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NO. 62222-6

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

Robert Carlson and Janet B. Carlson

Appellants/Cross Respondents

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 Corporation

Respondents/Cross Appellants

**THE INNIS ARDEN CLUB, INC.'S RESPONSE BRIEF AND
BRIEF ON ITS CROSS APPEAL**

Peter J. Eglick, WSBA 8809
Joshua A. Whited, WSBA 30509
EGLICK KIKER WHITED PLLC
1000 Second Avenue, Suite 3130
Seattle, Washington 98104
(206) 441-1069 phone
(206) 441-1089 fax

Attorneys for Respondent
The Innis Arden Club, Inc.

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I. INTRODUCTION

The Carlsons are unquestionably pursuing here the same claims and issues that they already litigated and lost in Carlson v. Innis Arden Club, et al., King County Superior Court Cause No. 06-2-06819-0 SEA, Court of Appeals No. 59878-3-I (“Carlson I”). The gravamen of the Carlsons’ Complaint this time is the same as the last time; they have just seized on a couple of new defendants in the course of recycling their claims. The Superior Court and this Court have already rejected the Carlsons’ objections to The Innis Arden Club’s (“Club”) compliance process. This Court should therefore affirm the trial court’s order dismissing the Carlsons’ complaint with prejudice based, inter alia, on *res judicata* and collateral estoppel. The Club also respectfully requests that this Court reverse the trial court’s decision denying the Club’s motion for attorney fees and sanctions and that this Court make such an award in connection with this appeal.

II. ASSIGNMENT OF ERROR ON CROSS APPEAL

A. **Assignment of Error.**

The trial court erred when it denied the Club’s motion for attorney fees and sanctions.¹ The Club should have been awarded its reasonable

¹ A copy of the trial court’s October 9, 2009 Order Denying Defendant’s Motion for Attorney’s Fees is attached as Appendix A. The order was also attached to the Club’s

attorney fees and costs and/or sanctions incurred pursuant to CR 11, RCW 4.84.185, and RCW 64.38.050.

B. Issue Pertaining to Assignment of Error.

1. Whether the trial court erred and abused its discretion in denying the Club's request for sanctions pursuant to CR 11 where Carlsons' claims sought to relitigate issues resolved against him in Carlson I and where the trial court itself had determined in a written order that Carlsons had affirmatively misled the *Ex Parte* Department Commissioner in improperly obtaining a default and injunction order?

2. Whether the trial court erred in denying the Club's request for reasonable attorney fees and costs pursuant to RCW 4.84.185 when the lawsuit was frivolous and sought to relitigate claims and issues already conclusively decided?

3. Whether the trial court erred in denying the Club's request for reasonable attorney fees and costs pursuant to RCW 64.38.050 when both the trial court and this Court already concluded in Carlson I that RCW 64.38.050 authorized an award of attorney fees to the Club for defending against such claims and issues?

appeal and has been identified in the Club's supplemental designation of clerk's papers which is being filed with this brief.

III. RESTATEMENT OF THE CASE

On May 18, 2008, this Court filed its decision in Carlson I. It provides factual background concerning the Innis Arden community, the Innis Arden view preservation covenant, the Innis Arden covenant compliance process, and the Carlsons' prior litigation against the Club. To avoid needless repetition, the Club refers the Court to the Carlson I opinion for the factual background and prior rulings regarding such matters.² The Club also provides the following supplemental facts:

Respondents Staley, Hollinrake and Jones, all of whom are Innis Arden residents, each invoked the Club's covenant compliance process, asking for a determination that trees on the Carlsons' Innis Arden property violate the View Preservation Covenant. CP 172. On August 27, 2007, in response to the petitions, the Carlsons filed this lawsuit against Staley, Hollinrake and Jones ("Carlson II"). CP 1-11. The Staleys' son had just passed away a week earlier and the Staleys were served with the Carlsons' Complaint on the day of their son's memorial service.³ CP 848.

The Carlson II complaint alleges two causes of action: (1) an action "to quiet title and for declaratory judgment," claiming that

² For the convenience of the Court, a copy of this Court's decision in Carlson I and its subsequent order making minor corrections to the opinion are attached to this brief as Appendix B.

³ Ms. Staley was also undergoing chemotherapy at the time. CP 848.

Hollinrake, Jones and Staley have no legal or equitable right under the Club Covenants to enforce the View Preservation Covenant against the Carlsons; and (2) an action “to stay arbitration,” claiming that the Club covenant compliance process invoked by Hollinrake, Jones, and Staley is unlawful arbitration. CP 9-10.

The Carlsons’ Complaint notably did not include the Club as a defendant although, as in the Carlson’s earlier Complaint in Carlson I, it challenged the legitimacy of the Club Covenants and the Club’s covenant compliance process. CP 1-11. Therefore, on October 2, 2007, Defendants Hollinrake and Jones filed a motion to dismiss the Carlson II Complaint arguing that the Carlsons had failed to name the Club as a necessary and indispensable party.⁴ CP 14-20. Hollinrake and Jones pointed out:

The Court ruled against Plaintiffs on all claims raised in Carlson One that are again raised in this case. Plaintiffs have deliberately avoided suing the IA Club in this case because Plaintiffs intend to re-litigate the IA Club’s procedures and bylaws without the participation of the IA Club, thereby denying the IA Club standing or representation.

CP 17.

⁴ Because the Carlson II Complaint again included the allegation that the View Preservation Covenant was not validly adopted or enforceable as between different subdivision of the community, *see* CP 4, the Hollinrake and Jones motion also suggested that all Innis Arden I homeowners were necessary parties. CP 14-20.

This case, Carlson II, when filed was assigned to Judge Mertel, who as the judge in Carlson I and another recent case involving Innis Arden was already intimately familiar with the Innis Arden community and its covenants, as well as the Carlsons prior claims. The Carlsons demanded that a different judge be assigned. CP 38-39. The case was then re-assigned to Judge Lum.

Judge Lum held a hearing on the Jones, Hollinrake, motion to dismiss at 11 a.m. on October 26, 2007. CP 213-214. He then took the matter of dismissal of the Carlson Complaint under advisement.

Just moments after the 11 a.m. hearing, but before Judge Lum issued his order, when Mr. Carlson knew that the question of whether his case could proceed at all in the absence of the Club was under advisement, Mr. Carlson made his way to the King County Superior Court *Ex Parte* Department located in a different part of the Courthouse. There, without notice to Defendants Jones, Hollinrake, Staley, the Club, and Judge Lum, Mr. Carlson successfully obtained, *ex parte*, from Commissioner Velategui a default judgment against Defendants Staley, who had not yet filed an Answer or otherwise appeared. *See* CP 178-179, CP 213-214.

In obtaining the default against the Staleys, Mr. Carlson, a member of the Bar, did not inform *Ex Parte* that the question of whether the Carlsons could proceed with the case in the absence of the Club—at all,

against anyone—had been taken under advisement by the assigned judge just a few moments earlier. He also did not mention at all the Carlson I litigation or any of its holdings. *See generally* CP 87-99.

Instead, Mr. Carlson injected the following language into the October 26, 2007 Staley default that he successfully presented to the Commissioner for entry:

1. The Court quiets title to the property owned by Plaintiffs at 1450 NW 186th Street, Shoreline, King County, Washington (“Carlson Property”), and pursuant to RCW 7.24.010 *et seq.*, declares that the Staley Defendants do not have any legal or equitable right to restrict the height of trees on the Carlson Property.

2. The Court, pursuant to RCW 7.04A.070(2) and RCW 7.24.190, stays arbitration of any dispute between the Plaintiffs and the Staley Defendants. The Staley Defendants, and all those in active concert and participation with them, are enjoined from threatening or taking any action to arbitrate, or otherwise non-judicially decide, disputes over the application of easements to the Carlson Property. [emphasis added]

CP 98-99.

Unaware of what Mr. Carlson had done, later that same day, October 26, 2007, Judge Lum issued the following Order on the Motion to Dismiss the Carlson Complaint:

Defendants’ Motion to Dismiss will be GRANTED unless plaintiff within 90 days of this order names Innis Arden Club, Inc. as a necessary party defendant and provides proof of service of the amended summons and complaint upon said Club.

CP 101.

Subsequently, on November 14, 2007, the Club, pursuant to its compliance procedures, held a hearing regarding the Staley, Hollinrake and Jones petitions concerning the Carlson trees.⁵ CP 172. At the hearing, Mr. Carlson submitted a memorandum to the Club, attaching the default judgment and injunction he had obtained in *Ex Parte*. CP 172. Mr. Carlson threatened in his memorandum distributed to the Club Board and attendees at the hearing:

The judgment provides that the Staleys have no legal or equitable right to restrict the height of trees on the Carlson Property, and enjoins the Staleys and all those in active concert and participation with them from attempting any non-judicial decision of, among other things, the subject matter of the Staley Petition. This includes the Board. Our position is that any effort by the Board to consider the merits of the Staley petition will violate the Court's injunction, and we will seek appropriate relief.

CP 176. In light of this threat, the Club President concluded the hearing noting that the Club was taking the matter under advisement and would consult with counsel. CP 172.

On November 28, 2007, in purported compliance with Judge Lum's October 26, 2007 decision on the Motion to Dismiss, the Carlsons filed a "supplemental complaint" in Carlson II directed at the Club. CP 102-106. The supplemental complaint did not contain any specific cause

⁵ A transcript of the hearing can be found at CP 428-465.

of action against the Club nor any unique prayer for relief, but instead, indicated: “Plaintiffs pray that the Court enter judgment in Plaintiffs’ favor and against Defendants according to the Prayer for Relief in Plaintiffs’ [original] Complaint.” CP 106.

On February 28, 2008, the Club answered the original and supplemental complaints, pleading, *inter alia*:

9.2 Admit that Plaintiff Carlson, an attorney, obtained entry in the Ex Parte Department of an improperly presented and worded default judgment without notice or disclosure to the Court (Judge Lum) or the Club, in a manner violative of Plaintiff/Attorney Robert J. Carlson’s obligations under the Rules of Professional Conduct as well as CR 11; all other allegations denied for lack of information. All rights are reserved with regard to Robert J. Carlson’s conduct on behalf of the Plaintiffs and notice is hereby given that sanctions and other relief will be sought.

CP 143-144. The Club’s Answer contained affirmative defenses including that the Carlsons’ claims were barred by *res judicata* and collateral estoppel. CP 149. And, the Club specifically requested attorney fees pursuant to CR 11, RCW 4.84.185 and RCW 64.38.050. CP 149.

On May 12, 2008, the Club filed its motion to vacate the Staley default judgment obtained *ex parte* by the Carlsons. CP 151-162. The trial court’s order granting the Club’s motion to vacate the Staley default was filed on June 18, 2008. Its basis is clearly stated and represents an unmistakable condemnation of Mr. Carlson’s improper actions:

In obtaining the default judgment against Defendants Staley, Mr. Carlson failed to provide important information which undoubtedly should have been provided. Mr. Carlson failed to inform *Ex Parte* that another Department of this Court had previously entered, in Carlson v. Innis Arden Club, et al., King County Superior Court Cause No. 06-2-06819-0 SEA (“*Carlson I*”), final rulings and judgments adverse to the Carlsons on issues raised in this case. Mr. Carlson included provisions in the Staley default judgment which he presented to the *Ex Parte* Commissioner for entry that were contrary to the rulings entered against the Carlsons in *Carlson I*. Further, he obtained the default judgment without providing any notice to Defendants Hollinrake or Jones, who had appeared. Despite the fact that the Innis Arden Club, Inc. was not a party at the time the default judgment was entered and was not given notice of it, Mr. Carlson nonetheless drafted the default judgment and has since demanded that it be applied as an injunction against and binding upon the Club, its Directors, and members. Mr. Carlson did so even though, just minutes before he presented the default judgment for entry in *Ex Parte*, he had left this Department’s courtroom, where this Department had taken under advisement a motion for dismissal of Mr. Carlson’s entire action unless the Club was named as a necessary party defendant. Mr. Carlson did not disclose to this Court that he would proceed immediately to *Ex Parte* and obtain entry of a default judgment which he would claim bound The Innis Arden Club, Inc. Nor did Mr. Carlson disclose to *Ex Parte* the procedural posture of the case as reflected in the motion hearing in which he had just participated. Accordingly, the Court hereby sets aside and vacates pursuant to CR 55(c)(1) and CR 60(b)(1),(4), and (11) the “Default Judgment” entered against Defendants Staley and the “Order on Plaintiffs’ Motion for Order of Default and Default Judgment” both dated October 26, 2007.

CP 495-496.

Shortly thereafter, on June 26, 2008, the Carlsons filed yet another motion asking the Court to enter a default judgment against the Staleys, proposing the very same objectionable language and injunctive relief that was in the prior judgment vacated by Judge Lum. CP 500-510. The motion was subsequently denied. CP 867-86.

On June 27, 2008, the Club filed a summary judgment motion, as did Hollinrake and Jones. CP 737-773; CP 774-793. The motions asked that the Plaintiffs' two causes of action be dismissed with prejudice as to all defendants based on the *res judicata* and collateral estoppel effect of Carlson I. Id. The motions were granted on July 24, 2008. CP 1078-1081; CP 1082-1084. During his oral ruling, Judge Lum explained in the clearest of terms the basis for his decision:

It is clear we can't relitigate the same issues over and over and over again. Otherwise, we would have no finality. And we would frustrate everyone, because all the losing parties could refile. And it would be an endless matter of tail catching.

I think that collateral estoppel and *res judicata* is based on common sense, as well as legal doctrine and common sense, sensibility of *res judicata*. We shouldn't be chasing our tails, year after year. And as to this cloud on title and community process issue, those have been decided.

And I'm going to grant the motion here. I'm not saying that Mr. Carlson could in no circumstance challenge, prior to determination, some activity. But what

he is challenging, in this particular lawsuit, is identical to what he has done before.

RP 21:3 – 21:18.

The trial court further held that the Club and other defendants were the prevailing parties and directed that any motion(s) for attorney fees be brought within 60 days. CP 1080. Plaintiffs then brought a motion for reconsideration of the summary judgment orders. Once reconsideration had been denied, in an order filed September 4, 2008,⁶ the Club filed, on September 12, 2008, its motion for attorney fees pursuant to RCW 64.38.050, Civil Rule 11 and RCW 4.84.185.⁷ The trial court ultimately denied the Club's motion stating:

The court notes that the issue of whether attorneys fees should be awarded pursuant to CR 11 is a very close question, but concludes that an award of such fees against Mr. Carlson is not warranted at this time.⁸

⁶ CP 1119.

⁷ The Club's motion for attorney fees is sub number 122 and is listed in the Club's supplemental designation of clerk's paper which is being filed with this brief.

⁸ The trial court issued identical and indistinguishable orders denying both the Club's motion for attorney fees and the parallel motion for attorney fees brought by Defendants Hollinrake and Jones. The orders are sub numbers 139 and 140. The orders are listed in the Club's supplemental designation of clerk's papers.

IV. ARGUMENT

A. By Failing To Provide Any Argument Concerning Three Of The Five Orders They Appealed, The Carlson Have Waived Any Challenge To Them.

The Carlsons' Notice of Appeal identifies five separate orders. However, their opening brief only addresses the trial court's two summary judgment orders. The sole assignment of error and the issues called out by the Carlsons in their opening brief relate to the summary judgment orders. And, there are no arguments, or authority offered anywhere in the Carlsons' opening brief concerning any of the other orders listed in their Notice of Appeal. The Carlsons have therefore abandoned appeal of any order except the trial court's summary judgment orders.⁹ RAP 10.3(a)(4) (requiring "separate concise statement of each error a party contends was made by the trial court"); RAP 10.3(a)(6) (requiring argument in support of issues presented as well as citations to legal authority and the record); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("An issue raised and argued for the first time in a reply brief is too late too warrant consideration.").

⁹ The Carlsons have, however, included countless documents in the Clerk's Papers which were not identified in the trial court's summary judgment order as having been considered by the trial court.

B. The Trial Court Appropriately Dismissed the Carlsons' Complaint With Prejudice Based on *Res Judicata* and Collateral Estoppel

The Carlsons' challenge to the trial court's summary judgment order is reviewed de novo. Stalter v. State, 151 Wn.2d 148, 155, 86 P.3d 1159 (2004). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Here, the trial court appropriately granted summary judgment based on *res judicata* and collateral estoppel.

Res judicata precludes relitigation of a claim once it has been decided. Collateral estoppel (also known as issue preclusion) prevents relitigation of an issue after the party against whom the doctrine is applied has had a full and fair opportunity to litigate his or her case. Nielson v. Spanaway General Medical Clinic, Inc., 135 Wn.2d 255, 262, 956 P.2d 312 (1998). *Res judicata* prevents a second assertion of the same claim or cause of action, while collateral estoppel prevents a second litigation of issues between the parties, even if the claim or cause of action is different. *See generally* Rains v. State, 100 Wn.2d 660, 665, 674 P.2d 165 (1983). Often, the two defenses are raised in tandem.

The purpose of collateral estoppel is to promote the policy of ending disputes and the doctrine is "well-known in Washington law as a means of preventing the endless relitigation of issues already actually

litigated by the parties and decided by a competent tribunal.” Nielson, 135 Wn.2d *supra*, at 255. To apply the doctrine of collateral estoppel, the party asserting the doctrine must demonstrate four elements:

- (1) the issue decided in the prior adjudication is identical with the one presented in the second action;
- (2) the prior adjudication must have ended in a final judgment on the merits;
- (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and
- (4) application of the doctrine does not work an injustice.

Nielson, *supra*, 135 Wn.2d at 262-263 (citing Reninger v. Department of Corrections, 134 Wn.2d 437, 449, 951 P.2d 782 (1998)). Identity of parties is not a requirement for the application of collateral estoppel. Dunlap v. Wild, 22 Wn.App. 583, 588, 591 P.2d 834 (Div.2 1979) (“one principle is clear: a nonparty to prior adjudication may invoke collateral estoppel defensively against a party to the earlier action”), citing Henderson v. Bardahl Int’l Corp., 72 Wn.2d 109, 116, 431 P.2d 961, 966 (1967).

“In determining whether application of the doctrine of collateral estoppel would work an injustice, we focus on whether the parties to the earlier adjudication were afforded a full and fair opportunity to litigate their claim in a neutral forum.” Nielson, *supra*, 135 Wn.2d at 264-65, 956 P.2d 312 (1998). Where a party has already had the opportunity to “present his evidence and his arguments on the issue to the trial court and

the Court of Appeals,” there is no injustice in applying collateral estoppel. Hanson v. City of Snohomish, 121 Wn.2d 552, 563, 852 P.2d 295 (1993).

Res judicata is also focused on curtailing multiplicity of actions and harassment in the courts. The doctrine applies when a prior judgment has

a concurrence of identity with a subsequent action in (1) subject matter, (2) cause of action, *and* (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made.

Rains v. State, 100 Wn.2d 660, 663, 674 P.2d 165 (1983).

As this Court made clear in Carlson I, in which the Carlsons sought to relitigate issues resolved by (then Superior Court) Judge Ellington and then by this Court in Innis Arden Club, Inc. et al., v. Binns et al., Division I Case No. 20497-1-I, *res judicata* bars not only the relitigation of claims and issues that were litigated in a prior action, but also those that “might have been litigated” in a prior action. Carlson I at 11¹⁰ (emphasis added) (quoting Pederson v. Potter, 103 Wn.App. 62, 69, 11 P.3d 833 (2000)).

In this, the Carlsons’ second, successive lawsuit against the Club and Innis Arden residents, the Carlsons’ Complaint asserts two causes of

¹⁰ As noted, the Carlson I decision is included as Appendix B to this brief. The opinion appears several places within the clerk’s papers, including at CP 749-773 and CP 290-313.

action against Defendants Hollinrake, Staley and Jones: (1) an action “to quiet title and for declaratory judgment,” which claims that Hollinrake, Jones and Staley have no legal or equitable right to enforce the View Preservation Covenant against the Carlsons; and (2) an action “to stay arbitration,” which claims that the Club covenant compliance process is unlawful arbitration and, thus, that Hollinrake, Jones and Staley cannot utilize it. CP 9-10. Based on these claims, the Carlson II Complaint contains the following Prayer for Relief:

Wherefore, Plaintiffs pray that the Court enter judgment in Plaintiffs’ favor and against Defendants as follows:

8.1 That the Court stay arbitration pursuant to RCW 7.04A.070(2) and RCW 7.24.190, and enter preliminary and permanent injunctions enjoining Defendants, and all those in active concert and participation with Defendants (a) from threatening or taking any action to arbitrate, or otherwise non-judicially decide disputes over the application of easements to the Carlson Property, specifically including those disputes referenced herein; and (b) from threatening or taking any action to secure assessment of fines or liens for any alleged violations of restrictive easements which may burden the Carlson property;

8.2. That the Court enter judgment quieting title to the Carlson Property, and pursuant to RCW 7.24.010 *et seq.*, enter judgment declaring:

a. That none of the Defendants are the real party in interest to assert any purported view

preservation rights with respect to properties they do not own;

b. That none of the Defendants have any legal or equitable right to restrict the height of trees on the Carlson property;

8.3 That the Plaintiffs have their costs, expert witness fees, attorneys fees, and such other and further relief as the Court may deem just and proper.

CP 10-11.

The Carlson II “Supplemental Complaint” naming the Club as an additional Defendant does not add anything new in the nature of a claim. Instead, it requests “judgment in Plaintiffs’ favor and against Defendants according to the Prayer for Relief in the Plaintiffs’ [original] Complaint.”

CP 106.

The problem is that the Carlsons’ causes of action and requests for relief here depend upon legal theories, issues, and arguments which the Carlsons already litigated and lost in Carlson I. Not only are the Carlson I and Carlson II Complaints strikingly similar,¹¹ but the effect and scope of the rulings in Carlson I are unambiguous.

Specifically, in Carlson I, the trial court entered the following adverse rulings against the Carlsons:

¹¹See CP 611-613 (presenting key excerpts from the Carlson I and Carlson II complaints that are virtually identical). Moreover, perusal of the two Complaints further reveals that, even when the wording of the two Complaints varies, the substance remains virtually the same.

6. Plaintiffs question on various grounds the validity of the View Preservation Amendment to the Innis Arden Restrictive Mutual Easements (“Covenants”) and assert that it is not enforceable across Innis Arden Subdivision boundaries. The issues Plaintiffs raise were or could have been adjudicated over a decade ago in Innis Arden, et al. v. Binns et al, King County Superior Court No. 84-2-09622-5 and Court of Appeals Div. I No. 20497-1-I, a class action lawsuit. Binns upheld the validity of the View Preservation Amendment as well as its enforceability across Innis Arden division boundaries.

Plaintiffs are, as a matter of law, in privity with parties to these prior adjudications. The doctrines of res judicata and collateral estoppel apply to bar such re-litigation. Accordingly, Plaintiffs’ various challenges to the validity of View Preservation Amendment and the cross-enforceability of the View Preservation Amendment across all Innis Arden Subdivision boundaries are hereby DISMISSED with prejudice.

7. The Club is a homeowners’ association pursuant to RCW 64.38, with inherent authority as a common interest community to enact the Club’s Bylaw IV.6 Compliance Procedures. The Club’s application of such Bylaws to Plaintiffs is valid. Plaintiffs’ Amended Complaint which alleged the invalidity of such Bylaw is hereby DISMISSED with prejudice.

CP 562-563.¹² Judge Mertel also expressly held in a related order:

The Court holds that the Homeowners’ Association’s compliance process, culminating in Judge Burdell’s decision, complies with substantive and procedural due process requirements. . . .

CP 570 (emphasis added).

¹² For the convenience of the Court, a complete copy of the trial court’s summary judgment order in Carlson I is attached as Appendix C to this brief.

And, in Carlson I, Judge Mertel dismissed with prejudice the Carlsons' entire first cause of action in which the Carlsons had alleged, *inter alia*, that:

7.3 The actions of the Club as alleged herein violate the Washington Uniform Arbitration Act, RCW 7.04A.010 *et seq.*, in that the Club wrongfully claims authority to arbitrate or otherwise reach a binding decision on the disputes over application of easements to private property described herein, whereas Plaintiffs have not contractually agreed to submit such disputes to arbitration, either before the Club's Board or any independent authority.

7.4 Plaintiffs are entitled to the Court's order staying arbitration pursuant to RCW 7.04A.070, and preliminary and permanent injunctions enjoining the Club (a) from taking any action to arbitrate or otherwise decide disputes over the application of easements to private property, such as those referenced herein; and (b) from assessing or threatening assessment of fines for any "violations" except violations of duly enacted bylaws, rules or regulations respecting the use of common areas. CP 551.

See 563 (dismissing cause of action with prejudice). Though worded somewhat differently, this cause of action, which was dismissed with prejudice in Carlson I, is the same as the Carlsons' second cause of action here.

This Court affirmed these rulings in all respects, making the point, among others, that "Carlson's challenge to the validity and cross-enforceability of the view preservation amendments was barred by *res*

judicata and collateral estoppel.” Appendix B at 15. This Court further recognized that the Club’s Covenant Compliance process “is authorized by the HOA act and the Club’s inherent authority under its governing documents” and is not, as the Carlsons argued, unauthorized binding arbitration pursuant to RCW 7.04A RCW. Appendix B at 19-20.

As this Court further explained in its Carlson I decision:

The Club's process does not purport to bar an aggrieved homeowner from bringing the dispute to court. Instead, it is a community-based process that allows for an initial evaluation of the dispute, with notice and a hearing, prior to judicial review. The Binns trial court judge recommended that Innis Arden develop such a process.

Appendix B at 17-18. The Carlson I opinion emphasizes at page 19 that: “Nothing in Wimberly prevents an HOA from creating a covenant compliance procedure as a community-based precursor to judicial review.”¹³

Notably, the Carlsons do not contend that Hollinrake, Jones or Staley are in violation of the covenants. Were that the case, the Carlsons would be entitled (just as Hollinrake, Jones and Staley are here) to either invoke the Club’s covenant process or seek relief from the courts. In other words, a party can choose to seek legal relief directly from the courts

¹³ In fact, this Court expressly affirmed Judge Mertel’s refusal to stay the Club’s covenant compliance proceedings, which the Carlsons had requested. Appendix B at 19-20.

rather than utilize the covenant compliance process if they have a colorable cause of action. Here, though, the Carlsons have no colorable cause of action because, per the holdings in Carlson I, merely using the Club process (which is the only action taken here) does not create an actionable cloud on title.

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." Op.Br. at 24. 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.

Carlson I clearly adjudicated Carlsons' attack on the Club's compliance procedures. Under them, the Club, as the homeowners association for Innis Arden, is authorized to address a violation regardless of who first raised it. Indeed, as noted by this Court, Covenant 11 has long given the Club even more conclusory authority than the due process procedure the Club chose to adopt.¹⁴

¹⁴ See Appendix B at 17-18 ("Moreover, the original Innis Arden covenants gave express authority to the grantor (whose powers are now invested in the Club) to make a final determination regarding the permissible height of walls, fences, and hedges and the removal of 'spite or nuisance' hedges and trees. These covenants further provide inherent authority for the Club's process, subject to judicial review.").

Carlsons' lengthy arguments on appeal concerning legal standing and equitable defenses with respect to Hollinrake, Jones, and Staley are exercises in misdirection. So are their demands for further discovery on such issues. Such matters do not bear on whether the claims that the Carlsons brought (for the second time) were properly dismissed by the trial court with prejudice based *on res judicata* and collateral estoppel—which are legal issues.

Similarly, Carlsons' cause of action and issue concerning a "cloud on title" were definitively decided against them in Carlson I.¹⁵ And, significantly, dismissal as a matter of law of the cloud on title claims in Carlson I came before Judge Mertel examined the merits of and affirmed the Club's decision that the Carlson trees obstructed views from the Rasch property in violation of the View Preservation Covenant. In other words, regardless of the outcome on the facts of a particular view blockage claim, it was resolved as a matter of law by Judge Mertel and this Court in Carlson I that there is no colorable cloud on title claim against the Club or

¹⁵ CP 562 ("2. The Carlsons' cause of action claiming that the Raschs' conduct created a 'cloud on title' to the Carlson property is hereby DISMISSED with prejudice; 3. The Carlsons' cause of action against the Club claiming that The Club's conduct has created a 'cloud on title' to the Carlson property and seeking to clear such alleged 'cloud on title' is hereby DISMISSED with prejudice.").

Innis Arden residents for simply utilizing the Club's compliance process. Here, that is what the Defendants have done.

Carlsons complain about the availability of fines as a Club sanction and invoke the principle of access to the courts¹⁶ in arguing their case on appeal. However, again collateral estoppel and *res judicata* apply, despite Carlsons' attempts to prove otherwise by selective use of statements by Judge Mertel and the Carlson I court. Carlson I encompassed declaratory facial challenges to the Club's compliance process in which Carlsons questioned whether they were subject to its jurisdiction at all, characterizing it, inter alia, as "forced arbitration." Because these issues of Club authority had not previously been decided, Carlsons were able to seek immediate judicial review. They lost: this Court confirmed that the Club has the authority to establish the process and to impose fines as part of it. The Carlsons are not entitled to relitigate those issues again here.

Carlsons' theory that the Club cannot impose fines until a covenant dispute is resolved in court¹⁷ is flatly inconsistent with the plain language of the holdings in Carlson I which affirmed the Club's authority to impose fines. Judge Mertel delayed the commencement date for fines in Carlson I to encourage compliance by the Carlsons, giving them an opportunity to

¹⁶ See, e.g., Op.Br. at 10-11.

¹⁷ Brief at 10.

spend their funds on obtaining permits and bringing their noncompliant trees into compliance. However, he made it clear that the delay was a one time only gesture.¹⁸ As Judge Mertel explained on May 11, 2007:

THE COURT: It was never my intent -- I mean you have every right to appeal, Mr. Carlson. I don't quarrel with that one iota, but the whole mechanism we set up here was to give you the chance to stay these fines where you got to go to the City to get your ducks lined up to get those trees trimmed.

CP 412. Judge Mertel also confirmed, that the Club had not violated anyone's due process or other rights in imposing fines:

MR. EGLICK: I don't think the club was found in violation with regard to fines. I think the issue that was resolved kind of without reaching at March 9 was simply when the fines would start accruing.

THE COURT: Exactly.

CP 413.

The Carlson I decision clearly recognized that the value of the Club's due process compliance procedures was in providing a

¹⁸ The point was driven home in the following colloquy with the Club's lead counsel, Peter Eglick:

MR. EGLICK: . . . With regard to the fines commencement, we never briefed that. I wasn't here when that happened. That was when they were cutting my shoulder open.

THE COURT: That's right.

MR. EGLICK: If I had been here I would have objected because we never briefed that. That happened, I think in part, and I - - I am not trying to be impertinent, but I think in part the Court was trying to soften the blow a little bit - -

THE COURT: You're wise beyond your years. CP 411.

“community-based process that allows for an initial evaluation of the dispute, with notice and a hearing, prior to judicial review.” Appendix B at 17-18 (emphasis added); *see*, Appendix B at 19-20 (“precursor” to judicial review). The Carlsons are now arguing that they can still, even after losing in Carlson I, use the same issues and claims to derail the Club compliance process before the Club has rendered a decision. If this were so, the Club process would be virtually meaningless because its invocation would each time give rise to a cause of action against those participating in it. That Mr. Carlson, an experienced litigation attorney, has clearly realized this is evidenced by his pursuit of Carlson II—only cosmetically different from Carlson I—as if Carlson I had never happened. Such gamesmanship is what the doctrines of *res judicata* and collateral estoppel preclude.

C. The Trial Court’s Decision Turned Predominantly On *Res Judicata* And Collateral Estoppel, Not on Inability to Grant Final Relief Under The Declaratory Judgment Act.

In two separate places, the Carlsons’ Opening Brief features small parts of Judge Lum’s oral ruling granting summary judgment with prejudice. Through the creative use of ellipses, Carlsons use these fragments to argue that the Court’s decision somehow turned on its inability to grant final relief under the declaratory judgment act and that, consequently, because the Court dismissed on this narrow basis, the

dismissal should have been without prejudice. *See* Op.Br. at 3, 14. However, the full quotation¹⁹ from Judge Lum's oral ruling reveals that the trial court's decision turned predominantly on *res judicata* and collateral estoppel:

. . . and it is true that there is a declaratory judgment act statute that provides for declaratory judgments in certain circumstances, but there are conditions on that statute, the DJ statute.

And within that, it must afford final relief. And I seriously doubt whether I can afford any final relief. And second, there is the overlay of prior litigation, legal rulings and prior Court of Appeals rulings, particularly issued by Judge Ellington and Judge Mertel, and now, I believe, Judge Lau on the most recent Court of Appeals decision.

It is clear we can't relitigate the same issues over and over and over again. Otherwise, we would have no finality. And we would frustrate everyone, because all the losing parties could refile. And it would be an endless matter of tail catching.

I think that collateral estoppel and res judicata is based on common sense, as well as legal doctrine and common sense, sensibility of res judicata. We shouldn't be chasing our tails, year after year. And as to this cloud on title and community process issue, those have been decided.

And I'm going to grant the motion here. I'm not saying that Mr. Carlson could in no circumstance challenger, prior to determination, some activity. But what he is challenging, in this particular lawsuit, is identical to what he has done before.

¹⁹ The underlined text in the transcript excerpt that follows is the text that the Carlsons deleted in "quoting" Judge Lum in their Opening Brief.

And this is not appropriate for relitigation. It has been decided. And it is [sic] community process whether or not it is valid. That is decided. And we don't know, at this point, what the community process will turn up.

RP 20:17 – 21:22 (emphasis added).

Clearly, Judge Lum dismissed with prejudice because the causes of action pled by the Carlsons were precluded and could not be relitigated. It is understood, as Judge Lum observed and the Club has consistently acknowledged, "...we don't know, at this point, what the community process will turn up." Neither the Court nor the Club has said that the Carlsons cannot challenge whatever decision the Club ultimately issues, if there are colorable challenges which were not decided in Carlson I. For example, if the Club concludes that the trees which are the subject of the pending petitions violate the View Preservation Covenant and then begins assessing fines against the Carlsons, the Carlsons can challenge that conclusion in court. In short, the trial court's ruling here does not preclude the Carlsons from pursuing colorable causes of action that have not previously been decided. It does preclude them from relitigating causes of action that they could have raised previously and/or that have already been rejected by the courts.

The Club therefore respectfully requests that this Court affirm the trial court's summary judgment order in its entirety and deny the Carlsons' appeal in its entirety.

D. The Carlsons Misdirect the Court to Various Issues Which Have No Bearing on the Trial Court's Summary Judgment Order.

The Carlsons' Opening Brief raises various side issues, accusing the Club in particular of various transgressions. These again are efforts at misdirection, but will be addressed here briefly.

For example, Carlsons complain that, although they (the Carlsons) have participated in "good faith," the Club has delayed issuance of its decision on the Staley, Hollinrake, Jones petition. In fact, Carlsons themselves have been the cause of and demanded such delay, threatening dire consequences if the Club proceeded. After this Carlson II lawsuit was filed and Mr. Carlson had without disclosing Carlson I obtained from the *Ex Parte* Department the default judgment and injunction concerning the Club process, Mr. Carlson threatened the Club and Innis Arden residents in writing with further legal action should they proceed to the merits of the petition or support the petitioners.²⁰ Mr. Carlson not only subsequently

²⁰ CP 176 ("Our position is that any effort by the Board to consider the merits of the Staley petition will violate the Court's injunction, and we will seek appropriate relief."). In response, the compliance hearing concluded with Mr. Jacobs noting that the Club was taking the matter under advisement and would consult with its attorney. CP 172.

purported to appeal Judge Lum's decision vacating that default judgment, although his Opening Brief now reflects an abandonment of that appeal, but he also sought review of this Court's Carlson I opinion in the Supreme Court.²¹ Any delay on the part of the Club has been the direct result of Mr. Carlson's threats and actions. Now that the Supreme Court has denied Carlson's petition for review in Carlson I, Carlsons have abandoned any appeal of Judge Lum's Order vacating the default and injunction Mr. Carlson obtained improperly from *Ex Parte*, and Carlsons' brief appears to take the Club to task for not proceeding, the Club may proceed. Meanwhile, no fines have accrued in connection with the petitions at issue in Carlson II because there has not even been a decision on its merits.

The Carlsons also accuse the Club of "bias" as they did unsuccessfully in Carlson I. CP 570 ("The Court holds that the Homeowners' Association's compliance process, culminating in Judge Burdell's decision, complies with substantive and procedural due process requirements and there has been no showing of fraud, misrepresentation, or undue bias." (emphasis added). Judge Lum appropriately dismissed this accusation here as well, noting "And there are allegations that there is

²¹ The Carlsons' petition for review took issue with virtually every aspect of this Court's opinion in Carlson I. Review was just recently denied by the Supreme Court on April 1, 2009. Supreme Court No. 82279-4.

some kind of bias or ill will, but I don't have any evidence of that." RP 22.²²

In fact, the only "evidence" the Carlsons produced concerning purported bias is an out of context quotation made by the Club President after Mr. Carlson badgered him at the November, 2007 compliance hearing. Club President Jacobs was not manifesting "bias" when he confirmed that, when the Carlsons sue the Club and Club members for "daring" to use the Club compliance process, the Club represents the homeowners' interests against such suits.²³

E. The Club's Cross-Appeal Should be Granted Because the Trial Court Erred When It Denied the Club's Motion for Attorney's Fees and Sanctions

1. The Club Should Receive An Award Under CR 11 and RCW 4.84.185 Because the Carlsons' Lawsuit Was Frivolous, Advanced Without Reasonable Cause, and Not Well Grounded in Fact or Law.

The trial court should have awarded the Club sanctions and reasonable attorney fees under CR 11 and RCW 4.84.185. Because the bases for imposition of attorney fees under RCW 4.84.185 and sanctions

²² Carlsons have provided the Court with a Report of Proceedings of the hearing before Judge Lum that is riddled with typographical errors and garbled phrases. Even so, it can be made out in this "transcript" that following Judge Lum's statement that there was no evidence of any bias, he indicated that what he mainly had in front of him was some "fairly laudatory language in the Court of Appeals, discussing the process. . ." RP 22.

²³ Page 4 of this Court's Commissioner's Ruling on Objection to Supersedeas Bond dated July 17, 2007 in Carlson I explained, "The Club represents all the residents, and, as it argues, it has an interest, on behalf of all the residents, in enforcing the covenants."

under Civil Rule 11 overlap substantially, and because the case law often addresses such matters simultaneously, the Club has combined its briefing on these two issues. However, CR 11²⁴ and RCW 4.84.185²⁵ each provide an independent basis for an award here.

Significantly, in setting aside the default judgment against the Staleys here, the trial court specifically held:

In obtaining the default judgment against Defendants Staley, Mr. Carlson failed to provide important information which undoubtedly should have been provided. Mr. Carlson failed to inform *Ex Parte* that another Department of this Court had previously entered, in Carlson v. Innis Arden Club, et al., King County Superior Court Cause No. 06-2-06819-0 SEA ("*Carlson I*"), final rulings and judgments adverse to the Carlsons on issues raised in this case. Mr. Carlson included provisions in the Staley default judgment which he presented to the *Ex Parte* Commissioner for entry that were contrary to the rulings entered against the Carlsons in *Carlson I*. Further, he obtained the default judgment without providing any notice to Defendants Hollinrake or Jones, who had appeared.

²⁴ CR 11 provides in relevant part:

The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

²⁵ RCW 4.84.185 provides in relevant part:

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense.

Despite the fact that the Innis Arden Club, Inc. was not a party at the time the default judgment was entered and was not given notice of it, Mr. Carlson nonetheless drafted the default judgment and has since demanded that it be applied as an injunction against and binding upon the Club, its Directors, and members. Mr. Carlson did so even though, just minutes before he presented the default judgment for entry in *Ex Parte*, he had left this Department's courtroom, where this Department had taken under advisement a motion for dismissal of Mr. Carlson's entire action unless the Club was named as a necessary party defendant. Mr. Carlson did not disclose to this Court that he would proceed immediately to *Ex Parte* and obtain entry of a default judgment which he would claim bound The Innis Arden Club, Inc. Nor did Mr. Carlson disclose to *Ex Parte* the procedural posture of the case as reflected in the motion hearing in which he had just participated. Accordingly, the Court hereby sets aside and vacates pursuant to CR 55(c)(1) and CR 60(b)(1),(4), and (11) the "Default Judgment" entered against Defendants Staley and the "Order on Plaintiffs' Motion for Order of Default and Default Judgment" both dated October 26, 2007.

CP 495-496.

However, it is not just Mr. Carlson's *ex parte* actions which make an award appropriate here: this entire lawsuit was frivolous and advanced without reasonable cause. All the claims and issues had already been decided against the Carlsons in Carlson I when the Carlsons decided to file this duplicative lawsuit.²⁶ And, even after this Court had spoken in Carlson I, the Carlsons continued to pursue Carlson II. Because *res judicata* and collateral clearly barred such relitigation, the Carlsons had

²⁶ Judge Mertel's summary judgment ruling in Carlson I was issued in May 2007. The Carlsons filed this lawsuit, Carlson II, in August 2007.

absolutely no colorable theory for pursuing this lawsuit. Attorney fees are appropriate under RCW 4.84.185.

CR 11 was therefore violated because, again, Mr. Carlson either knew or should have known (had he conducted a reasonable inquiry) that the Carlsons' claims and issues here were precluded by *res judicata* and/or collateral estoppel. Any reasonable inquiry would have demonstrated that this lawsuit (1) was not well grounded in fact, and (2) was not warranted by existing law or a good faith argument for the extension/modification of existing law.

Thus, where a lawsuit is, in its entirety, frivolous, the prevailing party is entitled to an award of attorney fees. *See, e.g., Quick-Ruben v. Verharen*, 136 Wn.2d 888, 903, 969 P.2d 64 (1998) (affirming attorney fee award pursuant to RCW 4.84.185 and CR 11 where litigant did not have standing and litigant knew or should have known he did not have standing).

With respect to CR 11, the Washington Supreme Court explained in *Quick-Ruben v. Verharen*, *supra* at 903, n.13:

CR 11 provides that by signing the pleading the party and/or attorney certifies: that to the best of the party's or attorney's knowledge, information, and belief, formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for

any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

The sanction for violation of CR 11 may include an award of reasonable attorney fees.

Filings which are not well grounded in fact and warranted by law include complaints precluded by collateral estoppel and *res judicata*. In Déjà Vu – Everett – Federal Way, Inc., v. City of Federal Way,²⁷ this Court held that an action that was barred by collateral estoppel and *res judicata* was frivolous and warranted imposition of CR 11 sanctions:

Considering the entire record and resolving all doubts in favor of Déjà Vu, we find the present action is not supported by any rational argument based on the law or the facts. It is frivolous to argue that our Supreme Court intended to breathe life into further challenges. Relitigation of the four-foot rule is a waste of time. We remand for an award of attorney fees in favor of Federal way for having to defend this suit below and on appeal.

This Court is not alone in finding that the filing of complaints containing precluded claims deserves CR 11 sanctions, as the 9th Circuit has ruled similarly on numerous occasions. See Buster v. Greisen, 104 F.3d 1186, 1190 (9th Cir. 1997) (“‘Frivolous’ filings are those that are ‘both baseless and made without a reasonable and competent inquiry.’”

²⁷ Déjà Vu – Everett – Federal Way, Inc., v. City of Federal Way, 96 Wn.App. 255, 264, 979 P.2d 464 (1999) (internal citations omitted), *review denied by*, 139 Wn.2d 1027, 994 P.2d 844 (2000).

The district court concluded that this suit was barred by the *res judicata* and collateral estoppel effects of the prior judgment. These findings are supported by the record, and a reasonable and competent inquiry would have led to the same conclusion. . . . [S]uccessive complaints based upon propositions of law previously rejected may constitute harassment under Rule 11.”); West Coast Theater Corp., v. City of Portland, 897 F.2d 1519, 1527 (9th Cir. 1990) (“After a reasonable inquiry, West Coast’s counsel could not have had an objectively reasonable basis for any portion of the complaint. First, as mentioned earlier, West Coast raises issues precluded from relitigation by collateral estoppel.”); *see also* Estate of Blue v. County of Los Angeles, 120 F.3d 982, 985 (9th Cir. 1997).

These shortcomings, by themselves more than enough to warrant CR 11 sanctions, were aggravated by the just plain disingenuous manner in which Mr. Carlson proceeded. For example, with respect to the Staley default, Mr. Carlson completely withheld relevant background from *Ex Parte*, including the Carlson I holdings that would have made clear why the ex parte relief Mr. Carlson sought could not properly be granted.

Mr. Carlson’s actions in obtaining the Staley default were a blatant violation of the duty of candor imposed under the RPCs,²⁸ and, further,

²⁸ See RPC 3.3.

strongly suggests awareness that the adverse rulings in Carlson I would significantly undercut his motion for default.

Despite substantial provocation, the Club went out of its way to try to persuade Mr. Carlson to turn back before he had to face the financial consequences of his actions. The Club's counsel sent Mr. Carlson three separate written notifications that pursuit of this lawsuit was inappropriate under CR 11 in light of the rulings in Carlson I.²⁹ And, as late as May 2008, the Club even offered not to seek attorney's fees or sanctions at all if the Carlsons would just stand down:

On March 3, 2008, we wrote a letter informing you that the Club would seek sanctions against you for your actions related to the default judgment you obtained *ex parte* against Defendants Staley. We received no response to our letter.

In light of the recent Division I Court of Appeals opinion issued on May 19, 2008 in Carlson v. Innis Arden Club, et al., King County Superior Court Cause No. 06-2-06819-0 SEA (*Carlson I*), we are again writing to advise you that by continuing to pursue this lawsuit, *Carlson II*, you are exposing yourself to the very real possibility of CR 11 sanctions in addition to attorney fees.

If you take immediate action to rectify the situation by stipulating to the setting aside of the Staley default and by voluntarily dismissing with prejudice

²⁹ See Exhibits H-J to the Declaration of Josh Whited in Support of Defendant Innis Arden Club, Inc.'s Motion for Award of Attorney's Fees Pursuant to RCW 64.38.050, Civil Rule 11 and RCW 4.84.185 ("Whited Declaration") at 4. The Whited Declaration has been listed in the Club's supplemental designation of clerk's papers and is sub number 124.

Carlson II, the Club will not pursue CR 11 sanctions or fees in connection with Carlson II. Otherwise, we reserve all rights.³⁰

Mr. Carlson was not moved and the Club was forced to spend thousands of dollars in motion practice to vacate the default judgment and injunction that Mr. Carlson improperly obtained from *Ex Parte*.

In sum, this entire action was premised on precluded claims and issues about which Mr. Carlson, an experienced litigator, should have known better. Any reasonable inquiry would have revealed that there was no colorable basis for this lawsuit: it was frivolous, it was advanced without reasonable cause and it was not well grounded in fact or law. The prior preclusive rulings were not entered so long ago as to be forgotten nor could they have been unknown to the Carlsons; the Carlsons brought this lawsuit on the heels of their dismissal by Judge Mertel in Carlson I and continued to pursue it even after this Court resoundingly upheld Judge Mertel.

Accordingly, the Club requests that it be awarded its reasonable attorney fees pursuant to RCW 4.84.185 and/or sanctions pursuant to CR 11.³¹

³⁰ Ex. I to Whited Declaration, sub number 124 (emphasis added).

³¹ In connection with its attorney fee motion before Judge Lum, the Club provided to the trial court extensive and detailed documentation regarding the fees and costs incurred. See Whited Declaration at 4-5; see also Ex. G to Whited Declaration, which includes the

2. The Club Should Have Been Awarded Its Reasonable Attorney Fees Pursuant to RCW 64.38.050.

Although the trial court appropriately confirmed in its July 24, 2008 summary judgment order that all of the Carlsons' claims and issues in this lawsuit are precluded by the doctrines of *res judicata* and collateral estoppel, the trial court nonetheless denied the Club's motion for attorney fees. The question of whether a party is entitled to attorney fees is an issue of law reviewed de novo. Tradewell Group, Inc. v. Mavis, 71 Wn.App. 120, 126-27, 857 P.2d 1053 (1993). Here, the Club is entitled to its reasonable attorney fees pursuant to RCW 64.38.050 which is the attorney's fees provision of the Washington Homeowners Association Act, RCW Ch 64.38. 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.

In Carlson I, Judge Mertel ruled that the Club was clearly entitled to award of attorney fees against the Carlsons pursuant to RCW 64.38.050 and rejected the Carlsons artificial attempts to characterize their claims and issues as somehow outside of the statute's ambit:

Club's invoices in this matter for time billed between December 1, 2007 and July 24, 2008.

6. Plaintiffs have objected to many of the time entries of the Club's counsel and asserted, with minimal explanation, that some entries are "unrelated" to the claims/issues arising under RCW Ch. 64.38. However, the claims/issues raised by Plaintiffs under RCW Ch. 64.38 were sweeping. Both of the causes of action asserted in the Amended Complaint against the Club clearly included RCW Ch. 64.38 components. And, the Club could not reasonably defend against such claims without engaging in core tasks associated with litigation, such as answering the Complaint and Amended Complaint, discovery, hearings, scheduling, etc.³²

The trial court's attorney fee award in Carlson I was affirmed on appeal and the Club was subsequently awarded its appellate attorney fees as well—all under the authority of RCW 64.38.050. As this Court explained in its Carlson I opinion, the Club was entitled to an award of attorney fees pursuant to RCW 64.38.050 because it successfully defended against the claims and issues raised by the Carlsons:

The Carlsons argue that the trial court erred in granting attorney fees to the Club pursuant to RCW 64.38.050 because that statute authorizes a fee award only for aggrieved homeowners, not for homeowners' associations. The question of whether a party is entitled to attorney fees is an issue of law reviewed de novo. Tradewell Group, Inc. v. Mavis, 71 Wn.App. 120, 126-27, 857 P.2d 1053 (1993).

We disagree. RCW 64.38.050 states, "Any violation of the provisions of this chapter

³² See Ex. C to Whited Declaration at 4.

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.” On its face, the statute does not limit an award of fees to aggrieved homeowners but does allow fees to the “prevailing party.” This allows HOAs, which are funded by the community as a whole, to recoup expenses incurred in defending against nonprevailing homeowners.³³

Here in Carlson II, the Carlsons brought forward, with thin disguise (e.g., the initial artifice of not naming the Club as a defendant in challenging the Club’s procedures), the very same claims and issues that they previously litigated and lost in Carlson I—claims and issues which gave rise to attorney fees under RCW 64.38.050. Because the Club is the prevailing party here, as it was in Carlson I, it is again entitled to attorney fees under RCW 64.38.050. And, the claims and issues raised by the Carlsons here include the same RCW Ch. 64.38 components that were present in Carlson I. For example, paragraph 8.1 of the Carlsons’ Prayer for Relief requests:

That the Court stay arbitration pursuant to RCW 7.04A.070(2) and RCW 7.24.190, and enter preliminary and permanent injunctions enjoining Defendants, and all those in active concert and participation with Defendants (a) from threatening or taking any action to arbitrate, or otherwise non-judicially decide disputes over the application of

³³ See Appendix A at 21. The opinion was also provided to the trial court as Exhibit E to the Whited Declaration (sub number 124).

easements to the Carlson Property, specifically including those disputes referenced herein; and (b) from threatening or taking any action to secure assessment of fines or liens for any alleged violations of restrictive easements which may burden the Carlson property;

CP 10. In other words, the Carlsons seek to prevent the Club from utilizing its covenant compliance process and imposing fines pursuant to it even though this Court concluded in Carlson I that the process and imposition of fines do not violate and in fact are authorized by, *inter alia*, RCW Ch.64.38 and do not constitute forced arbitration.

Accordingly, the Club should have been awarded its reasonable attorney fees pursuant to RCW 64.38.050.

F. The Club Should Also Be Awarded Its Reasonable Attorney's Fees and Costs on Appeal Pursuant to RAP 18.1 (a) and On the Same Bases that Required An Award in Superior Court.

RAP 18.1(a) permits an award of attorney fees where “applicable law grants to a party the right to recover reasonable attorney fees on review. . .” Should the Club prevail here, the Club also requests that it be awarded its reasonable attorney fees on appeal. Specifically, attorney fees are authorized by RCW 4.84.185 because the Carlsons’ lawsuit was entirely frivolous. Sanctions are also warranted under CR 11. In short, the Carlsons had no colorable basis for bringing this lawsuit.

Moreover, as this Court recently explained in its Carlson I opinion, attorney fees on appeal are also authorized by RCW 4.84.185: “Here, the

applicable law is RCW 64.38.050, which allows fees to the prevailing party for a dispute concerning violations of chapter 64.38 RCW.”³⁴ This Court further explained:

On its face, the statute [RCW 64.38.050] does not limit an award of fees to aggrieved homeowners but does allow fees to the “prevailing party.” This allows HOAs, which are funded by the community as a whole, to recoup expenses incurred in defending against nonprevailing homeowners.³⁵

Accordingly, the Club respectfully requests that it be awarded its attorney fees on appeal pursuant to CR 11, RCW 4.84.185 and RCW 64.38.050.

V. CONCLUSION

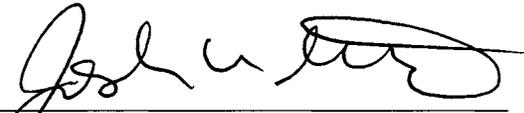
For all of the foregoing reasons, the Club respectfully requests that the trial court’s summary judgment order dismissing the Carlsons’ Complaint with prejudice be affirmed and that the Carlsons’ appeal be denied in its entirety. The Club further requests that the trial court’s decision denying the Club’s motion for reasonable attorney fees and/or sanctions be reversed and that the Club receive an award in connection with the litigation below. Finally, the Club requests that it be awarded fees and sanctions on appeal.

³⁴ Appendix A at 22.

³⁵ Id. at 21.

Respectfully submitted this 30th day of June, 2009.

EGLICK KIKER WHITED PLLC

By 

Peter J. Eglick, WSBA #8809
Joshua A. Whited, WSBA #30509
Attorney for Innis Arden Club, Inc.

EGLICK KIKER WHITED PLLC
1000 Second Avenue, Suite 3130
Seattle, Washington 98104
(206) 441-1069 phone
(206) 441-1089 fax

CERTIFICATE OF SERVICE

I, Deniece Bleha, do hereby certify that I am over the age of eighteen, and am not a party to this lawsuit.

On this 30th day of June, 2009, I caused to be served a true and correct copy of the foregoing in the manner described upon the following

parties:

Robert Carlson
1450 NW 186th St.
Shoreline, WA 98177

John Hollinrake
1048 NW Innis Arden Drive
Shoreline, WA 98177

Via First Class Mail, Postage
Prepaid

Via First Class Mail, Postage
Prepaid

Randal Jones
17777 13th Avenue NW
Shoreline, WA 98177

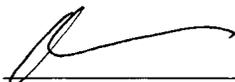
Brian Ritchie
2611 NE 113th St Ste 300
Seattle, WA 98125-6700

Via First Class Mail, Postage
Prepaid

Via First Class Mail, Postage
Prepaid

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

DATED this 30th day of June, 2009 at Seattle, Washington.


Deniece Bleha, Legal Assistant
Eglick Kiker Whited PLLC
1000 Second Avenue, Suite 3130
Seattle, Washington 98104
Tel. (206) 441-1069

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COURT OF APPEALS
STATE OF WASHINGTON

A P P E N D I X A

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IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

Robert Carlson,)	No. 07-2-27685-8 SEA
)	
Plaintiffs,)	ORDER DENYING DEFENDANT'S MOTION
vs.)	FOR ATTORNEY'S FEES
James Staley)	
)	
Defendant.)	

THIS MATTER having come before the undersigned Judge of the King County Superior Court having reviewed the files and records herein and for good cause shown, hereby enters an

Order Denying Defendant's Motion for Attorney's Fees. The Court notes that the issue of whether attorneys fees should be awarded pursuant to CR 11 is a very close question, but concludes that an award of such fees against Mr. Carlson is not warranted at this time.

DATED this 9th day of October, 2009.



 Judge Dean S. Lum
 King County Superior Court

ORDER DENYING MOTION FOR RECONSIDERATION

King County Superior Court
516 Third Avenue
Seattle, Washington 98101

A P P E N D I X B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ROBERT J. CARLSON and JANET B. CARLSON,)

Appellants,)

v.)

THE INNIS ARDEN CLUB, INC., a Washington For-Profit corporation;)

Respondent,)

JOHN J. HOLLINRAKE, JR. and KAREN E. HOLLINRAKE, and their marital community;)

Defendants,)

MICHAEL J. RASCH and CYNTHIA RASCH, and their marital community;)

Respondents,)

JOHN DOES 1-20 and JANE DOES 1-20;)

Defendants,)

JOHN P. UBERUAGA and JOANNA A. UBERUAGA,)

Respondents.)

NO. 59878-3-I

DIVISION ONE

Unpublished Opinion

FILED: May 19, 2008

LAU, J.—This case originated as a dispute between Michael and Cynthia Rasch

and Robert and Janet Carlson regarding the enforceability of covenants governing tree height restrictions in the Innis Arden subdivision. The Rasches brought a covenant violation petition against the Carlsons pursuant to the Innis Arden Club's covenant compliance process. The Carlsons unsuccessfully sought a preliminary injunction to stay the process, and an outside arbitrator determined that six of the Carlsons' trees did not comply with the covenants. The Carlsons again filed suit, principally arguing that the Club's compliance process was invalid and that the Rasches could not enforce the tree covenants against the Carlsons. The trial court granted summary judgment to the Club and the Rasches and granted their request for attorney fees. We conclude that the Carlsons' challenge to the cross-enforceability of the covenants is barred by res judicata and that the Club compliance process is valid. Accordingly, we affirm and award attorney fees on appeal to the Club and the Rasches.

Facts

Bill and Bertha Boeing developed the Innis Arden community in northwest King County in the 1940s. Innis Arden affords sweeping views of Puget Sound and the Olympic Mountains. The community was platted in three phases—Innis Arden in 1941, Innis Arden 2 in 1945, and Innis Arden 3 in 1949. Each plat was made subject to separately recorded but nearly identical restrictive mutual easements (covenants).¹ The covenants expressly attach to and pass with each parcel in that plat, binding all

¹ These restrictive mutual easements expressly run with the land and restrict its use by imposing vegetation height limits to preserve views and, thus, may be properly characterized as covenants. 20 Am. Jur. 2d Covenants, Conditions and Restrictions § 148.

owners and their respective successors in interest. Boeing, as the original grantor, reserved the authority to enforce specified covenant provisions, including the power to review and approve plans and specifications for all buildings, improvements, and alterations (covenant 4); to grant or deny permission for maintenance of fences or hedges greater than six feet or such lesser height as the grantor may specify (covenant 10); and to make conclusive determinations regarding the removal of "spite or nuisance" walls, hedges, fences, or trees (covenant 11).

In 1950, the Innis Arden Club, Inc., was established as a community organization for the entire Innis Arden development. Each lot received one share in the Club. Boeing deeded the Innis Arden reserve tract, including open space and community facilities, to the Club. In 1960, the Boeing family signed and recorded an assignment that transferred the grantor's rights to the Club. This assignment expressly stated that Boeing, as grantor, had "established a general plan for the development, improvement, maintenance and protection of real property described" in the three Innis Arden plats. Since then, the Club has administered the covenants and maintained the reserve tracts and common facilities. The Club is governed by a board composed of and elected by Innis Arden homeowners.

Over the years, some lot owners' trees grew tall enough to obstruct views and disputes arose over enforcement of the covenants. Thus, in 1981 and 1982, each of the three Innis Arden subdivisions adopted by supermajority and recorded a view preservation amendment.

In order to preserve the views of Puget Sound and the Olympic Mountains from lots in said subdivision, all trees, shrubs, brush and landscaping, whether native

or planted, on residential lots in said subdivision shall be kept to a height no higher than the highest point of the roof surface nor higher than the height of the house on each lot, whichever is lower. For this purpose, the height of a house shall be measured from the highest point of the roof surface to the lot grade which shall be the average of the highest and lowest ground elevations at exterior walls of the house. This amendment shall apply only to those trees, shrubs and brush which in any way obstruct the view of the sound and Olympics from a neighboring lot or lots.

The operative language of this covenant is identical for each subdivision, with the exception of certain specified lots that cannot affect the views of other homes within Innis Arden.

Disputes immediately arose concerning enforcement of the view preservation amendment. In 1984, a group of Innis Arden homeowners filed a class action lawsuit. The plaintiff class consisted of homeowners seeking a declaration of validity and enforceability of the view preservation amendments, and the defendant class consisted of homeowners challenging the amendments. The case was certified as a class action pursuant to CR 23(b)(1) and (2), and notice was given to all Innis Arden homeowners. The notice provided that Innis Arden homeowners could choose to join either the plaintiffs' class or the defendants' class. It also stated, "You may disregard this matter but you will be bound by the results of this litigation." The notice also stated that if the covenants were upheld, the litigation would proceed to a second stage where the individually affected properties of plaintiffs and defendants would be litigated.

In May 1987, the trial court granted summary judgment for the plaintiffs and ruled that "the Covenants, as amended, are valid and enforceable as to all lots within Innis Arden" The court explained in its oral ruling that the amendments were

reasonable, properly executed, and within the scope of the grantor's intent to preserve and maintain views. The court retained jurisdiction to appoint and oversee a special master to conduct factual inquiries regarding the application of the view preservation amendments to individual parties. The order expressly stated that it was final.

The defendant class appealed the order. In an unpublished opinion, Innis Arden Club, Inc. v. Binns, noted at 50 Wn. App. 1064 (1988), Division One upheld the validity of the view preservation amendments.

Protection of the area's marine and mountain views is eminently reasonable, and such views very obviously are and always have been one of the principal attractions of the Innis Arden development. The grantor's intent, as evidenced by the easements, was to protect homeowner views, and these amendments are clearly within that intent.

On March 8, 1990, the trial court issued an order on review of the special master's findings. The order "approved and affirmed" the special master's findings and conclusions with one exception.

The reference to "neighboring lot or lots" in the Restrictive Mutual Easements was not intended by its drafters, nor by the adopting community members, to be restricted to contiguous or adjacent lots. Due to the geography of Innis Arden, including plat layout and slope, trees several lots distant may entirely block views. The intent of the covenant is to restore such views. However, "neighboring" lots must be such as to have an actual—and not de minimus—view obstruction. . . .

Defendant class counsel was permitted to withdraw on the same date, "based upon the belief of the parties that no class issues remained for the Court's determination and that all remaining issues were individual enforcement matters for the Special Master."

The litigation then proceeded into the second stage, with the individual plaintiffs and defendants adjudicating their

disputes concerning applicability of the view preservation amendments before the special master. During those proceedings, the parties raised the issue of cross-enforceability between Innis Arden subdivisions, and the special master transferred the matter to the trial court.

On July 9, 1990, the trial court issued written notice to all Innis Arden residents regarding cross-subdivision enforcement of the covenants. The notice stated that defendant class counsel had previously been permitted to withdraw, but it listed nine individual defendants who were either represented by counsel or were attorneys proceeding pro se. The notice stated, "This pending issue may affect all residents and therefore the Court has published this notice."

On December 5, 1990, the trial court issued an order granting summary judgment to the plaintiff class and reiterating that the view preservation amendments are enforceable across Innis Arden subdivision boundaries. The court's order specified that this conclusion

is implicit in the court's initial Order Granting Class Action Summary Judgment dated May 4, 1987, the issue of cross enforceability was raised before the court in that initial proceeding, and the doctrine of collateral estoppel bars raising the issue of cross enforceability in the second phase of the proceeding. The time to raise the issue of cross enforceability was in the initial phase, as that issue relates directly to the facial validity of the View Preservation Amendments.

5. The court explicitly reaffirms its earlier ruling regarding the enforceability of the View Preservation Amendments across subdivision boundaries. The intent of the View Preservation Amendments, in light of the surrounding circumstances made clear by undisputed facts in the record, requires the court to reach the conclusion that the View Preservation Amendments are enforceable across Innis Arden subdivision boundaries.

Although the trial court's ruling was based on collateral estoppel, its oral ruling

also addressed the merits.

With respect to the merits, however, it is my view that intent is the central question. It is not discernible from the face of any single amendment what intent there was to cross subdivision enforcement.

The ambiguity is created not in the language of the amendment itself, but rather in the fact that there are three identical amendments which must be construed together because of the style and fashion of their adoption. They were essentially simultaneously adopted, they are essentially identical, and unless there is enforcement available across subdivision lines, there is neither sense nor fairness to the result.

. . . . Looking at the circumstances of the adoption of the amendments . . . the surrounding circumstances, the topography of the property of all three subdivisions, and the fact that it is a single community[,] I conclude that the amendments are enforceable across subdivision lines.

In June 1992, the class action was terminated after more than 600 special master petitions had been decided. The Binns trial court judge suggested in a letter that a “community process must eventually be substituted” that “permit[s] recourse to the Court, but only after informal efforts among the parties and a community-based process for preliminary decision”

In 1999, a supermajority of residents in each Innis Arden subdivision adopted covenant amendments providing for payment of mandatory dues to the Club. The Carlsons purchased a home in Innis Arden in June 2001. To close on the purchase, they had to sign an acknowledgement confirming that their property was subject to the covenants.

In 2002, faced with continuing covenant enforcement disputes, the Club Board drafted a bylaw amendment to create a formal mechanism for resolution of covenant compliance disputes. In 2004, the Board held an advisory vote of Innis Arden residents, and the proposal was rejected by a vote of 227 to 247.

But disputes continued regarding

the Board's authority to resolve covenant violations. Thus, on April 12, 2005, the Board adopted bylaw IV.6, a modified version of the previous covenant compliance proposal. Under this procedure, initial compliance petitions are screened by a committee which, after giving the homeowner an opportunity to respond, makes a recommendation to the Board. If the petition has a sufficient basis to move forward, there is notice and a hearing before the Board on the merits. If the Board upholds the petition after a hearing, it sets a date for compliance and can impose fines if the homeowner does not comply. The bylaw provides, "Board members whose participation would genuinely compromise the fairness of the complaint resolution process shall not participate in it."

If a homeowner does not wish to have the determination made by the Board, the bylaw provides that he or she may select a qualified outside arbitrator from a list provided by the Club, who "shall function as the Board's representative in the compliance matter and render a decision for the Board." The party requesting arbitration is responsible for costs and fees of arbitration or the fees may be evenly split if both parties consent to arbitration. Once the Board or arbitrator renders a decision, the Board has authority to set a compliance deadline after which fines shall accrue. The bylaw further provides, "The Board or arbitrator's decision after an open hearing shall be binding and final. The accrual of fines and the compliance deadline established by the Board shall remain in effect unless a court with jurisdiction issues an injunction staying the fines and/or compliance pending review."

In November 2005, the Rasches wrote a letter advising the Carlsons that their trees blocked the Rasches' view and requesting that the Carlsons bring their trees into compliance with the covenants. The

Rasches' home is located in Innis Arden 1, and the Carlsons' home is in Innis Arden 2. The Carlsons did not comply. The Rasches then submitted a covenant violation petition to the Board. In February 2006, the Carlsons filed in superior court a complaint and motion to stay arbitration, seeking to invalidate the Club's compliance procedure.

On March 6, 2006, even as they challenged the Club's compliance process, the Carlsons agreed to take the next step in that process by exercising their right to bypass a hearing before the Board and bring the dispute before a professional arbitrator. The Carlsons then filed a motion for preliminary injunction and to stay arbitration, which the trial court denied. The arbitrator, after hearing the dispute and visiting the site, determined that the Board had the power to decide the dispute and that six of the Carlsons' trees violated the covenants. The Board set a compliance deadline of June 16, 2006, and notified the Carlsons that daily fines would begin to accrue 30 days later unless they brought their trees into compliance.

The Carlsons moved for summary judgment, arguing that the arbitrator's decision was unenforceable because the Club's compliance process was invalid and because the tree covenants were not cross-enforceable between Innis Arden subdivisions. The Rasches and the Club filed a cross-motion for summary judgment.

On January 2, 2007, the trial court granted partial summary judgment to the Rasches and the Club and denied summary judgment to the Carlsons on the tree covenant issues. The trial court found that the Club is a homeowners association pursuant to chapter 64.38 RCW with the authority to enact its covenant compliance process and that the validity and enforceability of the view preservation amendments was barred by res judicata and collateral

estoppel. The trial court denied the Carlsons' request for attorney fees and instructed the Club to submit a motion seeking an award of attorney fees as the prevailing party.

The Rasches then filed a motion to enforce the arbitrator's decision. The trial court granted that motion, ruling that the Club process complied with substantive and procedural due process and that there was no showing of fraud, misrepresentation, or undue bias. The 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. Accordingly, the court ruled that fines against the Carlsons would not begin to accrue until 60 days from the date of the court's oral ruling, unless the trees were brought into compliance or the Carlsons could demonstrate that they were prevented from doing so by the City of Shoreline. The court ruled that the fines would continue to accrue during the pendency of any appeal taken.

On March 27, 2007, the trial court granted the Club's motion for award of attorney fees as the prevailing party under RCW 64.38.050 and set a further hearing for determination of the amount. The Club submitted a request for attorney fees of \$88,794.15, and on May 15, 2007, the trial court granted a reduced award of \$57,592.90. The Carlsons appeal.

Analysis

Cross-Enforceability of Covenants

The Carlsons argue that the trial court erred in granting summary judgment to the Club and ruling that their challenge to the validity and cross-enforceability of the view preservation amendments was

barred by res judicata and collateral estoppel. This court reviews a trial court order granting summary judgment de novo. Stalter v. State, 151 Wn.2d 148, 155, 86 P.3d 1159 (2004). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

Res judicata ensures the finality of decisions. Camer v. Seattle Sch. Dist. 1, 52 Wn. App. 531, 534, 762 P.2d 356 (1988).

Res judicata, or claim preclusion, bars the relitigation of claims and issues that were litigated, or might have been litigated, in a prior action. Application of the doctrine requires identity between a prior judgment and a subsequent action as to (1) persons and parties, (2) cause of action, (3) subject matter, and (4) the quality of persons for or against whom the claim is made. Collateral estoppel, or issue preclusion, prevents relitigation of an issue after the party estopped has already had a full and fair opportunity to present its case. The requirements for application of the doctrine are: (1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice.

Pederson v. Potter, 103 Wn. App. 62, 69, 11 P.3d 833 (2000) (internal citations omitted). The party asserting res judicata has the burden of proving that the claim was decided in the prior litigation. Civil Serv. Comm'n v. City of Kelso, 137 Wn.2d 166, 172, 969 P.2d 474 (1999).

The Carlsons argue that there was no final judgment in the Binns litigation operating against their predecessors in interest, the Berreths, that would give rise to collateral estoppel. They contend that the court's 1990 order on cross-enforceability was merely interlocutory and that there was no final judgment because the special master never ordered the Berreths to cut their trees. The Carlsons further argue that

the court's 1987 order has no preclusive effect because (1) it did not address individual disputes, (2) it did not describe the members of the class, (3) the Berreths were not named parties or embraced within any description of class members, and (4) cross-enforceability of the tree covenants was not addressed in the 1987 order, but only in the 1990 order that was entered after defendant class counsel had withdrawn.

These arguments evince a fundamental misunderstanding of the class action process. The Binns litigation was certified as a class action under CR 23(b)(1) and (2), under which potential class members do not have an automatic right to notice or absolute right of exclusion. Reeb v. Ohio Dep't of Rehab. & Corr., 435 F.3d 639, 645 (6th Cir. 2006).² Notice is a "safety valve" through which the court protects the rights of absent class members and safeguards against a possible future challenge to the res judicata effect of a CR 23(b)(2) action. 5 Alba Conte & Herbert Newberg, Newberg on Class Actions § 16:17 (4th ed. 2002); Sperry Rand Corp. v. Larson, 554 F.2d 868, 876 (8th Cir. 1977).

When damages cannot be proved on a class-wide basis and damage proof by individual class members in a single proceeding would be beyond the administrative capabilities of the court, the court may adjudicate common issues to a final judgment and then appoint a special master to resolve questions of individual damages, with the benefit of res judicata on the common issues. 2 Alba Conte & Herbert Newberg, Newberg on Class Actions § 4:33 (4th ed. 2002). As a general rule, when adequate

² Federal authority interpreting identical class action provisions in Washington law is "highly persuasive." Pickett v. Holland Am. Lines-Westours, Inc., 145 Wn.2d 178, 188, 35 P.3d 351 (2001).

representation is present, judgment in a class action lawsuit will bind absent members of the class described in that judgment with respect to common issues adjudicated.

1 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 1:6 (4th ed. 2002); Restatement (Second) of Judgments § 41(1)(e) (1982).

The threshold res judicata consideration with respect to class actions is whether the appellants were members of the class described in the final judgment. The next consideration is whether the initial proceedings complied with due process. The court applying res judicata must conclude that the class was adequately represented in the first suit. 5 Conte & Newberg, *supra*, § 16:25. “Adequate representation is usually present when a class representative with typical claims and defenses has no conflict of interest with other members of the class, and the court is satisfied that the class action will be vigorously prosecuted.” 2 Conte & Newberg, *supra*, § 4:47 at 342. In the absence of representational adequacy, absent class members can collaterally attack the binding nature of any final judgment on them. *Id.* (citing Hansberry v. Lee, 311 U.S. 32, 61 S. Ct. 115, 85 L. Ed. 2d 22 (1940)).

We conclude that the Binns orders are binding on all Innis Arden homeowners, including the Carlsons. The notice issued by the court to all Innis Arden homeowners (for both the original class action lawsuit and the subsequent cross-enforceability challenge) stated that they could choose to join the plaintiffs’ class, the defendants’ class, or neither, but that all homeowners in Innis Arden would be bound by the decision. This created a somewhat unusual situation with respect to defining the class to which absent class members

belonged—because the covenants run with the land and provide both a burden and a benefit, the absent class members did not fit neatly into either class. But this does not defeat the res judicata effect of both judgments on all Innis Arden homeowners and their successors, including the Carlsons, where there was no right of exclusion and the notice and judgment made it clear that the ruling on common questions would be binding on all.

The Carlsons contend that there is no order with preclusive effect on the cross-enforceability question because the 1987 order did not address that issue and because the defendant class was unrepresented when the 1990 order was issued. But the 1990 order ruled that the cross-enforceability question was barred from further challenge because it had been implicitly addressed in the 1987 order. In so ruling, the court noted that the cross-enforceability issue had actually been raised and argued in the original litigation. Accordingly, the 1987 order does have preclusive effect on that issue. Furthermore, even though defendant class counsel dropped out prior to the 1990 order, the court's notice shows that nine individual defendants continued to be represented by counsel. It is highly likely that all of the represented defendants had the same motivation to vigorously challenge the cross-enforceability of the covenants.

The Carlsons further mischaracterize the 1987 and 1990 orders as interlocutory. The Binns court properly bifurcated the proceedings by adjudicating the common question first—the validity and applicability of the covenants—and then appointing a special master to address individual disputes. The court's 1987 order stating, "The Covenants, as amended, are valid and enforceable as to all lots within Innis Arden," and the court's 1990 order ruling that the

cross-enforceability question was barred by the preclusive effect of the 1987 order, were final and binding on the Carlsons' predecessors in interest, the Berreths. The nature and extent of the Berreths' participation in the special master process is irrelevant to the preclusive effect of the 1987 or 1990 orders on the Carlsons with respect to the common questions.

Because we conclude that the Carlsons' challenge to the validity and cross-enforceability of the view preservation amendments was barred by res judicata and collateral estoppel, we need not reach the merits of that claim.³

Club Covenant Compliance Process

The Carlsons argue that the trial court erred in granting summary judgment for the Club and ruling that its compliance process was valid. They acknowledge that the covenants expressly allow the Club to access the court's "proceedings in law or equity" to resolve a covenant dispute. But they argue that the Club has no inherent or statutory authority to circumvent the court by forcing its residents to submit to a hearing process or to levy fines.⁴ The Club contends that its compliance process is authorized by its covenants and bylaws, as well as by statute.

The interpretation of a restrictive covenant is a question of law, reviewed de

³ We observe, however, that Save Sea Lawn Acres Ass'n v. Mercer, 140 Wn. App. 411, 166 P.3d 770 (2007) is factually distinguishable from this case.

⁴ The Carlsons argued for the first time in their reply brief, without analysis or citation to authority, that under this court's ruling in Binns, the Club has no inherent authority to enforce the original covenants. Arguments not supported by authority or analysis, as well as arguments raised for the first time in the reply brief, need not be considered. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Accordingly, we disregard this assertion.

novo. Parry v. Hewitt, 68 Wn. App. 664, 668, 847 P.2d 483 (1992). Questions of statutory construction are reviewed de novo. State v. Votava, 149 Wn.2d 178, 183, 66 P.3d 1050 (2003). “The primary goal of statutory interpretation is to ascertain and give effect to the legislature's intent and purpose.” In re Seattle Popular Monorail Auth., 155 Wn.2d 612, 627, 121 P.3d 1166 (2005). We read the statute as a whole to give effect to

all language used. In re Pers. Restraint of Skylstad, 160 Wn.2d 944, 948, 162 P.3d 413 (2007).

The Carlsons argue that the Club's compliance process is contravened by the Innis Arden covenants, which explicitly provide the right to enforce the covenants in court. They further contend that chapter 64.38 RCW, the homeowners' association act,⁵ limits a homeowners association's (HOA) powers to those enumerated in the statute. Because RCW 64.38.020(11)⁶ expressly permits HOAs to hold hearings and

⁵ The HOA act was passed in 1995. It is based on the Uniform Common Interest Ownership Act (UCIOA) as drafted by the National Conference of Commissioners on Uniform State Laws in 1994.

⁶ RCW 64.38.020(11) provides that a HOA may “[i]mpose and collect charges for late payments of assessments and, after notice and an opportunity to be heard by the board of directors or by the representative designated by the board of directors and in accordance with the procedures as provided in the bylaws or rules and regulations adopted by the board of directors, levy reasonable fines in accordance with a previously established schedule adopted by the board of directors and furnished to the owners for violation of the bylaws, rules, and regulations of the association.”

levy fines for “violation of the bylaws, rules, and regulations” but not for violations of covenants, the Carlsons argue that the Club’s process is also unauthorized by statute.

The general rule, as summarized in the Restatement (Third) of Property (Servitudes) § 6.8 cmt. b (2000), favors the Club’s compliance process.⁷

Fines, penalties, late fees, and withdrawal of privileges to use common recreational and social facilities may be used unless prohibited by statute or the governing documents. . . . Fines and penalties are commonly used to deter violations of use restrictions The power to impose fines or penalties has been sometimes denied common-interest communities on the ground that only the government may exercise such powers, but the prevailing view regards fines and penalties as legitimate tools of the common-interest community. The amounts must be reasonable, and the procedures adopted must provide property owners with notice of their potential liabilities and a reasonable opportunity to present the facts and any defenses they may have.

The Carlsons’ argument that the Innis Arden covenants expressly contravene the Club’s process is not persuasive. The Club’s process does not purport to bar an aggrieved homeowner from bringing the dispute to court. Instead, it is a community-based process that allows for an initial evaluation of the dispute, with notice and a hearing, prior to judicial review. The Binns trial court judge recommended that Innis Arden develop such a process. Moreover, the original Innis Arden covenants gave express authority to the grantor (whose powers are now invested in the Club) to make a

⁷ The restatement cites Glen Devin Condo. Ass’n v. Makhluif, 1994 Mass. App. Div. 227 (1994), where the court held that a condominium association had inherent authority under its governing documents to impose fines. Carlson argues that the Glen Devin court acknowledged that its opinion was overruled by statute. That is incorrect. The opinion actually stated that the condominium’s process was now expressly

authorized by statute, but because the statute was not retroactive, the court had to analyze the case in terms of inherent authority.

final determination regarding the permissible height of walls, fences, and hedges and the removal of “spite or nuisance” hedges or trees. These covenants further provide inherent authority for the Club’s process, subject to judicial review.

The Carlsons argue that even if the Club once had inherent authority to enforce covenants, its powers have been expressly limited by the HOA act to those enumerated in RCW 68.34.020—particularly where RCW 68.34.020(11) expressly grants the authority to hold hearings and impose fines for violation of “bylaws or rules and regulations” but not covenants. We disagree. Nothing in the HOA act expressly overrides the Club’s inherent authority to enforce covenant compliance under its governing documents. Rather, RCW 68.34.020 enumerates a list of powers that an HOA may exercise “[u]nless otherwise provided in the governing documents,” including the power to “[a]dopt and amend bylaws, rules, and regulations;” “levy reasonable fines . . . for violation of the bylaws, rules, and regulations of the association” after notice and an opportunity to be heard; “[e]xercise any other powers conferred by the bylaws;” and (14) “[e]xercise any other powers necessary and proper for the governance and operation of the association.” RCW 68.34.020(1), (11), (12), (14). The HOA act’s definition of “governing documents”⁸ is broad and expressly includes covenants and bylaws. The Innis Arden bylaws authorize the Club’s process and do not purport to

⁸ “Governing documents” is defined as “the articles of incorporation, bylaws, plat, declaration of covenants, conditions, and restrictions, rules and regulations of the association, or other written instrument by which the association has the authority to exercise any of the powers provided for in this chapter or to manage, maintain, or otherwise affect the property under its jurisdiction.” RCW 64.38.010(2).

restrict the homeowner's right to seek judicial review of the final determination issued by the Board or the outside arbitrator.

Wimberly v. Caravello, 136 Wn. App. 327, 149 P.3d 402 (2006) does not compel a different result. In Wimberly, an HOA's board declined to enforce a building restriction covenant. The affected homeowner sued, and the trial court enjoined the building. The building owner appealed, arguing that chapter 64.38 RCW expresses the legislature's intention that boards exercise the authority granted by their bylaws and that judges cannot substitute their judgment for that of the board. The court disagreed.

But the homeowners' association act begins, "Except as provided in the association's governing documents" And the governing documents here clearly do provide otherwise. The Association's bylaws and covenants provide that individuals may invoke the jurisdiction of the court to resolve covenant disputes. And that is what the Wimberlys did. By definition, "jurisdiction" is the power of a court to impose its judgment on the parties and subject matter of litigation.

Wimberly at 335–36 (internal citation omitted).

The Carlsons assert that Wimberly stands for the proposition that an HOA has no authority to decide covenant disputes if the covenants provide for judicial review. This is incorrect. Wimberly held that a homeowner may bring suit to enforce a covenant that an HOA declines to enforce where the governing documents expressly provide that right. Nothing in Wimberly prevents an HOA from creating a covenant compliance procedure as a community-based precursor to judicial review.

The Carlsons also argue that the trial court should have issued an order staying arbitration, because the Carlsons and the Rasches never entered into a written arbitration agreement as required by RCW 7.04.070(2) and because neither the Club nor the arbitrator had the authority to

adjudicate the dispute.

We disagree. The bylaw expressly states that it is authorized by the HOA act and the Club's inherent authority under its governing documents. It makes no reference to chapter 7.04A RCW as a source of authority. The bylaw further provides that the arbitrator shall "function as the Board's representative in the compliance matter and render a decision for the Board," thereby acknowledging that the outside decisionmaker has no more authority than the Board. The bylaw's use of the term "arbitrator" to refer to the outside decisionmaker does not convert the Club's covenant compliance process into an arbitration under the purview of chapter 7.04A RCW.

The Carlsons further argue that the court erred in ruling on summary judgment that the Club was an HOA because there were questions of material fact regarding whether the Club's mandatory dues amendments and parallel bylaws were validly adopted. We disagree. RCW 64.38.010(1) defines a "homeowners' association" as

a corporation, unincorporated association, or other legal entity, each member of which is an owner of residential real property located within the association's jurisdiction, as described in the governing documents, and by virtue of membership or ownership of property is obligated to pay real property taxes, insurance premiums, maintenance costs, or for improvement of real property other than that which is owned by the member.

The Club is a nonprofit corporation whose members are homeowners in Innis Arden.

The Club has the authority through its bylaws and through chapter 64.38 RCW to impose fees for community expenses. Accordingly, it meets the definition of an HOA, regardless of any purported flaws in the adoption of the mandatory dues amendments.

Attorney Fees

The Carlsons argue that the trial court erred in granting attorney fees to the Club pursuant to RCW 64.38.050 because that statute authorizes a fee award only for aggrieved homeowners, not for homeowners' associations. The question of whether a party is entitled to attorney fees is an issue of law reviewed de novo. Tradewell Group, Inc. v. Mavis, 71 Wn. App. 120, 126–27, 857 P.2d 1053 (1993).

We disagree. RCW 64.38.050 states, "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." On its face, the statute does not limit an award of fees to aggrieved homeowners but does allow fees to the "prevailing party." This allows HOAs, which are funded by the community as a whole, to recoup expenses incurred in defending against nonprevailing homeowners.

The Carlsons next argue that the trial court erred in finding that the Club was the prevailing party. The trial court's award of attorney fees is reviewed for abuse of discretion. Taliesen Corp. v. Razore Land Co., 135 Wn. App. 106, 141, 144 P.3d 1185 (2006). The determination of the prevailing party is a mixed question of law and fact that is reviewed under an error of law standard. Sardam v. Morford, 51 Wn. App. 908, 911, 756 P.2d 174 (1988). The prevailing party is the party who receives an affirmative judgment in their favor, Riss v. Angel, 131 Wn.2d 612, 633, 934 P.2d 669 (1997), or who substantially prevails, Hertz v. Riebe, 86 Wn. App. 102, 105, 936 P.2d 24 (1997). If both parties prevail on a major issue, neither party is a prevailing party. Id.

The Club prevailed on all of the major issues, including the Carlsons' quiet title claim—their challenge to the validity of

the covenant compliance process, including the imposition of fines; the Club's status as an HOA, and the cross-enforceability of the covenants. The trial court did rule that the Carlsons' challenge to the Club's remodel procedures and policies was reserved for a further hearing and that fines against the Carlsons would not begin to accrue until 60 days after the entry of its oral ruling. Nevertheless, given the scope of the Club's success on the major issues, we conclude that the trial court did not abuse its discretion in awarding fees to the Club as the prevailing party.

Carlson further argues that the court erred in entering an award of attorney fees without entering findings of fact or conclusions of law that would establish a record to review the award, as required by Mahler v. Szucs, 135 Wn.2d 398, 435, 957 P.2d 632 (1998). But the record shows that the Club extensively documented the basis for its

request, and the court's order contained findings and conclusions. The attorney fee award was proper.

The Club requests attorney fees for costs incurred on appeal based on RAP 18.1(a), which permits an award of fees where "applicable law grants to a party the right to recover reasonable attorney fees on review" Here, the applicable law is RCW 64.38.050, which allows fees to the prevailing party for a dispute concerning violations of chapter 64.38 RCW. Because the Club is the prevailing party under this statute below and on appeal, we grant the Club's request for attorney fees under RAP 18.1.⁹

The Rasches also request

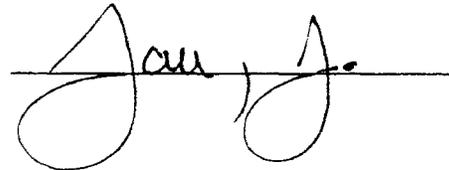
attorney fees on appeal based on RAP 18.1. But the Rasches made only a bare request, with no argument or citation to authority regarding the appropriate grounds for an award of fees. This is insufficient under RAP 18.1(b), which requires a party to devote a section of its brief to its request for attorney fees. “Argument and citation to authority are required under the rule to advise us of the appropriate ground . . . for the award.” Wilson Court Ltd. P’ship v. Tony Maroni’s, Inc., 134 Wn.2d 692, 710 n.4, 952 P.2d 590 (1998). The absence of any supporting argument in the Rasches’ brief is particularly problematic where, as here, the trial court

⁹ We need not decide the Club’s alternative request for attorney fees based on RAP 18.9 or CR 11.

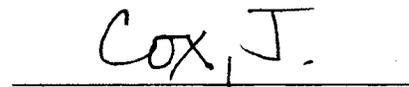
59878-3-1/24

denied the Rasches' request for attorney fees below. Accordingly, we deny the Rasches' request for attorney fees on appeal.

We affirm.

A handwritten signature in cursive script, appearing to read "J. J. Jones", written over a horizontal line.

WE CONCUR:

A handwritten signature in cursive script, appearing to read "Dwyer, A.C.J.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Cox, J.", written over a horizontal line.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ROBERT J. CARLSON and JANET B.)
CARLSON,)

Appellants,)

v.)

THE INNIS ARDEN CLUB, INC., a)
Washington For-Profit corporation;)

Respondent,)

JOHN J. HOLLINRAKE, JR. and)
KAREN E. HOLLINRAKE, and their)
marital community;)

Defendants,)

MICHAEL J. RASCH and CYNTHIA)
RASCH, and their marital community;)

Respondents,)

JOHN DOES 1-20 and JANE DOES)
1-20;)

Defendants,)

JOHN P. UBERUAGA and JOANNA A.)
UBERUAGA,)

Respondents.)

NO. 59878-3-1

DIVISION ONE

ORDER CHANGING OPINION AND
DENYING MOTIONS FOR
RECONSIDERATION AND TO
PUBLISH OPINION

Respondent Innis Arden Club, Inc., filed a motion to publish the opinion filed May 19, 2008; appellants Robert and Janet Carlson filed a motion for reconsideration. The court has determined that the motions should be denied but the opinion changed to address editorial corrections. Therefore, it is hereby

ORDERED that the motion to publish opinion is denied, and further

ORDERED that the motion for reconsideration is denied, and further

ORDERED that the opinion be changed to make minor editorial changes as

follows:

The sentence on the fifth line of page 2 and the remainder of the paragraph,
reading

The Carlsons again filed suit, principally arguing that the Club's compliance process was invalid and that the Rasches could not enforce the tree covenants against the Carlsons. The trial court granted summary judgment to the Club and the Rasches and granted their request for attorney fees. We conclude that the Carlsons' challenge to the cross-enforceability of the covenants is barred by res judicata and that the Club compliance process is valid. Accordingly, we affirm and award attorney fees on appeal to the Club and the Rasches.

is changed to read

The Carlsons moved for summary judgment, principally arguing that the Club's compliance process was invalid and that the Rasches could not enforce the tree covenants against the Carlsons. The trial court granted summary judgment to the Club and the Rasches and granted the Club's request for attorney fees. We conclude that the Carlsons' challenge to the cross-enforceability of the covenants is barred by res judicata and that the Club compliance process is valid. Accordingly, we affirm and award attorney fees on appeal to the Club.

On page 7, the first sentence of the third complete paragraph, reading

In 2002, faced with continuing covenant enforcement disputes, the Club Board drafted a bylaw amendment to create a formal mechanism for resolution of covenant compliance disputes.

is changed to read

In 2003, faced with continuing covenant enforcement disputes, the Club Board drafted a bylaw amendment to create a formal mechanism for resolution of covenant compliance disputes.

On page 9, the second complete sentence of the third complete paragraph reading

The trial court found that the Club is a homeowners association pursuant to chapter 64.38 RCW with the authority to enact its covenant compliance process and that the validity and enforceability of the view preservation amendments was barred by res judicata and collateral estoppel.

is changed to read

The trial court found that the Club is a homeowners association pursuant to chapter 64.38 RCW with the authority to enact its covenant compliance process and that the challenge to the validity and enforceability of the view preservation amendments was barred by res judicata and collateral estoppel.

On page 20, after the indented quote, the sentence reading

The Club is a nonprofit corporation whose members are homeowners in Innis Arden.

is changed to read

The Club is a corporation whose members are homeowners in Innis Arden.

The opinion having been changed, further reconsideration is denied.

DATED this 5th day of August 2008.

Dwyer, A.C.J.

Jaw, J.
Cox, J.

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APPENDIX C

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The Honorable Charles Mertel

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

ROBERT J. CARLSON and JANET B.
CARLSON,

Plaintiffs,

v.

THE INNIS ARDEN CLUB, INC., a
WASHINGTON CORPORATION, et al.,

Defendants.

CASE NO. 06-2-06819-0 SEA

ORDER GRANTING DEFENDANTS INNIS
ARDEN CLUB'S AND RASCHS'
MOTIONS FOR SUMMARY JUDGMENT
AND DENYING PLAINTIFFS CARLSONS'
MOTION FOR SUMMARY JUDGMENT
ON ALL CLAIMS

This matter came before the Court based on multiple motions and cross motions, including: 1) Defendant Raschs' Motion to Dismiss Plaintiffs' Claim Against the Raschs; 2) Plaintiffs' Motion to Strike; 3) Defendant Innis Arden Club, Inc.'s (Herein referred to as "The Club" or "Defendant Club") Renewal of Motion for Partial Summary Judgment Dismissing Plaintiffs' Cloud on Title Claims; 4) Defendant Club's Motion for Partial Summary Judgment (1) Dismissing Plaintiffs' Claims Regarding the Validity of the View Preservation Amendment and the Cross-Enforceability of Said Amendment on Res Judicata and Collateral Estoppel Grounds; and (2) Dismissing Plaintiffs' Claim That The Club is Not a Homeowners' Association; 5) Defendant Club's Motion for Partial Summary Judgment Upholding the Validity of The Club's Compliance Procedures and Their Application to the Plaintiffs and Upholding The Club's Authority on Review of Remodels and Dismissing Plaintiffs' Claims Regarding Same; 6) Defendant Raschs' Motion for Summary Judgment; and 7) Plaintiffs'

ORDER GRANTING DEFENDANTS INNIS ARDEN CLUB'S
AND RASCHS' MOTIONS FOR SUMMARY JUDGMENT
AND DENYING PLAINTIFFS CARLSONS' MOTION FOR
SUMMARY JUDGMENT -- 1 of 6

COPY

1 Motion for Summary Judgment on All Claims. The Court heard argument on December 8,
2 2006, reviewed the files and pleadings herein, and considered the following submitted by the
3 parties on the motions:

- 4 1. Motion to Dismiss Plaintiffs' Claim Against the Raschs, including Declaration
5 of Michael Rasch (9/8/06);
- 6 2. The Club's Response to Defendant Raschs' Motion to Dismiss Plaintiffs'
7 Claim Against the Raschs;
- 8 3. Declaration of Michael Jacobs Supplementing March 15, 2006 Declaration in
9 Opposition to Plaintiffs' Motion for Preliminary Injunction, Submitted in
10 Response to Motion to Dismiss Plaintiffs' Claim Against the Raschs;
- 11 4. Declaration of Peter Eglick in Support of The Club's Response to Defendant
12 Raschs' Motion to Dismiss Plaintiffs' Claim Against the Raschs;
- 13 5. Declarations of Michael Jacobs and Peter Eglick in Support of Defendant's
14 Opposition to Plaintiffs' Motion for Preliminary Injunction;
- 15 6. Plaintiffs' Motion to Strike;
- 16 7. Defendant Club's Joinder in Defendant Raschs' Response to Plaintiffs
17 Carlsons' Motion to Strike;
- 18 8. Plaintiffs' Opposition to Raschs' Motion to Dismiss;
- 19 9. Raschs' Reply to the Carlsons' Opposition to Raschs' Motion to Dismiss;
- 20 10. Defendant Club's Renewal of Motion for Partial Summary Judgment
21 Dismissing Plaintiffs' Claim on Title Claims;
- 22 11. Defendant Club's Motion for Partial Summary Judgment (1) Dismissing
23 Plaintiffs' Claims Regarding the Validity of the View Preservation
24 Amendment and the Cross-Enforceability of Said Amendment on Res Judicata
25 and Collateral Estoppel Grounds; and (2) Dismissing Plaintiffs' Claim That
26 The Club is Not a Homeowners' Association;
12. Declaration of Josh Whited in Support of Defendant Club's Motion for Partial
Summary Judgment (1) Dismissing Plaintiffs' Claims Regarding the Validity
of the View Preservation Amendment and the Cross-Enforceability of Said
Amendment on Res Judicata and Collateral Estoppel Grounds; and (2)
Dismissing Plaintiffs' Claim That The Club is Not a Homeowners'
Association; including as exhibit A the Declaration of Michael Jacobs;
13. Defendant Club's Motion for Partial Summary Judgment Upholding the
Validity of The Club's Compliance Procedures and Their Application to the
Plaintiffs and Upholding The Club's Authority on Review of Remodels and
Dismissing Plaintiffs' Claims Regarding Same;

ORDER GRANTING DEFENDANTS INNIS ARDEN CLUB'S
AND RASCHS' MOTIONS FOR SUMMARY JUDGMENT
AND DENYING PLAINTIFFS CARLSONS' MOTION FOR
SUMMARY JUDGMENT -- 2 of 6

- 1 14. Defendant Raschs' Motion for Summary Judgment, including Declaration of
2 Michael Rasch (11/13/06);
- 3 15. Plaintiffs' Motion for Summary Judgment on All Claims, including
4 Declaration of Robert Carlson in Support of Plaintiffs' Motion for Summary
5 Judgment;
- 6 16. Defendant Club's Brief in Opposition to Plaintiffs Carlsons' Motion for
7 Summary Judgment as corrected, including Declaration of Peter Eglick and
8 Declaration of Michael Jacobs;
- 9 17. The Hollinrakes' Brief in Opposition to the Plaintiff Carlsons' Motion for
10 Summary Judgment, including Declaration of John Hollinrake;
- 11 18. Plaintiffs' Combined Brief in Opposition to (1) Defendant Club's Motion for
12 Partial Summary Judgment (Res Judicata, Collateral Estoppel and HOA
13 Claims) and to (2) Rasch Defendants' Motion for Summary Judgment;
- 14 19. Plaintiffs' Brief in Opposition to Defendant Club's Motion for Partial
15 Summary Judgment (Compliance Bylaw and Remodel Claims) and Brief in
16 Opposition to Defendant Club's Motion for Partial Summary Judgment (Cloud
17 on Title Claims), including Supplemental Declaration of Robert Carlson;
- 18 20. Plaintiffs' Rebuttal Brief in Support of Plaintiffs' Motion from Summary
19 Judgment on All Claims, including Declaration of Janet Carlson;
- 20 21. Defendant Club's Objections to the Declaration of Janet Carlson;
- 21 22. The Club's Reply Brief in Support of Motion for Partial Summary Judgment
22 on View Preservation Amendment/Cross-Enforceability, Res
23 Judicata/Collateral Estoppel and Homeowners' Association Status;
- 24 23. The Club's Reply Brief in Support of Club's Motion for Partial Summary
25 Judgment (Cloud on Title Claims) and Reply Brief in Support of Club's
26 Motion for Partial Summary Judgment (Compliance Bylaw and Remodel
Claims);
24. Defendant Raschs' Reply Brief to Plaintiffs' Combined Opposition to (1)
Defendant Club's Motion for Partial Summary Judgment and (2) Rasch
Defendants' Motion for Summary Judgment;
25. Defendant Raschs' Response to Plaintiffs' Motion for Summary Judgment,
including Declaration of Michael Rasch (11/27/06);
26. John Locke, *Of the Conducts of the Understanding*: "...Love our neighbor as
ourselves is such a truth for regulating human society, that by that alone one
might determine all the cases and doubts in social morality...";
27. Abraham Lincoln, *Notes for a Law Lecture*: "Discourage litigation. Persuade
your neighbors to compromise whenever you can. Point out to them how the
nominal winner is often a real loser – in fees, expenses, and waste of time. As

ORDER GRANTING DEFENDANTS INNIS ARDEN CLUB'S
AND RASCHS' MOTIONS FOR SUMMARY JUDGMENT
AND DENYING PLAINTIFFS CARLSONS' MOTION FOR
SUMMARY JUDGMENT -- 3 of 6

1 a peacemaker the lawyer has a superior opportunity of being a good man...";
2 28. U.S. Senator Robert C. Byrd, Address to the U.S. Senate, July 28, 2005
3 (attached).

4 THEREFORE, being more than fully advised as to the facts; mindful of the multiple
5 philosophical and scriptural admonitions to "care for thy neighbor"... "honor thy
6 neighbor"... "respect thy neighbor" and "love thy neighbor",

7 **IT IS HEREBY ORDERED** that:

8 1. Plaintiff Carlsons oppose summary judgment for Defendants arguing that the
9 Club's Mandatory Dues Amendment was not properly adopted. The Court finds nothing in
10 this argument to preclude entry of summary judgment as to the factual issues now before the
11 Court.

12 2. The Carlsons' cause of action claiming that the Raschs' conduct created a
13 "cloud on title" to the Carlson property is hereby **DISMISSED** with prejudice.

14 3. The Carlsons' cause of action against The Club claiming that The Club's
15 conduct has created a "cloud on title" to the Carlson property and seeking to clear such
16 alleged "cloud on title" is hereby **DISMISSED** with prejudice.

17 4. The Raschs have withdrawn their motion to dismiss pursuant to CR 12(b)(7),
18 without prejudice. This Order does not, therefore, address that motion.

19 5. The Court finds that The Club is a homeowners' association pursuant to RCW
20 Chapter 64.38, the Washington Homeowners' Association Act. Plaintiffs' First Amended
21 Complaint to Quiet Title and for Declaratory Judgment to the contrary is hereby **DISMISSED**
22 with prejudice.

23 6. Plaintiffs question on various grounds the validity of the View Preservation
24 Amendment to the Innis Arden Restrictive Mutual Easements ("Covenants") and assert that it
25 is not enforceable across Innis Arden Subdivision boundaries. The issues Plaintiffs raise were
26 or could have been adjudicated over a decade ago in Innis

**ORDER GRANTING DEFENDANTS INNIS ARDEN CLUB'S
AND RASCHS' MOTIONS FOR SUMMARY JUDGMENT
AND DENYING PLAINTIFFS CARLSONS' MOTION FOR
SUMMARY JUDGMENT - 4 of 6**

1 Arden, et al. v. Binns et al., King County Superior Court No. 84-2-09622-5 and Court of
2 Appeals Div. I No. 20497-1-I, a class action lawsuit. Binns upheld the validity of the View
3 Preservation Amendment as well as its enforceability across Innis Arden division boundaries.

4 Plaintiffs are, as a matter of law, in privity with parties to these prior adjudications.
5 The doctrines of *res judicata* and collateral estoppel apply to bar such re-litigation.
6 Accordingly, Plaintiffs' various challenges to the validity of View Preservation Amendment
7 and the cross-enforceability of the View Preservation Amendment across all Innis Arden
8 Subdivision boundaries are hereby DISMISSED with prejudice.

9 7. The Club is a homeowners' association pursuant to RCW 64.38 with inherent
10 authority as a common interest community to enact The Club's Bylaw IV.6 Compliance
11 Procedures. The Club's application of such Bylaws to Plaintiffs is valid. Plaintiffs' Amended
12 Complaint which alleged the invalidity of such Bylaw is hereby DISMISSED with prejudice.

13 8. The Plaintiffs' challenge to the Club's remodel procedures and policies set
14 forth in Plaintiffs' Amended Complaint, specifically, ¶¶3.4, 3.6, 8.1, 8.2, 8.3, 8.4, 10.3, 10.5,
15 10.7 are hereby reserved for a further hearing on issues of procedural and substantive due
16 process, which continue to concern this Court.

17 9. In light of the foregoing, Plaintiffs' Motion for Summary Judgment on All
18 Claims is denied, and Defendants are hereby granted summary judgment DISMISSING all of
19 Plaintiffs' affirmative claims with prejudice with the limited exception of those claims
20 referenced in Paragraph 8 above, and those claims not yet briefed which assert that, even
21 under The Club's application of its Covenants, Bylaws, Rules and Regulations and in light of
22 the general plan for the community, the Carlsons' trees are not physically in violation.

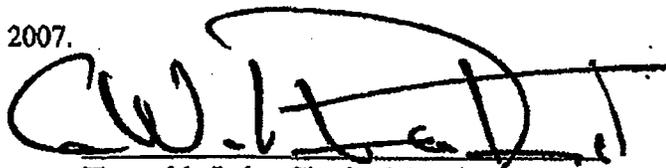
23 10. Defendant Club's Objection to the Declaration of Janet Carlson is
24 OVERRULED.

25 11. In light of the Court's rulings, Plaintiffs' request for attorney's fees in their
26 Amended Complaint is DENIED. Defendants are held to be

ORDER GRANTING DEFENDANTS INNIS ARDEN CLUB'S
AND RASCHS' MOTIONS FOR SUMMARY JUDGMENT
AND DENYING PLAINTIFFS CARLSONS' MOTION FOR
SUMMARY JUDGMENT -- 5 of 6

1 the prevailing parties on the issues resolved to date and may therefore submit a motion to the
2 Court seeking an award of attorney's fees.
3

4 Dated this 2nd day of January, 2007.
5

6 A handwritten signature in black ink, appearing to read 'C. W. Mertel', is written over a horizontal line.

7 Honorable Judge Charles Mertel
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ORDER GRANTING DEFENDANTS INNIS ARDEN CLUB'S
AND RASCHS' MOTIONS FOR SUMMARY JUDGMENT
AND DENYING PLAINTIFFS CARLSONS' MOTION FOR
SUMMARY JUDGMENT -- 6 of 6



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July 28, 2005

We All Need Good Neighbors, and We All Need to Be Good Neighbors

Senator Byrd delivered the following remarks about good neighbors, beginning with the poem, "My Neighbor's Roses."

The roses red upon my neighbor's vine
 Are owned by him, but they are also mine.
 His was the cost, and his the labor, too,
 But mine as well as his the joy, their loveliness to view.

They bloom for me and are for me as fair
 As for the man who gives them all his care.
 Thus I am rich because a good man grew
 A rose-clad vine for all his neighbors' view.

I know from this that others plant for me,
 That what they own my joy may also be;
 So why be selfish when so much that's fine
 Is grown for me upon my neighbor's vine?

— A. L. Gruber

The appreciation of a good neighbor is among the oldest, most cherished, and enduring of human values. It is a value that transcends both time and space.

This value was vividly and eloquently expressed more than two thousand years ago in the Bible which commands us in eight different passages to love our neighbors. (Leviticus 19:18, Matthew 19:19, Matthew 22:39, Mark 12:31, Luke 10:27, Romans 13:9, Galatians 5:14, James 2:8). In fact, this is one of the most repeated commands in the Scripture. In other passages, the Bible tells us how to treat our neighbors (Proverbs 25:17 and Romans 15:2) and in others warns us against mistreating our neighbors. (Deuteronomy 19:14, Exodus 20:16, Proverbs 3:29)

The appreciation of a good neighbor is also a value that knows no cultural or geographical boundaries. An old Chinese proverb, for example, maintains that "a good neighbor is a found treasure."

In the United States, towns and states celebrate Good Neighbor Days. Across the country, municipalities, corporations, radio stations, and newspapers present Good Neighbor Awards. Stores and businesses proclaim "Good Neighbor Days" to promote sales. Since the early 1970s, the federal government has celebrated

an annual Good Neighbor Day. This year Good Neighbor Day will be observed on September 25.

The web site for the national Good Neighbor Day points out that "being good neighbors is an important part of the social fabric that makes ours a great country." Indeed it is. Good neighbors are always there when you need them, offering a helping hand, providing comfort.

Seldom have I observed a stronger sense of neighborliness than among the coal miners in the West Virginia communities where I spent my boyhood years. Fred Mooney, a leading figure in organizing the West Virginia coal miners in the early Twentieth Century, in his autobiography, *Struggle in the Coal Fields*, recalled how his coal-mining neighbors, although themselves quite poor, sacrificed to help him and his family with food and clothes after he had been fired from his job and blacklisted for his union activities. Mooney explained, "This is the spirit of fellowship, love, and devotion that permeates the life of a union coal miner. He will give until it hurts and then divide the rest."

That is loving thy neighbor: "giv[ing] until it hurts" and expecting nothing in return.

I have observed this sense of neighborliness following mine explosions, floods, and other disasters that have befallen on my state over the years. I will never forget how the people of Buffalo Creek, West Virginia, came together following a disastrous flood in that community. How they worked together and shared together while caring for and comforting each other, thus enabling themselves and their neighbors to survive that horrible tragedy.

Being a good neighbor most often involves small, simple acts of kindness. The former Speaker of the House of Representatives, Tip O'Neill, liked to point out that "all politics is local." Being a good neighbor is also local. It begins right over the backyard fence. It involves small, simple acts of kindness, as well as dramatic gestures during catastrophic events.

A good neighbor is the friendly face who shows up with a cake or a pie at the house of a family who has a member who is ill. A good neighbor is a person who mows the lawn of the widow down the street. He may be the handyman who is quick to pull out his tool belt when a neighbor has a busted pipe, or a mechanic who starts his neighbor's car on a cold winter morning so he can get to work. He is a neighbor who will cheerfully shovel your sidewalk when it snows, or rake leaves, just to make life easier for you.

Such simple acts of kindness are part of the social fabric that makes for a better community, a better country, and a better world.

I am pleased to say, I have such good neighbors. Mr. Jim Nobles is a neighbor who is always seeking ways to help my wife, Erma, and me. When we are busy or tired, he somehow appears at our door with a basket of food. He provides us with transportation when we need it. On cold, winter days to my surprise and delight, when I arise, I often find that my neighbor has already shoveled the snow off my sidewalk. And, when he is able, he makes sure that my newspaper is on my porch in the morning. I am also fortunate to have as a neighbor Ms. Mary Lucas who carefully places my newspaper on my porch when Mr. Nobles is unable to do so.

I must confess that, at times, I feel a little guilty, because I am not a better neighbor. My work in the Senate, my family life, and other responsibilities prevent me from performing the kind, neighborly acts that Mr. Nobles and Ms. Lucas have performed for me over the years. But they, in the truest neighborly ways, never

express any complaint. They never want or expect anything in return. They just want to be good neighbors, and they are. They are, indeed, treasures!

I just wanted to take a few minutes of the Senate's time to say how fortunate I am to have these good neighbors, and to encourage all of us to think about being better neighbors! It is the human touch that makes a better community, a better country, and a better world.

###