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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

Cause No. 62222-6

Robert J. Carlson and Janet B. Carlson,

Appellants,

v.

James T. Staley and Sonja Staley, and their marital community; John J. Hollinrake, Jr. and Karen E. Hollinrake, and their marital community; Randal R. Jones and Vicki Jones, and their marital community; John Does 1-20 and Jane Does 1-20; and

The Innis Arden Club, Inc., a Washington For-Profit Corporation,

Respondents

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APPELLANTS' COMBINED REPLY BRIEF AND  
BRIEF IN RESPONSE TO CROSS-APPEALS

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## **I. INTRODUCTION**

### **A. Reply in Support of Appeal**

Appellees-Cross-Appellants The Innis Arden Club, Inc. ("Club") and the Hollinrakes/Joneses are fully aware that they cannot show an absence of genuine issues of material fact as to the elements of the causes of action in the Carlsons' Complaint, so they employ the tactic they used in the trial court. In their Briefs they misrepresent the nature of the Carlsons' causes of action, then argue that these non-existent claims have already been decided in previous litigation. But Washington law requires that this Court, on appeal, analyze *de novo* the elements of the Carlsons' causes of action, taking all evidence and reasonable inferences in the light most favorable to the Carlsons.

When this analysis (the correct standard of review) is applied to the actual elements of the Carlsons' action, it is clear that the claims are replete with genuine issues of material fact; therefore the trial court's order of summary judgment must be reversed. As a result, the trial court's dismissal of the action must be amended, such that the order of dismissal with prejudice is changed to a dismissal without prejudice.

**B. Response to Club and Hollinrake/Jones Cross-Appeals**

In the trial court, the Club and the Hollinrake/Jones parties sought an award of attorney fees under RCW 4.84.185, CR 11, and RCW 64.38.050. The trial court made discretionary rulings denying all motions. None of the Appellees contend that the trial court abused its discretion; instead they simply repeat arguments made to, and rejected by, the trial court.

In the absence of an abuse of discretion, this Court has no basis for reversing the trial court's denial of attorney fees. The Appellees' cross-appeals are utterly without basis, and must be dismissed.

**II. ARGUMENT - REPLY BRIEF ON APPEAL**

**A. When Presented With a Motion for Summary Judgment, A Court Must Consider the Elements of the Causes of Action At Issue**

The parties do not dispute the summary judgment standard or the *de novo* standard of review that must be applied on appeal. In their Opening Brief, at pp. 16-22, the Carlsons detailed the elements of their declaratory judgment causes of action, and the evidentiary support for those elements.

Washington precedent clearly explains the mechanics of applying the summary judgment standard: the trial court or appellate court must analyze, element-by-element, a Plaintiff's cause of action, determining

whether genuine issues of material fact exist as to the elements, Shows v. Pemberton, 73 Wn. App. 107, 868 P.2d 164, rev. den., 124 Wn.2d 1019, 881 P.2d 254 (1994), (when moving party claims absence of material fact, the burden shifts to the party with the burden of proof at trial to establish fact question as to "each essential element" of its case.)

Included in this element-by-element analysis is evaluation of any affirmative defenses. In Korslund v. DynCorp Tri-Cities Servs., 156 Wn.2d 168, 125 P.3d 119 (2005), the Supreme Court carefully considered *de novo* each element of each cause of action; first, on the claimed tort of wrongful discharge, the court analyzed the elements of clarity, jeopardy and causation, and the affirmative defense of justification. Id. at 178. The Supreme Court went on to analyze element-by-element the second cause of action for breach of promise: the existence of a promise, reliance, and breach. Id. at 184. Consideration of whether evidence exists to support each element of a given cause of action, the evidence and reasonable inferences taken in the light most favorable to the non-moving party, is the correct standard of review of a grant of summary judgment, id. at 177.

When this Court reviews the record in the instant case, it is clear that the trial court did not consider the elements of the causes of action set forth in the Carlsons' Complaint, nor did it give any consideration to the facts

supporting each element. The trial judge plainly intended to dismiss the Carlsons' declaratory judgment causes of action, regarding them as premature until the completion of the Club Process, and the judge intended that the merits of the dispute could be raised at a later time. In other words, the trial judge did not intend that the boilerplate summary judgment Order he was signing should dismiss with prejudice the merits of the underlying dispute, RecP 25. The judge's action stems from his confusion as to the causes of action set forth in the Carlsons' Complaint, because those causes of action were misrepresented by the Club and the Hollinrake/Jones parties.

**B. In This Appeal, As In The Trial Court, Appellees Have Misrepresented the Carlsons' Causes of Action**

**1. The merits of the case have not been decided.**

This fact is not in dispute: when the trial court dismissed this action, the merits of the tree height Complaint (leveled by Hollinrakes, Joneses and Staleys against the Carlsons) had clearly never been determined. As the trial judge himself pointed out, "we don't know, at this point, what the community process will turn up," RecP 22, ll. 21-22. Unquestionably, there would be no need to await the outcome of a community process if

the merits of Appellees' tree height Complaint had already been decided in previous litigation<sup>1</sup>.

This fact is not in dispute: the Carlsons filed a Complaint seeking a declaratory judgment on the merits of the Hollinrake and Jones, and the Staley, tree height complaints, CP1-11. The Complaint alleged that Hollinrake and Jones lacked standing, i.e. were not the real parties in interest, because they were asserting view rights of properties they did not own, that the Carlson trees do not block the view from their properties, and that as a result Hollinrakes and Joneses "have no legal or equitable right to restrict the height of trees on the Carlson property," CP 6-8, (Complaint ¶¶ 4.3, 4.13, 4.14)<sup>2</sup>. The Carlsons' Opening Brief, at pp. 16-22, detailed the elements of their declaratory judgment causes of action,

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<sup>1</sup> The Club Brief concedes that the merits of the Hollinrake/Jones and Staley tree height Complaints have yet to be decided in the Club Process, Club Br. at 27. Note that the Club acknowledges "there has not even been a decision on its merits," Club Br. at 29.

<sup>2</sup> Appellees James and Sonia Staley have not submitted a Brief, nor did they participate in the trial court. Regarding the Staleys, the Carlsons' Complaint similarly alleged that the view from the Staley property was not obscured by the Carlson trees, and the Staleys had no legal or equitable right to restrict the height of the Carlson trees, CP5-6. The Carlsons are unaware of whether the Staleys dispute any of these contentions.

and plainly showed that genuine issues of material fact exist as to each of those elements.

Because the merits have not been decided, that is, because genuine issues of material fact exist as to all the elements of that dispute, neither claim nor issue preclusion applies. As a result, it was error for the trial court to sign the Appellees' boilerplate orders dismissing with prejudice the Carlsons' action for declaratory judgment on the merits of the dispute. The Carlsons recognize that the trial court is given discretion under RCW 7.24.190 to decline to hear the declaratory judgment action until the Club Process is complete, and while the Carlsons disagree with that ruling because it is likely to delay resolution of the dispute, the Carlsons do not contend that the trial judge abused his discretion. Nevertheless, because the trial court did not reach the elements of the causes of action set forth in the Carlsons' Complaint, and genuine issues of material fact exist as to those issues, the trial court's order dismissing the case must be revised to a dismissal without prejudice.

In their response briefs, neither the Club, nor the Hollinrake/Jones Appellees, make any effort to show an absence of material fact as to the allegations in the Complaint. Instead, they each mischaracterize the clear content of the Complaint.

## **2. The Club's Brief denies the plain facts**

Despite the plain fact that the Carlsons' Complaint sought a declaratory judgment on whether the Hollinrake, Jones and Staley parties have the legal or equitable right to restrict the right of the Carlson trees, CP 5-8, the Club's Brief blandly asserts the opposite, at p. 21:

Contrary to the Carlsons' assertion, the question presented is not whether Hollinrake, Jones and/or Staley ultimately with regard to the Carlsons' specific trees have themselves "legal or equitable right to restrict the height of the Carlson trees." . . . Instead, the issue presented is whether the Hollinrakes, Staleys and Joneses are entitled to invoke the Club's compliance procedures (and whether the Club is entitled to proceed), without being subject to a cloud on title claim by the Carlsons.

Notably, the Club provides no record support whatever for this wholesale mis-characterization of the Carlsons' Complaint. Nowhere in the Complaint, or elsewhere in the record, was there any assertion challenging the Appellees' entitlement to invoke the Club Process, or the Club's entitlement to proceed. Indeed, the record plainly shows that the Carlsons participated in the Club's Process in good faith: they attended the Club's November 14, 2007 hearing on the Hollinrake/Jones Complaint, expecting that the Club would make a timely decision, and continued to await the ruling despite frustration at the Club's unexplained months, in fact years, of delay, RecP 10 (transcript of 11-14-07 Club hearing at CP691-729).

As for the cloud on title claim, it may be that the trial court determined that judicial resolution of a cause of action for cloud on title should await the completion of the Club Process, but that was not "the issue presented" in the Carlsons' Complaint. Because the Club Process is not binding, either on the Carlsons or the Appellees, the Appellees may very well continue to claim the right to restrict the height of vegetation on the Carlson property regardless of the outcome of the Club Process. The trial court determined that resolution of all the causes of action in the Carlson Complaint should await the completion of the Club Process, but it certainly did not reach the merits of the dispute so as to render summary judgment.

As shown in II.A. above, Washington law rejects the reasoning advanced by the Club. A court that elects to rule upon a summary judgment motion must analyze the summary judgment motion by considering the elements of the stated causes of action, see Korslund at 178, 184. The trial court determined that it would decline to address the declaratory judgment causes of action until the Club Process was finished. But as to the Appellees' motion for summary judgment, the trial court erroneously failed to conduct the required analysis of all elements. That led the trial

court to erroneously sign a boilerplate order dismissing the causes of action with prejudice instead of without prejudice.

**3. The Hollinrake/Jones Brief misrepresents the record to an even greater degree than the Club**

Badly as the Club's Brief misrepresents the plain facts of record, the Hollinrake/Jones Brief is even worse. Hollinrakes and Joneses ground their argument on an outright falsehood, claiming that:

The Carlsons asserted that the Tree Height Amendment is not valid and/or if it is valid that the defendant Hollinrakes cannot use it for their benefit because they live in a different subdivision than the Carlsons and that the defendants Hollinrake and Jones are not permitted to participate in the Compliance Procedures established by the Club. These issues were all litigated in [the *Binns* class action or the prior Carlson/Club/Rasch litigation.]

H/J Brief at 4. Hollinrake and Jones fail to provide any record cite for this astonishing statement, and for good reason: the statement is absolutely false, and is not supported in the record. The Carlsons did *not* challenge the validity of the Tree Height Amendment, or its benefit to those in a different subdivision, or the ability of Hollinrake and Jones to participate according to the Club "Compliance Procedures."

**a. Complaint asserted facts and law consistent with the Judge Mertel's prior rulings**

What the Carlson Complaint did challenge was, first, the Hollinrake/Jones contention that the Club Process was "binding and final" as to all parties. The Complaint alleged that the Club Process could not constitute binding arbitration under RCW 7.04A.070; CP 10 (Complaint ¶8.1); that any effort to hold a binding arbitration must be stayed, and that Hollinrakes and Joneses could not ask the Club to assess fines or liens prior to completion of court action, CP 10 (Complaint ¶8.1). Judge Mertel had ruled in the Club/Rasch litigation that the Club Process was *not* binding arbitration, that the Carlsons could litigate the dispute with the court "at all times," and that no fines could be imposed "until the court process is finalized." It cannot be disputed that these allegations in the Carlsons' Complaint were consistent with (and made as a direct result of) rulings made by Judge Mertel in the Club/Rasch litigation.

An excerpt of Judge Mertel's oral ruling was attached as Exhibit I (CP971-973) to the Carlson Decl. ¶17, CP905; it reads as follows, emphasis supplied:

"I am going to rule that Mr. Carlson had every right to access -- *at all times* through this process, which is, again, *part of the due process analysis* -- access

to the Court, and that he unveiled [sic, "availed"] himself of the Court, as he has a right to do.

And then *until the court process is finalized, that the daily assessments of fees* [sic, "fines"] by the homeowner's association [the Club] *may not occur*. I realize that's not good news to the association. . . ."

CP973.

The Court of Appeals explicitly noted that ruling: "The [Rasch Litigation] court's oral ruling emphasized that the Carlsons had a right to avail themselves of the trial court throughout the process and that until the court process is finalized, daily assessment of fines by the Club against the Carlsons may not occur." [Unpublished Court of Appeals decision, 2008 Wash. App. Lexis 1199, \*13-\*14].

**b. Complaint asserted that Hollinrake and Jones were not real parties in interest**

Second, the Complaint challenged the Hollinrake and Jones assertions that they were real parties in interest to assert covenant rights belonging to properties they did not own, CP 11 (Complaint ¶8.2(a)). This issue was not addressed in the Rasch litigation, because the Raschs only asserted that their own property was affected by the Carlson trees. But this issue was decided *against* the Hollinrake/Jones assertions, by Judge Ellington's rulings in the *Binns* class action matter. Under the court's guidelines in *Binns*, a petitioner had to allege ownership of a lot affected by another's

trees, and prove a view obstruction to the lot he or she owned, CP904 [Carlson Decl. ¶15(b)] and CP931-935 [Ex. F guidelines and form petition requiring ownership of affected lot, at CP932-933].

Hollinrakes' and Jones' implication (H/J Brief at 7) that this issue was decided in their favor in prior litigation is an outright falsehood. Moreover, their Brief fails to reconcile their position with settled Washington law providing that only a property's owner has standing, that is, only the owner is the real party in interest, to enforce covenant rights benefiting that property, Magart v. Fierce, 35 Wn. App. 264, 267; 666 P.2d 386 (1983). The Carlsons' Opening Brief pointed out the risk of inconsistent decisions in allowing non-owners to assert another party's rights (Op. Br. at 20); neither the Hollinrake/ Jones Brief nor the Club's Brief responded.

**c. Complaint alleged that Hollinrake and Jones had no legal or equitable right to restrict height of the Carlson trees**

Third, the Complaint challenged the merits of the Hollinrake/Jones Complaint under the Club Process. The Carlsons' Opening Brief set forth the elements Hollinrakes and Joneses must show in order to prevail: the existence of a view obstruction caused by the accused trees (different trees

than the ones complained of in earlier litigation<sup>3</sup>), that the view obstruction occurs from a neighboring lot, and that no affirmative defenses bar equitable relief. These allegations were not addressed in any prior litigation. The trial judge's stated reason for not entertaining the Carlsons' declaratory judgment Complaint on these allegations was simply that because the Club Process had not yet been completed, he did not feel he could grant "complete relief," RecP 12.

#### **IV. ARGUMENT - RESPONSE BRIEF ON CROSS-APPEALS**

The cross-appeals filed by the Club and the Hollinrake/Jones parties assert that the trial court erred in denying their applications for an award of attorney fees. The trial court, in its discretion, determined that attorney fees were not warranted on any of the grounds urged by Cross-Appellants: CR11, RCW 4.84.185, and RCW 64.38.050.

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<sup>3</sup> According to remarks made by Hollinrake in the transcript of the November 14, 2007 "Club Process" hearing, the trees that Hollinrake and Jones are complaining about are deciduous trees in the Carlsons' front yard, whereas the trees at issue in the Rasch tree complaint were conifers in the Carlsons' rear yard. CP691-729.

There is literally nothing in the record to suggest that the trial court abused its discretion, and the Cross-Appellants have made no effort to show abuse of discretion. All they have done is repeat arguments made to, and rejected by, the trial court. These cross-appeals are entirely without merit.

**A. Standard of Review is Abuse of Discretion**

**1. Standard of Review**

A trial court's order denying an application for attorney fees under RCW 4.84.185 will not be overturned by an appellate court absent an abuse of discretion, Allard v. First Interstate Bank, N.A., 112 Wn.2d 145, 149, 768 P.2d 998 (1989), Skimming v. Boxer, 119 Wn. App. 748, 754, 82 P.3d 707 (2004).

Similarly, a trial court's order denying an award of attorney fees under CR 11 is reviewed for abuse of discretion, Cooper v. Viking Ventures, 53 Wn. App. 739, 743, 770 P.2d 659 (1989) (noting that CR 11 is modeled on the federal rule as amended in 1983, which is "designed to confer wide latitude and discretion upon the trial judge.")

In regard to RCW 64.38.050, the Club Brief asserts that "the question of whether a party is entitled to attorney fees is an issue of law reviewed de novo," citing Tradewell Group, Inc. v. Mavis, 71 Wn.App. 120, 126-7,

857 P.2d 1053 (1993). This is incorrect: Tradewell holds only that the determination of whether a legal basis for an award exists is reviewed under the de novo standard, the amount of any award is reviewed under the abuse of discretion standard, id. at 127. Further, unlike in Tradewell, the statute itself provides for that even if the legal basis is met, an award of fees is left to the discretion of the trial court: "[t]he court, in an appropriate case, may award attorney fees to the prevailing party." RCW 64.38.050.

## 2. What Constitutes Abuse of Discretion

To show an abuse of discretion, Washington precedent requires a showing that the trial court's discretion was manifestly unreasonable, was based upon untenable grounds, or that no reasonable person would take the position adopted by the trial court:

"A trial court abuses its discretion when its exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons." Davis v. Globe Mach. Mfg. Co., 102 Wn.2d 68, 77, 684 P.2d 692 (1984). Also, "[a]n abuse of discretion exists only where no reasonable person would take the position adopted by the trial court." Singleton, at 730 (quoting Wilkinson v. Smith, 31 Wn. App. 1, 14, 639 P.2d 768 (1982)).

Allard, 112 Wn.2d at 149.

Nowhere in the Briefs of the Cross-Appellants is there any statement, argument, or reasoning of any kind, to suggest that the trial court abused

its discretion. Nevertheless, Cross-Appellees the Carlsons will address the absence of any abuse of discretion in the following section.

**B. The Trial Court Did Not Abuse its Discretion in Denying Cross-Appellants' Application For Fees**

**1. Neither claim preclusion nor issue preclusion would have provided a basis for a fee award**

As set forth in detail in the Carlsons' Opening Brief and in Section II. above, the causes of action in the Carlsons' Complaint involved completely different parties, properties, views, claims and evidence, none of which were addressed in any previous litigation. Nor did the Carlsons' Complaint challenge the Club Process, and it is undisputed that the Carlsons participated in the Club Process hearing on November 14, 2007.

While the trial court was confused about the nature of the causes of action in the Carlsons' Complaint, the judge certainly understood that the Carlsons were not trying to re-litigate the merits of a dispute that had already been decided; instead he recognized that "we don't know, at this point, what the community process [Club Process] will turn up." RecP 22. It was unquestionably reasonable for the judge to conclude that no attorney fee award was appropriate.

**2. The timing of the Complaint was authorized by the ruling in prior litigation, by the covenants, and by the Declaratory Judgment Act**

As set forth in the Carlsons' Opening Brief, pp.10-11, and in section II.B.3.a. above, in the Rasch Litigation, Judge Mertel explicitly ruled , as part of his analysis of due process requirements, that the Carlsons had the right to access the court at all times during the Club Process. (Mertel oral ruling, CP973.) This Court acknowledged and approved that ruling, 2008 Wash. App. Lexis 1199, \*13-\*14 (trial "court's oral ruling emphasized that the Carlsons had a right to avail themselves of the trial court throughout the process and that until the court process is finalized, daily assessment of fines by the Club against the Carlsons may not occur," emphasis supplied).

Second, court action to resolve covenant disputes is explicitly authorized by the covenants burdening and benefiting the Innis Arden No. 2 subdivision, RME-IA2, covenant 1, CP916-922.

Third, the Legislature intended that the Uniform Declaratory Judgment Act, RCW 7.24.010 *et seq.*, be construed liberally in order to timely decide justiciable controversies and provide parties certainty about their respective rights, Nelson v. Appleway Chevrolet, Inc., 160 Wn.2d 173, 185 (2007).

Unquestionably, there were ample solid legal grounds supporting the Carlsons' conclusion that their declaratory judgment complaint need not wait, possibly forever, for the Club Process to be complete, and it was reasonable for the trial court to reject contrary arguments made by the Club and by Hollinrakes and Joneses.

**3. No abuse of discretion to deny attorney fees in regard to the Staley default**

The Staleys were duly served with the declaratory judgment action, and when they failed to appear in the action, were subject to the court's default judgment rules. Pursuant to CR 55(a)(3), because they had not entered an appearance, they were not entitled to notice of the motion. The Local Rules of the King County Superior Court provide that "a party may seek entry of an Order of Default in the Ex Parte Department," KCLCR 55(a)(1); the Local Rules do not permit a party to note a motion for default before the assigned judge except when there has been an entry of appearance, id.

The Club, acting as legal representative for the Staleys under CR 60(b), moved the trial court to set aside the default judgment, after which the Staleys defaulted again. The trial court twice denied the Club's application for attorney fees: once after the CR 60(b) motion and once after dismissing the Complaint. The court was entirely reasonable in

doing so; despite the Club's protestations, the Staley default was entered according to the rules of the court.

**4. No abuse of discretion in denying attorney fees under RCW 64.38.050**

The Club correctly points out that in the Carlsons' prior litigation against the Raschs and the Club, the court entered an award of attorney fees under the provisions of the Homeowners Association Act ("HOA Act"), RCW 64.38.050. But that prior litigation included an explicit claim that the Club Process violated the HOA Act. RCW 64.38.050 provides:

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

Because, in the prior case, the Club prevailed on the Carlsons' claim that the Club had violated the HOA Act, the statute was triggered.

In the case at bar, there was never any allegation that the Club violated the HOA Act; the Carlsons participated in the Club Process, and only joined the Club in this action because the trial court considered the Club a necessary party. In the absence of any allegation that the Club was violating "the provisions of this chapter," chapter 64.38 RCW, there was no statutory basis for an attorney fee award. But even if there had been, the trial court had discretion to determine whether to award fees ("may

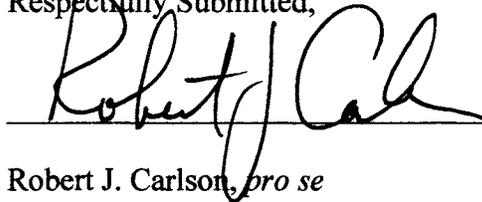
award") if it determined this was "an appropriate case." The court, in its reasonable discretion, recognized that there was no basis for a fee award.

#### IV. CONCLUSION

The Carlsons disagree with the trial court's decision not to hear the dispute over the use of their property before the Club Process is complete, but do not assert that decision to be an abuse of discretion. However, because the court failed to consider the elements of the Carlsons' causes of action under the appropriate CR 56 standard, it was error for the court to grant summary judgment dismissing those causes of action with prejudice. The order of dismissal should be amended to a dismissal without prejudice.

As to the Cross-Appeals, the trial court plainly did not abuse its discretion in denying any award of attorney fees, and the Cross-Appellants made no effort to suggest abuse of discretion. The Cross-Appeals should be denied.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Robert J. Carlson", is written over a horizontal line. The signature is cursive and somewhat stylized.

Robert J. Carlson, *pro se*

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I, Robert J. Carlson, appearing *pro se* on behalf of Appellants Robert J. Carlson and Janet B. Carlson, certify that this 14th day of September, 2009, I served a true and correct copy of: APPELLANTS' COMBINED REPLY BRIEF AND BRIEF IN RESPONSE TO CROSS-APPEALS via first class U.S. mail upon the counsel and parties as set forth below:

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Dated: September 14, 2009



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