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No. 73715-5-I

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COURT OF APPEALS, DIVISION I,  
OF THE STATE OF WASHINGTON

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MOSES H. MA and KRISTINE S. MA-BRECHT-MA, husband and wife,

Appellants,

vs.

JAMES LARSON and PATRICIA A. LARSON, husband and wife, and  
ANTONETTE SMIT LYSEN,

Respondents.

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REPLY BRIEF OF APPELLANTS MA

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Gerald Robison, WSBA #23118  
Attorney at Law  
648 S. 152<sup>nd</sup> Street, Suite 7  
Burien, WA 98148-1195  
(206) 243-4219

Sidney Tribe, WSBA #33160  
Talmadge/Fitzpatrick/Tribe  
2775 Harbor Ave. SW  
Third Floor, Suite C  
Seattle, WA 98126  
(206) 574-6661

Attorneys for Appellants Moses H. Ma and Kristine S. Ma-Brecht-Ma

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A. INTRODUCTION

Moses Ma and Kristine Ma-Brecht-Ma (“the Mas”) planned and properly permitted with the City of Burien a modest addition to their home, less than 40% of the floor space below. The CC&R’s governing their neighborhood allow two and a half story homes, and also state that if the CC&R’s conflict with the Burien zoning code, the code prevails. Nevertheless, the trial court decided on summary judgment that the Mas’ project violated the CC&Rs, and enjoined them from building it.

The trial court erred on summary judgment in interpreting the term “half story” to unambiguously mean “a story half the height” of other stories. It also erred in concluding the CC&Rs and the zoning code did not conflict, despite the fact that one allowed the Mas project, and the other ostensibly did not.

This Court should reverse the trial court’s summary judgment ruling adopting the Larsons’ interpretation of the CC&Rs here. It should also reverse the trial court’s \$25,000 attorney fee award, as it has no basis in law, statute, or equity, and is unsupported by the facts.

B. REPLY ON STATEMENT OF THE CASE

The Larsons attempt to place responsibility for the present litigation onto the Mas. Br. of Resp’ts at 6-7. They contend that the Mas acted improperly by (1) not obtaining advance permission from the

Larsons to remodel their home, (2) not seeking to “clarify” the meaning of “two and a half stories” with the homeowners’ association, and (3) filing a declaratory judgment action to establish their rights under the CC&Rs. *Id.*

The Larsons omit important facts regarding the origins of this matter. First, the Mas were not obligated under the CC&Rs to get advance approval for their project from either their neighbors or the homeowners’ association. CP 43-44. The homeowners’ association apparently has no direct interest in the Mas’ project; the Larsons admit that when they asked the association to intervene in the declaratory judgment action it declined. CP 239. Second, the Mas did not believe that they needed “clarification” regarding whether their project complied with the CC&Rs. They believed and still believe that their remodel is a “half story” and thus fully complies with the CC&Rs. CP 83. Third, the Larsons first raised the specter of litigation *against the Mas* in September 2014, and then two months later sent the Mas a series of deceptive “petitions”<sup>1</sup> they had circulated in which they “demand[ed] that [the Mas] alter [their] plans to comply with” the CC&Rs. CP 138-45.

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<sup>1</sup> The petitions were deceptive, because they pronounced the Mas’ addition a “third story” without acknowledging the dispute about the meaning of “half story” or the fact that the Mas’ first “story” is a basement that may or may not constitute a “story” under the CC&Rs. CP 138-45. They also stated that the Mas’ project should be subject to a 25-foot height limit that did not actually exist in the CC&Rs as written, but was merely “proposed.” *Id.*

The Larsons also complain that the Mas named them as defendants to the declaratory judgment action, as opposed to the homeowners' association. Br. of Resp'ts at 7.

However, the Larsons admitted below that the homeowners' association had no dispute with the Mas, and even *declined to intervene* when the Larsons asked it to do so. CP 239. The Larsons cite to no provision in the bylaws, nor any statute, requiring the Mas to name the homeowners association as a defendant.<sup>2</sup>

The Larsons use a deceptive illustration to suggest that the Mas' plan is to virtually double the existing height and floor space of their home. Br. of Resp'ts at 6. This illustration is one of five appearing at CP 36, and is deceptive because it depicts the home's north elevation, which is an end view that reveals nothing about the existing house or the addition.

The true representation of the size of the addition is located at CP 37, appended hereto at Appendix A. It is a view of the home from the side, showing the existing structure and the addition clearly. CP 37.

The Larsons continue to refer to the Mas' proposed addition as a "third story" or a "3-story project." Br. of Resp'ts at 1, 2, 7. The Larsons

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<sup>2</sup> The legal impropriety of naming a defendant with no interest in the controversy is addressed in the Mas' argument section, *infra*.

forget the summary judgment standard which favors the Mas, because there is substantial dispute of their characterization. The Mas assert that after their proposed project is completed, their home will either be one and a half stories or two and a half stories, depending on whether their daylight basement qualifies as a “story.” CP 21.

Finally, the Larsons violate the rules of this Court by relying on evidence and matters outside the trial court record. Br. of Resp’ts at 8-9, 22 n.2. They recount their failed attempt to have the Mas’ appeal dismissed as moot. *Id.* The Commissioner denied their motion in a detailed order, and they did not move to modify that decision to bring the issue to this panel. Instead, they do so in their brief, again referring to matters the trial court did not consider. *Id.* In so doing, they refer this Court to new evidence outside the record that this Court has not admitted under RAP 9.11. *Id.* They have violated RAP 10.3(a)(5) and (6).

Ordinarily, the Mas would respond by moving under RAP 10.7 to strike the offending section from the Larsons’ brief. However, the Mas believe that a motion to strike would only serve the Larsons’ apparent desire to delay this proceeding.<sup>3</sup> The Larsons made repeated requests for

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<sup>3</sup> It has become clear since the Larsons filed their dismissal motion that they believe they would benefit from delaying resolution of this appeal until next year, when they will make another attempt to attack the Mas’ project by convincing other neighbors to amend the CC&Rs to specifically prohibit it. If the CC&Rs allow ex post facto amendments at all, they permit it only every 10 years. CP 44. Based on the 1967

extension of their brief, and combined those requests with strategic timing of their RAP 18.9(c) motion. *See*, Commissioner’s order denying motion to dismiss. This served to delay filing of the Larsons’ responsive brief for *three and a half months*, from its original due date of December 12, 2015 to an actual filing date of March 24, 2016.

Although the Mas are forced to decline the opportunity to move to strike, they nonetheless respectfully request that this Court disregard matters outside the trial court record and impose a sanction for violation of the court rules under RAP 18.9.

### C. ARGUMENT

- (1) The Larsons’ Interpretation of the Term “Half Story” Is Not Reasonable and Leads to Absurd Results; the Term Unambiguously Means “a Story Half the Area of the Story Below”

In their opening brief, the Mas argued that the phrase “2 ½ stories in height” is unambiguous regarding the meaning of the term “half story.” Br. of Appellants at 9-14. They contended that the term “half story” in the context of home construction is interpreted by experts and this Court to mean “a story half the floor area of the stories below,” rather than “a story half the height of the stories below.” *Id.* They cited numerous examples concluding that a “half story” is a story half the floor area of the story

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adoption date, the next 10-year cycle commences in 2017. *Id.*

below. *Id.* They also noted that the Larsons' interpretation of "half story" as "a story half the height" is absurd, contrary to logic, and would favor homeowners with taller stories and disfavor homeowners with shorter stories. *Id.*

The Larsons first respond that the CC&Rs are unambiguous because they use the phrase 2 ½ stories "in height," and that no further inquiry is needed. Br. of Resp'ts at 14-15. They claim that because the CC&Rs use the term "in height," the only reasonable reading is that a "half story" is a story half the height of the story or stories below. *Id.*

The Larsons cannot explain how use of the term "in height" leads to absolute resolution of this issue in their favor, when this Court and others have concluded otherwise based on identical language. The cases the Mas have cited use the same "in height" language, describing a building in terms of being stories and half stories "in height." Br. of Appellants at 10-12, citing *Foster v. Nehls*, 15 Wn. App. 749, 750, 551 P.2d 768 (1976); *Johnson v. Linton*, 491 S.W.2d 189, 196-97 (Tex. Civ. App. 1973); *Madden v. Zoning Bd. of Review of City of Providence*, 48 R.I. 175, 136 A. 493, 494 (1927). Yet in each of those cases, the court found that even the term "half story in height" referred to a story with half the floor area of the others, not a story half the height. *Id.*

The Larsons attempt to distinguish all of these authorities that interpret the term “half story” as the Mas do. Br. of Resp’ts at 22-26. However, they distinguish these cases mostly on their facts and holdings, ignoring the pertinent issue: whether these cases demonstrate that the Larsons’ interpretation of “half story” is unsustainable. *Id.* For example, the Larsons distinguish this Court’s ruling in *Foster* by stating that the Court found that the covenant in that instance was violated, and that it was intended to protect views. Br. of Resp’ts at 22. However, those facts are not relevant to the question of whether the term “half story” unambiguously means “half the area.” Also, *Foster* went to trial, where the original platter and developer testified that the covenant was intended to protect views. *Foster*, 15 Wn. App. at 751. Here, no such evidence was admitted; the case was decided on summary judgment. CP 231-32.

If the Larsons believe that the term half story “in height” unambiguously means a story half the height of the others, one would think the Larsons could produce one counterexample of a court, expert, or administrative body concluding that the term means what they say it does. They have not. The Mas’ interpretation is the only logical one given all of the circumstances, and the trial court erred in concluding otherwise.

The Larsons next argue that reviewing the “entirety” of the CC&Rs reveals that their interpretation is unambiguously the right one.

Br. of Resp'ts at 15-17. They aver that because the drafters referred to square footage requirements at other points in the document, they clearly could not have intended the term "half story" to refer to floor area. *Id.*

The fact that the drafter of the CC&Rs did not choose to define the term "half story" actually supports the Mas' argument. As the Mas and this Court have explained, experts all over the country have long noted that the term "half story" is a commonly used construction term meaning "a story half the floor area." No authority the Mas (or apparently the Larsons) could find states that it means a story half the height. Thus, the drafter appeared to believe that the term "half story" was unambiguous and needed no definition.

The Larsons also claim that their interpretation protects the "collective interests" of the homeowners by "protecting views." Br. of Resp'ts at 18-20. They cite their deceptively phrased petitions in support of this claim. *Id.* They also rely on *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 120, 118 P.3d 322 (2005),<sup>4</sup> claiming it is "obvious" that the "collective interests" of the Shoreview homeowners will be protected by adopting the Larsons' interpretation of the CC&Rs. *Id.* at 18-19. The

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<sup>4</sup> *Viking* involved the issue of whether, in a restrictive covenant, a racially discriminatory provision could be severed from a provision restricting density. 155 Wn.2d at 115. Its usefulness in resolving the present case is limited to general statements about covenants.

Larsons claim that the Mas' interpretation would lead to an "arms race" where every neighbor builds the tallest home possible. *Id.*

The Larsons' claim that their interpretation best protects all homeowners collectively is unsustainable. The Larsons suggest that plat residents' *only* collective interest is in views. They ignore that the residents also have an interest in being able to enhance their property values and increase their living space.

The Larsons' interpretation benefits only those property owners who have the good fortune of already having a house or a lot large enough for their needs, who do not need extra space for growing families, home offices, or hobbies. The Larsons read the CC&Rs to benefit *only* those upland neighbors with the good fortune of having downslope neighbors who have short stories. The Larsons' interpretation prevents those downslope neighbors from enhancing their own property with additions, because a 4- or 5-foot "story" is useless as living space. On the other hand, an upland neighbor with two tall stories *may* make an addition, creating an unfair and uneven application of the CC&Rs.

The Mas' interpretation allows every neighbor with a one- or two-story house to make modest additions, as long as they keep the new story half or less than the area of the story below. This is the interpretation that

benefits most property owners collectively. Based on the facts of the present case, the Larsons' interpretation benefits them.

The Larsons next claim that any evidence supporting the Mas' interpretation was "inadmissible" because the Mas cannot use extrinsic evidence to "change" the "plain meaning" of the term "height" to "area." Br. of Resp'ts at 18-22.

The Larsons' argument regarding extrinsic evidence begs the question. Of course, any extrinsic evidence is irrelevant if this Court concludes the CC&Rs are unambiguous. The Mas agree that, if this Court believes that the CC&Rs' meaning is "plain," and that either the Mas' or the Larsons' reading controls, then extrinsic evidence would be irrelevant. However, in the event that this Court concludes the CC&Rs are ambiguous, the Mas evidence is relevant to resolve such ambiguity.

Finally, the Larsons claim it is not an absurd result that under their interpretation of the CC&Rs, a home of height far greater than the Mas' could be built if a homeowner had taller than average stories. Br. of Resp'ts at 21-22.

- (2) In the Alternative, the Larsons Concede the Term "Half Story" Is Ambiguous, Thus It Needs to Be Construed and the Trial Court Erred in Granting Summary Judgment on the Grounds that It Was Unambiguous

Contained within the Larsons' argument that the CC&Rs are unambiguous is a helpful concession: just as the Mas claimed in their opening brief at 15, the CC&Rs are at the very least ambiguous, and thus must be interpreted using legal principles and evidence. Br. of Resp'ts at 21 ("If there is any ambiguity in the phrase '2 ½ stories in height,' it is limited to the meaning of a "story." ).<sup>5</sup>

If the term "half story" is ambiguous, then the trial court erred in concluding that the term was unambiguous. This Court should consider all of the applicable rules of contract construction, as well as the evidence and authorities, to resolve the ambiguity.<sup>6</sup> As explained in the Mas' opening brief and above, all of the facts, law, precedent and logic point to the conclusion that the term "half story" means a "story half the floor area."

Finally, the Larsons argue that the factual dispute over whether the Mas' basement counts as a story under the CC&Rs is "not before this

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<sup>5</sup> The Larsons then make an argument that interpretation of the ambiguous term "story" is not material because it does not matter whether a story "means a story of ordinary height or...extraordinary height." Br. of Resp'ts at 21. This argument is perplexing for two reasons. First, the Mas are not arguing that a "half story" can be of "extraordinary height," they presume that a story is one of the same or very similar height to the stories below. Second, the definition of "half story" is absolutely material to this Court's resolution of this matter, thus the definition of "story" is as well.

<sup>6</sup> In the alternative, this Court should remand for an evidentiary hearing to resolve the issue.

Court.” Br. of Resp’ts at 29. They claim that the Mas stated the status of the basement was not material or “germane.” *Id.*

The Larsons misstate the Mas’ summary judgment position. The Mas argued at summary judgment and in their opening brief that the factual dispute over application of the CC&Rs to the basement *would be relevant* and require resolution *if* the trial court accepted the Larsons’ definition of “story” as “a story half the height.” CP 150, 226.

The Larsons rely on an out-of-context statement from the Mas’ motion below, a statement that the basement issue is not “germane.” Br. of Resp’ts at 29. The Mas’ statement merely explains that under the Mas’ position regarding the definition of “half story,” whether or not the basement is a story, the Mas’ house after renovation will still comply with the CC&Rs because it will be at most two and a half stories. CP 25.<sup>7</sup>

The Larsons’ entire summary judgment position below (and on appeal) is predicated on a factual finding that the Mas’ basement counted as a story. CP 86, 92-94. If the basement is not a story, then the Mas prevail because their home as renovated would be only two stories. This issue was factually disputed. CP 30, 83. The issue is material if this Court

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<sup>7</sup> To reiterate the Mas’ trial court position, if the trial court concluded that a “half story” was a story half the floor area, then *regardless* of whether the basement is a story, the resulting project would be either one and a half stories, or two and a half stories. CP 225. Because the trial court agreed with the Larsons that a half story means a story “half the height,” the basement issue is relevant because if it does *not* count as a story, the Mas’ project would render their home a two story home. *Id.*

adopts the Larsons' interpretation of "half story," and therefore was wrongly decided on summary judgment.

(3) The Burien Zoning Code and the CC&Rs Conflict Because One Permits What the Other Forbids

The Mas have argued that because their project was permitted by the City of Burien, and complies with its zoning code, then it is also permitted by the CC&Rs. Br. of Appellants at 14-15. They maintain that if the CC&Rs conflict with the zoning code, the code prevails by the CC&Rs' express terms. *Id.*

The Larsons respond that there is no conflict because a conflict only exists "when one law *requires* what another law forbids." Br. of Resp'ts at 27 (emphasis added). They cite *Cannabis Action Coal. v. City of Kent*, 180 Wn. App. 455, 482, 322 P.3d 1246, *review granted sub nom. Sarich v. City of Kent*, 336 P.3d 1165 (2014), *aff'd*, 183 Wn.2d 219, 351 P.3d 151 (2015). The Larsons then argue that unless it is impossible to comply with both the CC&Rs and the zoning code, there is no conflict. *Id.* at 27-28 (arguing a true conflict would exist only if "a homeowner could not build a house that satisfied both requirements").

The Larsons misread the very quotation they are relying on from *Cannabis Action*. That case does not state that a conflict only exists if one law "requires" what the other forbids, it states that a conflict exists when

one law “permits” what the other forbids. *Cannabis Action*, 180 Wn. App. at 482.

Here, it is indisputable that the Burien zoning code permits the Mas’ project, because the City issued a permit. CP 83. The City of Burien has issued a permit. *Id.* The Larsons maintain that the CC&Rs prohibit the same project. Under the Larsons’ own argument, the two conflict. Thus, according to the CC&Rs, the zoning code takes precedence. CP 44.

The Larsons warn that accepting the Mas’ position “would spell the end of the CC&Rs,” and restrictive covenants in general. Br. of Resp’ts at 28. They claim that the Mas are advocating that this Court adopt a rule that no covenant can be enforced if it differs from a zoning code. *Id.*

The Larsons’ argument is not well founded. The CC&Rs themselves contain this “conflict provision,” this Court would simply be applying the CC&Rs to the facts of this case. This case does not involve any broad legal principles regarding conflicts between covenants and zoning codes. This is a straightforward contract construction issue.

The CC&Rs allow a homeowner who is unsure about the CC&R restrictions to simply abide by the Burien zoning code in the event of a

conflict. The Mas have done so. The trial court erred in granting summary judgment for the Larsons.

(4) There Is No Equitable Basis for an Attorney Fee Award In this Declaratory Judgment Action; the Trial Court Was Not Authorized to Award Any Amount of Attorney Fees Without Scrutiny and a Lodestar Calculation

The Mas argued in their opening brief that the trial court erred in concluding that the Larsons had legal grounds for an award of attorney fees based on the equitable principle enunciated in *Rorvig v. Douglas*, 123 Wn.2d 854, 873 P.2d 492 (1994). Br. of Appellants at 26-30. They also argued that the trial court abused its discretion by failing to scrutinize the attorney fee claim pursuant to this Court's rule in *Berryman v. Metcalf*, 177 Wn. App. 644, 312 P.3d 745 (2013), *review denied*, 179 Wn.2d 1026, 320 P.3d 718 (2014). *Id.* at 30-35. Instead, the trial court just awarded \$25,000, a seemingly arbitrary figure roughly half of the \$51,199.00 the Larsons requested.

The Larsons respond that (1) this Court should decline to consider the *Rorvig/Berryman* issues at all because the Mas' counsel filed their fee response one day late, br. of resp'ts at 30-33, and (2) because the trial court styled the fee award as "damages" akin to those sometimes awarded in slander of title or malicious prosecution cases, neither the American Rule nor *Berryman* applies. *Id.* at 39.

(a) The Attorney Fee Issue Was Raised Below and Is Properly Before this Court

The Larsons argue that this Court should uphold the attorney fee award under RAP 2.5, claiming that defenses to the attorney fee award were not raised below because the Mas' fee response was filed one day late. Br. of Resp'ts at 30-33.

The Larsons misread RAP 2.5, suggesting that this Court is somehow prohibited from considering arguments that the trial court did not "consider." RAP 2.5 does not restrict review to the arguments the trial court "considered." The rule states that this Court may decline to review issues not "raised" in the trial court. RAP 2.5. The Larsons' argument seems to presume that these two terms are synonymous.

Court rules are interpreted using principles of statutory construction. *State v. Greenwood*, 120 Wn.2d 585, 592, 845 P.2d 971 (1993). A fundamental rule of statutory construction is that the enacting body is deemed to intend a different meaning when it uses different terms. *State v. Beaver*, 148 Wn.2d 338, 343, 60 P.3d 586 (2002) ("[w]hen the legislature uses different words within the same statute, we recognize that a different meaning is intended."); *Simpson Inv. Co. v. Dep't of Revenue*, 141 Wn.2d 139, 160, 3 P.3d 741 (2000) (it is "well established that when 'different words are used in the same statute, it is presumed that a different

meaning was intended to attach to each word.’” (quoting *State ex rel. Pub. Disclosure Comm’n v. Rains*, 87 Wn.2d 626, 634, 555 P.2d 1368 (1976))).

The terms “raised” and “considered” have different meanings. The two terms are used frequently in concert in all manner of legal contexts, in the phrase “raised and considered.” *Brandon v. Webb*, 23 Wn.2d 155, 166, 160 P.2d 529, 534 (1945) (“On appeal to this court several questions were raised and considered...”); *Faben Point Neighbors, W. Hunter Simpson and Craig E. Tall, Appellants v. City of Mercer Island, Pacific Properties, and Samis Foundation, Respondents*, WL 417997 at \*2 (Wash. Shore. Hrg. Bd. 1999) (“The petitioners’ shoreline issues were raised and considered for the second time”); 101 C.J.S. Workers’ Compensation § 1537 (“Manifest and fundamental error, apparent on the record, may be raised and considered for the first time in the higher court”).

If the terms “raised” and “considered” were synonymous, this common usage would be redundant. “Raised” suggests that the issue was called to the attention of the trial court, “considered” suggests that the trial court at some point contemplated the issue. Thus, the fact that the trial court here may or may not have considered the Mas’ objections based on a local court rule, the issues with the fee order were raised. Even assuming *arguendo* LCR 7 prohibited the response from being considered, the attorney fee issues were nonetheless raised below, and thus subject to

appeal. There is no order from the court striking the response as untimely, nor is there any statement that the court refused to consider the responding pleading.

Furthermore, the trial court apparently did not “consider” the filings of either party in making its decision. CP 317. Instead, the trial court based its fee ruling on the summary judgment documents and “the applicable law on an award of attorney’s fees.” *Id.* Thus, by the Larsons’ logic, even if the Mas’ fee response had not been one day late, this Court would be precluded from reviewing the fee order because the trial court did not “consider” *either party’s* fee submissions in making its fee ruling. Such formalistic evasion of appellate review is contrary to this Court’s desire to see cases resolved on their merits.

Even assuming that the Larsons have not misinterpreted the term “raised,” RAP 2.5’s limitation on review is discretionary, not mandatory. RAP 2.5. While appellate courts normally decline to review issues raised for the first time on appeal, they have discretion to accept review of claimed errors not appealed as a matter of right. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). Ultimately, an appellate court’s decision to review an error not raised in the trial court is discretionary. *Cole v. Harveyland, LLC*, 163 Wn. App. 199, 258 P.3d 70 (2011). This Court has full discretion to consider the issue even when it was not raised

below. *In re Marriage of Wendy M.*, 92 Wn. App. 430, 962 P.2d 13 (1998).

Finally, there is an exception to RAP 2.5 that allows this Court to consider, regardless of what was raised below, a decision that is totally unsupported by the facts in the record. RAP 2.5(a). As explained in the Mas' opening brief at 29-30 and *infra*, there are no facts in this record to support the trial court's ruling that fees were awardable based on "slander of title."

This Court should not elevate form over substance and conclude that arguments raised and decided below based purely on the law are unreviewable because the Mas' attorney filed a document a day late. The Larsons had no legal grounds for a claim of attorney fees, and the trial court erred in concluding otherwise based on the summary judgment record and *Rorvig*.

(b) *Rorvig Does Not Authorize an Award of Attorney Fees as Damages in a Declaratory Judgment Action; Attorney Fees as Damages Is Narrow Exception to the American Rule*

The Larsons claim that they are entitled to attorney fees, applying a narrow exception to the American Rule that allows for attorney fees as damages in a slander of title case. Br. of Resp'ts at 33-36.

The Larsons seek to expand *Rorvig* far beyond its narrow confines, and argue for the *de facto* elimination of the American Rule. As explained in *City of Seattle v. McCreedy*, 131 Wn.2d 266, 278, 931 P.2d 156, 162 (1997), the kinds of actions in which attorney fees are recoverable are extremely limited, and do not include declaratory judgment actions to determine the meaning of a covenant.

In *McReady*, certain landlords and tenants objected to the City of Seattle's residential housing inspection program. *McReady*, 131 Wn.2d at 269-70. The City filed a declaratory judgment action and issued inspection warrants under the program. *Id.* In an earlier appeal, the court quashed some of the warrants. In the later appeal, the defendants argued that because the City filed a declaratory injunction action requiring them to litigate to quash the invalid warrants – which they analogized to dissolving a wrongfully issued temporary injunction – they should receive attorney fees as damages. *Id.* at 277-79.

Our Supreme Court explained the various equitable exceptions to the American Rule and their origins. *Id.* The Court acknowledged that attorney fees are recoverable in an action where a trial on the merits has for its sole purpose the determination of whether an injunction should be dissolved, the injunction is dissolved, and a trial was the sole procedure available to the party attempting to dissolve the temporary injunction. *Id.*

It noted that if dissolving the injunction is not the sole purpose of the trial, then attorney fees are available only for services performed in dissolving the temporary injunction. *Id.*

However, the *McReady* court cautioned that the rationale supporting this exception starts from the premise that a temporary injunction or restraining order *prohibits* an individual from engaging in some given activity. It observed that the only option available to a party faced with a temporary injunction or restraining order (other than submitting to the order) is to take legal action. *Id.* Thus, if the wrongfully enjoined party prevails in the action to dissolve the temporary injunction, then attorney fees represent the damages suffered from the injunction.

The *McReady* court concluded by warning that applying these equitable exceptions too broadly would swallow the American Rule, “because virtually all litigation compels a party's opponent to litigate.” *Id.* It reiterated that Washington courts have narrowly limited the type of actions where attorney fees are awarded as damages. *Id.* The Court cautioned that the *Rorvig*, exception for slander of title is based on a determination “that a *wrongful* act may leave another party with no choice but to litigate.” *Id.* (emphasis added).

The Mas did not act wrongfully by filing a declaratory judgment action to determine the meaning of the CC&Rs, in the face of the Larsons’

threats to litigate and demands that they stop their project. CP 138-39. Neither the Mas' proposed project nor the Mas' declaratory judgment action slandered the Larsons' title. The Mas acted in good faith, believing they were abiding by the CC&Rs and the Burien zoning code. The Larsons, not the Mas, forced litigation because they believed their view of the CC&Rs was the right one.

Nor did the Mas act wrongfully by naming the Larsons as defendants, rather than the homeowners' association. On the contrary, filing an action against the homeowners' association – with which the Mas had no dispute – would have violated the justiciability requirement of the UDJA.

Under the Uniform Declaratory Judgments Act, chapter 7.24 RCW, a plaintiff must establish that there is a real and actual dispute between the parties:

(1) ... an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) *between parties having genuine and opposing interests*, (3) *which involves interests that must be direct and substantial*, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

*Coppernoll v. Reed*, 155 Wn.2d 290, 300, 119 P.3d 318 (2005) (emphasis added). The UDJA also requires that every party with an interest be

joined in the litigation. RCW 7.24.110; *Primark, Inc. v. Burien Gardens Associates*, 63 Wn. App. 900, 906, 823 P.2d 1116 (1992).

The homeowners' association had no interest in this litigation. CP 239. The Larsons admit that they asked the homeowners' association to intervene, and it declined. *Id.* Also, if the Larsons truly believed that the association was a real party in interest, they could have moved for joinder under the RCW 7.24.110. They did not, and thus waived the issue.

If the Mas had sued the homeowners' association despite having no dispute with it, the association could have sought dismissal on the grounds that it was not a proper defendant under the UDJA, because there was no direct and substantial existing dispute between it and the Mas.

This dispute was between the Larsons and the Mas. The Larsons first raised the specter of litigation here. CP 138. The Larsons claimed their interpretation of the CC&Rs was correct, and made the "demand" that the Mas stop work on their project. The Larsons forced the Mas to resort to litigation to determine the legal interpretation of the CC&Rs. This action is not akin to slander of title or malicious prosecution.

The American Rule applies here. Each party to this dispute is responsible for its own attorney fees and costs.

- (c) This Is Not a Guardianship Case; the Fee Here Was a Prevailing Party Attorney Fee Award and the Rationale Behind the Lodestar Method Applies

The Mas argued in their opening brief that the trial court abused its discretion by failing to scrutinize the Larsons’ attorney fee request using the lodestar method and the *Mahler*<sup>8</sup>/*Berryman* protocol. Br. of Appellants at 30.

The Larsons respond that because the trial court styled the fee award as a damages award applying an equitable principle, no scrutiny of the request was required. Br. of Resp’ts at 36-39. In support, they cite *In re Guardianship of Decker*, 188 Wn. App. 429, 447, 353 P.3d 669, review denied, 184 Wn.2d 1015, 360 P.3d 818 (2015).

The Larsons are incorrect; a prevailing party attorney fee award – even when styled as an equitable “damages” award – is not automatically exempt from lodestar analysis. *Decker* is a guardianship case, in which a fee award based on the lodestar analysis would not actually reflect the reasonable fee incurred. *Decker*, 188 Wn. App. at 447-48. A guardianship is a fully equitable *action*, rather than an equitable exception to the American Rule that can be raised in response to an ordinary legal claim. *Id.* In fact, the guardianship statute actually provides its own

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<sup>8</sup> *Mahler v. Szucs*, 135 Wn.2d 398, 433–34, 957 P.2d 632, 966 P.2d 305 (1998) (overruled on other grounds by *Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 659, 272 P.3d 802 (2012)).

standard for calculating attorney fees that differs from the lodestar method. *Id.* at 449, citing RCW 11.92.180.

This Court in *Decker* explained in detail why, although the lodestar analysis is normally the foundation for an attorney fee award, it was not an abuse of discretion for a trial court in a guardianship matter to consider both the lodestar *and* other equitable factors in calculating the reasonable fee:

The court, in overseeing guardianships, must weigh the competing concerns of individual autonomy and protection of incapacitated persons. RCW 11.88.005. This is not a typical situation wherein lodestar analysis is required, such as where a trial court awards attorney fees to the prevailing party. Here, the primary considerations for the fee award are equitable, and trial courts are not required to apply the lodestar method. But the trial court, in making its equitable decision, may balance lodestar factors when it determines just and reasonable fees.

*Id.* at 447 (citation omitted).

Even when a trial court states it is employing an alternative to the lodestar to calculate a fee, the trial court still must enunciate and explain the equitable factors underpinning the award and justifying departure from the lodestar method. *Id.*; *Matter of Marriage of Van Camp*, 82 Wn. App. 339, 342, 918 P.2d 509, 511 (1996) (“although it rejected the lodestar formula, the court considered both the computations and records

introduced into evidence by the...experts; in fact, it used many of the lodestar factors in calculating a reasonable fee”).

An award of attorney fees must be “reasonable,” even when attorney fees are awarded as an element of damages or on equitable grounds. *See, e.g., James v. Cannell*, 135 Wash. 80, 82, 237 P. 8 (1925), *adhered to on reh’g*, 139 Wash. 702, 246 P. 304 (1926) (in action to dissolve injunction bond, attorney fees awardable as damages (“not exceeding, of course, a reasonable amount”). Parties and trial courts may not avoid this fundamental principle by claiming that an arbitrary amount of fees as “damages” is reasonable simply because it does not exceed the lawyer’s total claimed billings in the case.

This case is not a guardianship, nor is it governed by statutes in which the Legislature has established an alternate method to calculating a reasonable attorney fee. The trial court invoked an equitable principle to conduct fee-shifting between the parties. CP 320. The Court made no reference any method used to calculate reasonableness. This was an abuse of discretion under *Mahler* and *Berryman*.

#### D. CONCLUSION

The trial court erred when it entered summary judgment for the Larsons and denied summary judgment for the Mas. Summary judgment for the Larsons should be reversed, and this case should be remanded with

orders to entered summary judgment for the Mas. In the alternative, if the CC&Rs are ambiguous, this Court should remand for resolution of the many remaining factual issues.

This Court should reverse the award of attorney fees in favor of the Larsons. There were no grounds for it. In the alternative, this Court should remand the attorney fee award so that the trial court may enter proper findings and conclusions supporting a reasonable fee award.

If this Court concludes that there are grounds for attorney fees and the Mas prevail, they should be awarded attorney fees incurred in this appeal.

DATED this 6<sup>th</sup> day of May, 2016.

Respectfully submitted,



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Sidney Tribe, WSBA #33160  
Talmadge/Fitzpatrick/Tribe  
2775 Harbor Ave. SW  
Third Floor, Suite C  
Seattle, WA 98126  
(206) 574-6661

Gerald Robison, WSBA #23118  
Attorney at Law  
648 S. 152<sup>nd</sup> Street, Suite 7  
Burien, WA 98148-1195  
(206) 243-4219  
Attorneys for Appellants Ma

# APPENDIX A



DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the Reply Brief of Appellants Ma in the Court of Appeals Cause No. 73715-5-I to the following counsel of record:

Gerald Robison  
Attorney at Law  
648 S. 152<sup>nd</sup> Street, Suite 7  
Burien, WA 98148-1195

David A. Bricklin  
Bricklin & Newman, LLP  
1001 Fourth Avenue, Suite 3200  
Seattle, WA 98154

Mark Clausen  
Morgan R. Blackbourn  
Clausen Law Firm PLLC  
701 5<sup>th</sup> Avenue, Suite 4400  
Seattle, WA 98104

Original E-filed with:  
Court of Appeals, Division I  
Clerk's Office  
600 University Street  
Seattle, WA 98101-1176

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: May 6, 2016, at Seattle, Washington.



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Matt J. Albers, Paralegal  
Talmadge/Fitzpatrick/Tribe