

No.: 68152-4

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

FAIRWAY ESTATES ASSOCIATION OF APARTMENT OWNERS,  
a Washington nonprofit corporation,

Appellant,

vs.

UNKNOWN HEIRS and DEVISEES of ROBERT D. YOUNG; ESTATE OF  
ROBERT D. YOUNG, deceased; UNKNOWN HEIRS and DEVISEES of ZELLA  
E. YOUNG; ESTATE OF ZELLA E. YOUNG, deceased; UNKNOWN HEIRS and  
DEVISEES of MONETA HARRIS a/k/a MONETA YOUNG a/k/a MONETA M.  
JORSTAD; ESTATE OF MONETA HARRIS a/k/a MONETA YOUNG a/k/a  
MONETA M. JORSTAD, deceased; JUDY HAVENS and JOHN DOE HAVENS,  
wife and husband or state registered domestic partners,

Defendants,

SAND POINT COUNTRY CLUB, INC., a Washington non-profit corporation;

Respondent,

FINANCIAL FREEDOM SENIOR FUNDING CORPORATION, a Delaware  
corporation as successor in interest to TRANSAMERICA HOMEFIRST, INC.; *et al.*,

Defendants.

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COURT OF APPEALS DIV I  
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BRIEF OF APPELLANT

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## **I. INTRODUCTION**

For almost 50 years, our Legislature has deemed it the unwavering public policy of this state that every condominium association in Washington has a statutory lien on each condominium unit within that association, securing assessments levied against that unit.

A trial court has now ruled that a Washington condominium association, Appellant herein, does not have a lien on a condominium unit.

Every condominium unit in Washington is subject to a recorded Declaration of Condominium, which instrument (a) establishes the association and its obligations to administer the common areas of the condominium, (b) establishes the units, and (c) establishes the continuing lien on all of the units to secure assessments to maintain the condominium, among many other provisions.

The unit at issue is owned in fee simple by Respondent. Respondent had leased the unit to a third party (who in turn assigned the lease). Respondent asserted to the trial court that the Association's Declaration of Condominium lien only burdened Respondent's tenant's leasehold interest, and not the unit itself. This is contrary to our state's law, which mandates that every condominium unit in Washington is burdened by a Declaration of Condominium lien so long as the Declaration of Condominium exists.

## **II. ASSIGNMENTS OF ERROR**

*Assignments of Error*

1. The trial court erred in entering the Order Granting Defendant Sand Point Country Club's Motion for Summary Judgment and denying Plaintiff's Motion for Summary Judgment on December 1, 2011. (CP 444-446)

2. The trial court erred in entering the Judgment Granting Sand Point Country Club's Motion for Attorney's Fees and Costs on January 4, 2012. (CP 519-521)

*Issues Pertaining to Assignments of Error*

1. Is it the public policy of this state, as evidenced by the plain meaning of the Declaration of Condominium lien statutes, that a condominium association has a Declaration of Condominium lien on a condominium unit securing assessments levied by the association against that unit? (Assignment of Error No. 1)

2. Can a condominium association foreclose its Declaration of Condominium lien on a unit when assessments against that unit remain unpaid? (Assignment of Error No. 1).

3. Does it violate public policy and the plain meaning of the Declaration of Condominium lien statute to limit a Declaration of Condominium lien to encumber only the unit owner's tenant's leasehold interest in a unit, even though the unit will continue to exist subject to the Declaration of Condominium after expiration of that lease, resulting in no

Declaration of Condominium lien at all once that leasehold expires?

(Assignment of Error No. 1).

4. Even if the trial court's rulings on the above issues are upheld on appeal, is a condominium unit owner entitled to an attorney fee award against a condominium association under a lease to which the association was not a party, or under a statute providing for attorney fees in Declaration of Condominium lien foreclosure actions, where a trial court has ruled that the condominium unit is not subject to the Declaration of Condominium lien, and therefore can't be foreclosed upon? (Assignment of Error No. 2).

5. Even if the trial court's rulings on the above issues are upheld on appeal, did the trial court abuse its discretion in awarding the specific amount of attorney fees awarded to a condominium unit owner? (Assignment of Error No. 2).

### **III. STATEMENT OF THE CASE**

#### **A. Facts Relevant to Issues Presented For Review**

1. The Association And Its Declaration of Condominium Lien on the Unit.

Appellant Fairway Estates Association of Apartment Owners ("Association") is a Washington non-profit corporation duly organized pursuant to the Horizontal Property Regimes Act, RCW 64.32, as amended by the Washington Condominium Act, RCW 64.34 (hereinafter

referred to as the “Act”) for the operation of Fairway Estates, a condominium established under the Act. (CP 113). The Association was created under the terms of the Declaration of Condominium registered pursuant to Ch. 65.12 RCW under Registration Certificate 22172, Title No. 4999-5000 Apt. C-42, Volume 73, Folio 272 (“Registration Certificate”) and recorded in the records of King County, Washington under Recorder’s No. 7501210372 and re-recorded under Recorder’s No. 7502030355, as thereafter amended of record, and under Survey Map and Plans registered under the Registration Certificate and recorded in the records of said County in Volume 9 of Condominiums, Pages 45 through 53, inclusive, as thereafter amended of record (hereinafter collectively referred to as the “Declaration”). (CP 118-210).

Respondent Sand Point Country Club, Inc., a Washington corporation (“Sand Point”) holds registered title in fee simple to the condominium unit that is the subject of this foreclosure proceeding: Real property commonly known as 8001 Sandpoint Way NE, Unit C-42, Seattle, Washington 98115 and legally described as:

Residential Unit No. 42, Building C and parking Unit 42C of Fairway Estates, a Condominium, according to the Declaration thereof recorded under Recording No. 7501210372, and any amendments thereto; said unit is located on Survey Map and Set of Plans recorded in Volume 9 of Condominiums, pages 45 through 53, inclusive, and amended in Volume 9 Condominiums, Pages 54 through 62, inclusive, in King County, Washington; Situate in the City of Seattle, County of King, State of Washington.

(“Unit”). Chadwick Declaration. (CP 11-19). Sand Point admits that it is the owner of the Unit in fee simple. Opposition at 6. (CP 403). The Unit is subject to Ch. 65.12 RCW, the Washington Registration of Land Titles Act (Torrens Act). (CP 11-19). Title in fee simple to the Unit is registered to and vested in Sand Point pursuant to the Registration Certificate. Id.

Pursuant to Section 12.1 of the Amended and Restated Declaration registered and recorded under King Co. Recorder’s No. 9610241108 and re-recorded under No. 970411285 (“Amended Declaration”), the affairs of the Association are managed by a Board of Trustees (the “Board”). (CP 265).

The Board has the right to levy assessments for common expenses of the Association against the units in the Condominium pursuant to Section 16.1 of the Amended Declaration. Said section provides:

16.1 Within thirty (30) days prior to the beginning of each calendar year, the Board shall estimate the net Common Expenses charges to be paid during such year, and may include a reasonable provision for contingencies and replacement and acquisition and operating reserves, less any expected income and any surplus available from the prior year’s Common Funds. The estimated Common Expenses shall be assessed to Units pursuant to the percentages set forth in this Declaration or as the same may be amended pursuant to the terms hereof. If the estimated Common Expenses prove inadequate for any reason, including nonpayment of any Owner’s Assessment, the Board may at any time levy a further Assessment, which shall be assessed to the Owners in like proportions. Each Owner shall be obligated to pay Assessments made pursuant to this Section to the treasurer of the Board, the Manager or the Managing Agent for the Association in

equal monthly installments on or before the first day of each month during such year, or in such other reasonable manner as the Board shall designate. The Association may from time to time establish reasonable late charges and at a rate of interest to be charged on all subsequent delinquent Assessments or installments thereof. In the absence of another established nonusurious rate, delinquent Assessments shall bear interest from the date of delinquency at the maximum rate permitted under RCW 19.52.020 on the date on which the Assessments became delinquent. At the option of the Board, upon the failure of any Owner to pay an Assessments installment when due, the entire Owner's Assessment for the year may be declared due and payable.

Id. (CP 274)

“Unit” is defined as “an Apartment Unit or Parking Unit.”

Amended Declaration § 1.32. (CP 234). “Apartment Unit” is defined:

‘Apartment Unit’ means an ‘Apartment’ or ‘Unit’ as used in the Act which is a physical portion of the Condominium designated for separate ownership and is intended for single family residential use as specified in the Declaration including one or more rooms or spaces located on one or more floors (or part of floors) in a Building.

Amended Declaration § 1.2. (CP 229). Reflecting the unique nature of the condominium form of real property, each condominium unit and its unseverable, undivided percentage interests in the common areas (which includes the underlying land) is deemed a discrete parcel of real property. RCW 64.32.190.

The Association has a lien interest in the Unit to secure the obligation to pay such assessments pursuant to RCW 64.32.200(2), RCW 64.34.364(1) and Section 17.1 of the Amended Declaration which provides:

17.1 Each monthly assessment and special Assessment shall be the separate or joint and several personal debt and obligation of the Owner or Owners of the Units for which the same are assessed at the time the Assessment is made and shall be collectible as such. Suit to recover a money judgment for unpaid Common Expenses and special Assessments, shall be maintainable without foreclosing or waiving the lien securing the same. The amount of any Assessment, whether regular or special., assessed to the owner of any Apartment Unit or to any Unit, plus late charges and interest at the rate set forth in Section 16.1, and costs and reasonable attorneys' fees incurred, shall be a lien upon such Apartment Unit. The lien for payment of Common Expenses and Special Assessments shall have priority over all other liens and encumbrances, recorded or unrecorded, to the extent provided in RCW 64.32.200 (2). If action is taken or the collection is referred to an attorney or collection agent for enforcement, then the Owner in default shall pay reasonable attorneys' fees, collection fees and costs actually incurred by the Board.

Id. (CP 271)

In addition to other collection remedies, the Association is entitled to foreclose its Declaration of Condominium lien on the Unit pursuant to RCW 64.32.200(2), RCW 64.34.364(9) and Amended Declaration § 17.3. (CP 272). The action before the trial court was an *in rem* foreclosure proceeding, to wit, seeking judgment against the Unit establishing the amounts due and secured by the Association's Declaration of Condominium lien, a decree of foreclosure extinguishing upon sheriff's sale the interests of the unit owner and all other persons or entities that may claim some right, title or interest in the Unit, but not seeking any judgment establishing the *in personam* liability of anyone for the amounts due the Association. (CP 1-10).

The assessment obligation secured by the Unit has been in default *since October 1, 2006*. (CP 115). In this foreclosure proceeding, the trial court ultimately entered Judgment and Decree of Foreclosure determining the amounts due the Association under its Declaration of Condominium lien on the Unit as \$65,102.45 as of December 9, 2011, awarded *in rem* against Sand Point's tenant's leasehold interest in the unit only, and decreeing foreclosure as against any right, title or interest of certain Defendants captioned herein, other than Sand Point. (CP 486-492). All other Defendants captioned herein have stipulated to or had default judgments (declaratory only) and decrees of foreclosure entered against them, or have been dismissed from this action.

## 2. Unit Owner Sand Point's Lease of Unit To Third Party

The foregoing facts are those relevant to any routine Washington condominium lien judicial foreclosure action.

However, further documents registered and recorded by Sand Point established a complex and unique rental scheme that Sand Point in substance asserted to the trial court gives it an "exception" to our state's Declaration of Condominium lien statutes' mandate that all condominium units are subject to a Declaration of Condominium lien:

Prior to the creation of the Fairway Estates Condominium by registration and recording of the Declaration of Condominium in 1975, Sand Point was the registered owner of that land. *See, Chadwick*

Declaration. (CP 11-19). Again prior to creation of the Condominium, Sand Point leased that land to Fairway Estates, a limited partnership (“Original Lessee”). Lease. (CP 354-380).

Sand Point (along with Original Lessee as a joint Declarant) recorded and registered the Declaration of Condominium creating the Unit and its unseverable, undivided percentage interest in the condominium common areas (which included the land), as a parcel of real property; Sand Point expressly retained fee ownership of the Unit. Declaration of Condominium § 4(a). (CP 124-125).

Each of the condominium units, including the Unit, were, upon creation of the Condominium in 1975, encumbered by the Declaration of Condominium lien securing statutory assessments necessary for the maintenance of the condominium. Declaration of Condominium § 17.1. (CP 148-149). Said Declaration of Condominium lien provision was duly preserved under the 1996 Amended Declaration, under § 17.1. (CP 271).

The Declaration of Condominium lien is superior to all rights, title, or interests in the Unit, including Sand Point’s registered ownership interest, except for limited statutory subordination to tax liens and to valid mortgages of record to the extent provided by statute. RCW 64.32.200(2); RCW 64.34.364(1),(2); Amended Declaration § 17.1. (CP 271).

Subsequent to recording the Declaration in 1975, Sand Point and Original Lessee executed a Modification of Lease that provided that Sand

Point instead now leases each of the condominium units that it created and owned, including the Unit, to Original Lessee, and that Original Lessee in turn could assign the units to third parties, under a specific form that was mandated by this Modification. Modification of Lease § 1. (CP 91).

The Modification of Lease **expressly subordinated the Lease, and any interests created thereby, to the Declaration of Condominium.** Modification of Lease § 2. (CP 92-93). Expiration of the lease of the Unit to Sand Point's tenant will not terminate the Declaration of Condominium, the Declaration of Condominium lien, or the Unit and its unseverable, undivided percentage interest in the condominium common areas (including the land) as a parcel of real property. **Sand Point admits that it owns this Unit in fee simple, not subject to any ground lease, and that when Sand Point's lease of the Unit to Young expires, it will still own this Unit, which will continue to exist after termination of the lease.** Opposition at 6. (CP 403).

Original Lessee purportedly assigned its rights in its leasehold interest in the Unit to Robert D. Young and Zella E. Young, husband and wife ("Young"), under the specific form mandated by the above Modification of Lease. Assignment. (CP103-106). Robert D. Young and Zella E. Young are each deceased. (CP 108 - 110). No probate proceedings have been located for either decedent. (CP 34).

## **B. Procedure In Superior Court**

The Association's action before the trial court was an *in rem* foreclosure proceeding, to wit, seeking judgment against the Unit establishing the amounts due and secured by the Association's Declaration of Condominium lien, a decree of foreclosure extinguishing upon sheriff's sale the interests of the unit owner (Sand Point) and all other persons or entities that may claim some right, title or interest in the Unit (other Defendants captioned herein), but not seeking any judgment establishing the *in personam* liability of anyone for the amounts due the Association. (CP 1-10). The Association moved for summary judgment on its non-monetary, declaratory relief claims against Sand Point. (CP 20-110, 111-380, 11-19). Sand Point responded with its own cross-motion for summary judgment, amended its Answer to assert a declaratory relief counterclaim against the Association, to wit, that the Association's Declaration of Condominium lien does not encumber any fee ownership interest of Sand Point in any condominium unit subject to the Declaration of Condominium, and filed a response to the Association's summary judgment motion. (CP 381-393, 394-397, 398-405).

The Association filed its Opposition to Sand Point's Motion for Summary Judgment, and its Reply to Sand Point's Opposition to the Association's Motion for Summary Judgment. (CP 406-415, 416-417, 418-422, 423-436). Sand Point filed its Reply to the Association's Opposition to Sand Point's Motion for Summary Judgment. (CP 437-

442). The trial court heard oral argument on both motions for summary judgment on October 10, 2011. (CP 443). Seven weeks later, on December 1, 2011, the Court filed its Order Granting Sand Point's Motion for Summary Judgment, and denying the Association's motion for summary judgment. (CP 444-446).

The Association moved for reconsideration, and the Court granted that motion in part, awarding Judgment and Decree of Foreclosure determining the amounts due the Association under its Declaration of Condominium lien on the Unit as \$65,102.45 as of December 9, 2011, awarded *in rem* against Respondent's tenant's leasehold interest in the unit only, and decreeing foreclosure as against any right, title or interest of certain Defendants captioned herein, other than Sand Point. (CP 463-483, 484-485, 486-492, 493-494). All other Defendants captioned herein have stipulated to or had default judgments (declaratory only) and decrees of foreclosure as to any right, title or interest they may have in the Unit entered against them, or have been dismissed from this action.

Sand Point moved for an award of attorney fees. (CP 447-451, 452-462). The Association opposed that motion. (CP 495-508). Sand Point filed its Reply to the Association's Opposition, and the Court entered a Judgment awarding attorney fees to Sand Point. (CP 509-512, 519-521).

All claims of all parties have been resolved by orders or judgments of the trial court.

#### **IV. ARGUMENT**

##### **A. Standard of Review**

1. Summary Judgment: The Court of Appeals reviews a summary judgment order *de novo*, engaging in the same inquiry as the trial court. *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005). Summary judgment is proper if, after viewing all facts and reasonable inferences in the light most favorable to the nonmoving party, there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Torgerson v. N. Pac. Ins. Co.*, 109 Wn. App. 131, 136, 34 P.3d 830 (2001). The interpretation and applicability of a statute presents questions of law reviewed *de novo*. *Quality Food Ctrs. V. Mary Jewell T, LLC*, 134 Wn. App. 814, 817, 142 P.3d 206 (2006).

2. Judgment For Attorney Fees: Whether a party is entitled to attorney fees is an issue of law that the Court of Appeals reviews *de novo*. *Ethridge v. Hwang*, 105 Wn. App. 447, 460, 20 P.3d 958 (2001). We review the reasonableness of the amount of fees awarded under the abuse of discretion standard. *Ethridge*, 105 Wn. App. at 460.

**B. The Plain Meaning of the Condominium Lien Statutes**

**Mandate That Every Condominium Unit is Subject to A Lien, Not Just a Unit Owner's Tenant's Leasehold Interest.**

Based upon the record established herein, summary judgment in favor of the Association on its claims and against Sand Point on its counterclaim should have been granted. In this instance, there is no genuine issue of material fact, but rather the interpretation of RCW 64.32.200(2) and RCW 64.34.364(1)'s mandate that every condominium association in Washington has a Declaration of Condominium lien on the units subject to the Declaration of Condominium, and not just a unit owner's tenant's leasehold interest.

Our Legislature deemed it so basic and fundamental a public policy that every condominium association holds a lien on the units subject to that Declaration, that it chose the most direct and plain language to so express that right:

All sums assessed by the Association of apartment owners but unpaid for the share of the common expenses chargeable to any apartment shall constitute a lien on such apartment.

RCW 64.32.200(2); and

(1) The association has a lien on a unit for any unpaid assessments levied against a unit from the time the assessment is due.

\* \* \*

(9) The lien arising under this section may be enforced judicially by the association or its authorized representative in the manner set forth in Chapter 61.12 RCW.

RCW 64.34.364 (1), (9). When interpreting a statute, the reviewing court's aim is to ascertain the legislature's intent. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Campbell & Gwinn*, 146 Wn.2d at 9-10. Interpretations that give meaning and effect to every word are favored over those that render parts of the statute redundant or superfluous. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No 1*, 149 Wn.2d 660, 685, 72 P.3d 151 (2003), quoting *Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985). Applying these canons of construction, the plain meaning of RCW 64.32.200(2) and RCW 64.34.364(1) is that every condominium **unit** in Washington is burdened by a condominium association lien. The statutes do not say "the association has a lien on *only a unit owner's tenant's leasehold interest* if a unit owner has elected to lease the unit." The trial court should not have read into the statute such a restriction by ruling that the Association could only foreclose Sand Point's tenant's leasehold interest in the Unit. (CP 444-446).

Faced with a condominium declarant argument similar to that which Sand Point asserts here - that it should not be held to pay assessments on units it owned - the Texas Court of Appeals held that the Texas assessment statute, analogous to RCW 64.32.200(2) and RCW

64.34.364(1), applied to all units subject to the Declaration of

Condominium:

[W]e find a strong legislative intent, as established by the specific wording of the statute, that all apartment owners must pay their *pro rata* share of the maintenance expenses of the condominium regime. When fees are not paid, there is a risk of injury to the public from poorly maintained facilities. . . . Accordingly, we hold the exemption provisions [in a private agreement] are against public policy and, therefore, void.

*Alma Investments, Inc. v. Bahia Mar Co-Owners Ass'n*, 999 S.W.2d 820, 825-6 (Texas App.1999).

Condominium assessments are due in every case, and secured by a lien on every condominium unit at Fairway Estates Condominium - that is the law. RCW 64.32.080, RCW 64.34.360(2) and Amended Declaration of Condominium § 17.1 *mandate* that the Plaintiff assess all units *subject to the Declaration of Condominium* for common expenses under the per-unit formula provided in the Declaration. *There are no exceptions.*

Thus, if for any reason a particular unit fails to pay its share of the common expenses, as represented by the assessments against the subject unit, all the other unit owners must make up the difference. By contesting this *in rem* assessment foreclosure action, Sand Point is essentially asking this Court to excuse it from having this Unit shoulder its portion of the common expenses - common expenses that benefit Sand Point's ownership of the Unit. Sand Point, as the original signing Declarant creating the 1975 Declaration of Condominium, established the very terms

of the Declaration of Condominium and its Lease and modifications thereto. As the signing Declarant, Sand Point voluntarily subjected itself to the unequivocal mandate of RCW 64.32.200(2) and RCW 64.34.364(1) that all units created under the Declaration of Condominium must serve as security for payment of unpaid assessments, and are thus subject to foreclosure if statutory assessments are not paid for any reason, as here.

**C. Condominium Regime is NOT Subject to a Ground Lease.**

It bears emphasizing that the lease regime set up by Sand Point is **not a common “ground lease”** scheme: Under a ground lease condominium regime, a landowner grants a long-term lease to a developer. The developer then declares (creates) a Declaration of Condominium encumbering *the developer’s leasehold estate*. The developer then owns the units that are thus created under the Declaration of Condominium, and outright deeds those units to third parties homeowners. Those homeowners thus own their unit in fee simple, but that fee simple interest in the condominium unit is itself subject to that prior ground lease. When the ground lease finally expires, usually many years into the future, the entire condominium regime, including the Declaration of Condominium and all of the units, also terminates. *See, e.g., Dime Savings Bank v. Pesce*, 636 N.Y.S.2d 747, 748-750 (1995), *aff’d*, 93 N.Y.2d 939, 715 N.E.2d 93 (1999); *Celentano v. Oaks Condo. Assoc.*, 265 Conn. 579, 583-4 (2003); *Association of Owners v. Honolulu*, 7 Haw. App. 60, 64-7, 70

742 P.2d 974 (Haw. 1987). These “ground lease condominiums” in Washington are now heavily governed by RCW 64.34.220, which was not in effect when Sand Point executed the Declaration of Condominium.

However, under the condominium regime that Sand Point established, even when this lease expires, under the express lease modification clause subordinating the lease to the Declaration of Condominium, Modification of Lease § 2, the Declaration of Condominium will not terminate as a result of that lease expiration. (CP 92-93). The Unit will continue to exist. Sand Point (or whoever Sand Point deeds the unit to) will continue to own the Unit. **Sand Point admits that it owns this Unit in fee simple, not subject to any ground lease, and that when Sand Point’s lease of the Unit to Young expires, it will still own this Unit, which will continue to exist after termination of the lease.** Opposition at 6. (CP 403). While Sand Point asserts that it will have the right to then immediately terminate the condominium regime, Id, unless and until the Declaration of Condominium may ever be properly terminated as provided under the Declaration of Condominium and Washington law (which is *not* a foregone conclusion), this Unit is subject to the Declaration of Condominium, and its attendant express lien provisions as required by Washington law. Declaration of Condominium § 17.1, RCW 64.32.200 and RCW 64.34.364(1).

**D. Lease of Each Unit Has No Effect On Declaration of Condominium Lien.**

Sand Point may have originally had a ground lease with its Original Lessee, Fairway Estates LP, before this condominium was created in 1975. However, when Sand Point decided to create a condominium on the land it owned, it then elected to establish a unique scheme under which:

A. The prior Lease would be expressly subordinated to the Declaration of Condominium and all units created thereby; Modification of Lease § 2. (CP 92-93).

B. Sand Point would expressly own all of the condominium units it created; Declaration of Condominium § 4(a). (CP 124-125).

C. Sand Point's Original Lessee would then be leased all of the condominium units that were created; Modification of Lease § 1 (CP 91).

D. Sand Point's Original Lessee would have the right to assign its lease interest or otherwise assign its possessory interest in each unit to third parties ("Third Party Tenants"); Id. (CP 91).

E. Sand Point would continue to receive the lease payments that its Original Lessee was obligated to pay Sand Point for its lessee interest in each of the condominium units, either from the Original Lessee, or upon a lease assignment of a particular unit, from the Third Party Tenants,

Declaration of Condominium § 13.(I); Amended Declaration § 13.9. (CP 141-143, 269-271).

F. Sand Point would be assured it would continue to get those lease payments without the hassle of actually having to collect those lease payments from the Third Party Tenants: Sand Point set up a scheme whereby *the Association would serve as Sand Point's de facto "bill collector"* for those lease payments. Declaration of Condominium § 13.(I); Amended Declaration § 13.9. (CP 141-143, 269-271). In other words, the Declaration of Condominium that Sand Point created requires that the Association itself is obligated to make an aggregate payment to Sand Point on behalf of the Third Party Tenants for the lease payments due from each of the Third Party Tenants for all of their respective units. Thus, a portion of the assessments that the Association levies against all of the condominium units (and that the Third Party Tenants are personally liable for) would include a sum to fund the lease payment that was due Sand Point on that unit.

G. As Modification to Lease § 2 provides and Sand Point admits, when the lease assignments to the Third Party Tenants finally expire many years from now, *the condominium will not terminate. All of the condominium units will continue to exist.* Opposition at 6. (CP 92-93, 403).

However, as a necessary corollary to this scheme, to the extent Sand Point has not or does not deed the units to third parties, it would continue to own all of those condominium units it created. And under RCW 64.34.200(2), RCW 64.34.364(1) and Amended Declaration §§ 17.1, 17.3, each of those units would serve as security for the statutory assessment obligation to the Association, and thus subject to foreclosure if assessments for any reason were not paid. (CP 271, 272). Because of this obvious risk of foreclosure by a condominium association (that Sand Point is now facing here), landowners who want to develop a condominium yet retain ownership of the land elect to proceed with a standard “ground lease” arrangement, now regulated by RCW 64.34. 220.

While Young as a purported lease assignee held a possessory (leasehold) interest in the Unit and was personally liable for assessments, if for any reason they defaulted on assessments levied against the Unit, the Association could either sue Young on their personal liability, or enforce its Declaration of Condominium lien against the Unit, regardless of who may then own the Unit. In this case, Sand Point continues to own the Unit and its ownership interest is subject to foreclosure in this *in rem* foreclosure proceeding. *At no time in this case has the Association asserted that Sand Point is personally liable for assessments;* however, the present holder of legal title of real property subject to a lien interest is a

necessary party in any such lien foreclosure action. *Hallgren Co., Inc. v. Correl, Inc.*, 13 Wn. App. 263, 265 (1975).

Sand Point has no obligation in this *in rem* foreclosure proceeding to pay anything to the Association. But the Association is entitled to foreclose its lien on this unit as security for the unpaid assessment obligation. Sand Point could, like any party claiming an interest in real property subject to an *in rem* foreclosure proceeding, advance funds to protect its interest in the property from foreclosure, but that decision is not the Association's concern in this *in rem* foreclosure proceeding.

In drafting and executing the various Declaration of Condominium and Lease documents, Sand Point may or may not have reserved a right of contribution, or may have some other remedy (such as an unjust enrichment claim) as against Young in the event Sand Point were to make any advance to the Association to pay the unpaid assessments to avoid foreclosure of its present ownership interest in the unit, but again that is not the Association's concern in this *in rem* foreclosure proceeding. Any absence or ineffectiveness of such right or remedy is a failure of Sand Point to address when it drafted and executed the various Declaration and Lease documents in the 1970s, and does not limit or modify the Association's Declaration of Condominium lien interest in the Unit.

To hold, as the trial court did, that the Association only has a lien interest in Sand Point's tenant's leaseholds, means that the Association has

no lien interest in the Units to secure payment of assessments vital to maintenance of this Condominium once each lease on the various units expires. This would be contrary to RCW 64.32.200(2) and RCW 64.34364(1)'s unequivocal mandate that every Washington condominium shall enjoy a lien on every condominium unit to secure unpaid assessments. And thus the Association is entitled to foreclose its lien interest in this Unit securing unpaid assessments, including any ownership interest of Sand Point in this Unit.

**E. The 1996 Restatement (Amendment) of the 1975**

**Declaration Did Not Modify the 1975 Declaration of Condominium Lien on Each Unit.**

Sand Point incorrectly asserts that somehow the Association is divested of its 1975 Declaration of Condominium lien interest encumbering the fee interest of each condominium unit, by operation of the 1996 Declaration Restatement (amendment) establishing that the Lease Assignees (Tenants) shall be personally liable for assessments. (CP 401 (“the only reasonable conclusion is that the Association’s assessment lien does not attach to the fee simple and lessor’s interest of [Sand Point] in the Unit”). No part of the 1996 Restated (Amended) Declaration modifies any portion of the 1975 Declaration’s provisions establishing that the Unit is encumbered by the Declaration of Condominium lien. Indeed, the 1996 Restated Declaration § 17.1 is in substance identical to the 1975

Declaration § 17.1 that Sand Point itself approved and executed as original Declarant. (CP 271, 148-149).

The 1996 Restated Declaration, § 1.24, 17.1 established *in personam* liability for assessments upon each Lease Assignee (Tenant), by defining *Owner* as the Lease Assignees (Tenants) holding leasehold interests in the units. (CP 232-233, 271).

However, the 1996 Restated Declaration definition of *Unit*, §§ 1.32, 1.2, continues to remain, unmodified, the actual condominium units established under the 1975 Declaration, § 3. (CP 234,229,122-124) And again, all units are subject to the Declaration of Condominium lien on the *Unit*, § 17.1, which has not in substance changed between the 1975 Declaration and 1996 Restated Declaration.

As to judicial foreclosures of security interests in real property where the owner of the property is not the same as the *obligor* on the obligation secured by that security interest, Washington law has long recognized that a creditor can foreclose on its collateral. *Seattle-First National Bank v. Hart*, 19 Wn. App. 71, 72-3 (1978) (mortgagee foreclosed on mortgage on real property granted and owned by lessors who had mortgaged the property to secure a loan by mortgagee to their lessees). *Hart* thus establishes, similar to the case at bar, that an owner of property (here, Sand Point) that grants a security interest (here, Declaration of Condominium lien) in real property that it owns (the Unit) to secure an

obligation owed to a creditor (here, the Association) by another (the Tenant) is absolutely valid and enforceable.

Recognizing this principle (security interests in real property where the owner of the property is not the same as the *obligor* on the obligation secured by that security interest), our Legislature deferred to the provisions of the particular Declaration of Condominium to define who may be personally liable for assessments, RCW 64.32.200(1), but expressly provided that the Declaration of Condominium lien encumbers the unit, RCW 64.32.200(2) - regardless of who owns the unit. Recognizing that a Declaration may impose personal liability on the unit owner or a unit owner's lessee, our Legislature defined an "Apartment Owner" as someone who either owns a unit in fee simple, or holds a leasehold interest in the unit. RCW 64.32.010(2).

Thus, for this particular unit there is a difference between who is *personally liable* for assessments (Tenants) versus who owns *the collateral* that serves as security for unpaid assessments (Sand Point). That difference does nothing to invalidate Creditor's Declaration of Condominium lien interest in the Unit. To hold otherwise would be *reforming* the Declaration of Condominium to modify the Declaration and Lease documents. The Declaration of Condominium lien encumbers the Unit and Sand Point's fee ownership interest in the Unit, and not simply the leasehold interests of Sand Point's Tenants, Young. Nothing in the

1975 Declaration, 1996 Restated Declaration, Lease or amendments thereto changes this lien encumbrance upon the fee interest in the Unit. Nothing in these documents states that the “Unit” is only a leasehold. The “Unit” exists into perpetuity and survives expiration of the lease of this Unit granted by Sand Point as owner of the Unit to Fairway Estates LP as Lessee, as subsequently assigned to Young.

Ultimately, even if the 1975 Declaration and 1996 Restated Declaration attempted to divest the Association of its Declaration of Condominium lien interest in the units, and limit such lien to only the unit owner’s tenant’s leasehold interest, such an attempt would be void *ab initio* under the unwavering mandate of RCW 64.32.200(2) and RCW 64.34.364(1) that all condominium units in Washington are encumbered by an association lien.

**F. Sand Point’s Assertion That No Declaration of Condominium Lien Can Foreclose Out An Owner’s Interest In A Unit Would Effectively Render All Statutory Declaration of Condominium Liens Void.**

Sand Point asserts that RCW 64.34.364(2) supports the argument that its fee interest in the Unit cannot be foreclosed because it is an owner and not a lienholder. (CP 388). Sand Point confuses a fee simple unit owner with a lienholder, two distinctly different interests in real property: RCW 64.34.364(1) plainly and simply establishes that every condominium

association has a lien interest on units subject to the Declaration of Condominium. One is hard put to imagine a more direct and concise statement of legislative intent. Anyone who has *any* interest in any condominium unit in our state has that interest subject to a Declaration of Condominium lien. Our Legislature enacted other statutory provisions (*i.e.*, RCW 64.34.364(2),(3)) that statutorily *subordinate* Declaration of Condominium liens to certain *lienholders* - real property tax liens, mortgages and deeds of trust - but not to *owners* of units. To subordinate the Declaration of Condominium lien to any interest of the owner means that the association creditor would have nothing to foreclose on - what ownership interest would a winning bidder at sheriff's sale obtain?

Nothing. This argument makes no sense. Plaintiff seeks judgment *in rem* and decree of foreclosure foreclosing out any interests of all of the named defendants, and as such does not seek any monetary award against Sand Point *in personam*. However, because of Sand Point's record title to the Unit, they are a necessary party to this judicial foreclosure action: The person or entity that holds record title to real property *is* a necessary party in a judicial foreclosure action, and failure to name such party as a defendant also results in any foreclosure having no effect on such party's interest. *Hallgren Co. v. Correl, Inc.*, 13 Wn. App. 263, 265-6 (1975).

**G. Sand Point's Unit Lease Default Remedies Irrelevant to Declaration of Condominium Lien.**

Sand Point asserts that its remedies as a unit owner landlord to its various tenants (*i.e.*, to take possession of the Unit upon lease payment default) is somehow at odds with and thus somehow modifies or limits the Declaration of Condominium lien. (CP 390-391). Nothing in any Lease provision (remedy upon default or otherwise) limits the Declaration provisions creating the Declaration of Condominium lien or what it encumbers (the Unit). Sand Point is receiving its lease payments on this Unit. Thus, there is no default on the Lease and any remedies of Sand Point for any lease default are irrelevant to this foreclosure case. There is nothing at odds between Sand Point's remedies against its tenants and the Association's security interest in the Unit.

**H. Sand Point In Substance Seeks, Unpled, *Reformation* of the Declaration and Lease Instruments That Sand Point Itself Executed and Presumably Drafted.**

Sand Point in substance asked the trial court to now decree a reformation of the Declaration of Condominium Lien and its encumbrance on the Unit, so that the lien does not effect the Unit and Sand Point's ownership interest, but only encumbers Sand Point's lessee's interest. The Declaration does not say that - and even if it did, it would violate RCW 64.32.200(2) and RCW 64.34.364(1). To rule that the Declaration of Condominium lien "encumbers only the lessee's interest in the unit" of necessity would require a *reformation* of the Declaration and Lease

documents. Reformation of an instrument is an equitable remedy. *Leonard v. Washington Employers, Inc.*, 77 Wn.2d 271, 279 (1969). Sand Point has not pled such a reformation claim, much less named and joined each and every person or entity with any interest in all of the condominium units, likely numbering in the hundreds. Every one of those third parties obtained their interests in the various units expecting the Declaration of Condominium means what it says, including its express provisions that the Association would be able to continue to meet its maintenance, repair, insurance and protection obligations for the condominium buildings under the Declaration through assessment revenue - and the right to foreclose its lien on the units if assessments are not paid for any reason.

**I. Deed of Trust Act Inapplicable to Judicial Foreclosures.**

Sand Point asserts that the Washington Deed of Trust Act, Ch. 61.24 RCW, somehow limits Creditor's Declaration of Condominium lien interest in the Unit. (CP 389). (RCW 61.24.050 provision that trustee's deed shall convey all interest that the deed of trust grantor conveyed to the foreclosing beneficiary). The Deed of Trust Act governs the *procedures* for foreclosing on a deed of trust by trustee's sale; the *substantive* rights of the parties to a deed of trust are governed by the four corners of any particular deed of trust. This case is a judicial (lawsuit) foreclosure of a Declaration of Condominium lien. The Deed of Trust Act has no applicability to this case.

**J. 1987 Foreclosure Proceeding On Different Unit Has No Legal Effect on Association's Rights to Foreclose its Lien in This Foreclosure Proceeding.**

Sand Point asserts that it “was not named as a Defendant” in a prior foreclosure action. (CP 386). That proceeding twenty-four years ago involved another unit and had and has no effect on the unequivocal right of the Association to foreclose its lien on this Unit. Washington law provides that a creditor foreclosing its lien interest in real property through judicial foreclosure, may elect to name *or not name* as Defendants any particular person or party with an interest in that property or other purported creditors that may appear to have record mortgage, deed of trust or lien interests in that property; the result of not naming such other purported creditor or interested party is that the foreclosing creditor's foreclosure action has no effect on the recorded interest of that purported creditor or interested party. *U.S. Bank of Wash. v. Hursey*, 116 Wn.2d 522, 526 (1991); *Spokane Savings and Loan Soc. v. Lillopoulos*, 160 Wash. 71, 73-4 (1930). The Association had the right to name or refrain from naming as a defendant any purported third party creditor or interested party, and not naming such creditor or interested party has the result of having no effect on such creditor's or interested party's purported interest, if any. No judgment was entered in that case establishing any rights of any parties to that action. Sand Point has not presented any evidence that it

was even aware of that prior foreclosure action prior to the instant foreclosure action. Nothing in that twenty-four year old case modifies any Declaration of Condominium rights of the Association.

**K. Sand Point Is Not Entitled to Attorney Fees under 1973 Lease to Which Association Is Not a Party and Which Predates the 1975 Declaration of Condominium under Which Association's Lien Being Foreclosed Herein Arises.**

Sand Point asserts that it is entitled to attorney fees under the 1973 Lease predating the 1975 Declaration of Condominium under which Sand Point itself created the Association and the Declaration of Condominium lien. (CP 449).

It is well settled that a contract's attorney fee provisions should not be applied reciprocally as to a nonsignator to the contract. *See, e.g., Mut. Sec. Fin. v. United*, 68 Wn. App. 636, 643 (1993) (“[B]ecause Guzman never signed the note. . . there is no basis to award Guzman attorneys fees based on a ‘bilateral’ application of the note’s attorney fee provision”); *Watkins v. Restorative Care Ctr.*, 66 Wn. App. 178, 194-5 (1992) (“It would be both unfair and contrary to law to enforce the attorney fees provision negotiated between the Pavloffs and RCC against the Watkins, who were strangers to the agreement”); *Snohomish Reg. ’l Drug Task Force v. Real Prop. Known as 414 Newberg Rd.*, 151 Wn. App. 743, 761 n.10 (2009) (“[RCW 4.84.330] has little if any applicability to contractual

provisions requiring indemnification of legal costs incurred as a result of actions brought by third parties”).

The Association was not and is not a signatory to that 1973 Lease, executed before the 1975 Fairway Estates Condominium was even created and thus before the Association and the Declaration of Condominium lien on the Unit even came into existence. (CP 354-380). The Association is not the Original Lessee (Fairway Estates LP) or the Lease Assignee (Young). The Association has never agreed to assume any of the obligations of the Original Lessee, and indeed the 1975 Modification of Lease expressly recites that the Lease is junior and subordinate to the Association’s Declaration of Condominium interests in the subject Unit. To hold otherwise leads to an absurd result: That the Association is foreclosing its Declaration of Condominium lien on itself as lessee.

Sand Point cites to Lease § 8 (CP 449); that section, in its full context, which Sand Point misleadingly omitted in its Motion for Attorney Fees, does not address any Declaration of Condominium lien foreclosure action. (CP 357). That section simply provides, in substance, that if its Original Lessee fails to pay construction vendors for any work on the land subject to the lease, and those vendors sue the Original Lessee for such unpaid bill and elect to name Sand Point as a defendant as well, or those vendors record and attempt to enforce a mechanics lien for unpaid construction labor or materials, that the Original Lessee will defend any

action against Sand Point. That section does not and of course could not address any enforcement of the Association's Declaration of Condominium lien.

Sand Point has not been named as a party in this foreclosure action as a result of foreclosure of some mechanics lien for an unpaid construction vendor bill that the Original Lessee was obligated to pay; rather, it has been named as a defendant as a direct result of its record title to the Unit, which ownership interest is subject to the Declaration of Condominium lien under RCW 64.32.200(2) and RCW 64.34.364(1), and which record ownership interest was sought to be foreclosed in this action.

Young was expressly granted (assigned) all interest of the Original Lessee *in the Unit* (as opposed to the *Lease*), including a right to possession, which right was made expressly *subject to* the lease - without any provision for attornment or assumption. Indeed, nowhere did Young even sign the lease assignment. This lease assignment was executed by the Original Lessee in the form mandated under the *pro forma* exhibit attached to an earlier lease modification which Sand Point itself as owner of the Unit had executed, and presumably drafted.

While the Original Lessee may have agreed to certain provisions of the lease, including possible indemnification, neither the Association nor lease assignee Young agreed to *assume* the heavy mantle of *all of the Original Lessee's obligations*, including indemnification. And especially

indemnification in the scenario where one tenant fails for whatever reason to pay statutory assessments, the Association duly enforces its Declaration of Condominium lien for nonpayment of assessments on the Unit, and Sand Point elects to contest that lien foreclosure by asserting, contrary to the express terms of the Lease, the Declaration of Condominium and RCW 64.32.200(2) and RCW 64.34.364(1), that its ownership interest is not junior and subordinate to the Declaration of Condominium lien and thus not subject to foreclosure.

For the foregoing reasons, §§ 8, 10 and 19 of the 1973 Lease regarding rights of Sand Point to assert an attorney fee claim against its Original Lessee, Fairway Estates LP, are insufficient authority to establish that the Association is liable to Sand Point for attorney fees incurred in this Declaration of Condominium lien foreclosure action. (CP 357-358, 362).

Sand Point asserts, erroneously, that “the obligations of the ‘Lessee’ under the Lease were assumed by the Unit Owners [Lease assignees, such as Young (“Tenants”)] which comprise the [Association].” (CP 449).

Plaintiff has never agreed to assume the Original Lessee’s obligations under the lease, and indeed the 1975 Modification of Lease expressly recites that the Lease is junior and subordinate to Plaintiff’s Declaration of Condominium interests in the subject Unit. To hold

otherwise leads to an absurd result: That Plaintiff is foreclosing its Declaration of Condominium lien on itself as lessee.

Contrary to Sand Point's implication ("comprise the Plaintiff"), the Tenants are *not* "the Association." The Association is a nonprofit corporation established to maintain, preserve, insure and protect the very Unit that Sand Point owns and benefits from. To hold that the Plaintiff *is* a Tenant leads to the absurd result that Plaintiff is foreclosing its Declaration of Condominium lien on itself as Tenant.

**L. Sand Point Is Not Entitled to Attorney Fees Under Declaration Provisions That Apply to Third Parties.**

Sand Point asserts that Declaration of Condominium § 13.9 provides authority for attorney fees. (CP 449). That provision on its face reaffirms that the Tenants shall be liable for rent payments to Sand Point as landlord. (CP 269-271). The provision assures Sand Point that it would continue to get those lease payments without the hassle of actually having to collect those lease payments from the Tenants; Sand Point, as the drafter and signatory of the Declaration of Condominium, set up a scheme whereby *the Association would serve as Sand Point's de facto "bill collector"* for those lease payments: The Declaration of Condominium that Sand Point created requires that the Association itself tender, out of assessments received, an aggregate payment to Sand Point for the lease payments due from each of the Third Party Tenants for all of their

respective units - but does not make the Association a party to the Lease. Thus, a portion of the assessments that the Association levies against all of the condominium units (and that the Third Party Tenants are personally liable for) would include a sum to fund the lease payment that was due Sand Point on that unit. However, nothing in § 13.9 provides that the Association is now a lessee under the Lease or imposes an attorney fee right in favor of Sand Point.

Sand Point asserts that Declaration of Condominium § 13.10 provides authority for attorney fees. (CP 449). However, under that section's express terms, the Association holds harmless only the "Ground Lessee." "Ground Lessee" is a defined term under § 1.17 of the Amended and Restated Declaration (CP 231): "'Ground Lessee' means Fairway Estates, a Limited Partnership, as the lessee under the Underlying Lease."

Thus, § 13.10 does not apply to obligate the Association to hold *Sand Point* harmless from anything, but only the Original Lessee, Fairway Estates LP. Nothing in § 13.10 makes the Association a lessee under the Lease. Nothing in § 13.10 provides Sand Point authority to demand attorney fees in this declaratory judgment and decree of foreclosure proceeding as against Sand Point.

**M. Sand Point is not Entitled to Attorney Fees Under Statutory and Declaration Lien Foreclosure Provisions If There Is No Lien on Sand Point's Unit.**

Sand Point asserts that Declaration of Condominium § 17.3 provides authority for attorney fees. (CP 449). However, the trial court decreed that foreclosure of the Association's Declaration of Condominium lien would not effect Sand Point's ownership interest in the unit, only foreclosing Sand Point's lessee's leasehold interest in the Unit. (CP 444-446).

The Amended Declaration § 17.3 provision for attorney fees in the event of foreclosure of the Declaration of Condominium lien is predicated on the Association actually *having a lien* on that Unit. (CP 272). The trial court's Order decrees otherwise. (CP 444-446). Thus, under the Order, if not reversed on appeal, § 17.3 of necessity does not apply at all in governing the rights of the Association vis-a-vis Sand Point. Sand Point may not resort to § 17.3 as authority providing it a right to an attorney fee award.

Sand Point asserts that RCW 64.34.364(14) provides authority for attorney fees. (CP 450). The RCW 64.34.364(14) provision for attorney fees in the event of foreclosure of the Declaration of Condominium lien is predicated on the Plaintiff actually *having a lien* on that Unit under RCW 64.34.364(1). The trial court's Order decrees otherwise. (CP 444-446). Thus, under the Order, if not reversed on appeal, RCW 64.34.364(14) of necessity does not apply at all in governing the rights of the Association

vis-a-vis Sand Point. Sand Point may not resort to RCW 64.34.364(1) as authority providing it a right to an attorney fee award.

**N. Sand Point is Not Entitled To Attorney Fees in a Declaratory Relief Action If the Trial Court Order Decreeing That the Association Has No Lien On The Unit Survives Appeal.**

Washington follows the American Rule on attorney fees: “It is well established that we adhere to the American rule, which states that absent a contract, statute, or recognized ground of equity, the prevailing party does not recover attorney fees as costs of litigation.” *Rorvig v. Douglas*, 123 Wn.2d 854, 861 (1994).

The trial court has entered a declaratory judgment establishing that Sand Point owns this Unit free and clear of any lien encumbering its ownership interest. (CP 444-446). As such, at most Sand Point has prevailed in obtaining an order denying the Association’s request for *declaratory relief* - a Decree of Foreclosure - establishing that any foreclosure by the Association would extinguish Sand Point’s ownership interest in the unit. *See, e.g., Hallgren Co., Inc. v. Correl, Inc.*, 13 Wn. App. 263, 265 (1975).

In Washington, there is no right to an award of attorney fees *personally for or against a party claiming an interest in property who is not personally obligated* under the instrument being foreclosed, when a foreclosing lien creditor seeks declaratory relief (decree of foreclosure), as

was sought by the Association as against Sand Point in this case. *See, e.g.*, RCW 7.24.100 (declaratory judgment actions); *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 776-7 (1994). Thus, Sand Point is not entitled to any attorney fee award.

**O. Sand Point's Attorney Fees are Excessive and Unreasonable, Where There Were Solely Issues of Law Involving Interpretation of Statutes and the Declaration of Condominium Documents.**

The issues in this case as between the Association and Sand Point were solely issues of law: Does the Declaration of Condominium lien encumber the Unit and thus whoever owns it (here, Sand Point), or only Sand Point's tenant's leasehold estate?

Sand Point's counsel's work in this case included preparation of:

1. Answer;
2. Brief interrogatories;
3. Motion to Amend Answer;
4. Reply to Opposition to Motion to Amend Answer;
5. Sand Point Country Club's Motion for Summary Judgment dated September 15, 2011 and proposed Order;
6. Declaration of Robert G. Casey in Support of Sand Point Country Club's Motion for Summary Judgment dated September 15, 2011;
7. Sand Point Country Club's Response to Plaintiff's Motion for Summary Judgment dated October 3, 2011,
8. Sand Point Country Club's Reply to Opposition to Motion for Summary Judgment dated October 10, 2011,
9. Attend summary judgment hearing.

(CP 452-462). Is the sum of \$24,000.00 a reasonable fee for the foregoing work? Such a fee award is excessive and unreasonable.

Sand Point did not engage in any extensive discovery. None of Sand Point's summary judgment motion paperwork exceeded 13 pages. No mediation took place. Sand Point's fee application indicates three attorneys were utilized to undertake the foregoing work solely involving an issue of law. An examination of the itemized fee invoices indicates duplicative and unnecessary work billed by more than one attorney that should have been handled by one attorney (and indeed, here handled by two senior attorneys).

Hourly time was excessive for particular tasks, and block billing was engaged in that prevents the Court's determination of the actual time allegedly undertaken to accomplish particular tasks (*e.g.*, to prepare an unfiled memorandum, Sand Point bills 4.70 on 7/5/11, and 1.75 and 5.30 respectively on 7/6/11, buried in amongst other asserted work). The Court should decline to award any fees for block billing and any fees of multiple attorneys to accomplish the same task.

**P. The Trial Court Abused Its Discretion in Determining (1) Whether Sand Point is Entitled to any Attorney Fee Award and (2) if so, the Reasonableness of any Fee Claim.**

Even if there is a legal basis to award Sand Point attorney fees, which the Association denies, whether to award attorney fees and how much to award are accorded to the sound discretion of the Court. Sand Point cites to *Absher Constr. Co. v. Kent School Dist. No. 415*, 79 Wn.

App. 841 (1995) and urges a mechanical employment of the Lodestar method for attorney fees to conveniently conclude that the Court should award the actual fees billed. *Absher* does not so hold, and the various factors set out by the *Absher* court must be considered in arriving at any attorney fee award:

Nevertheless, the "lodestar" method set out in *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 675 P.2d 193 (1983) appears to be the accepted starting point for all attorney fee determinations. The "lodestar" fee is determined by multiplying the hours reasonably expended in the litigation by each lawyer's reasonable hourly rate of compensation. *Bowers*, 100 Wn.2d at 597; *Singleton v. Frost*, 108 Wn.2d 723, 733, 742 P.2d 1224 (1987). The "lodestar" is only the starting point and the fee thus calculated is not necessarily a "reasonable" fee. *Fetzer II*, 122 Wn.2d at 151; *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 744, 733 P.2d 208 (1987). Whether or not a fee is reasonable is an independent determination to be made by the awarding court. *Fetzer II*, 122 Wn.2d at 151; *Nordstrom*, 107 Wn.2d at 744; *Boeing*, 108 Wn.2d at 65. The burden of demonstrating that a fee is reasonable always remains on the fee applicant. *Blum v. Stenson*, 465 U.S. 886, 897, 79 L. Ed. 2d 891, 104 S. Ct. 1541 (1984); *Fetzer II*, 122 Wn.2d at 151. In judging whether a fee is reasonable the court may use the "factors" approach. *Allard v. First Interstate Bank N.A.*, 112 Wn.2d 145, 149, 768 P.2d 998 (1989). These "factors" are, however, often subsumed within the "lodestar" approach. *Scott Fetzer Co. v. Weeks*, 114 Wn.2d 109, 124, 786 P.2d 265 (1990) (*Fetzer I*). There are additional concerns which may also be relevant. The awarding court should consider the relationship between the amount in dispute and the fee requested. *Fetzer II*, 122 Wn.2d at 150. The court may consider the hourly rate of opposing counsel. *Boeing*, 108 Wn.2d at 66. Fees should be awarded only for services related to causes of action which allow for fees. *Boeing*, 108 Wn.2d at 66; *Nordstrom*, 107 Wn.2d at 743. The court may discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time. *Bowers*,

100 Wn.2d at 597. It is appropriate to discount work which could be useful in ancillary or parallel litigation. *Fetzer II*, 122 Wn.2d at 151, n.6. Fees are not penalties, but rather a cost of litigation. *Detonics ".45" Assocs. v. Bank of Cal.*, 97 Wn.2d 351, 354, 644 P.2d 1170 (1982). The reasonableness of a request depends on the circumstances of each individual case. *Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 169, 795 P.2d 1143 (1990).

*Absher*, 79 Wn. App. at 846-7. Any fee award must consider the foregoing criteria. Employing the foregoing criteria, the fee award requested by Sand Point is unreasonable for the work enumerated above, and the trial court abused its discretion by awarding the full, exact amount that Sand Point asked to be awarded.

**Q. Equity Mandates that Sand Point not be Awarded any Attorney Fees where the Declaration and Lease Documents Drafted and Executed by Sand Point itself Fail to Establish that Sand Point Owns the Unit Free and Clear of any Declaration of Condominium Lien.**

The reasonableness of a request for attorney fees depends on the circumstances of each individual case. *Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 169, 795 P.2d 1143 (1990).

In the instant case, Sand Point was the author and signatory creating the 1973 Lease that it entered into as landlord with third party Fairway Estates LP as tenant. In 1975 Sand Point then created the condominium regime established under the Declaration of Condominium,

which Declaration in turn establishes the Association itself and the Declaration of Condominium lien securing unpaid statutory assessments, as mandated by RCW 64.32.200(2) and RCW 64.34.364(1). As in *Schmidt*, the circumstances of this case do not warrant an award of attorney fees to Sand Point.

In the instant case, the dispute between Plaintiff and Sand Point is over whether the developer is subject to the law that binds every condominium unit created in this state to a lien by the condominium association for nonpayment of assessments - RCW 64.32.200(2) and RCW 64.34.364(1).

The Association's primary reason for existence is to maintain, preserve, insure and protect Sand Point's condominium Unit and all other condominium units and indivisibly appurtenant interests in the common areas (building and land). The Association's sole revenue source (other than bank interest) is from statutory assessments levied against all of the condominium units.

The Association never did "negotiate" any contract whatsoever with Sand Point; the Association did not have any option to consent to or decline any provision in the 1975 Declaration that established the condominium units and the lien. Under the trial court's order, if not reversed in this appeal, the developer has successfully created a most unique condominium regime whereby the developer continues to own this

unit it created, requires that the Association continue to observe its obligations to maintain, repair, insure and protect for the benefit of the unit owners, including Sand Point, but free of any lien to secure unpaid statutory assessments that solely fund those obligations.

Sand Point created a complex web of legal relationships under the Lease, the Declaration of Condominium, and the subjection of all of the condominium units to Registered Land (Torrens) requirements. The case now on appeal will ultimately resolve one unsettled aspect of that complex relationship: Whether the Declaration of Condominium lien encumbers the Unit, or only the Unit owner's tenant's leasehold estate. It is inequitable that Sand Point as the drafter of the Lease and Declaration of Condominium should benefit by an award of attorney fees against the Association when Sand Point itself is solely responsible for having created a most complex and unique condominium regime.

The trial court's Order, if not reversed on appeal, plants the seeds of a crisis for this condominium, when the unit Leases expire in 50 years: The Association will then have no lien on even a leasehold estate when the unit leases expire, and thus no way to enforce any lien for unpaid assessments, contrary to RCW 64.32.200(2) and RCW 64.34.364(1). As a matter of public policy, it is inequitable to reward Sand Point for drafting such a Declaration of Condominium by awarding it attorney fees to clarify the rights of the Association and of Sand Point.

## V. RAP 18.1(B) REQUEST FOR ATTORNEY FEES ON APPEAL

The Association requests that its fees and expenses in this appeal be awarded pursuant to RAP 18.1(b). Applicable law grants the Association a right to recover its attorney fees and expenses on review before the Court of Appeals: Washington law provides for recovery of attorney fees incurred in attempting to recover unpaid condominium assessments through foreclosure:

The association shall be entitled to recover any costs and reasonable attorneys fees incurred in connection with the collection of delinquent assessments, whether or not such collection activities result in suit being commenced or prosecuted to judgment.

RCW 64.34.364 (14). In addition to the foregoing statutory authority, Section 17.1 of the Amended Declaration provides in relevant part:

The amount of any Assessment, whether regular or special., assessed to the owner of any Apartment Unit or to any Unit, plus late charges and interest at the rate set forth in Section 16.1, and **costs and reasonable attorneys' fees incurred, shall be a lien upon such Apartment Unit.**

(CP 271). Further, while the foregoing authorities provide for attorney fees in an association foreclosure action, as here, state law provides a general right to attorney fees to the Association when enforcing its rights against a declarant (here, Sand Point):

If a declarant or any other person subject to this chapter fails to comply with any provision hereof or any provision of the declaration or bylaws, any person or class of persons

adversely affected by the failure to comply has a claim for appropriate relief. The court, in an appropriate case, may award reasonable attorney fees to the prevailing party.

RCW 64.34.455. Whether a case under [this statute] is appropriate for an award of fees is a discretionary decision. *Eagle Point Condo. Ass'n v. Coy*, 102 Wn. App. 697, 715, 9 P.3d 898 (2000). This is most certainly an appropriate case: The Association never did “negotiate” any contract whatsoever with Sand Point; the Association did not have any option to consent to or decline any provision in the 1975 Declaration that established the condominium units and the lien. Sand Point created a complex web of legal relationships under the Lease, the Declaration of Condominium, and the subjection of all of the condominium units to Registered Land (Torrens) requirements. The trial court’s Order, if not reversed on appeal, plants the seeds of a crisis for this condominium, when the unit leases expire in 50 years: The Association will then have no lien on even a leasehold estate when the unit leases expire, and thus no way to enforce any lien for unpaid assessments, contrary to RCW 64.32.200(2) and RCW 64.34.364(1). As a matter of public policy, it is inequitable to reward Sand Point for drafting such a Declaration of Condominium by declining to award the Association its attorney fees to clarify the rights of the Association and of Sand Point.

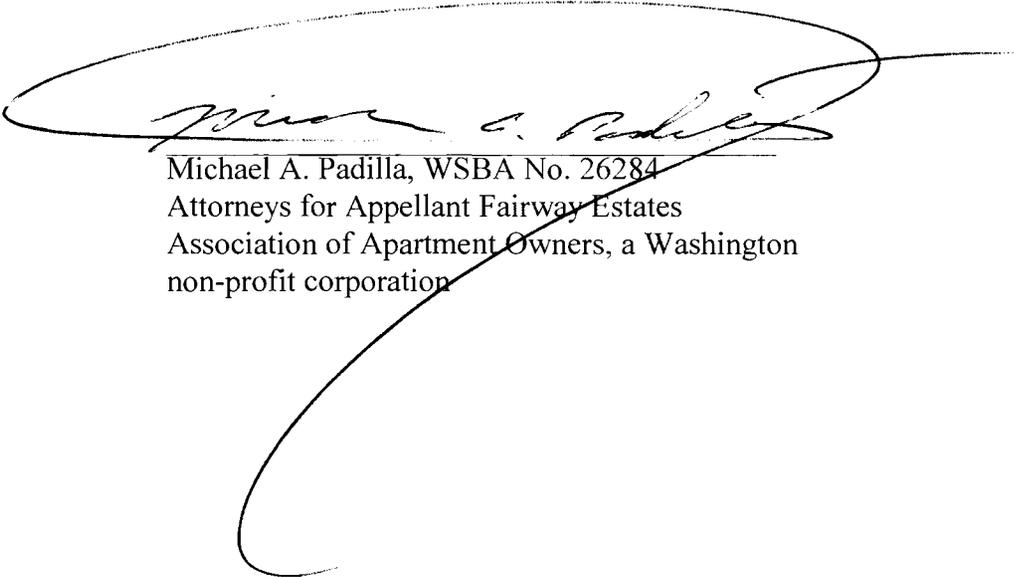
## **VI. CONCLUSION**

The appeal herein seeks reversal of the trial court's Order Granting Sand Point's Motion for Summary Judgment (CP 444-446), denying Sand Point's counterclaim and granting the Association's claims so that it can foreclose its Declaration of Condominium lien on the Unit, and thus foreclose Sand Point's interest in the unit as fee owner of the Unit.

The appeal herein also seeks reversal of the trial court's Judgment Granting Sand Point's Motion for Attorney Fees (CP 519-521), and award the Association its attorney fees incurred in this appeal.

Dated this 12 day of March, 2012.

LAW OFFICES OF JAMES L. STRICHARTZ



Michael A. Padilla, WSBA No. 26284  
Attorneys for Appellant Fairway Estates  
Association of Apartment Owners, a Washington  
non-profit corporation

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR THE COUNTY OF KING**

FAIRWAY ESTATES ASSOCIATION OF  
APARTMENT OWNERS, a Washington non-  
profit corporation,

Plaintiff,

v.

UNKNOWN HEIRS and DEVISEES of ROBERT  
D. YOUNG; ESTATE OF ROBERT D. YOUNG,  
deceased; UNKNOWN HEIRS and DEVISEES of  
ZELLA E. YOUNG; ESTATE OF ZELLA E.  
YOUNG, deceased; UNKNOWN HEIRS and  
DEVISEES of MONETA HARRIS a/k/a  
MONETA YOUNG a/k/a MONETA M.  
JORSTAD; ESTATE OF MONETA HARRIS  
a/k/a MONETA YOUNG a/k/a MONETA M.  
JORSTAD, deceased; JUDY HAVENS and  
JOHN DOE HAVENS, wife and husband or state  
registered domestic partners; SAND POINT  
COUNTRY CLUB, INC., a Washington non-  
profit corporation; FINANCIAL FREEDOM  
SENIOR FUNDING CORPORATION, a  
Delaware corporation as successor in interest to  
TRANSAMERICA HOMEFIRST, INC.; WELLS  
FARGO BANK, N.A., successor by merger to  
NORWEST BANK MINNESOTA NORTH, N.A.,  
as Trustee of Unknown Trust; BETTY  
DALHANYK and JOHN DOE DALHANYK,  
wife and husband or state registered domestic  
partners; BONNIE NORMAN and GARY  
NORMAN, wife and husband or state registered  
domestic partners;

No. 10-2-17653-5SEA

DECLARATION OF SERVICE

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2012 MAR 12 AM 11:53

1 MARK JORSTAD and JANE DOE JORSTAD,  
2 husband and wife or state registered domestic  
3 partners; GARY NORMAN as Trustee of  
4 Unknown Trust for Benefit of Moneta Harris a/k/a  
5 Moneta Young a/k/a Moneta M. Jorstad; JOHN  
6 DOE and JANE DOE, Unknown Occupants of the  
7 Subject Real Property; and also all other persons  
8 or parties unknown claiming any right, title,  
9 estate, lien, or interest in the real estate described  
10 in the Complaint herein,  
11 Defendants.

12 This is to declare that on the 12<sup>th</sup> day of March, 2012, I did cause to be served true and correct copies of the  
13 Notice of Appeal to Court of Appeals, and Declaration of Service to the Party(ies) listed below:

14 **Attorneys for Defendant Sand Point Country Club Inc.**

15 Robert G. Casey  
16 Eisenhower & Carlson, PLLC  
17 1201 Pacific Avenue, Suite 1200  
18 Tacoma, WA 98402

- via US Mail  
 via Hand Delivery  
 via Facsimile  
 via Overnight Mail

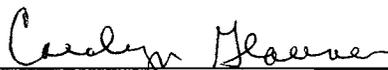
19 **Pro Se Attorneys Defendants**

20 Judy Havens and John Doe Havens  
21 w/t/n/i Dale Havens  
22 20219 - 104<sup>th</sup> Place SE  
23 Kent, WA 98031

- via US Mail  
 via Hand Delivery  
 via Facsimile  
 via Overnight Mail

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

26 Dated this 12<sup>th</sup> day of March, 2012 at Seattle, Washington.

27   
28 \_\_\_\_\_  
29 Carolyn Glauner