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SPOKANE, WA 99201**

**DEC 17 2013**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 315827-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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JAMES WALTZ and MARIYLN MILLER, Appellants,

v.

TANAGER ESTATES HOMEOWNER'S ASSOCIATION, *et al.*,  
Respondents,

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On Appeal from Spokane County Superior Court  
Cause No. 11-2-02155-1

Judge Linda G. Tompkins

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**APPELLANTS' REPLY BRIEF**

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## I. INTRODUCTION

The Association's<sup>1</sup> brief fails in all respects to address the two fundamental legal principles that are at issue in this case:

(1) An association is bound to follow the express terms of its Covenants, Conditions, and Restrictions ("CC&Rs"), and the failure to do so precludes enforcement of the CC&Rs (*Mariners Cove Beach Club, Inc. v. Kairez*, 93 Wn. App. 886, 890-91, 970 P.2d 825 (1999)); and

(2) An association is bound to comply with its governing documents (such as bylaws and CC&Rs) and state law, and the failure to do so renders any action by the association or its committees invalid (*Hartstene Pointe Maintenance Ass'n v. Diehl*, 95 Wn. App. 339, 345, 979 P.2d 854 (1999)).

The Association's brief never refers to either of these cases and never makes any attempt to explain why these rules of law are inapplicable.

Ultimately, Kirk Firestone's actions on July 31, 2008—when he unilaterally declared the voting by the Architectural Committee null and void—violated the governing documents of the Association. As a result of Mr. Firestone's violation of the governing documents, the Association cannot enforce the CC&Rs against the Waltzes. *Mariners Cove*, 93 Wn.

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<sup>1</sup> Throughout this brief, the respondents may be referred to collectively as "the Association" and the individual defendants may be referred to as "the Board."

App. at 890-91. Because of Mr. Firestone's wrongful conduct, the actions taken by the Association relating to the Waltzes' residence after July 31, 2008 are invalid. *Hartstene Pointe*, 95 Wn. App. at 345.

Instead of addressing the trial court's failure to apply these undisputed legal principles to the facts of the case, the Association attempts to paint the appellants, James Waltz and Marilyn Miller ("Waltzes"), as ne'er-do-wells who simply wanted to make trouble in the neighborhood. The Association's posturing is contrary to the evidence at trial, which is that the Waltzes did everything requested of them by the Association, the Architectural Committee, and the Board. Unfortunately, the Waltzes' cooperative efforts throughout the events of 2008 have been used against them to deny them their rights under the governing documents of the Association.

In the end, the Association's arguments on appeal focus primarily on one aspect of this case—monetary liability of the individual directors—to the exclusion of the more significant aspect of this case—the invalidity of the actions taken by the Association and its Board. Regardless of the liability of the individual directors for their breaches of fiduciary duty, the trial court erred: (a) by refusing to declare the actions of the Association to be invalid; and (b) by refusing to declare that the Association's lack of

action means that the Waltzes are deemed to have fully complied with Article 9.1 of the CC&Rs in regard to their July 29<sup>th</sup> and August 2<sup>nd</sup> plans.

In the end, the Waltzes should be permitted to raise the walls on the addition a mere 1' 7", which would make the space above the garage usable and livable, without any meaningful impact on outward appearances.

## **II. ARGUMENT IN REPLY**

As a preliminary matter, the Association argues that the Waltzes have not challenged any findings of fact by the trial court. This is untrue. A number of the trial court's Conclusions of Law include factual findings that are not labeled as "Findings of Fact." The Waltzes have challenged the factual findings contained in Conclusions of Law #2, #3, #5, and #7. (App.'s Brief, p. 3, Assignments of Error #4 and #6) Therefore, these factual findings are subject to review by this Court. *See Scott's Excavating Vancouver, LLC v. Winlock Properties, LLC*, 176 Wn. App. 335, 342, 308 P.3d 791 (2013) (stating that findings of fact erroneously labeled as conclusions of law are reviewed as findings of fact).

### **A. When exercising its authority, the Board is duty-bound to follow the terms of the Association's governing documents.**

The Association argues that the CC&Rs give the Board ultimate authority to enforce the CC&Rs, and as a result, the Board can take any

action it wants, without limitation. (Resp.'s Brief, p. 25-26) However, the Association fails to cite any legal authority for the proposition that the Board can act with impunity and without any constraints or limitations. To the contrary, the law is well established that a corporation and its managing personnel are bound by the governing documents of the corporation. RCW 64.38.025(1) ("*Except as provided in the association's governing documents or this chapter, the board of directors shall act in all instances on behalf of the association.*") (emphasis added); *Hartstene*, 95 Wn. App. at 345; *Leppaluoto v. Eggleston*, 57 Wn.2d 393, 402, 357 P.2d 725 (1960).

More importantly, the argument that the Board had ultimate authority to enforce the CC&Rs ignores a key undisputed fact in this case. The undisputed fact is that Kirk Firestone, the Board's President, acted on his own and without Board approval in a number of instances, all of which violated the governing documents of the Association. As a result, Mr. Firestone's unilateral and unauthorized actions do not constitute a proper exercise of Board authority.

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**B. As to Conclusion of Law #2, the undisputed evidence established that Kirk Firestone acted without authority when declaring votes null and void on July 31, 2008.**

Under the governing documents of the Association, no individual officer or director has the authority to act on behalf of the Association. (Ex. P-03, Section VII) Rather, any action taken by the Board has to be approved by a majority of the Board at an open meeting or by the written consent of a 2/3 majority of the Board. (Ex. P-03, Sections IV and VI)

In this case, the critical event which precipitated this dispute was Kirk Firestone's action on July 31, 2008 to declare the voting of the Architectural Committee to be null and void. (Ex. P-33) The testimony of Gary Wilson, the Vice-President of the Board and the Chair of the Architectural Committee, unequivocally established that Mr. Firestone acted unilaterally and without any authority:

Q Now, the next e-mail that follows is July 31, 2008 at 3:59 p.m. Do you see that? It starts on the first page of the exhibit down at the very bottom?

A Yes.

Q It's from Kirk Firestone. Do you see that?

A Yes.

Q Now, he's just responding to you; he's not responding to the entire committee. Correct?

A Yes.

Q And it says, quote, "Gary, read your e-mail. All current votes are null and void as the AC has not been provided a complete set of plans to evaluate," closed quote. Do you see that?

A Yes.

Q Now, as of 3:59, were you still a member of the Board?

A Yes.

Q As of 3:59, were you still the chair of the Architectural Committee?

A Yes.

Q Prior to Mr. Firestone sending this e-mail, had you communicated verbally to Mr. Firestone that you were resigning?

A Not until later on when I did the e-mail.

Q Prior to this, did Mr. Firestone -- prior to his e-mail, did he contact you and tell you that you were off the committee?

A No.

Q So you didn't have any conversation one way or the other about your position as a Board member or committee member with Mr. Firestone prior to your e-mail that is Exhibit 33?

A No.

Q So since you were still a Board member as of 3:59 on July 31, 2008, was there a Board meeting where the majority of the Board voted to authorize Kirk Firestone to declare the votes of the Architectural Committee null and void?

A No.

Q Was there a written consent form generated by two-thirds

majority of the Board authorizing Mr. Firestone to declare the votes of the Architectural Committee null and void?

A If there was, I didn't see it.

Q As of 3:59 p.m. on July 31, was there a meeting of the Architectural Committee where a majority of the committee voted to turn the issue over to the Board?

A Not that I'm aware of.

(RP at 371-73; Ex. P-33) In fact, Mr. Firestone admitted that he acted without the authority from the Board or the Architectural Committee:

Q And then if you look just above that -- it starts on the previous page -- there's an e-mail from you to Mr. Wilson the same date at 3:59 p.m. Do you see that?

A Mm-hmm.

Q Is that a "yes"?

A Yes.

Q Now, this e-mail is drafted by you. Correct?

A Yes.

Q And you state, quote, "All current votes are null and void," closed quote. Do you see that?

A I do.

Q Those are your words. Correct?

A Yes.

Q Now, when you made that declaration to Mr. Wilson, you had not received any approval from other Board members to make that declaration. Correct?

A Correct.

Q There had been no Board meeting to authorize you to take that action. Correct?

A Correct.

Q There had been no written approval of two-thirds of the other Board members authorizing you to take that action. Correct?

A Correct.

Q In fact, you didn't have -- there was no vote from the majority of the Architectural Committee to have you step in and take that action. Correct?

A Correct.

(RP at 437-39) Finally, Mr. Firestone admitted in his testimony that the proper action would have been to allow the vote to proceed, and if any Committee members felt there was insufficient information to act, their remedy was to vote to disapprove of the plan:

Q Let's take a look again at Exhibit 33. Okay. Exhibit 33, again, down at the bottom, contains an e-mail from you to Mr. Wilson. Correct?

A Correct.

Q And this is the e-mail where you declare the votes null and void. Correct?

A Correct.

Q And you do state you are taking this action because the Architectural Committee has not been provided a complete set of

the plans to evaluate? Do you see that?

A I do.

Q Okay. But you didn't make any references to the fact that the chair had resigned. Correct?

A I didn't.

Q Now, you understand under the bylaws that if a committee member feels there's insufficient information, they can simply vote to disapprove the plan?

A They can.

Q That's the remedy for a committee member if they feel like the homeowner hasn't provided sufficient detail. Correct?

A Okay.

Q In fact, if we look at the architectural portion of the covenants, it simply contemplates that's an action a committee member can take. If we take a look at Exhibit 2, page 15, the very top deals with section 9.2, specification of reasons for disapproval. And the subsection 2 of that, which is 9.2.2, one reason the committee can disapprove a plan is failure to include information in such plans and specifications as may have been reasonably requested. Do you see that?

A I do.

Q So the remedy under the covenants, if there's incomplete plans, is for the committee members to vote to disapprove the plan. Correct?

A Correct.

Q If committee members feel they have sufficient information, they can vote to approve the plan. Correct?

A Correct.

Q There's nothing in here that says that the president can step in, override the majority of the committee, and declare votes null and void. Correct?

A Nope.

(RP at 473-474)<sup>2</sup>

Mr. Firestone's unilateral action on July 31, 2008 was not permitted by the governing documents of the Association. (Ex. P-03, Section VII) Furthermore, the law does not recognize the right of a single director to act on behalf of the board of directors or the corporation:

It is well settled that the power to do particular acts and the general authority to manage the corporate affairs is vested in the trustees of directors, and their acts are binding only when done as a board and at a legal meeting.

*Trethewey v. Green River Gorge, Inc.*, 17 Wn.2d 697, 727, 136 P.2d 999 (1943) (holding that an individual director lacked authority to terminate an existing contract between the corporation and an employee). Therefore, it was error for the trial court to conclude that Mr. Firestone acted within his authority when declaring the Committee votes null and void on July 31, 2008.

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<sup>2</sup> The Association's brief cites at length to opinions given by Marcia Ethridge about the interpretation of the governing documents. Ms. Ethridge was not a Board member, and she did not have personal knowledge of the Board's misdeeds. However, on cross-examination, Ms. Ethridge admitted that if a majority of the Architectural Committee felt that there was sufficient information to act on a plan, a single individual could not override the majority. (CP at 645)

To try to get around this fact, the Association argues that the Architectural Committee had failed “to function in a manner consistent with its governing documents,” thus requiring Mr. Firestone to take action. (Resp. Brief, p. 29) The problem with this argument is that the trial court made no such finding, and the Association and the Board fail to identify any evidence in the record to support this allegation. In fact, the evidence established that the Committee was following the same “reasonable” process on July 31, 2008 that it had followed in the past, up until Mr. Firestone intervened. (RP at 647- 58)

Moreover, Mr. Firestone demonstrated his disregard of the governing documents and the law by repeatedly taking action without Board approval or participation. Other examples of Mr. Firestone’s unilateral actions include his issuance of a Stop Work Order (Finding #28, CP at 824; RP at p. 285, l. 16-25; p. 286, l. 1-10), his unilateral appointment of William Murray to the Board on August 1<sup>st</sup> (Finding #45, CP at 827), his rejection of the Waltzes’ August 2<sup>nd</sup> plan (Findings #48-49, CP at 828), and his representation that the Board signed off on the final plans on August 12, 2008, despite any evidence of Board action. (RP at 496-97; Ex. P-16)<sup>3</sup>

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<sup>3</sup> The Association’s apparent expert on the CC&R’s, Marcia Ethridge, admitted on cross-examination that Mr. Firestone’s conduct ran afoul of the governing documents in a number of instances. (CP at 662-63)

**C. Findings of Fact #17.a, #43 and #48 establish that the Waltzes should be deemed to have complied with the CC&Rs due to the Committee's failure to take action on the Waltzes' plans of July 29<sup>th</sup> and August 2<sup>nd</sup>.**

The Association's defense of the trial court's Conclusion of Law #3 ignores three critical Findings of Fact. First, the trial court recognized that, under Article 9.1 of the CC&Rs, inaction by the Committee would constitute approval of any plan submitted by the Waltzes:

In the event said committee fails to approve or disapprove such design and location within thirty (30) days after said plans and specifications have been submitted to it or if no suit to enjoin the erection of such structures has been commenced prior to the completion thereof, approval will not be required and this Article will be deemed to have been fully complied with.

(Finding #17, CP at 819-20; Ex. P-02, Art. 9.1) Second, the trial court found that the Committee did not take action on the July 29<sup>th</sup> plan. (Finding #43, CP at 827) Finally, the trial court found that neither the Committee nor the Board took any action on the August 2<sup>nd</sup> plan. (Finding #48, CP at 828)

Based on the findings that the Association failed to take any action on the Waltzes' July 29<sup>th</sup> and August 2<sup>nd</sup> plans, and based on the clear and unambiguous language of Article 9.1, the July 29<sup>th</sup> and August 2<sup>nd</sup> plans did not require "approval" and the Waltzes should be deemed to have fully complied with the CC&Rs with respect to those plans. (Ex. P-02, Art. 9.1)

Contrary to the Association's argument, the events at the meeting on August 3<sup>rd</sup> do not change the result. First, the trial court's prior findings establish that the meeting on August 3<sup>rd</sup> was a *Committee* meeting, not a *Board* meeting, and furthermore, that there was conflicting evidence "about what actions, if any, the Committee took relative to the Waltz issue." (Finding #47, CP at 828) Second, irrespective of whether the Committee was in control or the Board was in control, "No action was apparently taken on the latest [August 2<sup>nd</sup>] Waltz plan." (Finding #48, CP at 828)

Despite the fact that no action was taken at the August 3<sup>rd</sup> meeting, "Kirk Firestone then met again with Jim Waltz on the following day, August 4, 2008, stating the August 2 plan had been rejected, and detailing necessary modification." (Finding #49, CP at 828) In short, Kirk Firestone lied to Mr. Waltz, telling him that the August 2<sup>nd</sup> plan had been rejected, when in fact, no action had been taken on the plan. In reliance on Kirk Firestone's misrepresentation and with "strong disagreement" (Finding #50, CP at 828), Jim Waltz provided another set of plans that was unacceptable to him.

The trial court's finding that Mr. Waltz "effectively withdrew his approval request regarding the July 29 and August 2, 2008 plans" is essentially a finding that the Waltzes waived their rights as to those plans.

In order to establish waiver, there must be evidence establishing “an intentional and voluntary relinquishment of a known right.” *224 Westlake, LLC v. Engstrom Properties, LLC*, 169 Wn. App. 700, 714, 281 P.3d 693 (2012). If a party does not have knowledge of the true facts regarding his rights, there can be no waiver. *Id.*; *Ross v. Harding*, 64 Wn.2d 231, 240, 391 P.2d 526 (1964).

In this case, there is no evidence to support a finding of waiver. In fact, the only evidence in the record is to the contrary. Mr. Waltz testified that the only reason he submitted the August 4<sup>th</sup> plans was due to the *untrue* representations from Mr. Firestone:

Q So what happened between your submission of the August 2nd plans and then the submission of the August 4th plans?

A Kirk came by and told me that my plans had failed again and that I had to draw him up a new set of plans and it had to be lower than the roof height or he wasn't going to pass it. He had two options that he would do under Article 9: He could come in and tear it down and charge us for it or we would have to put the old trusses back on and live with it.

Q And is that what prompted you then to submit Exhibit 15?

A Yeah. He told me that I had to do that or it wouldn't be passed.

(RP at 679-80) Similarly, the Waltzes' decision to sign-off on the subsequent August 4<sup>th</sup> plans was also based on these untrue statements.

(RP at 132-33) The Waltzes did not discover that Mr. Firestone's statements were untrue until after litigation began. (RP at 130)

In light of the trial court's unchallenged findings: (1) that no action was taken on either the July 29<sup>th</sup> or August 2<sup>nd</sup> plans; and (2) that Mr. Firestone misrepresented to the Waltzes that the plans had been rejected, the trial court's conclusion that the Waltzes waived their rights as to those plans was erroneous.

**D. The trial court's use of equitable estoppel was error in light of Article 10.1 of the CC&Rs as well as the undisputed testimony of the Board's President, Kirk Firestone.**

Both the trial court's decision and the Association's brief fail to address the legal effect of Article 10.1 of the CC&Rs, which plainly and unambiguously states, "Failure by the Association or *by any Owner* to enforce any covenant or restriction herein contained shall in no event be deemed a waiver of the right to do so thereafter." (Ex. P-02, Art. 10.1) (emphasis added) On this basis alone, the trial court's application of equitable estoppel was error.

In addition, the undisputed evidence at the time of trial also precludes the application of equitable estoppel. The Board's President, Kirk Firestone, who orchestrated the events of 2008, admitted in his testimony that it was never his intent that the Waltzes would be giving up

their rights under the CC&Rs by signing off on the plans dictated by the

Mr. Firestone:

Q Were you present when Mr. Waltz signed these?

A I believe I was.

Q In fact, you took them to Mr. Waltz at his place of business?

A I did.

Q And when you presented them to him, he told you that he was signing this under protest?

A I don't remember what his exact words were.

Q But you knew --

A I know that he wasn't happy. That's what I remember.

Q But you don't -- based on what he said, you knew he wasn't happy about it. Correct?

A I recall he wasn't happy.

Q But you don't recall his exact words. Correct?

A I don't recall the exact words.

Q Now, when you -- did you take these signed plans back to the Board, then?

A I don't recall.

Q Did you tell the Board at that point in time that Mr. Waltz was not happy with these plans?

A I don't recall.

Q Now, who came up with the language on each of the plan sheets that were signed by Mr. Waltz?

A The language referring to where his signature is?

Q Yes.

A I believe I did.

Q Now, you'd agree with me there's no language in here that states that Mr. Waltz and Ms. Miller are waiving any of their rights? Doesn't say that; correct?

A Doesn't appear to.

Q There's no language in here stating that Ms. Waltz and Ms. Miller are compromising any of their rights under the covenants or the bylaws?

A Doesn't appear to be.

Q There's no language in here stating that the Waltzes were releasing the association or its officers from violations of any --

A It doesn't say that, no.

Q And you didn't have a conversation with Mr. Waltz where you told him that was the expectation, did you?

A Excuse me?

Q Sure. When Mr. Waltz signed these, you didn't tell him that by signing it, your expectation was that he was releasing all his rights?

A No.

Q And that wasn't your intent. Correct?

A He was just signing the plans.

(RP at 468-70) Mr. Firestone confirmed this testimony later:

Q And again, it wasn't your expectation, when you had Mr. Waltz sign the plans, for him to waive the provisions of Section 10.1 of the covenants. Correct?

A Correct.

(RP at 471) In addition, Mr. Waltz's testimony corroborates the admissions of Mr. Firestone:

Q When you signed those plans, was there any discussion with Mr. Firestone that -- did he tell you you'd be waiving your rights by signing off on those documents?

A No.

Q Did he discuss with you that this was a full and final settlement of any disputes between you and the association?

A No.

Q Did he ever present you with a document that would indicate that you were waiving or releasing your rights relative to the association's conduct?

A No.

Q Have you ever signed a document presented by the association that indicated that you were compromising or releasing or waiving any rights?

A No.

(RP at 137)

Failing to address the legal effect of Article 10.1 and the undisputed testimony of Mr. Firestone, the Association argues that the

decision in *Ebel v. Fairwood Park II Homeowners' Ass'n*, 136 Wn. App. 787, 150 P.3d 1163 (2007) compels the application of equitable estoppel in this case. Because the facts in *Ebel* are distinct from the undisputed facts in this case, *Ebel* does not control the outcome for the Waltzes.

In *Ebel*, homeowners who actively participated in an association for a number of years, including serving as board members, eventually challenged the overall authority of the corporate association to act because it was not properly formed. *Ebel*, 136 Wn. App. at 793-94. The Court of Appeals held that the homeowners ratified the formation of the association through their active participation and their acceptance of benefits from the association. *Id.* at 794. In doing so, the Court of Appeals noted that ratification is only effective if the estopped party acts “voluntarily and with full knowledge of the facts.” *Id.*

In this case, the Waltzes have not challenged the overall authority of the Association to act. Instead, the Waltzes have established that the Association failed to follow the governing documents when it acted, and the failure to follow the governing documents rendered the specific actions invalid. In addition, the Waltzes did not receive any benefit from the Association’s Stop Work Order and the subsequent directive to lower the walls of the garage addition. In fact, the Waltzes experienced a significant detriment in the loss of the addition as usable, livable space. Finally, the

Waltzes did not act voluntarily or with full knowledge of the facts. The Waltzes only acquiesced to Mr. Firestone's actions after he lied to them and threatened to tear down the partially built addition. As a result, the facts of this case are distinctly different than the facts in *Ebel*, and the concept of ratification in *Ebel* does not apply to this case.

**E. The Association acknowledges that the trial court applied the incorrect legal standard for determining breach of fiduciary duty.**

In its brief, the Association appears to recognize that the trial court improperly relied upon RCW 4.24.264 and RCW 24.06.035(2) as establishing the standard of conduct for directors of a nonprofit corporation. (Resp.'s Brief, p. 33-34) To get around this problem, the Association argues that the trial court must have "implicitly" applied the correct standard of conduct. *Id.* However, a plain reading of the trial court's Conclusion of Law #5 demonstrates that the trial court applied the incorrect standard of conduct.

The fiduciary duty of a corporate officer includes a duty to act in compliance with the law and the governing documents of the corporation. *Leppaluoto*, 57 Wn.2d at 402 (stating that a corporate officer is liable for any act "which he knows, or ought to know, is unauthorized"). Where a corporate officer takes an action he knows, or should know, is

unauthorized, good motives or good intentions do not relieve the officer of liability. *Id.*

In this case, Kirk Firestone's action on July 31, 2008 was unauthorized. Therefore, he breached his fiduciary duty when he declared the votes null and void without any authority to do so. The other members of the Board then sanctioned Mr. Firestone's wrongful conduct in an "emergency" meeting on August 5, 2008, which was not open to the members, in contravention of the Association's bylaws. The other members of the Board breached their fiduciary duties through this wrongful conduct.

In addition to acting without authority, the Board members breached their fiduciary duty by acting unreasonably in rejecting the Waltzes' proposed addition. There was no evidence presented by the Board that lowering the walls and roof by 1' 7" would change the addition from "unharmonious" to "harmonious" or that the minor difference in height would have any impact on property values or the neighborhood. Due to this lack of evidence, the trial court's findings that the Board acted reasonably and in good faith are not supported by substantial evidence. (App.'s Brief, p. 41-45)

**F. The trial court failed to recognize the Waltzes' statutory basis for an award of attorneys' fees.**

The Association argues that there is no contractual, statutory, or equitable basis for the award of attorneys' fees. (Resp.'s Brief, p. 38-39) Similarly, the trial court concluded that there was no basis for an award of fees. (Conclusion #8, CP at 830) However, both the Association and the trial court ignore RCW 64.38.050, which provides:

*Any violation of the provisions of this chapter entitles an aggrieved party to any remedy provided by law or in equity. The court, in an appropriate case, may award reasonable attorneys' fees to the prevailing party.*

RCW 64.38.050; *see also* *Roats v. Blakely Island Maintenance Com'n, Inc.*, 169 Wn. App. 263, 287-88, 279 P.3d 943 (2012) (recognizing the statutory basis for attorneys' fees for violations of the homeowners' association act).

During the trial, the Waltzes established violations of RCW 64.38.025(1) (duty of care) and RCW 64.38.035(4) (open Board meetings and keeping of minutes of all actions taken).<sup>4</sup> Therefore, the trial court had a duty to determine whether an award of fees under RCW 64.38.050 was appropriate. The trial court's failure to recognize RCW 64.38.050 as

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<sup>4</sup> It is undisputed that there were no minutes taken of the meeting of August 3, 2008, when the Board allegedly took over the Waltz matter from the Committee. (Finding #47, CP at 828) Similarly, there was no notice to Association members of the "emergency" Board meeting of August 5, 2008. (CP at 264) Finally, there was no evidence of a Board meeting on August 12, 2008, when the Board allegedly accepted the final Waltz plans. (CP at 681; Ex. P-16)

a basis for an award of fees means that the trial court failed to exercise its discretion to award fees. This failure to exercise discretion is an abuse of discretion. *Bowcutt v. Delta North Star Corp.*, 95 Wn. App. 311, 320, 976 P.2d 643 (1999) (“Failure to exercise discretion is an abuse of discretion.”)

**G. The Waltzes’ request for relief did not include any coercive order from the trial court, in which case, the Waltzes were entitled to a jury trial.**

The Association argues that the primary relief sought by the Waltzes was injunctive (i.e., equitable) because it was “coercive” in nature. The argument mischaracterizes the relief sought by the Waltzes. The relief actually requested did not seek an order from the court which would either enjoin the Association from taking any action or compel the Association to take action in the future. Rather, the Waltzes simply asked the court to declare that the Waltzes could build their addition according to the July 29<sup>th</sup> and August 2<sup>nd</sup> plans. If the court had granted the relief sought, there would be no directive to the Association to take any action or to refrain from taking any action. Instead, the Association would simply be advised that the Waltzes had complied with the CC&Rs. At that point, the Waltzes could proceed to complete their addition according to their submitted plans.

The Association's reliance on *Greenbank Beach and Boat Club, Inc. v. Bunney*, 168 Wn. App. 517, 280 P.3d 1133 (2012) is misplaced. In that case, one component of relief sought by the association was a directive to the homeowner to modify an existing structure. *Greenbank*, 168 Wn. App. at 523. As a result, the relief sought a coercive order compelling the homeowner to take specific action. *Id.* In this case, no such coercive relief was requested by the Waltzes. Therefore, it was an abuse of discretion by the trial court to characterize the Waltzes' claims as primarily equitable in nature and to deny the Waltzes their right to a jury trial.

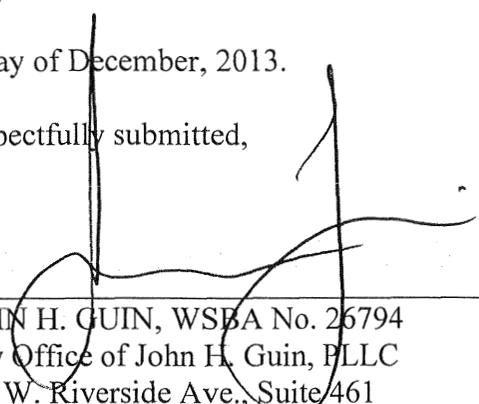
### **III. CONCLUSION**

The Waltzes' plan to construction a liveable, usable space above their garage would have been approved by a majority of the Architectural Committee, but for the unauthorized act of Mr. Firestone to declare the Committee voting null and void. The trial court erred in failing to declare Mr. Firestone's conduct, and the Board's acquiescence to such conduct, invalid. Accordingly, the Waltzes request that the trial court's decision be reversed and that judgment be entered in favor of the Waltzes on their claims for declaratory judgment and breach of fiduciary duty.

In the alternative, the Waltzes request that the matter be remanded to the trial court for a jury trial, with instructions on the law consistent with the errors of law assigned above.

DATED this 17<sup>th</sup> day of December, 2013.

Respectfully submitted,



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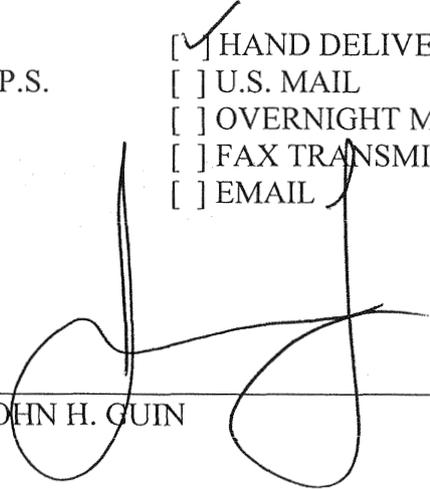
*Attorney for Appellants*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 17th day of December, 2013, I caused to be served a true and correct copy of the forgoing document to the following:

Timothy P. Cronin  
Mullin, Cronin, Casey & Blair, P.S.  
N 115 Washington, Third Floor  
Spokane, WA 99201

- HAND DELIVERY
- U.S. MAIL
- OVERNIGHT MAIL
- FAX TRANSMISSION
- EMAIL

  
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JOHN H. GUIN