Thomas statement that they could have the storage during construction, which was still ongoing. CP 136. Appellant also stated that they had not exceeded the 10 day limitation for recreational vehicles and asked for Respondents to “clarify these said temporary structures in question.” *Id.*

### **C. The Trial Court Proceedings**

Respondents filed the instant action on February 23, 2016 seeking declaratory and injunctive relief naming Lana Chaney Harmo and “John Doe Harmon.” CP 4-5. The complaint alleged that Defendants were violating two of the Restrictive Covenants: Paragraph 6 pertaining to the prohibition on the erection of temporary structures and Paragraph 3 pertaining to the requirement that permanent barns “be similar to” the

house in style and material. CP 5-6. The complaint alleged “Defendants have also began construction of a pole-barn.” CP 6:1. The complaint also sought reasonable attorney’s fees pursuant to Paragraph 13 of the Covenants. CP 7.

Respondents amended the complaint on December 29, 2016, still naming Lana Chaney Harmon and “John Doe Harmon.” CP 45. The amended complaint added allegations concerning violation of Paragraph 7 of the Restrictive Covenants and also added allegations concerning the pole-barn: “Defendants have constructed a pole-barn. While such construction is permitted by the Covenants, the Defendants are building said barn with siding and roofing different in material, color, and design than the house located on the premises.” CP 46: 23-25.

Appellants answered the amended complaint denying noncompliance with the Restrictive Covenants, alleging Respondents’ approval of certain storage structures during construction, and asserting six counterclaims for, *inter alia*, removal of hay and lumber from the Property. CP 107-112.

On August 18, 2017, Respondents moved for partial summary judgment against Defendants “regarding violation of the applicable covenants and restrictions with regard to temporary structures and the siding and roofing materials used to construct Defendants’ shop.” CP 60.

At the hearing on the Respondents' motion for partial summary judgment, the court found that "the issue comes down to one sentence in the [Restrictive Covenants], all outbuildings must complement, i.e. be similar to the house style or material, color, and design which shall include siding and roofing materials, not necessarily a model of precision certainly." VRP 10:17-21. Holding that the best circumstance from defendant's standpoint was to find the provision vague, the trial court then resorted to parole evidence and found the only parole evidence was the intent of the drafter of Restrictive Covenants who had taken in the position in the past with other residents that metal buildings didn't qualify as meeting the "similar to" standard. VRP 10:22-25, 11:1-6. The trial court held that "even if that language is vague, it has to be interpreted as precluding the kind of structure that the defendants have erected." VRP 11:6-9.

When analyzing the sought injunction, the trial court then stated "the more difficult part is what do we do by way of remedy and balancing of equities." VRP 11:10-11. The trial court granted the Respondents' motion for partial summary judgment stating:

I don't think that we are in a position where there are any equities to balance. The defendants chose to build a structure knowing all the information they had and they did so at their peril. The structure doesn't have to come down, but certainly the

nonconforming parts of it have to change.  
So I will grant the motion for summary  
judgment.

VRP 11:16-23.

The Order on Respondents' motion for partial summary judgment was filed on October 25, 2017 and ordered that "Defendants are enjoined from placing temporary structures in the future on the property" and "Defendants shall re-clad the existing barn ... with roofing and siding that comply with the [Restrictive Covenants] within 150 days." CP 346-347.

On July 9, 2018 Respondents made a motion for entry of final judgment seeking a permanent injunction and \$29,627.84 in attorney's fees and costs under Paragraph 13 of the Restrictive Covenants.<sup>1</sup> CP 360-361. Citing to Paragraph 13 of the Restrictive Covenants, the motion for final judgment stated that "the covenants and restrictions provide that the prevailing party in any litigation regarding the covenants and restrictions shall be entitled to attorney fees and costs." CP 361.

The original Declaration of Respondents' attorney Matthew J. Andersen sought attorney fees in the amount of \$26,137.00 based on 88.6 hours of work at \$295.00 per hour and \$230.34 in costs. CP 377. Matthew J. Andersen later amended the declaration based on a mistake in

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<sup>1</sup> Appellants stipulated to the dismissal of their counterclaims. CP 369-374.

his previous calculations. CP 394. Matthew J. Andersen's Amended Declaration sought the reduced amount of \$23,355.94 in attorney's fees and costs ("Andersen Declaration"). CP 394-395. Earl Jackson, the attorney of record before Matthew Andersen, also submitted a Declaration seeking \$3,260.50 in attorney's fees ("Jackson Declaration"). CP 379-380.<sup>2</sup>

On August 8, 2018, Appellants filed objections to Respondents' motion for final judgment attorney fees. CP 445-450. Specifically, Respondents objected to the Jackson Declaration that sought payment of fees for an unrelated matter and charges that were unreasonable, excessive and/or duplicative.<sup>3</sup> CP. 446-447. Appellants also objected to the Andersen Declaration that sought payment of fees for an unrelated matter and charges that were unreasonable, excessive and/or duplicative. CP. 448-449. Respondents sought a reduction of \$2,027.85 in Earl Jackson's fees and a reduction of \$7,182.50 in Matthew Andersen's fees. CP 450.

Respondents then moved to strike Appellants' objections while simultaneously replying to those objections. CP 452-457.

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<sup>2</sup> Upon Respondents' motion, an order was entered on August 1, 2018 amending the caption to replace "John Doe Harmon" with "Sunshine Harmon." CP 359, 443.

<sup>3</sup> There was a separate action pending before the Washington State Human Rights Commission involving the Appellants and Respondent Thomas. CP 446:2-4.

The hearing on Respondents' motion for final judgment took place on August 29, 2018. VRP 17. The trial court reduced Earl Jackson's bill by \$1,500.00 because the court "did have a lot of problem figuring out where I was looking at Mr. Jackson's billing and eight different entries about revisions of a complaint." VRP 24:23-25, 25:1-2. As to Matthew Andersen's billing, the trial court reduced his billings by \$2,726.50. VRP 25: 3-12. This reduction was based on Andersen's time entries for matters that were unrelated to the case (\$1,726.50) and a reduction (\$1,000.00) on the motion for final judgment. VRP 25:3-9, 27:7-9.

On August 29, 2018 the trial court entered judgment against both Appellants Lana Chaney Harmon and Sunshine Harmon in the amount of \$21,871.94 "to cover Plaintiffs' attorney fees and costs, as the prevailing party, pursuant to the covenants and restrictions that were at issue in this case." CP 462. The judgment also permanently enjoined the Appellants "from erecting temporary structures on the property" and stated that Appellants were found to be in breach of the Restrictive Covenants with regard to the roofing and siding of the barn Appellants had erected but that the violation had "been abated." CP 461. This appeal followed.

## **V. STANDARDS OF REVIEW**

The final judgment awarded Respondents a permanent injunction and attorney's fees in the amount of \$21,871.94. The decision to grant an

injunction is reviewed for an abuse of discretion. *Wimberly v. Caravello*, 136 Wn. App. 327, 340, 149 P.3d 402 (2006). An award of attorney fees is reviewed for an abuse of discretion. *Berryman v. Metcalf*, 177 Wn. App. 644, 656–57, 312 P.3d 745, 753 (Wash. Ct. App. 2013)(“An appellate court will uphold an attorney fee award unless it finds the trial court manifestly abused its discretion.”)

The trial court also granted Respondents’ motion for partial summary judgment for injunctive relief. As to those claims, appellate review is de novo. *Rivett v. City of Tacoma*, 123 Wn.2d 573, 578, 870 P.2d 299, 301 (1994)(“This case is an appeal from an order on summary judgment. In reviewing such an order, this court engages in the same inquiry as the trial court. Since the relevant facts are undisputed and the trial court's decision involved only questions of law, our review is de novo.”)

## VI. ARGUMENT

### **A. The Trial Court Abused Its Discretion In Awarding Attorney Fees**

An award of attorney fees is reviewed for an abuse of discretion. *Berryman*, 177 Wn. App. at 656–57. Discretion is abused when the trial court exercises it on untenable grounds or for untenable reasons. *Chuong Van Pham v. City of Seattle*, 159 Wash.2d 527, 538, 151 P.3d 976 (2007).

“A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638, 641 (2003)(internal quotations omitted.)

“The general rule in Washington, commonly referred to as the American rule, is that each party in a civil action will pay its own attorney fees and costs. This general rule can be modified by contract, statute, or a recognized ground in equity.” *Cosmopolitan Eng'g Grp., Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 296–97, 149 P.3d 666, 669 (2006)(internal citations omitted.)

### ***1. Fees Against Both Appellants***

The award of attorney’s fees in this action was based solely on Paragraph 13 of the Restrictive Covenants. CP 51, 361. Paragraph 13 provided in relevant part that:

[s]hould any suit or action instituted by the Grantor ... to enforce any of said reservations, conditions, agreements, covenants and restrictions, or to restrain the violation of any thereof, ***after the demand for compliance therewith or for the cessation of such violation, and failure to comply with such demand***, then ... the parties instituting such suit or action shall be entitled to recover attorney’s fees in such suit or action, in addition to statutory costs and disbursements.

CP 15-16, at ¶ 13.

Thus, Respondent Grantor in this action was only entitled to attorney's fees if the action was instituted "after the demand for compliance" with the Restrictive Covenants and "failure to comply with such demand..." *Id.*

In this action, however, the Respondents' motion for partial summary judgment focused solely on the "violation of the applicable covenants and restrictions with regard to temporary structures and the siding and roofing materials used to construct Defendants' shop."<sup>4</sup> CP 60. A "demand for compliance" with regard to the "siding and roofing materials used to construct Defendants' shop" was never made by the Respondents. None of the letters from Respondents to Appellant Lana Chaney Harmon concerned the pole barn. CP 124, 130-131, 133-134. Rather, those letters dealt with the recreational vehicle on the Property and temporary structures such as a greenhouse. *Id.* As even Respondents stated, the construction of the pole barn began *after* these letters were sent and thus none of them addressed the pole barn having siding and roofing that were not similar to the home in violation of Paragraph 3 of the Restrictive Covenants. CP 62-63, 124 130-131, 133-134.

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<sup>4</sup> The words "shop", "barn" and "pole-barn" are used interchangeably in Respondents' motion. CP 60, 63, 121, 347.

Moreover, there was no “demand for compliance” and a “failure to comply with such demand” “with regard to temporary structures.” CP 15-16, at ¶ 13, 60. Appellant Lana Chaney Harmon responded to Respondents’ December 14, 2015 letter complaining of “temporary structures.” CP 133. On December 31, 2015 she wrote back to Respondents’ counsel that “[w]e have complied by removing our storage container” and asked Respondents to “clarify these said temporary structures in question.” CP 136. Respondents did not respond, they filed suit. CP 1-8.

The trial court, however, did not look to Paragraph 13 of the Restrictive Covenants when awarding attorney’s fees. Rather, attorney’s fees were based on Respondents incorrect statement that “[t]he covenants and restrictions provide that the prevailing party in any litigation regarding the covenants and restrictions shall be entitled to attorney fees and costs.” CP 361. That is not what Paragraph 13 provided. CP 15-16, at ¶ 13. Indeed at the hearing on Respondents motion for final judgment, Respondents’ counsel stated that he brought the proposed judgment “with blanks in three spots for Your Honor to fill in” ... and asked the trial court if it had any specific questions about his bill. VRP 17:8-13. The trial court responded: “No, sir.” VRP 17:14.

The trial court's award of attorney's fees in this action against both Appellants rested on "facts unsupported in the record", that the covenants and restrictions provided for attorney's fees to the "prevailing party" in any litigation. CP 361. As such, the attorney's fee award in the final judgment was based on untenable grounds and amounted to an abuse of discretion by the trial court. *See Chuong Van Pham*, 159 Wash.2d at 538. Th judgment of the trial court should accordingly be vacated. CP 460-462.

## ***2. Fees Against Appellant Sunshine Harmon***

Even if the award of attorney's fees in the final judgment was valid as against Appellant Lana Chaney Harmon, the award of those fees as against Appellant Sunshine Harmon was an abuse of discretion. Both Appellants Lana Chaney Harmon and Sunshine Harmon were named as "Judgment Debtors" in the judgment awarding attorney's fees. CP 460-462. As stated previously, the award of attorney's fees in this action was based solely on Paragraph 13 of the Restrictive Covenants. CP 51, 361. However, only Appellant Lana Chaney Harmon was the owner of the Property and a party to the Restrictive Covenants that provided for attorney's fees. CP 9-17. Lana Chaney Harmon was, in fact, the only person that initialed the Restrictive Covenants that included the attorney's fees provision. CP 17. The Amended Complaint asserts that only Lana

Chaney Harmon was the owner of the Property and only she was provided the Restrictive Covenants. CP 49-50. None of the letters that Respondents sent concerning violation of the restrictive covenants were sent to Appellant Sunshine Harmon, only Lana Chaney Harmon. CP 124, 130-131, 133-134.

In the case of Sunshine Harmon, there is no “contract, statute, or a recognized ground in equity” modifying the American rule that each party will pay its own fees and costs. *See Cosmopolitan Eng'g Grp., Inc.*, 159 Wn.2d at 296–97. Appellant Sunshine Harmon cannot be liable for attorney’s fees on violations of the Restrictive Covenants that he never was a party to. CP 9, 17. Moreover, Appellant Sunshine Harmon was never provided a “demand for compliance” that was a prerequisite for an award of attorney’s fees under Paragraph 13 of the Restrictive Covenants. CP 15-16, at ¶ 13, 60.

The trial court’s award of attorney’s fees against Appellant Sunshine Harmon in this action rested on “facts unsupported in the record”, namely that that Appellant Sunshine Harmon was an owner of the Property and party to the Restrictive Covenants that allowed for an award of attorney’s fees. CP 9, 17. As such, the attorney’s fee award as against Appellant Sunshine Harmon in the final judgment was based on untenable grounds and amounted to an abuse of discretion by the trial court. See

*Chuong Van Pham*, 159 Wash.2d at 538. The judgment of the trial court as against Appellant Sunshine Harmon should accordingly be vacated. CP 460-462.

**B. The Trial Court Abused Its Discretion In Awarding Permanent Injunctive Relief**

The decision to grant an injunction is reviewed for an abuse of discretion. *Wimberly*, 136 Wn. App. at 340. To obtain permanent injunctive relief, a party generally must establish three elements: “(a) a clear legal or equitable right, (b) a well-grounded fear of immediate invasion of that right, and (c) that the act complained of will result in actual and substantial injury” *Huff v. Wyman*, 184 Wash.2d 643, 651, 361 P.3d 727, 731 (2015). “Failure to establish any one of these requirements results in a denial of the injunction.” *Id.* Moreover, “injunctive relief will not be granted where there is a plain, complete, speedy and adequate remedy at law.” *Tyler Pipe Indus., Inc. v. State, Dep't of Revenue*, 96 Wn.2d 785, 791, 638 P.2d 1213, 1216 (1982).

The judgment here provided that Appellants “are permanently enjoined from erecting temporary structures on the property...” CP 461. In support of their motion for entry of a final judgment that included the permanent injunction, Respondents made absolutely no showing of either the second or third elements: a well-grounded fear of immediate violation of the temporary structures Restrictive Covenant or that the erection of a

temporary structure on the Property would result in “actual and substantial injury.” *Huff*, 184 Wash.2d at 651. Respondents’ counsel merely reiterated that Respondents had prevailed on their motion for partial summary judgment<sup>5</sup> which enjoined Appellants “from placing temporary structures in the future ...” CP 360. Respondents’ counsel went on, in an unsworn statement of fact, to assert that “[w]ith regard to the construction of temporary structures, Plaintiffs have on one occasion since entry of judgment been forced to demand the abatement of an ongoing violation of the court’s order. Although this violation was abated, the court should include a permanent injunction against temporary structures.” CP 361.

This unsworn statement of Respondents’ counsel making one demand for the removal of a temporary structure, *that was abated*, cannot support a finding of “well-grounded fear of immediate” violation of the Restrictive Covenant concerning temporary structures by Appellants. *See Hall v. Elliott*, 15 Wn.2d 518, 520, 131 P.2d 137, 138 (1942)(“Where injunctive relief is sought to prevent a threatened injury, it must be one that is actual and material, and not merely possible, or doubtful, or contingent.”) Nor did Respondents’ counsel unsworn statement

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<sup>5</sup> Respondents’ motion was for “partial summary judgment.” CP 61. The order deciding that motion was on “Plaintiff’s Motion for Partial Summary Judgment.” CP 346. The motion for final judgment, however, incorrectly stated that Respondents prevailed “on summary judgment ...” CP 360.

demonstrate that a violation of the Restrictive Covenant would result in “actual and substantial injury” to Respondents. *See Washington Fed'n of State Employees, Council 28, AFL-CIO v. State*, 99 Wn.2d 878, 891, 665 P.2d 1337, 1345 (1983)(denying injunctive relief to union petitioner where “petitioner fails to set forth proof of such injuries to be suffered by state employees. Nowhere in the record do we find an affidavit on behalf of any state employee who may be injured.”)

Finally, there is no allegation whatsoever that Respondents would have no adequate remedy at law without the permanent injunction. Quite the contrary, Respondents made numerous claims that the Restrictive Covenants were in place to protect property values. CP 47, at ¶ 17, 130, 133. However, “specific injuries complained of by the property owners— decreased property values and damage to bulkheads, landscaping, and other structures—may be easily compensated by money damages.” *Kucera v. State, Dep't of Transp.*, 140 Wn.2d 200, 210, 995 P.2d 63, 69 (2000), *citing Steele v. Queen City Broad. Co.*, 54 Wash.2d 402, 341 P.2d 499 (1959) (money damages adequate since owners were mainly concerned with the loss in property value.)

The trial court here entered a permanent injunction against Appellants without a finding that *any* of the elements for a permanent

injunction had been met.<sup>6</sup> VRP 17-28, CP 360-361. Moreover, the trial court did not determine - nor could it - that Respondents would not have an adequate remedy at law without the injunction. The trial court's judgment entering a permanent injunction was both based on untenable grounds and made for untenable reasons because it rested on facts unsupported in the record and applied no legal standard for the issuance of an injunction. *Rohrich*, 149 Wn.2d at 654. The judgment awarding a permanent injunction against Appellants should accordingly be vacated. CP 460-462.

**C. The Trial Court Erroneously Granted Partial Summary Judgment By Admitting Parole Evidence To Determine The Genuine Issue of Material Fact of Whether The Pole Barn Was Prohibited By The Restrictive Covenants**

In reviewing the order on partial summary judgment, the standard of review is de novo. *Rivett*, 123 Wn.2d at 578. "Summary judgment is proper only if the evidence viewed in a light most favorable to the

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<sup>6</sup> Respondents and the trial court may have erroneously believed that the order granting Respondents' motion for partial summary judgment, which enjoined Appellants from placing temporary structures on the Property, was a sufficient basis to support the permanent injunction of the same conduct. CP 347, 360-361, 461. That partial summary judgment order, however, undermined not supported the necessity for a permanent injunction. *See Nat'l Grange of Order of Patrons of Husbandry v. O'Sullivan Grange, No. 1136*, 35 Wn. App. 444, 455, 667 P.2d 1105, 1112 (1983)(reversing injunction where the invasion of a clear right was previously rectified by court order and there were "no findings supporting a well grounded fear" that the violation would occur again.)

nonmoving party shows there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c).

“[C]onstruing the evidence in the light most favorable to the nonmoving party, the court asks whether a reasonable jury could find in favor of that party.” *Herron v. KING Broad. Co.*, 112 Wn.2d 762, 767-68, 776 P.2d 98 (1989). The moving parties bear the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Any evidence the opposing party offers, and “all reasonable inferences therefrom,” are considered in the light most favorable to the non-moving party. *Young*, 112 Wn.2d at 225-26.

“A court must construe restrictive covenants by discerning the intent of the parties as evidenced by clear and unambiguous language in the document.... Only in the case of ambiguity will the court look beyond the document to ascertain intent from surrounding circumstances.” *Hollis v. Garwall, Inc.*, 88 Wn. App. 10, 15–16, 945 P.2d 717, 720 (1997), *aff’d*, 137 Wn.2d 683, 974 P.2d 836 (1999). “Context evidence is not admissible to import into a writing an intention not expressed. It is admissible solely to clarify the meaning of the written words used. The court is to declare the meaning of what the parties wrote, not what they

intended to write.” *Wimberly v. Caravello*, 136 Wn. App. 327, 336, 149 P.3d 402, 408 (2006).

Summary judgment is not appropriate where the trial court finds ambiguity in the contract language and looks to the parties’ intentions because “[a]s a general rule, we consider the parties’ intentions questions of fact.” *Wm. Dickerson Co. v. Pierce Cty.*, 128 Wn. App. 488, 492-493, 116 P.3d 409 (2005)(reversing grant of summary judgment on breach of contract claim because more than one reasonable interpretation of contract provision was possible and stating that as a general rule, the parties’ intentions are questions of fact.), *see also, Hall v. Custom Craft Fixtures, Inc.*, 87 Wn. App. 1, 9-10, 937 P.2d 1143 (1997)(“Summary judgment is not proper if the parties’ written contract, viewed in light of the parties’ other objective manifestations, has two (or more) reasonable but competing meanings.”); *Mayer v. Pierce Cty. Med. Bureau, Inc.*, 80 Wn. App. 416, 420, 909 P.2d 1323, 1326 (1995)(“Interpretation of an unambiguous contract is a question of law.”).

The Restrictive Covenant pertaining to Appellants’ pole-barn provides that “[a]ll outbuildings must compliment (i.e. be similar to) the house style in material, color and design, which shall include siding and roofing materials.” CP 13, at ¶ 3. The trial court determined that language “sufficiently vague” to resort to parole evidence of Respondents’ intent

based on their position taken with other residents in the past that metal buildings don't satisfy the standard. VRP 10:24-25, 11:2-9. The trial court then held, as a matter of law, that Respondents' pole barn violated the Restrictive Covenant based on this parole evidence. VRP 11:6-9.

Once the trial court found the Restrictive Covenant language ambiguous and sought to discern the parties' intentions, a genuine issue of material fact was created. *Wm. Dickerson Co*, 128 Wn. App. at 492-493; *Hall*, 87 Wn. App. at 9-10. The trial court clearly believed there were "competing meanings" to the Restrictive Covenant to resort to parole evidence but then impermissibly decided questions of fact, not law, when it determined the Respondents' intentions. *Id.* That Respondents may have enforced a "no metal" policy with other residents did not establish, as a matter of law, the parties' intentions when the Restrictive Covenant, as written, established no such limitation. While Respondents may have intended to prohibit metal siding and roofing on outbuildings, those were not the unambiguous written words used.

The trial court erred in awarding partial summary judgment to Respondents based on an ambiguity in the Restrictive Covenant that required the admission of parole evidence. *Id.* The parties' intentions that the trial court delved into when it admitted parole evidence was a question of fact and the question of whether the pole barn violated the Restrictive

Covenants was a genuine issue of material fact, not properly disposed of on summary judgment. *Young*, 112 Wn.2d at 225.

## VII. CONCLUSION

For the foregoing reasons, this Court should vacate the judgment entered by the trial court in its entirety and reverse the trial court's order granting Respondents motion for partial summary judgment.

Respectfully submitted this 1st day of April, 2019.

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**CERTIFICATE OF SERVICE**

I, Corey Evan Parker, certify under penalty of perjury under the laws of the United States and of the State of Washington that on April 1, 2019, I caused to be served the document to which this is attached to the party listed below in the manner shown next to their name:

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