

Appellate Case No. 59211-4

COURT OF APPEALS,  
DIVISION I OF THE STATE OF WASHINGTON

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SANDRA LAKE,

Appellant

v.

WOODCREEK HOMEOWNERS ASSOCIATION,  
a Washington homeowners association;  
and GLEN R. CLAUSING, a single man,

Respondent.

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APPELLANT'S SUMMARY OF ARGUMENTS

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COURT OF APPEALS  
DIVISION I  
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As requested by this Court, the following brief is a summary of arguments on the matters currently before the Court of Appeals. Ms. Lake does not intend to waive or abandon any argument or point raised in previous filings. To the extent any argument or point is not included herein Ms. Lake adopts and incorporates her filings in their entirety.

**A. Issues The Court Of Appeals May Decide.**

The Supreme Court reversed the Court of Appeals on the discrete issue that this Court had based its decision on in favor of Ms. Lake. *Lake v. Woodcreek Homeowners Ass'n*, 168 Wn.2d 694, 710, 229 P.3d 791 (2010). At the conclusion of its decision, the Supreme Court stated that “Lake, in her appeal, made assignments of error that were not raised in the petitions for review or Lake's answer,” and remanded the case to this Court “for consideration of any of Lake's remaining arguments.” *Id.*, 168 Wn.2d at 713 (emphasis added).

Pursuant to RAP 13.7(b), the Supreme Court could have, but did not, decide all of the issues raised by Ms. Lake that may support the Court of Appeals previous decision favoring Ms. Lake’s position. RAP 13.7(b). Instead, the Supreme Court remanded the case to the Court of Appeals to consider any remaining arguments. *Lake*, 168 Wn.2d at 713. Rule of Appellate Procedure 13.7(b) governs this situation:

If the Supreme Court accepts review of a Court of Appeals decision, **the Supreme Court will review only the questions raised in ... the petition for review and the answer**, unless the Supreme Court orders otherwise upon the granting of the motion or petition. ... **If the Supreme Court reverses** a decision of the

Court of Appeals that did not consider all of the issues raised which might support that decision, **the Supreme Court will** either consider and decide those issues or **remand the case to the Court of Appeals to decide those issues.**

(Emphasis added.) Here, the Supreme Court reviewed only the following discrete questions: “Does the HPRA or Woodcreek’s declaration bar the division of a condominium’s common areas? Does the HPRA or Woodcreek’s declaration require the unanimous consent of condominium owners to combine a portion of the common area with the owner’s apartment?” *Lake*, 168 Wn.2d at 669.<sup>1</sup> The Supreme Court’s statement of the questions on review come directly from Mr. Clausing’s and Woodcreek’s petitions to that Court. (Clausing’s Pet. for Discretionary Review at 1-2; Pet. for Review of Woodcreek Homeowners Ass’n at 1.) In his Petition for Discretionary Review, Mr. Clausing framed the questions he raised before the Supreme Court as:

[W]hether the combining of a condominium common area and a condominium apartment under RCW 64.32.090(10) does, or does not, require unanimous homeowner approval? [and] Under RCW 64.33 ... does combining or “converting” common area to an apartment area change the declared “values” or declared percentages of ownership?

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<sup>1</sup> The Supreme Court also answered the question whether the Woodcreek Declaration must be amended before construction of Mr. Clausing’s bonus room is permissible in the affirmative. *Lake*, 168 Wn.2d at 708-10. The Supreme Court’s decision on this issue now governs the Court of Appeals consideration of Ms. Lake’s remaining issues that are now before the Court of Appeals. *See id.*, 708-10, 713.

(Clausing's Pet. for Discretionary Review at 1-2.) Woodcreek similarly framed its question to the Supreme Court:

Under [HPRA], is the unanimous consent of all owners required to combine an apartment with a common area when the declared values set forth in the condominium declaration are unchanged following the combination and the combination is approved by at least the minimum vote of the owners required by the terms of the declaration and the Act?

(Pet. for Review of Woodcreek Homeowners Ass'n at 1.) The Supreme Court did not consider and decide all of the issues Ms. Lake raised in her appeal related to her Assignment of Error 1. *See Lake*, 168 Wn.2d 694; Appellant's Revised Opening Br. at 1-2.

Rather, Ms. Lake's appeal raises multiple issues in addition to the questions posed by Respondents to the Supreme Court. The Court of Appeals may now consider and decide those issues. RAP 13.7(b). Specifically, this Court may determine whether the trial court erred in entering summary judgment dismissing Ms. Lake's complaint because the Board violated the Declaration by permitting an "owner" to build a bonus room and whether Mr. Clausing violated the Declaration by constructing a bonus room because the Declaration reserves that right to a "purchaser." *See id.*, 168 Wn.2d at 713; *Lake*, 142 Wn. App. 356; RAP 13.7(b); Appellant's Revised Opening Br. at 1-2. Alternatively, this Court may consider and decide whether the trial court erred in entering summary judgment because the Board and Mr. Clausing violated the Declaration by

approving and constructing the bonus room in violation of the restrictive covenants stated in the Declaration. *See id.*; Appellant's Reply Br. at 15-16 (regarding *McLendon*, title to property, and the necessity for amendment of the Declaration); Supplemental Brief of Resp't Sandra Lake (Case No. 81873-8) at 7-9. These issues are before the Court of Appeals procedurally as part of Ms. Lake's appeal as a matter of right from the trial court's summary judgment order, RAP 2.2(a)(1), 5.1(a), 6.1, and as part of a Motion of the Merits brought by Ms. Lake following the Supreme Court's decision that now "clearly control[s this case] by settled law," RAP 17.14(e)(1).

In addition, the Court of Appeals also has before it the following issues: (i) Mr. Clausing's Motion to Determine Remaining Issues on Remand - Ms. Lake's summary of her response to that motion is woven throughout this brief; (ii) whether the trial court abused its discretion by permitting Woodcreek to amend its answer; (iii) whether the trial court erred when it ordered an award of attorney fees and costs to Mr. Clausing; (iv) whether attorney fees on appeal should be awarded to Ms. Lake pursuant to RCW 64.34.455; (v) Ms. Lake's Motion to Strike Woodcreek's submissions and arguments outside the record; and finally, (vi) Ms. Lake's Motion for Extension of Time (to respond to Mr. Clausing's pending motion) which no party has opposed.

**B. The Trial Court Erred By Entering Summary Judgment And Dismissing Ms. Lake's Complaint.**

The trial court's summary judgment dismissing Ms. Lake's complaint against Mr. Clausing and Woodcreek Homeowners Association should be reversed and the case remanded for trial. The trial court erred when it entered summary judgment against Ms. Lake because: (1) the Woodcreek Declaration reserves and limits the right to construct a bonus room to a "purchaser," and Mr. Clausing is not a purchaser; and (2) the Board failed to amend the restrictive covenants stated in the Declaration and Mr. Clausing constructed his bonus room without an amendment to the restrictive covenants.

Woodcreek and Clausing concede that the Declaration must be amended. (*See e.g.* Clausing's Reply [in support of] Clausing's Mot. To Determine Remaining Issues of Remand at 7, 8; Resp't Woodcreek Homeowner's Ass'n Opp'n To Appellant Lake's Mot. on the Merits at 3, 8.) When an owner is adversely affected by a failure to comply with the Horizontal Property Regimes Act (HPRA) and the governing Declaration, then HPRA imposes liability. RCW 64.32.060; 64.34.455. RCW 64.34.455 provides that, "If [Clausing or the Woodcreek homeowners association]<sup>2</sup> fail[] to comply with any provision [of the governing statutes] or any provision of the declaration or bylaws, any person or class

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<sup>2</sup> The language of the statute uses the phrase "any other person" and "person" is defined as any "natural person" or "legal entity." RCW 64.34.455, 64.34.020(28). RCW 64.34.020 and 64.34.455 apply to Woodcreek. RCW 64.34.010(1).

of persons adversely affected by the failure to comply has a claim for appropriate relief.” Similarly, RCW 64.32.060 provides,

Each apartment owner shall comply strictly ... with the covenants, conditions and restrictions set forth in the declaration or in the deed to his apartment. **Failure to comply** with any of the foregoing shall be ground for an action to recover sums due, for damages or injunctive relief, or both, maintainable ... by a particularly aggrieved apartment owner.

(Emphasis added.) Lake brought this action pursuant to RCW 64.32.060 and 64.34.455, and there was evidence before the trial court in its consideration of Mr. Clausing’s and Woodcreek’s motions for summary judgment that Ms. Lake had been adversely affected by the approval and construction of Mr. Clausing’s bonus room. (CP 1-10, ; see CP 77-78, 839, 840, 843-44, 845.)

Woodcreek and Mr. Clausing’s concession that the Declaration must be amended, and the Washington Supreme Court’s decision, support the conclusion that the trial court erred because it can not be determined as a matter of law that Woodcreek and Mr. Clausing complied with HPRA and the Declaration. See *Lake v. Woodcreek Homeowners Ass’n*, 168 Wn.2d 694, 710, 229 P.3d 791 (2010). In fact, the opposite determination is possible because Woodcreek and Mr. Clausing **failed** to comply with the Declaration and are liable. Because the opposite determination is possible, the trial court erred in concluding that the summary judgment standard had been satisfied by Mr. Clausing and Woodcreek.

**1. The Declaration Limits Bonus Rooms To “Purchasers” And Mr. Clausing Is Not A “Purchaser.”**

The Declaration reserves the right of “purchasers” to build bonus rooms and does not extend that right to “owners.” *Lake*, 168 Wn.2d at 709-10. The Declaration makes a critical distinction between “owner” and “purchaser” with respect to bonus rooms. (*See* CP 386 (regarding right of “purchaser” to build a bonus room).) Throughout the Declaration there are references to “owners” and their rights, interests, and obligations. (*See generally* CP 218-66, 273-326, 341-64, 383-93.) However, nowhere does the right to later add a bonus room inure to an “owner.” The Supreme Court noted that, “Nothing in the 1977 amendments [to the Woodcreek Declaration] indicates that *owners* retained a continuing right to build a second-story addition.” *Lake*, 168 Wn.2d at 710 (emphasis added). Therefore, the Declaration restricts the right to build a bonus room to “purchasers,” and does not afford that right to “owners.” Approval and construction of a bonus room contrary to this restriction violate, and are a failure to comply with, the Declaration. *See* RCW 64.32.060.

The Supreme Court rejected Woodcreek and Clausing’s defense that “purchasers” and “owners” are the same category of people, and that “[t]he Woodcreek declaration has always preserved an option for owners to build a bonus room.” *Lake*, 168 Wn.2d at 709-10. The Supreme Court specifically points out that Woodcreek and Clausing base their defense on the 1976 amendments that “discuss[] a *purchaser’s* option to build a bonus

room,” and concludes the opposite, that “[n]othing in the 1977 amendments [to the Woodcreek Declaration] indicates that *owners* retained a continuing right to build a second-story addition.” *Id.* (emphasis added). The Supreme Court refused to extend the *purchaser’s* option into a continuing right of *owners*. *Id.* The Woodcreek Declaration does not extend the right to build a bonus room to owners. *Id.* Approval and construction of a bonus room, therefore, violates the Declaration and Chapter 64.32 RCW. As a result, the trial court erred when it dismissed Ms. Lake’s complaint because Woodcreek and Mr. Clausing failed to comply with the limitations set forth in the Declaration.

**2. Approval And Construction Of Mr. Clausing’s Bonus Room Violated Restrictive Covenants In The Declaration.**

Mr. Clausing’s construction of the bonus room, and the Board’s approval, violate the Woodcreek Declaration because the bonus room conflicts with the restrictive covenants stated in the Declaration. Owner property rights, including the restrictive covenants recorded pursuant to HPRA, can only be altered through an amendment to the Declaration. *Lake*, 168 Wn.2d at 708-10; RCW 64.32.090(13); CP 298 (paragraph 19 of the 1973 amendment to the Declaration); *see also e.g.* RCW 64.32.090(2),(3). Here,

Clausing’s bonus room increased his apartment’s square footage, increased the number of rooms in his apartment, and added a story

to the building in which his apartment is located...Once the construction of Woodcreek was complete...the developer submitted amendments in 1977, along with revisions to the survey and building plans, which gave a final accounting of the condominium. The revised building plans listed the units with second-story additions; Clausing's unit was not among them. In a chart accounting for the elevations of each unit, the "second story" column for Clausing's unit indicates, "N/A."...**The Woodcreek declaration and incorporated survey and building plans delineate the property rights of the Woodcreek owners, and after the developer finished construction, Clausing's unit was a single story.** Nothing in the 1977 amendments indicates that owners retained a continuing right to build a second-story addition.

*Lake*, 168 Wn.2d at 709-10 (emphasis added). The restrictive covenants, which set forth the statutorily required description of Clausing's unit and building, prohibit the construction of Clausing's Bonus Room. *See id.*, 168 Wn.2d at 708-10. Construction that varies from the restrictive covenants does not comply with the Declaration. *See id.*; RCW 64.32.060. 64.32.090(2),(3).

The trial court erred because the Board approved construction that does not comply with the restrictive covenants stated in the Declaration and Mr. Clausing constructed his bonus room in violation of and without an amendment to the restrictive covenants.

Moreover, the Supreme Court's decision concludes that amending the Declaration is required before Mr. Clausing could construct his bonus room without violating the Declaration or HPRA.

[A] threshold question is **whether an amendment to the Woodcreek declaration was required before the construction**

**of Clausing's second-story addition was permissible...**The Woodcreek declaration and incorporated survey and building plans delineate the property rights of the Woodcreek owners, and after the developer finished construction, Clausing's unit was a single story. Nothing in the 1977 amendments indicates that owners retained a continuing right to build a second-story addition.

Nevertheless, the question remains whether Clausing's second-story addition triggered the unanimous consent requirement in RCW 64.32.090(13)....

*Lake*, 168 Wn.2d at 708-10 (emphasis added). The Supreme Court's opinion, and use of the word "nevertheless" when turning to the question whether the amendment must be unanimous, provides that an amendment to the Declaration was required before Clausing's addition was permissible. *Id.* Mr. Clausing agrees: "Clausing and Woodcreek, at both the Court of Appeals and Supreme Court levels, argued that no amendment to the Woodcreek Declaration was required in respect to the Clausing bonus room based on the existing declaration and past practices of the Board ... The Supreme Court did not agree with any of these arguments." (Clausing Response to Lake's Mot. on the Merits at 7.) Because the Declaration must be amended before construction of Mr. Clausing's bonus room is permissible, the trial court erred when it dismissed Ms. Lake's complaint on summary judgment.

Even if the Declaration does not have to be amended "before" approval and construction of a bonus room, the fact remains that the requirements in HPRa and the Declaration mandate that a bonus room

violates HPRA and the Declaration **unless the Declaration is amended.**

This mandate is not a result of the Supreme Court's decision; it is a result of the language in the Declaration and the statutory requirements in HPRA, all of which existed in May and July of 2004 when the Board approved Mr. Clausing's bonus room and Mr. Clausing began construction. The Supreme Court's decision did not alter the requirements of the Declaration or HPRA.

Woodcreek and Mr. Clausing's failure to comply with the Declaration and HPRA is the crux of Ms. Lake's complaint. But for Ms. Lake's complaint, resulting appeal, and the Supreme Court's decision reiterating the requirements in HPRA and the Declaration, Woodcreek and Clausing would not seek to amend the Declaration in order to remediate their failure to comply. (Woodcreek Response to Lake's Mot. on the Merits at 10; Clausing's Response to Lake's Mot. on the Merits at 7, *see also id.*, at 8-10.) Liability can not be avoided, and the trial court's summary judgment order affirmed, by an amendment of the Declaration six and a half years after the actions that resulted in the violation of the HPRA and the Declaration. By failing to amend the Declaration and by constructing a bonus room in violation of the limitations in the Declaration, Woodcreek and Mr. Clausing failed to comply with HPRA and the Declaration to the adverse affect of Ms. Lake. Under RCW 64.32.060 and 64.34.455, Ms. Lake has a claim and a right to a remedy.

Therefore, the trial court's grant of summary judgment was in error and must be reversed.

**3. The Woodcreek Declaration Has Not Been Amended.**

RCW 64.32.090(13) and paragraph 19 of the 1973 amendment to the Declaration dictate that the declaration may be amended only when "not less than sixty percent of the apartment owners shall consent [in writing] to any amendment." RCW 64.32.090(13); CP 298. The Board granted Mr. Clausing permission to construct a bonus room without seeking amendment to the declaration. *Lake*, 168 Wn.2d at 702. There is no evidence in the record that there has been an amendment that would allow Mr. Clausing's bonus room. (*See generally*, CP all.)

The June 5, 2006 resolution "ratification" vote that Woodcreek and Mr. Clausing have previously relied on, even if procedurally accurate,<sup>3</sup> fails to amend the Declaration. Homeowner "approval" of the Board's "approvals" does not amend the Declaration as to the restrictive covenants stated in the Declaration, it does not amend the Declaration to remove the limitation authorizing only "purchasers" to build bonus rooms, and it does not comply with the procedures for amending the Declaration stated in Paragraph 19 of the 1973 Amended Declaration.

Further, the "ratification" vote in this case is not the same as the ratification vote in *McLendon v. Snowblaze Recreational Club Owners*

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<sup>3</sup> Ms. Lake does not concede the June 5, 2006 vote is procedurally accurate or substantively effective.

*Ass'n*, 84 Wn. App. 629, 929 P.2d 1140 (1997). In that case, the homeowners ratified a *lease* entered into by the Board and the Court upheld that ratification on the basis that an *agreement* may be ratified. (Br. of Respondent Clausing at 35 quoting *McLendon*, at 632.) Ratification of an agreement is not the same as ratification of the Board's actions to permit construction in violation of the Declaration or to amend the Declaration, if that is what the resolution in fact accomplished. *McLendon* does not stand for the principle that the Board's approval may be ratified by vote.

Now, in violation of RAP 9.12, Woodcreek has submitted documents, and arguments made based on those submissions, that are outside both the trial court and appellate records. Ms. Lake filed a Motion to Strike these submissions and arguments, which is summarized, *infra*. Ms. Lake respectfully requests that the Court of Appeals strike the submissions and award attorney fees and costs.<sup>4</sup>

Even if the Court does not strike Woodcreek's submissions and arguments, the trial court's error remains and should be reversed. While it is apparent that Woodcreek assumes that that the amendment in the

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<sup>4</sup> With its June 1, 2011, supplemental brief Woodcreek has again filed a declaration of counsel and exhibit of the December 8, 2010 resolution. (Decl. of Counsel in Support of Respondent Woodcreek Homeowners Association's Supplemental Brief Regarding Remaining Issues On Appeal.) This submission is outside the trial court and appellate records. Ms. Lake also anticipates that Woodcreek and Mr. Clausing may rely on Woodcreek's submissions from outside the record in support of their arguments before this Court. Ms. Lake moves to strike all of Woodcreek's submissions outside the record and any arguments by Woodcreek or Mr. Clausing based on those submissions for the reasons stated herein and in her previously filed Motion to Strike.

resolution is procedurally and substantively effective, whether that assumption is correct is well outside this Court's scope of review and jurisdiction. RAP 9.12; *see also* CP 995-1008 (Am. Notice of Appeal); *see* Woodcreek Homeowner's Ass'n Opp'n to Lake's Mot. on the Merits at 3, 9. This Court can not make a determination of whether the amendment is procedurally and substantively effective because that issue has not been considered by any trier of fact, and therefore, this Court can not affirm the summary judgment order dismissing Ms. Lake's complaint on that basis. *See* RAP 9.11, 9.12.

Finally, even if the Homeowner Association's approval of the December 8, 2010 resolution properly amends the Declaration it does not eliminate Woodcreek and Mr. Clausing's liability under RCW 64.32.060 and 64.34.455 for failing to comply with the Declaration to the adverse affect of Ms. Lake between 2004 and 2010 (during which time, for the most part, this lawsuit and appeal were pending). RCW 64.32.090(13) and 64.32.100, which Mr. Clausing and Woodcreek claim support their argument that amendment to the Declaration six and a half years after their actions, do not support the position that correction of a failure to comply with HPRA or the provisions in the Declaration eliminates liability. RCW 64.32.090(13) requires a procedure to amend the Declaration; that procedure here is at paragraph 19 of the Declaration. (CP 298.) The statute does not provide that later amendment of a declaration alters a person's

failure to comply. And, RCW 64.32.100 requires the **declarant** to amend the declaration **before** the first conveyance of an apartment if and when the survey maps and plans that must be submitted upon the declarant's recording of the declaration do not accurately reflect the condominium as it is actually built. RCW 64.32.100. The Declarant's right to amend the Declaration is distinct from the Homeowners Association's and individual homeowner's rights and obligations relating to the limitations and procedures in HPRA and the Declaration. RCW 64.32.100 and 64.32.090(13) do not eliminate Woodcreek and Mr. Clausing's liability. Instead, RCW 64.32.060 requires homeowner associations and individuals to comply with the declaration. Because Woodcreek and Mr. Clausing failed to comply, the trial court erred in granting summary judgment.

**C. Ms. Lake Has Not Raised A New Argument.**

Ms. Lake's position that the Declaration must be amended before construction is not a new argument. Ms. Lake clarified in her Reply Brief filed with this Court in support of her Revised Opening Brief, that the

... Certificate of Amendment together with the Survey Maps and Plans referred to herein, ... state the covenants, conditions, **and restrictions** effecting a common plan for the condominium development mutually beneficial to all of the described apartments, and that the covenants, conditions and restrictions and plan as now existing or hereafter amended, are binding upon each such apartment as a parcel of realty, and upon its owners or possessors and their heirs ... without requirement of further specific interest or inclusion in deeds, contracts, or security instruments....

Appellant's Reply Brief at 13 citing CP 388 (emphasis added). She further argued that,

Ms. Lake ought to be able to rely upon the Certificate of Amendment to Declaration, its contents and the effect of its contents becoming effective upon recording. The Certificate of Amendment lists the units with bonus rooms and the Woodcreek owners should be able to rely upon the fact that no other units shall have bonus rooms unless the Declaration is amended in accordance with the Declaration.

Id. at 14; *see also generally* Appellant's Revised Opening Brief at 6, 7, 13 ("the addition of the Bonus Room unlawfully changed title to property") and Supplemental Brief of Resp't Sandra Lake (Case No. 81873-8) at 7 ("The approval and construction of Mr. Clausing's bonus room contradicts the Woodcreek Declaration, and the failure of Woodcreek to properly amend the Declaration means that current and future homeowners do not have accurate notice of the matters of title affecting the Woodcreek townhouse condominiums."). Of critical importance, the Supreme Court framed the question in terms of timing when it concluded the Declaration must be amended: "whether an amendment to the Woodcreek declaration was required **before** the construction of Clausing's second-story addition [would be] permissible." *Lake*, 168 Wn.2d at 708-09 (emphasis added). And, liability under Chapter 64.32 RCW is based on a failure to comply, not simply a failure to amend. Therefore, Ms. Lake has not improperly raised an improper new argument that the Declaration must be amended

“before” construction of the bonus room in order for Mr. Clausing and Woodcreek to be held liable under RCW 64.32.060 and 64.34.455.

**D. The Supreme Court Did Not Affirm The Trial Court.**

The Supreme Court did not affirm the trial court’s entry of summary judgment. *Lake*, 168 Wn.2d 694. The Supreme Court did not broadly hold that Mr. Clausing and Woodcreek had not violated HPRA or and the Woodcreek Declaration. Instead, the Supreme Court’s narrow decision clarifies that (A) the HPRA does not prohibit the combination of common area with apartment; (B) the Declaration defines property rights and those can only be altered by amending the Declaration; and (C) in this case, unanimous consent is not the required method for amending the Declaration. Furthermore, whether the trial court erred when it entered summary judgment against Ms. Lake (1) because the Woodcreek Declaration reserves and limits the right to construct a bonus room to a “purchaser,” and Mr. Clausing is not a purchaser, or (2) because the Board failed to comply with the restrictive covenants stated in the Declaration and Mr. Clausing constructed his bonus room in violation of and without an amendment to the restrictive covenants properly remain arguments to be considered by the Court of Appeals. *Lake*, 168 Wn.2d at 713. Therefore, Mr. Clausing’s pending Motion To Clarify Issues must be denied as to Ms. Lake’s Assignment of Error No. 1.

**E. Woodcreek's Submissions Outside The Record Should Not Be Considered And Should Be Stricken.<sup>5</sup>**

Woodcreek opposes Ms. Lake's Motion on the Merits by submitting and relying, in part, on Woodcreek counsel's testimony about a November 2010 meeting of the Woodcreek Homeowners Association Board of Directors, and Exhibit A is a copy of a proposed amendment to the Woodcreek Declaration. (Decl. of Counsel, Scott Barbara dated Nov. 22, 2010 with Exh. A.) Woodcreek also filed a supplemental declaration and second Exhibit A. (Decl. of Counsel to Supplement Resp't Woodcreek Homeowners Ass'n's Opp'n To Appellant Lake's Mot. on the Merits dated Jan. 18, 2011.)

The Court of Appeals should not include Woodcreek's counsels' declarations and exhibits A, and the arguments supported by the same, in considering the matters before it because neither of the declarations nor exhibits A were considered by the trial court in its decision granting summary judgment and neither are part of the record on appeal. RAP 9.12, 18.14; (CP 777-81; *see also* CP all). The Court of Appeals scope of review is limited to the record before the trial court. RAP 9.12.

Furthermore, Woodcreek has failed to provide any legal authority explaining why the Court should set aside the applicable standard of review and consider submissions that are outside both the trial court and appellate records. Respondent Woodcreek Homeowners Ass'n's Opp'n to

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<sup>5</sup> See footnote 4, *supra*.

Appellant Lake's Mot. to Strike; *see also generally* RAP 9.11, 9.12, 10.3(a)(6), (b); RAP 17.3. Moreover, consideration of the resolution in light of the arguments before this Court would necessarily require determination whether the resolution is a procedurally and substantively effective amendment to the Woodcreek Declaration. Such a determination is for a trier of fact and outside the scope of review. RAP 9.11, 9.12; *see also* CP 995-1008 (Am. Notice of Appeal). Therefore, Woodcreek's declarations, exhibits A, and arguments should be stricken.

Ms. Lake reiterates her request pursuant to RAP 18.9(a) that the Court award her the costs for bringing the motion to strike because Woodcreek's counsels' declarations, the contents thereof, and exhibits A are documents outside the record and the filing of these documents violate RAP 9.12. *See also Green v. Normandy Park*, 137 Wn. App. 665, fn9, 151 P.3d 1038 (2007).

**F. The Trial Court Abused Its Discretion When It Permitted Woodcreek To Amend Its Answer To Deny Liability.**

The trial court abused its discretion when it permitted Woodcreek to amend its Answer because (a) Ms. Lake should have been afforded the opportunity to conduct discovery prior to summary judgment determination when Woodcreek had completely altered its position as to liability; (b) Woodcreek should not have been permitted to retract admissions made in its original Answer and confirmation of joinder; (c)

Ms. Lake was prejudiced by Woodcreek's amendment of its Answer because she relied upon the answer during many months of litigation.

Until the trial court permitted Woodcreek to amend its Answer, Woodcreek had admitted liability. Ms. Lake was prejudiced by Woodcreek's amended Answer because the trial court considered it as part of its decision to grant Clausing's motion for summary judgment. (CP 799, ¶ 27.) Further, Ms. Lake previously argued that additional time was needed for discovery and that the summary judgment could not be decided on the pleadings before the court due to the court's granting of permission to amend after the summary judgment briefing had been submitted. More broadly, in her response to Woodcreek's motion to amend, Ms. Lake argued that additional time was needed for discovery for the overall posture of the case. Continuance of the summary judgment motions even at that time would not have eliminated the prejudice to her. (CP 648.) When Ms. Lake filed her response to Woodcreek's Motion to Amend on November 7, 2006, only two months remained until the first major discovery deadline. Ms. Lake required additional discovery, and explained to the trial court the high cost that would be involved, and argued the prejudice to her if the amendment was granted. (CP 648.) The trial court ignored these discovery deadlines and focused only on the June 4, 2007 trial, rather than impending short-term discovery deadlines. (CP 721.)

Ms. Lake requests that this Court deny Mr. Clausing's Motion To Determine Remaining Issues on Remand as to Assignment of Error 2. Whether the trial court erred in granting summary judgment is still before this Court and not just as to this issue. The trial court considered Woodcreek's Amended Answer in reaching its summary judgment decision. Therefore, in order for this Court to conduct a review of the trial court's decision de novo, the Court cannot at this time simply dismiss Ms. Lake's appeal of the trial court's decision to permit Woodcreek to file an amended Answer when the trial court relied on that amended Answer in reaching its decision as to Mr. Clausing's motion. Whether the trial court abused its discretion in granting the amended answer remains an issue unresolved to date and is fully before this court.

Furthermore, Ms. Lake disputes Mr. Clausing's characterization of the colloquy between Ms. Jones, counsel for Lake, and the trial court, and refers the Court to her argument on this issue in her Reply Brief at 16-19. The court offered Ms. Jones the opportunity to re-file and she accepted that offer, but then the trial court instructed Ms. Jones to "go ahead and go first . . ." thereby cutting off the discussion of re-filing documents. (CP 794-95.) Ms. Jones proceeded as instructed by the trial court fully believing that she represented the prevailing party on summary judgment because the trial court ignored her acceptance of the opportunity to re-file. (Id.) When Ms. Jones asked for leave to re-file it was intended that all Ms.

Lake's documents be re-filed, including the motion and the responsive pleadings to Mr. Clausing's and Woodcreek's motions for summary judgment.

Ms. Lake also requests that the Court find that the trial court abused its discretion and reverse the order permitting Woodcreek to amend its Answer to deny liability.

**G. The Court Should Reverse The Trial Court's Award To Mr. Clausing, and Award Ms. Lake Attorney's Fees.**

Both Ms. Lake and Mr. Clausing have requested an award of attorney fees at each step in this litigation. The trial court's award of fees and costs to Mr. Clausing should be reversed, and instead, Ms. Lake should be awarded fees for defending Mr. Clausing and Woodcreek's motions for summary judgment. Likewise, Ms. Lake should be awarded attorney fees and costs related to all parts of the appellate process. RCW 64.34.455; RAP 18.1.

First, Mr. Clausing's award of attorney fees and costs relating to his motion for summary judgment should be reversed because the trial court erred in granting summary judgment. The award should also be reversed, even if the trial court did not err, because the trial court improperly awarded fees for Mr. Clausing's personal time. Mr. Clausing's failure to submit a notice of appearance or otherwise provide notice that he would seek attorney fees for his personal time is significant. For example,

the law acknowledges that attorney fees are taken into account when parties consider settlement against the costs of litigation. *See e.g. Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 673, 15 P.3d 115 (2000); *McConnell v. Mothers Work, Inc.*, 131 Wn. App. 525, 533-534, 128 P.3d 128 (2006); RCW 8.25.070(1). A notice of appearance from the representing counsel not only provides notice that a party is represented and that service should be sent to that counsel, but notifies the parties of the reputation, level of competence and expertise, as well as, generally, the cost of fees that will be incurred based on these factors. When an attorney seeks to recover fees for his own time without having filed a notice of appearance that attorney has withheld critical information about the potential risks affecting the course of litigation. The attorney should, therefore, not be rewarded with an award of his own attorney fees. Finally, there is no authority supporting an award of attorney fees to a party who assisted in his defense but did not represent himself because the party himself is an attorney. The trial court's award of fees for Mr. Clausing's time should be reversed.

Further, the award of fees at the trial court level is based on RCW 64.34.455. RCW 64.34.455 provides attorney fees may be awarded to a party that seeks to enforce statutory guarantees afforded condominium owners. This is not an appropriate case for an award of attorney's fees to Mr. Clausing because Mr. Clausing is not the party seeking to enforce the

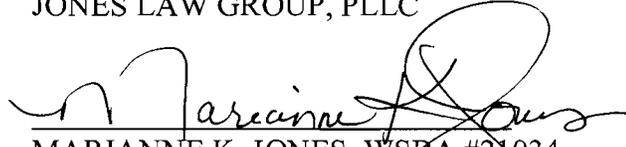
statutory guarantees afforded to condominium owners and there was no finding by the trial court that Ms. Lake's suit was frivolous. Therefore, there was no basis for the trial court to award fees under RCW 64.34.455..

Finally, Ms. Lake is entitled to attorney fees at the trial court level pursuant to RCW 64.34.455. Ms. Lake brings a meritorious case and seeks to enforce the statutory guarantees afforded condominium owners. Her request for attorney's fees and costs relating to the summary judgment motions should be granted.

Second, this Court has the authority to award Ms. Lake attorney fees on appeal. RAP 18.1; *Lake*, 168 Wn.2d at 713. Determination by this Court may include the entire appellate process because the Supreme Court remanded the determination of whether and to whom to award attorney fees for the Supreme Court's review to this Court. "Clousing requests attorney fees. Because this case is not fully resolved, however, we leave it to the Court of Appeals to consider an award for the work related to our review." *Id.* Pursuant to RCW 64.34.455, Ms. Lake is entitled to that award on appeal. *See also* RAP 18.1.

RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of June, 2011.

JONES LAW GROUP, PLLC

A handwritten signature in black ink, appearing to read "Marianne K. Jones". The signature is written in a cursive style with a large, looping initial "M".

MARIANNE K. JONES, WSBA #21034

MONA K. MCPHEE, WSBA #30303

Appellate Case No. 59211-4

COURT OF APPEALS,  
DIVISION I OF THE STATE OF WASHINGTON

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SANDRA LAKE,

Appellant

v.

WOODCREEK HOMEOWNERS ASSOCIATION,  
a Washington homeowners association;  
and GLEN R. CLAUSING, a single man,

Respondent.

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PROOF OF SERVICE OF  
APPELLANT'S SUMMARY OF ARGUMENTS

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COURT OF APPEALS  
DIVISION I  
FILED  


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by email service by agreement on 1<sup>st</sup> day of June, 2011

  
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