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No. 66308-9
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DALLAS K. BUNNEY AND MARYLOU BUNNEY, husband
and Wife,

Appellants,

v.

GREEN BANK BEACH AND BOAT CLUB, INC, and
HOLMES HARBOR WATER COMPANY, INC.,

Respondents.

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

The restrictive covenants at issue in this case make clear that if no “suit to enjoin construction” is brought prior to completion of construction, full compliance with the covenants is deemed to have occurred. Respondents argue that the Complaint for Declaratory Judgment can somehow be shoehorned into a “suit to enjoin construction.” This argument must be rejected because it is at odds with the rule that restrictive covenants are to be interpreted in accordance with their clear and unambiguous language.

Even if there were some basis for a judgment against the Bunneys, there is no legal basis for an award of attorneys’ fees against them. Washington cases have consistently reversed awards of attorneys’ fees for “pre-litigation bad faith” where, as here, the trial court did not make findings both that the position taken was frivolous *and* that the position was taken with an improper motive such as harassment. In addition, because the Bunneys received no notice until after trial that sanctions for

“pre-litigation bad faith” were being sought, imposition of attorneys’ fees on that ground violates due process.

II. ARGUMENT

a. **The Trial Court’s Decision that Plaintiffs’ Complaint for Declaratory Judgment was a “Suit to Enjoin Construction” is Reviewable on Appeal.**

Respondents claim that “an order denying summary judgment is not an appealable order.”¹ This is not an accurate statement of the legal doctrine. “[A] denial of summary judgment cannot be appealed following a trial if the denial was based upon a determination that material facts are in dispute and must be resolved by the trier of fact.” *In re Custody of A.C.*, 124 Wn. App. 846, 852, 103 P.3d 226, 229 (2004) (citing *Johnson v. Rothstein*, 52 Wn. App. 303, 304, 759 P.2d 471, 472 (1988)). “But the denial of summary judgment may be reviewed after the entry of a final judgment if summary judgment was denied based on a substantive legal issue.” *Id.*

¹Respondents’ Brief at 10.

(citing *Bulman v. Safeway, Inc.*, 96 Wn. App. 194, 198, 978 P.2d 568, 571 (1999), *rev'd*, 144 Wn.2d 335, 27 P.3d 1172 (2001)).

The trial court's decision on this issue was not that issues of fact precluded summary judgment. Instead, the decision resolved a substantive legal issue, namely whether an action for a declaratory judgment is a "suit to enjoin construction" for purposes of the following provision of the Restrictive Covenants of Holmes Harbor Estates, Inc.:

. . . [I]n any event, if no suit to enjoin the construction has been commenced prior to the completion thereof approval will not be required and the related covenants shall be deemed to have been fully complied with.²

b. The Trial Court's Erred in Its Legal Conclusion that the Plaintiff's Complaint for Declaratory Judgment was a "Suit to Enjoin Construction."

The trial court determined as a matter of law that Plaintiffs' Complaint for Declaratory Judgment was a "suit to

² Clerk's Papers at 8 (Findings of Fact and Conclusions of Law at 3). *See also* Clerk's Papers at 423 (Restrictive Covenants of Holmes Harbor Estates, Inc., Exhibit A to Declaration of Kathryn C. Loring).

enjoin construction” for purposes of the covenant requiring that a suit to enjoin construction be commenced prior to completion of construction.³ This decision is obviously at odds with the clear and unambiguous language of the covenant. Respondents do not dispute that Washington “[c]ourts are to determine the drafter’s intent by examining the clear and unambiguous language of the covenant.” *Bauman v. Turpen*, 139 Wn. App. 78, 88-89, 160 P.3d 1050, 1056 (2007) (citing *Burton v. Douglas County*, 65 Wn.2d 619, 399 P.2d 68, 70 (1965))

The language “suit to enjoin construction” is clear and unambiguous. There is no legal basis for the argument that “Plaintiffs’ Complaint for Declaratory Judgment” is a “suit to enjoin construction.” Nowhere in the complaint is there any request for a preliminary or permanent injunction. The relief requested is a “declaratory judgment,”⁴ not an injunction. The

³ Clerk’s Papers at 38 (Order Denying Defendants’ Motion for Summary Judgment at 5) (“ . . . Plaintiffs’ *Complaint* requesting that defedant’s residence be brought into compliance with the height restriction satisfies such requirement.”)

⁴ Clerk’s Papers at 520 (Complaint for Declaratory Judgment at 4).

specific provision upon which the trial court and Respondents rely seeks a “declaratory judgment . . . determining that the residence so-constructed by Bunney should be modified”⁵ This request is not a “suit to enjoin construction” under any accepted definition of that phrase.

There is only one rational interpretation of the covenant at issue. If no suit to enjoin construction is brought before the completion of construction, full compliance with the covenants is deemed to have taken place. Because no suit to enjoin construction was brought before the November 2008 completion of construction of the Bunneys’ home, the covenants are “deemed to have been fully complied with.” Because the covenants by their own terms unequivocally deem the Bunneys’ home to be in full compliance, there is no basis whatsoever for a judgment against the Bunneys. The judgment of the trial court should be vacated, and the declaratory judgment action against the Bunneys dismissed with prejudice.

⁵ *Id.*

c. The Trial Court Erred in Imposing Judgment Requiring the Bunneys to Pay Attorneys' Fees.

There is no basis for a judgment of any kind against the Bunneys. Accordingly, the award of attorneys' fees should be vacated along with the rest of the trial court's judgment. Even if there were some basis for a judgment against the Bunneys, there is no legal basis for an award of attorneys' fees against them. Respondents do not dispute that there is no provision for attorneys' fees in the covenants for Holmes Harbor Estates. And Respondents admit that imposition of attorneys' was not warranted under Rule 11 or because the Bunneys presented a frivolous defense.⁶ Instead, they claim attorneys' fees were warranted as a fine or sanction for "pre-litigation bad faith." The Bunneys were given no notice whatsoever that Respondents were seeking attorneys' fees as a sanction for "pre-litigation bad faith." In addition, the trial court did not make the required findings for such an award: that the position

⁶ Respondents' Brief at 15

taken was frivolous *and* that the position was taken with an improper motive such as harassment.

The court's findings of "bad faith" describe only the Bunneys' attempts to properly resolve their dispute with Respondents. Though no reported decision has ever approved an award of attorneys' fees for "pre-litigation bad faith," there are cases with dicta acknowledging a trial court's power to sanction pre-litigation bad faith. Each of those cases has reversed such an award and made clear that it is an abuse of discretion to award such fees absent two findings: first, that a position taken was frivolous *and* second, that the position was taken with an "improper motive." *See Matter of Pearsall-Stipek*, 136 Wn.2d 255, 267, 961 P.2d 343, 349 (1998); *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 929, 982 P.2d 131, 136 (1999).

The trial court made neither of the required findings. There is no finding and not a shred of evidence in the record that the Bunneys acted with an improper motive such as

harassment. Nor was there a finding that the Bunneys' defense was frivolous. Respondents' Brief acknowledges that the award of attorneys' fees was not based on a finding that the Bunneys' position in the litigation was frivolous.⁷ The Bunneys' had every right to contest Respondents' position both at board meetings and in court. And the trial court had no power whatsoever to "fine" or sanction them for doing so.

As mentioned above, no reported Washington case has affirmed an award of attorneys' fees for pre-litigation misconduct. The two Washington cases reversing such awards as an abuse of discretion, *Pearsall-Stipek* and *Rogerson Hiller*, make clear that the findings in this case do not support such an award. In *Pearsall-Stipek*, the trial court awarded attorneys' fees to an elected official who was the subject of five unsuccessful recall petitions. The petitioner had presented a new recall petition based on findings that had been held insufficient in a prior proceeding and another petition based on

⁷ Respondents' Brief at 15.

new charges that were also found insufficient. *Pearsall-Stipek*, 136 Wn.2d at 259, 961 P.2d at 345. While recognizing that the court's "inherent equitable powers authorize the award of attorney fees in cases of bad faith," the Supreme Court reversed the fee award because there were insufficient findings of "bad faith." *Id.* at 266, 961 P.2d at 349. The court explained:

Given the repeated and wholly meritless efforts to recall Ms. Pearsall-Stipek, Mr. Bennett's persistence suggests that he may be motivated by spite rather than by a sincere belief in the sufficiency of the recall charges. However, the trial court found only that Mr. Bennett's petition was frivolous and advanced without reasonable cause. In the absence of any findings of bad faith, we are compelled to hold that the trial court abused its discretion in awarding attorney fees. The award of attorney fees is reversed.

Id. at 267, 961 P.2d at 349. In this case, as in *Pearsall-Stipek*, the trial court made no finding whatsoever that the Bunneys acted with any improper motive. On the contrary, the trial court's findings make clear that the Bunneys had a sincere

belief in the merits of their defense.

In *Rogerson Hiller*,

the trial court found that “the tax deduction taken by Aero composites ... was inconsistent with the position taken by Michael Rogerson and the Rogerson Group on the central issue in this litigation[,]” the ownership of the equipment. Based on this finding and “a pattern of disregard for the separation of corporate entities” the trial court concluded that Rogerson acted in bad faith.

Rogerson Hiller, 96 Wn. App. at 929, 982 P.2d at 137. The

Court of Appeals reversed, explaining:

The issue of ownership of the equipment was hard fought. Ultimately the trial court, believing that the California income tax return impeached Rogerson, rejected his claim that Rogerson Hiller owned the equipment. But nothing in the trial court's decision indicates that Rogerson brought a frivolous claim of ownership to harass Northwest or for other improper motive. In fact, Rogerson's witnesses attempted to explain that the equipment mentioned in the tax return was not the equipment at issue. The trial court did

not find the testimony credible. But many if not most trials turn upon which party is the most credible. And this decision frequently comes down to deciding that a party is simply not believable on the principal issue. The conduct here does not rise to the level of bad faith required by *Pearsall-Stipek*.

Id. at 930, 982 P.2 at 137. As in *Rogerson Hiller*, the issues in this case were hard fought. And, as in both *Rogerson Hiller* and *Pearsall-Stipek*, there was no finding by the trial court that the Bunneys acted with an improper motive. They proceeded on the advice of legal counsel and presented legitimate defenses to Respondents' claims. These defenses included meritorious arguments that the Homeowners' Associations had abandoned the height restrictions, that the Bunneys' home conformed to the height restrictions if measured from the highest point of the property in accordance with Island County land use practice, and that no suit to enjoin construction had been brought prior to completion of construction.

In addition, because the Bunneys received no notice that

attorneys' fees were being sought as a "fine" or sanction for pre-litigation bad faith, imposition of fees violates the Bunneys' due process rights. In *Staley v. Staley*, 15 Wn. App. 254, 256, 548 P.2d 1097, 1099 (1976), the court explained:

Due process of law as provided by the Fourteenth Amendment to the United States Constitution and Article 1, Section 3 of the Washington State Constitution requires adequate notice and an opportunity to be heard prior to deprivation of a significant property interest.

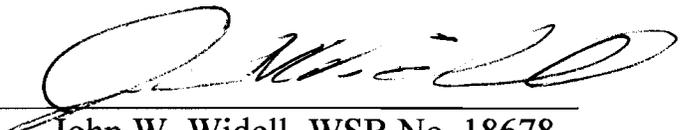
The Complaint for Declaratory Judgment made no request for attorneys' fees on the ground of bad faith or frivolousness. No such request was made until the *conclusion of trial*. The trial court made findings of bad faith after a trial, during which the Bunneys and their counsel had no notice that bad faith was an issue being litigated. This process violates the principles of fundamental fairness at the core of the due process clause. Imposing the sanction of nearly \$75,000 in attorneys fees against the Bunneys with no notice that they were being

accused of “pre-litigation bad faith” prior to the completion of the case violates the Bunneys’ rights to due process.

III. CONCLUSION

For these reasons, the judgment of the trial court against the Bunneys should be vacated and the case remanded to the trial court with instructions to dismiss all claims with prejudice. Even if the Bunneys’ home is not deemed to fully comply with the covenants, the trial court’s award of attorneys’ fees should be vacated.

Respectfully submitted this 5th day of July, 2011.

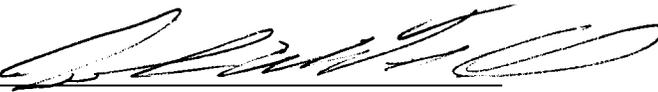
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CERTIFICATE OF SERVICE

I certify that I sent a copy of the Brief of Appellants to the attorney of record for Respondents via Federal Express to the following address:

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Dated this 5th day of July, 2011.

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