

No. 73715-5-I

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

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

Appellants.

vs.

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

Respondents.

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BRIEF OF RESPONDENTS

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FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2016 MAR 28 AM 11:30

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## I. INTRODUCTION

The question for the court is whether the appellants can build a 3-story addition in a plat that limits houses to “2 ½ stories in height.” The answer seems obvious, but the appellants argue that the limit of “2 ½ stories in height” allows them to build a 3-story house. Respondents James and Patricia Larson and Antonette Lysen argued, and the trial court agreed, that the restriction is a height limitation. Appellants Moses Ma and Kristine Ma-Brecht-Ma’s argument that a “half story in height” actually means “a half story in area” conflicts with the plain words in the Covenants, Conditions and Restrictions (“CC&Rs” or “covenants”). The Mas’ interpretation should be rejected.

The homeowners’ board administers the plat’s CC&Rs. But when the Mas filed suit to challenge the meaning of the CC&Rs, they did not name the homeowners’ association. Instead, they sued their uphill next-door neighbors, the Larsons. The Larsons had no choice but to participate in the lawsuit to enforce the proper meaning of the CC&Rs.

The trial court agreed that the Mas’ project violated the plain and obvious meaning of “2 ½ stories in height.” The clear purpose of the height limitation was to preserve the character of the development and the spectacular views of Puget Sound and the Olympic Mountains that the plat’s homeowners have enjoyed for more than a half-century. The trial

court gave effect to this purpose by applying the clear language to stop the construction of the Mas' 3-story project. The trial court also awarded the Larsons and Ms. Lysen (who intervened) attorneys' fees as damages authorized by the CC&Rs and in equity. The Mas have appealed.

## II. RESTATEMENT OF ISSUES

1. Where a restrictive covenant limits a single family home to "2 ½ stories in height," can the issue of whether the restriction creates a limit on height or a limit on area be discerned from the plain and obvious language of the covenant itself?

2. Does applying the "2 ½ stories in height" limitation to the Mas' proposed 3-story project require a trial?

3. When appealing parties failed to raise arguments before the trial court, can they raise them for the first time on appeal without any attempt to show a valid reason for failing to raise the arguments below?

4. Do the governing CC&Rs authorize an award of damages, including attorneys' fees under the rationale applied in *Rorvig v. Douglas*, 123 Wn.2d 854, 873 P.2d 492 (1994)?

5. When a court awards special damages in the form of attorneys' fees and the opposing party fails to object, is it reversible error if the court does not award damages using the lodestar analysis?

### III. STATEMENT OF THE CASE

#### A. The Shoreview Plat Limits Homes to 2 ½ Stories in Height.

Respondents James and Patricia Larson and Antonette Smit Lysen (collectively, the “Larsons”) live in the Shoreview plat in Burien, Washington. Shoreview, as its name suggests, offers sweeping views of Puget Sound and the Olympic Mountains. CP 129. The Larsons and Ms. Lysen both own houses located on a hillside above Puget Sound where they enjoy their scenic surroundings. *Id.* Appellants Moses Ma and Kristine Ma-Brecht-Ma (the “Mas”) also own a home in the Shoreview plat. *Id.* The Mas’ home is situated such that the Larsons’ and Ms. Lysen’s homes look directly down and over the Mas’ house. *Id.* The Mas’ house currently does not block the views of the Larsons or Ms. Lysen because it is only two stories tall. If a third story were added, it would block significant portions of the Larsons’ and Ms. Lysen’s views. *Id.*

The Larsons and Ms. Lysen are longtime residents of the Shoreview community. In 1967, Mrs. Larsons’ parents built the Larsons’ Shoreview home. *Id.* The house is situated on a steep hill that provides excellent views. CP 117. Mrs. Larson’s parents resided in the house continuously from 1967 until 2000. CP 129. Mrs. Larson lived in the

home at various points during this time, and the Larsons took title to the house in 2001, upon the death of Mrs. Larson's mother. *Id.*

Like the Larsons, Ms. Lysen has a long history in the Shoreview community. Mr. Lysen and her husband bought their house in 1971 and has lived there since. *Id.*

The Mas purchased their home in the Shoreview community on or about December 7, 2005. CP 2. The Mas split their time between their Shoreview home and a residence in Normandy Park. CP 129. The Mas also own a second house below and on the other side of their property from the Larson home. *Id.*

The Shoreview plat is governed by Covenants, Conditions, and Restrictions which, among other restrictions, limit the height of houses to "2 ½ stories in height." CP 109. The Shoreview plat was recorded on March 21, 1947. CP 108. In April of 1947, the owners of the Shoreview plat recorded the CC&Rs. *Id.* One of the restrictions contained within the 1947 CC&Rs limited the height of houses built in the Shoreview plat:

**Only one single detached one-family dwelling of not to exceed 2 ½ stories in height**, and one private attached or unattached garage for not more than 2 cars are permitted on any one lot, which sd [said] structure shall meet all other restrictions of land and bldg. as provided herein.

CP 109. The 1947 CC&Rs provided that they would remain in effect until January 1, 1967, and then automatically renew every ten years unless a majority of owners voted otherwise. *Id.*

On January 1, 1967, a majority of the homeowners in the Shoreview plat voted to ratify the CC&Rs, including the limitation on houses to 2 ½ stories in height. CP 114. The homeowners also added additional language that assisted in defining how the height limit would be calculated. The updated provision stated:

Only 1 single detached 1 family dwelling of not to exceed 2 & ½ stories in height, exceptions may be granted in extreme terrain. A daylight basement shall be considered a story if more than 50% exposed . . .

CP 112. The CC&Rs, as restated in 1967, remain in effect to this day.

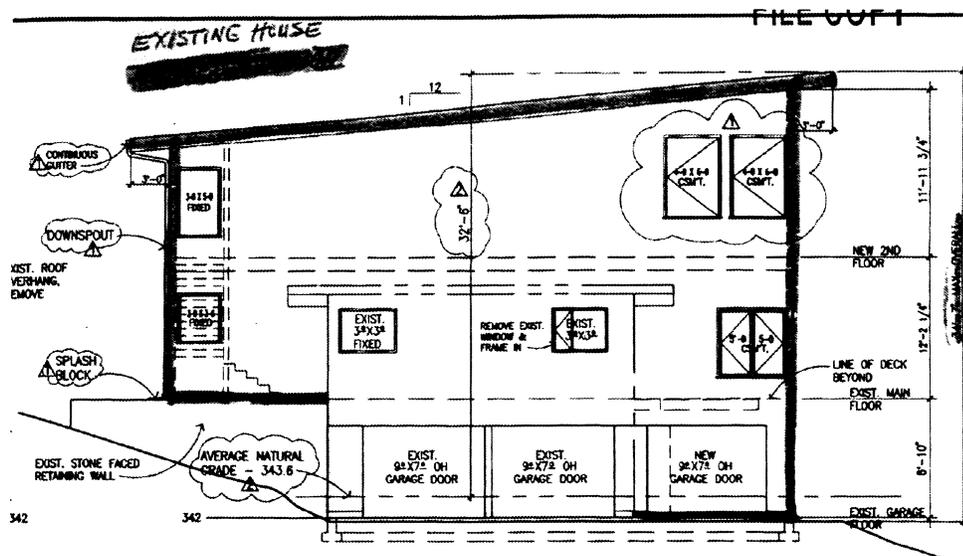
Because the CC&Rs are recorded, when the Mas purchased their lot, they were on notice that construction on their lot was subject to the restrictions in the CC&Rs. The Mas presented no evidence that they lacked notice of or did not agree to the CC&Rs. If the Mas did not want to abide by those restrictions, they should not have bought the property.

B. The Mas Seek to Build a 3-Story Home Despite the CC&R's 2 ½ Story Limit.

In October 2013, the Mas' applied for a building permit to add a third story and significantly expand floor space on the first two floors. CP 127. Specifically, they intended to "add garage/renovate expand

kitchen/add master bedroom floor.” *Id.* (emphasis supplied)). Due to the location of the Mas’ house, it would directly impact the views currently enjoyed by the Larsons and Ms. Lysen. CP 116; CP 132-6.

The magnitude of the proposed addition is reflected by this drawing from the Mas’ architect showing the profile of the new structure juxtaposed on the profile of the existing structure:



CP 36. (We have added highlighting of the existing structure in a lighter shade and the proposed three-story structure in a darker shade.)

When the Mas applied for their building permit to add a third story, the Mas did not share their plans with the Larsons and Ms. Lysen, nor did the Mas submit their plans to the homeowners’ association. CP 130. Furthermore, the Mas did not attempt to clarify the meaning of “2 ½ stories in height” with the homeowners’ association board. *Id.*

The Larsons — concerned about the impact the Mas’ proposed third floor addition would have on their views as well as the noncompliance with the CC&Rs — provided notice to the Mas on or about September 10, 2014 that the Mas’ third floor addition would violate the CC&Rs’ “2 ½ stories in height” restriction. CP 137.

The Larsons also sought the input of other homeowners in the Shoreview plat about the importance of restricting the height of homes to protect the view from neighboring homes. The Shoreview plat homeowners came to a clear consensus that the height limitation was important and should be respected. CP 130. A total of 66 of the 99 homeowners in the plat signed a petition against the Mas’ proposed third story addition. CP 138-44. No one indicated a contrary view.

C. Course of Proceedings.

The Mas sued to build their 3-story project. But rather than file a lawsuit against the homeowners’ association that administers the CC&Rs, the Mas chose to file a declaratory judgment action only against the Larsons. CP 1. Having no other choice but to defend the lawsuit to maintain their views protected by the CC&Rs, the Larsons counterclaimed for a declaratory judgment and permanent injunction. CP 10-12.<sup>1</sup>

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<sup>1</sup> Ms. Lysen intervened because her interests were implicated in the lawsuit.

Both parties brought summary judgment motions. CP 23, 88. The trial court agreed with the Larsons that the limitation on houses to “2 ½ stories in height” meant that a half story is measured by height, rather than area. The trial court denied the Mas’ motion for summary judgment and granted the Larsons’ motion. CP 230. The court entered a permanent injunction against the Mas, preventing the Mas from undertaking their proposed 3-story project. *Id.*

The trial court also awarded the Larsons’ attorneys’ fees, not as a cost of litigation, but as special damages. Recognizing that the Larsons “had no choice but to defend against the plaintiffs’ action to protect their interest in the height limits in the CC&Rs,” the trial court awarded the Larsons’ attorneys’ fees as special damages, but awarded less than fifty percent of the amount sought. CP 320-1. The Larsons’ total attorneys’ fees incurred in defending the lawsuit brought by the Mas was \$51,199. CP 236. The trial court awarded the Larsons \$25,000 as special damages. CP 321.

After the trial court issued its rulings and after this appeal was filed, the homeowners in the Shoreview plat voted on a proposed amendment to the CC&Rs which would supplement the 2 ½ story limit with a twenty-five foot height limit. *See* Decl. of Antonette S. Lysen in Support of Respondents’ Mtn to Dismiss (Dec. 14, 2015). All property

owners in the plat received a ballot where they could vote “yes” or “no” on the proposed amendment. *Id.* When the written ballots were returned, 74 of the 99 property owners had voted in favor of the revised height limit. *Id.* Only three “no” votes were returned. The rest of the plat owners did not vote. *Id.* On November 9, 2015, Ms. Lysen recorded the amendment to the CC&Rs as the amendment authorized her to do. *Id.*

The Larsons then moved this court to have the appeal dismissed as moot. *See* Respondents’ Mtn to Dismiss (December 18, 2015). Because the new CC&R language applies to any project not yet completed, the Mas’ proposed project (which is not yet built) cannot be built no matter what the Court decides in this appeal. The Mas responded by claiming the amendment was not valid, although they provided no evidence to support this position. *See* Motion to Strike/Response to Motion to Dismiss (February 1, 2016). The Court Commissioner denied the motion, reasoning that the new 25-foot height limit would not be an issue if this court affirms and, if this court decides for the Mas, the trial court would be better suited to address the validity of the amendment on remand:

If this court were to affirm, it is likely that issues around the validity and applicability of the amended CC&Rs will not arise at least as to the Ma’s [sic] current project. If this court were to reverse, it is likely that the issues around the validity and applicability of the amended CC&Rs will be addressed in further litigation in the trial court on remand.

Ruling on Motion to Dismiss (Feb. 23, 2016) at 4.

#### IV. STANDARD OF REVIEW

The usual standard of review applies to the Courts review of the summary judgment ruling. Courts review the facts and law with respect to summary judgment *de novo*. *Schaaf v. Highfield*, 127 Wn.2d 17, 21, 896 P.2d 665 (1995). “In reviewing the evidence, the trial court must consider the evidence and the reasonable inferences therefrom in a light most favorable to the nonmoving party.” *Id.* Summary judgment is appropriate only when, after reviewing all facts and reasonable inferences in the light most favorable to the nonmoving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *see also Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

#### V. ARGUMENT

##### A. Summary of Argument.

The CC&Rs’ “2 ½ stories in height” limitation unambiguously caps a structure’s height, not its floor area. This is evident from the words used in this section of the CC&Rs (“in height”). It is also evident when the document is read as a whole. Elsewhere, the drafters addressed an area limitation, and, when they did so, they used the term “square feet” to prescribe the area limitation.

The unambiguous meaning establishing a height limit is also in keeping with the Supreme Court's ruling that subdivision covenants are to be read broadly to protect the common interests of the plat's homeowners. *See Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 118 P.3d 322 (2005).

The Mas attempt to convert the limit "in height" to a limit based on floor area. There is no basis for that conversion. The plain words of the restriction do not support converting "height" to "area." The Mas' argument would leave the words "in height" an orphan, with no meaning, in contravention of the standard rule to give every word and term meaning when construing a contract. *American Agency Life Ins. Co. v. Russell*, 37 Wn. App. 110, 114, 678 P.2d 1303 (1984).

The trial court properly awarded a portion of the Larsons' attorneys' fees as damages. First, the Mas failed to timely respond to the Larsons' motion for an award of attorneys' fees as damages, so the trial court properly did not consider the Mas' arguments and their belated attempt to raise the issues here should be rejected. *See* RAP 2.5. In any event, the trial court had an adequate basis for awarding damages and its award was within the range of evidence presented.

B. Basic Rules of Contract Interpretation Dictate that the “2 ½ Stories in Height” Restriction is Unambiguous and should be Applied as a Restriction on Height, not Area.

The interpretation of language contained in a restrictive covenant is a question of law for the court. *Green v. Normandy Park*, 137 Wn. App. 665, 681, 151 P.3d 1038 (2007) (citing *Parry v. Hewitt*, 68 Wn. App. 664, 668, 847 P.2d 483 (1992)). “While interpretation of the covenant is a question of law, the drafter’s intent is a question of fact. But where reasonable minds could reach but one conclusion, **questions of fact may be determined as a matter of law.**” *Wilkinson v. Chiwawa Communities Ass’n*, 180 Wn.2d 241, 250, 327 P.3d 614 (2014) (emphasis supplied).

When a homeowners’ restrictive covenant is in dispute, rules of strict construction in favor of the free use of land are inapplicable. Subdivision covenants tend to enhance, not inhibit, the efficient use of land. *Viking Properties, Inc.*, 155 Wn.2d at 120, 118 P.3d 322. Our Supreme Court has made clear that special emphasis should be placed on protecting the homeowners’ collective interests:

As such, the court’s goal is to ascertain and give effect to those purposes intended by the covenants. In ascertaining this intent, we give a covenant’s language its ordinary and common use and will not read a covenant so as to defeat its plain and obvious meaning. Moreover, **the court will place special emphasis on arriving at an interpretation that protects the homeowners’ collective interest.**

*Id.* (emphasis added; internal quotations omitted).

Unambiguous language used in a contract must be enforced. “If contractual language is ‘clear and unambiguous,’ we must enforce the written contract.” *RSD AAP, LLC v. Alyeska Ocean, Inc.*, 190 Wn. App. 305, 316, 358 P.3d 483 (2015) (citing *Lehrer v. Dep’t of Soc. & Health Servs.*, 101 Wn. App. 509, 515, 5 P.3d 722 (2000)). Courts impute an intention corresponding to the reasonable meaning of the words used. *Id.* at 315, 358 P.3d 483.

A contract provision “is not ambiguous merely because the parties to the contract suggest opposing meanings.” *GMAC v. Everett Chevrolet, Inc.*, 179 Wn. App. 126, 135, 317 P.3d 1074, *review denied*, 181 Wn.2d 1008, 335 P.3d 941 (2014). Ambiguity will not be read into a contract where it can be reasonably avoided. *Mayer v. Pierce County Medical Bureau, Inc.*, 80 Wn. App. 416, 421, 909 P.2d 1323 (1995). Language that is clear on its face does not need construction. *Lamar Outdoor Advertising v. Harwood*, 162 Wn. App. 385, 395, 254 P.3d 208 (2011). In assessing the meaning of the contract, the court should consider the contract as a whole. *Wilkinson*, 180 Wn.2d at 250, 327 P.3d 614.

In construing a contract, including determining if the contract is unambiguous, courts follow the context rule, which allows consideration of extrinsic evidence, but not where the extrinsic evidence would vary, modify or contradict the contract’s words:

We also follow the context rule that extrinsic evidence relating to the context in which a contract is made may be examined to determine the meaning of specific words and terms. Extrinsic evidence includes both the contract's subject matter and objective, the circumstances surrounding contract formation, both the parties' conduct and subsequent acts, and the reasonable of the parties' respective interpretations. **However, extrinsic evidence may not be used to show an intention independent of the contract or to vary, contradict, or modify the written words.**

*RSD AAP, LLC*, 190 Wn. App. at 315, 358 P.3d 483 (internal citations omitted) (emphasis supplied). Therefore, the appropriate place for the court to start its analysis is with the actual words of the contract.

1. The plain language of the CC&Rs measures a half story by reference to "height"

The Mas seek to convince the court that the phrase "2 ½ stories in height" actually establishes a floor area limitation for the third story of a house. Decisively, the plain language of the CC&Rs answers this question directly by allowing only "1 single detached 1 family dwelling of not to exceed 2 ½ stories **in height.**" CP 112 (emphasis supplied). Notably, there is no reference to full or half stories in terms of square footage or floor area. "Stories," as used in these CC&Rs, unambiguously refers to "height," not area.

The court need not look beyond the pertinent language both in 1947 and 1967 CC&Rs. The 1967 ratification of the 1947 language

restated the limit as “2 ½ stories in height, exceptions may be granted in extreme terrain.” *Id.* “Height” is the only modifier to “2 ½ stories,” and the obvious meaning is that “height” is the only measure of what constitutes a half story. Hence, a “half story” is half the height of the full stories in the house. One could hardly imagine a plainer or more obvious meaning of limiting a house to “2 ½ stories in height.” “Language that is clear on its face does not need construction.” *Lamar Outdoor Advertising v. Harwood, supra*, 162 Wn. App. at 395. The court does not need to search for a hidden meaning behind the clear-cut phrase, “2 ½ stories in height.”

2. Considering all parts of the document together supports a reading that the restriction is measured in height, not area

The Mas’ argument is further undermined by a reading of the CC&Rs as a whole. “We examine the language of the restrictive covenant and consider the instrument in its entirety. The lack of an express term with the inclusion of other similar terms is evidence of the drafters’ intent.” *Wilkinson*, 180 Wn.2d at 250, 327 P.3d 614 (internal citations omitted). *See also King County v. Vinci Const. Grands Projets*, 191 Wn. App. 142, 364 P.3d 784 (2015).

In *Wilkinson*, the issue was whether covenants should be construed to include a durational limit on rentals. *Id.* at 245, 327 P.3d 614. The

court noted that the covenants contained no explicit durational limit. *Id.* at 252, 327 P.3d 614. That silence spoke volumes. Elsewhere, the covenants contained detailed instructions on what homeowners could not do and contained a clear expression that rentals were permissible uses. *Id.* at 251, 327 P.3d 614. Yet the covenants did not contain any durational restriction on rentals. That silence supported the court’s ruling that the drafters of the covenants intended to permit rentals without any durational limitation. *Id.* at 252, 327 P.3d 614.

In this case, the CC&Rs, read as a whole, do not support the Mas’ attempt to convert the height limit to an area limit. The drafters obviously knew how to include floor area limits in the CC&Rs. The CC&Rs establish a minimum square footage requirement for houses, stating “. . . nor shall any of [said] residences have less than 1100 square feet of floor area exclusive of porches and garages . . .” CP 112. In other words, the CC&Rs clearly identify floor area measured in square footage, and define what features are and are not included in those measurements. If the drafters had intended to measure a half story based upon area rather than height, they would have drafted language similar to that pertaining to minimum floor area. They would not have used the word “height.”

The qualification in the 1967 ratification that “exceptions may be granted in extreme terrain” further indicates that the intent was to limit a

half story by height, not by area. Where a home sits on extreme terrain—such as a steep slope — it would be possible to increase the height of the home without blocking views from an uphill lot. Thus, on “extreme terrain,” an exception allowing a third story could meet the obvious intent of preserving views. But there would be no reason to allow an expansion of the area of a third floor on a steep slope. The exception only makes sense if the restriction applies to height, not area.

3. The Mas’ argument fails to provide any meaning to the words “in height.”

Courts have a duty to read every contract in such a manner that every section is given effect. *American Agency Life Ins. Co.*, 37 Wn. App. at 114, 678 P.2d 1303. “An interpretation of a writing which gives effect to all of its provision is favored over one which renders some of the language meaningless or ineffective.” *Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980) (citing *Newsom v. Miller*, 42 Wn.2d 727, 731, 258 P.2d 812 (1953)).

The Mas fail to establish a meaning to the words “in height.” The Mas attempt to read the pertinent language as “2 ½ stories” (as opposed to “2 ½ stories in height”). Their reading leaves “of height” as an orphan prepositional phrase. The court cannot simply ignore half of the key term to read the CC&Rs as the Mas wish.

4. The Plain meaning of the “2 ½ stories in height” is consistent with the only extrinsic evidence and the collective interest of the homeowners

The plain and obvious meaning of the term “in height” is consistent with the Supreme Court’s directive to construe covenants with “special emphasis” on protecting the homeowners’ collective interests. *See Viking Properties, Inc.*, 155 Wn.2d at 120, 118 P.3d 322 (“the court will place special emphasis on arriving at an interpretation that protects the homeowners’ collective interest”). It also is consistent with the only extrinsic evidence presented to the trial court.

The collective interests of homeowners in the Shoreview plat are obvious. The “2 ½ stories in height” limitation serves the purposes of protecting views (in the Shoreview plat) and protecting the neighborhood from out-of-scale homes. These twin purposes to serve the common good were supported by extrinsic evidence in the record. A total of 66 of the 99 homeowners in the plat signed a petition against the Mas adding a third story to their home. CP 138-44. No one signed a petition in favor of the Mas position.

The only other extrinsic evidence revealed the general character of the neighborhood, with its hilly terrain and expansive views of Puget Sound and the Olympic Mountains. CP 132-6. This extrinsic evidence provides further support for the plain English construction of the “in

height” restriction as a limitation on height to protect the community’s exceptional views and neighborhood character.

The Mas offered no extrinsic evidence to support a construction that substituted “area” for “height.” Even if they had tried, such evidence would have been inadmissible, because extrinsic evidence cannot “be used to show an intention independent of the contract or to vary, contradict, or modify the written words.” *RSD AAP, LLC*, 190 Wn. App. at 315, 358 P.3d 483. The words “in height” cannot be rewritten into “in area” by extrinsic evidence.

The Mas proposed construction is diametrically opposed to the Supreme Court’s direction in *Viking Properties*. Rather than promote the interests of the community of homeowners, the Mas offer a construction that benefits only themselves. If other downhill lot owners attempt the same maneuver, the community will be confronted with an “arms race” as everyone attempts to develop their property with an eye to maximizing their “use” of the common view. When each one takes that approach, the view ends up being consumed by a few – those in front who build the tallest homes. Only by imposing reasonable constraints on everyone can the common interest in preserving views for all be protected. Construing the restriction as the trial court did protects the collective interests of all the homeowners instead of singling the Mas out for special treatment. The

trial court's ruling, not the Mas interpretation, is consistent with the teaching of *Viking Properties*.

5. The Mas' efforts to create ambiguity fail.

A court will not read ambiguity into a contract where it can reasonably be avoided. *GMAC*, 179 Wn. App. at 135, 317 P.3d 1074. The Mas repeatedly argue that the CC&Rs would allow a person to build a taller home than the one proposed if each story were of extraordinary height. Such an argument is speculative, because neither the Mas nor any other homeowner has proposed such a project. The Mas presented no evidence that such a hypothetical project was ever built or even contemplated, and they have not presented plans to that effect.

Decades of ordinary homes with ordinary floor-to-ceiling heights in the Shoreview plat have complied with the "two and half stories in height" limitation. If a creative property owner decided to pursue Mas' contrivance, the outcome might be different. *But see, e.g., Foster v. Nehls*, 15 Wn. App. 749, 551 P.2d 768 (1976) (view protection upheld). The court should not venture into speculation about a hypothetical project. *See, e.g., Potter v. Department of Labor and Industries*, 101 Wn. App. 399, 409, 3 P.3d 229 (2000) ("We cannot give a statute an interpretation that is inconsistent with its plain language based upon speculation that a plain reading may possibly produce negative repercussions"); *Cooper's*

*Mobile Homes v. Simmons*, 94 Wn.2d 321, 326, 617 P.2d 415 (1980) (“It is true that we should not interpret a statute as to reach an absurd result, but neither should we make an absurd interpretation to reach a desired result”) (internal citations omitted).

If there is any ambiguity in the phrase “2 ½ stories in height,” it is limited to the meaning of a “story.” But to avoid summary judgment, the Mas needed to demonstrate a dispute about a *material* issue. CR 56(c); *see also Kaplan v. Northwestern Mut. Life Ins. Co.*, 115 Wn. App. 791, 804, 65 P.3d 16 (2003). Nothing in this case required resolution of the issue postulated by the Mas, *to wit*, whether “story” means a story of ordinary height or whether it might allow a story of extraordinary height. *If* the Mas had proposed a structure with extraordinarily high stories, the issue presented by Mas would be ripe for review. But they did not. They proposed a structure with stories of ordinary height – three of them, obviously more than the 2 ½ stories allowed. Any ambiguity about the height of a given story is irrelevant to the resolution of *this* case. *See, e.g., Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 60 P.3d 1245 (2003) (even if disputed term were ambiguous, the ambiguity would be irrelevant because another provision in contract controlled without regard to

disputed term). The meaning of a “story” may be ambiguous in some other setting, but that is not the issue here.<sup>2,3</sup>

C. Mas’ Reliance on Other Courts’ Interpretation of a “Half Story” is Misplaced and Does Not Overcome the Plain Language of the CC&Rs.

The Mas misconstrue *Foster*, 15 Wn. App. at 551 P.2d 768 in several respects. First, they ignore the court’s holding: The court affirmed the trial court’s ruling that the two story house violated the restrictive covenant’s requirement that no house can exceed one and one-half stories in height. *Id.* at 752, 551 P.2d 768.

Second, the court did not state that a “half story” height restriction must be measured by floor area. Mas’ contrary suggestion is wrong.

Third, the court found that the one and one-half story height limit was a restriction intended to protect views and, therefore, declined to reduce the height limitation to an “inches and feet definition.” *Id.* Instead,

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<sup>2</sup> Upon the Mas suggesting the existence of this unintended loophole in the CC&Rs (*i.e.*, allowing 18-foot high ceilings on two stories), the community responded by adopting an amendment to clarify that such an anomalous structure would not be allowed. Neither the Mas (if there is a remand) nor anyone else will be able to circumvent the CC&Rs in that manner from here forward. *See supra* at 8-9.

<sup>3</sup> This court could certainly formulate speculative, absurd results under the Mas’ construction of the covenants, too. For instance, a homeowner could build a pyramidal house with multiple floors, each with less than half as much area as the story below it. This hypothetical house could be up to four stories tall, but only count as a two and a half story house because each upper floor counts as a “half story” under the Mas’ tortured theory. Such a result is just as speculative and irrelevant as the scenario that the Mas repeatedly posit.

the court looked at whether the house blocked views. *Id.* at 751, 551 P.2d 768. Thus, the *Foster* court’s reading of the one and one-half stories limitation was actually more expansive than the interpretations offered by either the Mas or the Larsons: the court construed the limitation to restrict *any* view obstruction that might arise. *Id.* at 752, 551 P.2d 768.

Ultimately, *Foster* stands for the proposition that the restrictive covenant’s limitation on height to one and one-half stories “prohibits the construction of any residence which substantially obstructs the view enjoyed by other residents of the subdivision.” *Id.* at 751, 551 P.2d 768. It does not require a half story as measured by area. The case does not support the Mas’ argument.

In *O’Connell v. City of Brockton Bd. of Appeals*, 344 Mass. 208, 212, 181 N.E.2d 800 (1962), the court noted, in passing, the City of Brockton’s definition of “half story” set forth in the local ordinance. The City of Brockton’s definition is not before this Court. The case is wholly irrelevant because that definition does not appear in the Shoreview CC&Rs. Moreover, that definition was not even involved in the court’s reasoning, which instead focused on whether a basement should be counted as a story. *Id.* at 213, 181 N.E.2d 800.<sup>4</sup>

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<sup>4</sup> Moreover, the City of Brockton’s definition of a half story does not support Mas’ claim that the term means a floor that covers only one-half of the area of the floor beneath it. Rather, Brockton’s code defined “half story” in a way that suggests

Mas' reliance on *Johnson v. Linton*, 491 S.W.2d 189 (Tex. Civ. App. 1973) is misplaced for three reasons. One, the court's statements about the half-story issue were *dicta*. The court decided the case on grounds that the defendant had obtained permission for the work. *Id.* at 196. The court made clear, twice, that it was commenting on the definitional issue only in the event it was not upheld on the express permission issue. *Id.* at 196, 197. Second, in its gratuitous discussion, the court applied the rule which strictly construes covenants in favor of the free and unrestricted use of the premises. *Id.* at 197. However, our Supreme Court abandoned that rule in cases where residential subdivision restrictive covenants are at issue, such as here. See *Viking Properties, Inc.*, 155 Wn.2d at 120, 118 P.3d 322 *supra*. Third, the court in *Johnson* relied on evidence provided in the trial court to help it construe the term. *Id.* at 196. No such evidence was presented to the trial court here. In sum, the *Johnson dicta* has no application in Washington generally or to this case in particular.

Appellants' reliance upon *Hiner v. Hoffman*, 90 Haw. 188, 193, 977 P.2d 878 (1999) is misplaced for several reasons. Chief among them

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that it refers to a low profile dormer. In Brockton's code, a "half story" can cover up to two-thirds of the area of the floor beneath, but it must be "situated *in* a sloping roof." *O'Connell*, 344 Mass. at 212, 181 N.E.2d 800 (emphasis supplied). Thus, this definition supports Larson's view that a half story is primarily a limitation on the vertical dimension (though in Brockton, it includes a slight horizontal limitation, too).

is that *Hiner*, like *Johnson*, applied a rule of strict construction in favor of the free use of land. *Id.* at 193-94, 977 P.2d 878. For that reason alone, the case has no persuasive effect here. *See Viking Properties, Inc.* Indeed, the case helps demonstrate the wisdom of the more community-oriented rule embodied by *Viking*. Using rules of strict construction, the court in *HinerI* reached the bizarre result that a three-story residence was permissible even though the restrictive covenants clearly stated that “no dwelling shall be erected . . . which exceeds two stories in height.” *Id.* at 196, 977 P.2d 878. This court need not follow such a strained interpretation.

Finally, in addition to being an outdated case, *Madden v. Zoning Board of Review of City of Providence*, 48 R.I. 175, 136 A. 493 (1927) determined what constituted a two and one-half story home based on evidence presented in the context of Rhode Island in 1927. *Id.* No such evidence is present in this record. Moreover, the court was reviewing an administrative agency determination (a zoning board decision) and, consequently, deferred to the agency in making its ruling. *Id.* Here, there was no administrative decision and no deference required. *Madden* is not applicable to this case.

The varying definitions of “half story” used in cases in other jurisdictions are not relevant to the court’s purpose here.<sup>5</sup> “[T]he court’s goal is to ascertain and give effect to those purposes intended by the covenants. In ascertaining this intent, we give a covenant’s language its ordinary and common use and will not read a covenant so as to defeat its plain and obvious meaning.” *Viking Properties, Inc.*, 155 Wn.2d at 120, 118 P.3d 322. The Mas’ attempt to obfuscate the plain and obvious meaning of the CC&Rs by citing to irrelevant cases does not change the covenants mandate that houses are limited to “2 ½ stories **in height.**”

D. There is No Conflict Between the CC&Rs and the Zoning Code.

The Mas attempt to create a conflict between the zoning code and the CC&Rs where none exists. Their argument misconstrues the interplay of restrictive covenants and zoning codes. The Mas point to the provision of the CC&Rs which provides that when the County zoning restrictions conflict with the CC&Rs, “the county restrictions shall take precedence and be enforced.” CP 44. The Mas then reason that “[i]f a project is not

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<sup>5</sup> In fact, other courts have defined “half story” as did the trial court here. *See, e.g., Donaldson v. White*, 261 Or. 314, 316-7, 493 P.2d 1380 (1972), (applying definition of a half story as “a second-floor living space, the entire area of which is above the bottom of the roof slope”). This “sloped roof” reference is similar to the definition in the *City of Brockton* case. *See* note 4, *supra*. But because each of these cases turns on the law and evidence unique to that particular case, they provide little of value to resolving the issues in this case.

allowed under the CC&Rs, but allowed under the zoning code, then the two rules ‘conflict’ by definition.” Mas Br. at 15.

Just because the building is allowed under the zoning code, but not the CC&Rs, does not mean that the two are in conflict. At its most basic level, a conflict exists when one law requires what another law forbids. For instance, in analyzing whether a conflict exists between a zoning ordinance and a statute, the Court of Appeals has said:

In determining whether an ordinance is in conflict with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa. The conflict must be direct and irreconcilable with the statute. . .

*Cannabis Action Coalition v. City of Kent*, 180 Wn. App. 455, 482, 322 P.3d 1246 (2014).

Here, no such conflict exists: the zoning code permits a building to be shorter than 35 feet without a minimum height requirement, so any height limitation imposed by the CC&Rs is valid. See Burien Municipal Code 19.15.005.1. An example of a true conflict would be if the CC&Rs imposed a *maximum* height of 30 feet and the zoning code imposed a *minimum* height of 35 feet. In such a case, a true conflict would exist because a homeowner could not build a house that satisfied both requirements. Here, the Mas can build a home that complies with the

covenants and the zoning code. The conflict the Mas attempt to create between the CC&Rs and the Burien zoning code does not exist.

The Supreme Court rejected a similar argument in *Viking Properties*: "Although the City's zoning regulations call for a minimum density of four dwelling units per acre, nothing in the regulations compels property owners to develop their parcels to any particular minimum density." *Viking Properties, Inc.*, 155 Wn.2d at 130, 118 P.3d 322.

The Mas' reasoning would spell the end of CC&Rs, which our Supreme Court has recognized as a salutary device for protecting home values. *See Viking Properties*, 155 Wn.2d at 119, 118 P.3d 322. Under the Mas' reasoning, many restrictive covenants would never come into effect. If they touched on a subject also addressed by the local zoning ordinance, the covenant would either be invalid because it restricts more than the minimum requirements of the zoning code or it would be less restrictive than the zoning code, in which case the zoning code would control and the covenant would be superfluous. This can hardly be the result the Supreme Court had in mind when it acknowledged the benefits of community-based covenants in *Viking Properties*.

E. The Issue of the Meaning of the Covenant's Clause relating to the Basement is not before this Court.

The Mas describe an ambiguity as to whether the Mas' basement counts as a story. Mas Br. at 25. But the Mas did not raise that issue in their motion for summary judgment. To the contrary, they disclaimed it as a material issue for summary judgment purposes:

No definition or explanation is provided in the CC&R's for what is meant by exposed, and the CC&R does not contain any other definition of story. **But that question is not germane to this case** since even if the basement is counted as a story the house does not exceed two stories at this time, and will be two and half stories when the addition is completed.

CP 25 (emphasis supplied).

Because the Mas did not raise the basement issue in the trial court, they cannot raise it now. "On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court" RAP 9.12. *See also "In re Guardianship of Cornelius*, 181 Wn. App. 513, 533, 326 P.3d 718 (2014).

F. The Mas Waived Any Objections to the Trial Court's Award of Damages and the Trial Court Properly Award Damages to the Larsons.

The trial court properly awarded damages as attorneys' fees to the Larsons, because the Mas failed to timely respond to the Larsons' motion

for attorneys' fees. Thus, this court does not need to consider the Mas' objections which they failed to raise below. RAP 2.5(a). Even if the court now considers the issue, the trial court possessed an adequate legal basis to award damages.

1. The Mas failed to timely file a response to the Larsons motion for attorneys' fees, so the trial court did not have to respond to the objections the Mas raise now.

The Mas fault the trial court for failing to consider their objections raised below, but any fault lies with the Mas, not the trial court. The trial court properly did not consider the Mas' objections under the controlling King County local rule. "Any material offered at a time later than required by this rule, and any reply material which is not in strict reply, **will not be considered by the court over objection of counsel except upon the imposition of appropriate terms**, unless the court orders otherwise." LCR 7(b)(4)(G) (emphasis supplied).

The Mas failed to timely respond to the Larsons' motion for attorneys' fees. On June 26, 2015, the Larsons filed their attorneys' fee request and noted the motion for hearing without oral argument on July 9, 2015. CP 233. Under King County LCR 7, the Mas' answer was due July 7, 2015. July 7 came and went without any response from the Mas. On July 8, the Larsons filed their reply, noting that the Mas had failed to

respond. CP 307-08. Later that same day, the Mas filed an untimely response and made no request for the court to consider the response upon terms. CP 309-11. On July 9, the Larsons filed an objection to the Mas' late response, pursuant to LCR 7(b)(4)(G). CP 314. The Larsons noted that the Mas failed to show good cause or excusable neglect for the late filing and service. CP 315. Again, the Mas made no attempt to request consideration of the late papers.

In its order granting damages to the Larsons, the trial court did not authorize Mas' late-filed response (with or without terms, as required by the local rule). It gave no heed to their belated objections. CP 316-21. Therefore, the Larsons' motion seeking attorneys' fees as special damages was unopposed and the trial court properly granted the motion.

Because the Mas failed to challenge the issue of attorneys' fees before the trial court, this court does not have to review this issue now. *See* RAP 2.5(a). Generally, a failure to preserve a claim of error by presenting it first to the trial court means the issue is waived. *Bellevue Sch. Dist. No. 405 v. Lee*, 70 Wn.2d 947, 950, 425 P.2d 902 (1967). An appellate court retains the discretion to consider an issue raised for the first time on appeal, but it rarely exercises it. *Karlberg v. Otten*, 167 Wn. App. 522, 531, 280 P.3d 1123 (2012) (citing *Smith v. Shannon*, 100 Wn.2d 26, 38, 666 P.2d 351 (1983)).

The reason for the rule is obvious from the Mas' brief. They spend much effort arguing that the lower court failed to identify its reasons for awarding \$25,000 in fees. Obviously, by not pointing this out in a proper response in superior court, they are now playing a game of "gotcha" with the lower court. The Mas' late response denied the Larsons any chance to address their objections below. This is exactly the kind of conduct RAP 2.5(a) is designed to prevent. Allowing the Mas to litigate the propriety of the attorney fee award on appeal, when they failed to do so below, does not serve the purposes of judicial economy and finality.

RAP 2.5 identifies three exceptions to the general rule precluding new issues on appeal. Two are clearly irrelevant here (lack of trial court jurisdiction and manifest errors affecting a constitutional right). But the Mas have argued that the third exception applies – "failure to establish facts upon which relief can be granted." RAP 2.5(a)(2).<sup>6</sup> In this case, no question exists that the Larsons and Lysen have stated facts justifying relief on the merits of their claim. The Mas cited no authority that RAP 2.5(a)(2) should apply to the numerous procedural issues such as awards of attorneys' fees, costs, and post-trial matters. By the Mas' theory, an appellant could appeal discovery orders, jury instructions, motions *in*

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<sup>6</sup> See Mas' Motion to Strike/Response to Motion to Dismiss (February 1, 2016).

*limine* and other decisions that were unopposed before the trial court. Obviously, RAP 2.5(a)(2) does not stand for this proposition. *See, e.g., In re Marriage of Grimsley-Lavergne*, 156 Wn. App. 735, 236 P.3d 208 (2010). For these reasons, Appellants arguments are not persuasive and this court should dismiss their appeal of the award of fees as damages.

2. Even if this court reviews the issue the Mas failed to preserve, the trial court's ruling should be affirmed.

We concur with the Mas's statement of the standard of review. Legal issues are reviewed *de novo*. The trial court's factual determinations are reviewed for an abuse of discretion.

Independent of the Mas' failure to timely respond to the Larsons' motion for attorneys' fees as damages, the trial court possessed an adequate legal basis for awarding them. The covenants authorize recovery of damages for violations of the CC&Rs. CP 113. The court ruled that the attorneys' fees incurred by the Larsons in the defending against Mas' lawsuit were an element of those damages. CP 320.

This is not a case governed by the frequently stated rule that "absent a contract, statute, or recognized ground in equity, attorneys' fees will not be awarded as part of the cost of litigation." *Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.*, 126 Wn. App. 352, 358, 110 P.3d 1145 (2005). Attorneys' fees are not sought "as part of the cost

of litigation.” Instead, they are sought as part of the damages incurred by the Larsons in defending the lawsuit. As such, the award is consistent with the reasoning of *Rorvig v. Douglas*, 123 Wn.2d 854, 873 P.2d 492 (1994). There, our Supreme Court first acknowledged the well-known limitation on awarding fees as the cost of litigation. *Id.* at 861, 873 P.2d 492. But the court went on to explain that, in other situations, fees incurred in responding to a wrongful action undertaken by the plaintiff may be awarded as damages. *Id.*

In *Rorvig*, the plaintiffs brought an action for slander of title and prevailed. *Rorvig*, 123 Wn.2d at 856, 873 P.2d 492. The plaintiffs and defendants could not come to an agreement on the sale of property, but the defendants recorded a “memorandum of agreement” which clouded the title of the property. *Id.* at 857, 873 P.2d 492. Subsequently, the plaintiffs could not sell the property to a third party due to the clouded title; the plaintiffs’ only recourse was to sue to clear the title. *Id.* After upholding the trial court’s determination that the elements of slander of title had been met, the court reasoned that damages in the form of attorneys’ fees were warranted:

It is the defendant who by intentional and calculated action leaves the plaintiff with only one course of action: litigation . . . actual damages are difficult to establish and often times are minimal in slander of title. Fairness requires the

plaintiff to have some recourse against the intentional malicious acts of the defendant.

*Id.* at 862, 873 P.2d 492. Under this reasoning, the court awarded attorneys' fees as part of the plaintiff's damages, not as a cost of litigation.

*Id.* at 863, 873 P.2d 492.

Here, the trial court followed the reasoning of *Rorvig* and explained that it considered the following factors in awarding damages:

- a. The case concerned enforcement of CC&Rs, which are essential attributes of title to real estate;
- b. Defendants Larson and Lysen had no choice but to defend against the plaintiffs' action to protect their interest in the height limits in the CC&Rs;
- c. Plaintiffs are sophisticated, with significant financial resources. The Larsons and Lysen are retired and have essentially fixed incomes;
- d. Plaintiffs chose not to name as defendants the homeowners' association, which would have had the right to recover attorney's fees for enforcing the CC&Rs under applicable Washington law;
- e. It is equitable given all the circumstances identified in this Order and given the parties' positions in this litigation to allow the Larsons and Lysen to recover their fees.

CP 320. The trial court also analyzed the hourly rate used by the Larsons' attorneys and found the rate to be reasonable. *Id.*

The CC&Rs are unambiguous that a lot owner may pursue an action at law to prevent a violation of the CC&Rs, and the lot owner may recover damages. CP 113. Because the Larsons successfully prevented the Mas from violating the CC&Rs, the Larsons were entitled to recover their damages.

The underlying rationale of *Rorvig* helps determine the elements of those damages. Like slander of title actions, “actual damages are difficult to establish and are minimal” in preventing a homeowner from violating CC&Rs. *Rorvig*, 123 Wn.2d at 862, 873 P.2d 492. Much like *Rorvig*, the Mas left the Larsons with no recourse but litigation. The Mas chose to file suit against the Larsons, not the homeowners association. At issue was not just the application of the height limit to the Mas property, but its application to every property in the subdivision. (Little surprise, then, that there was near unanimous support for the Larsons defense by the other homeowners.) As the trial court noted in its findings, if the Mas had chosen to name the homeowners’ association as a defendant, the Mas would have been subject to an attorney fee award if the HOA prevailed. CP 320. Because the Larsons, living on fixed incomes (CP 320), were carrying this burden for all the homeowners, an award of damages was appropriate under the terms of the covenants. The award of damages was well within the discretion of the trial court, and the trial court’s finding adequately support its award.

3. The trial court was not required to use the *Berryman* fee analysis.

Because the trial court was awarding partial attorneys’ fees as a form of damages (not as litigation costs), it was not required to apply the

*Berryman* factors or use a lodestar analysis. *Berryman* and similar cases apply to attorneys' fee awards when made as the costs of litigation. "In general, trial courts should use the lodestar method when determining the award of attorney fees **as costs.**" *In re Guardianship of Decker*, 188 Wn. App. 429, 446, 353 P.3d 669, 677 (2015), *review denied*, 184 Wn.2d 1015, 360 P.3d 818 (2015) (emphasis supplied).

Mas cite no authority for utilizing that approach when, as in *Rorvig* and this case, fees are awarded as part of damages. Indeed, the *Berryman* approach is not even required in all cases when fees are awarded as the costs of litigation:

While the lodestar method is generally accepted as the starting point for attorney fee determinations, it is not required in all contexts. **Where the primary considerations for the fee award are equitable, courts are not required to apply the lodestar method to determine an award of fees.**

*In re Guardianship of Decker, supra*, 188 Wn. App. at 447(emphasis supplied). Here, the trial court noted it was using its equitable powers to award damages, including fees. CP 320.

For the foregoing reasons, the trial court was not required to use a lodestar analysis. Instead, as in the review of any damage award, the question on appeal is whether the damage award falls within the range of substantial evidence in the record. *Shields v. Garrison*, 91 Wn. App. 381,

386, 957 P.2d 805 (1998). “An appellate court will not disturb an award of damages made by the fact finder unless it is outside the range of substantial evidence in the record, or shocks the conscience, or appears to have been arrived at as the result of passion or prejudice.” *Mason v. Mortgage Am., Inc.*, 114 Wn.2d 842, 850, 792 P.2d 142 (1990).

The trial court’s award of damages undoubtedly fits within the range of substantial evidence before the court. The Larsons submitted evidence that they had suffered damage in the amount of over \$51,000 in attorneys’ fees and other litigation expenses. CP 251. The trial court considered the hourly rate and amount of work that the Larsons’ attorneys spent on the matter and found the hourly rate reasonable. CP 320-1. The Mas presented no contrary evidence. Thus, substantial evidence regarding this element of damages ranged from zero to \$51,199. The trial court’s award fell within this range. As long as there was substantial evidence supporting a damage award of up to \$51,199 (and there was, *see* CP 248-98), the trial court’s award of a lesser amount should be sustained. *Shields v. Garrison, supra*.

The Mas attack the trial court’s analysis for the damage award, but they do not offer evidence or analysis showing that the evidence of \$51,199 in litigation costs was not substantial evidence nor can they suggest that the actual award was not within the range of the evidence.

Instead, they decry the lack of “scrutiny of the billing submissions, or any analysis of why the amount chosen was an accurate reflection of the lodestar calculation.” Mas Brief at 33. But the Mas misunderstand the nature of the trial court’s award. The trial court clearly concluded that an award of the full attorneys’ fees was an element of damages, not an award of litigation costs. Given the standard for review of an award of damages, the trial court committed no error.

G. Fees on Appeal Should be Awarded to the Larsons, Not the Mas

1. The Larsons are entitled to an award of attorneys’ fees on appeal.

The same reasons that the trial court awarded attorneys’ fees also support an award of fees to the Larsons if this Court affirms. Fees should be awarded as a component of the damages the Larsons have suffered, as provided for in the covenants. The Larsons did not choose to appeal and had no choice but to defend the appeal, not just for their own personal benefit, but to protect the validity of the covenants for the benefit of all the homeowners in the subdivision who have benefitted from these covenants for more than 60 years. RAP 18.1(b)

2. The Mas are not entitled to an award of attorneys' fees if they prevail.

The Mas request an award of fees. This is inappropriate for three reasons. First, if their appeal is denied, as the losing party they should receive no fees. Second, there is no basis to award the Mas fees as damages under the covenants. They initiated this appeal and the litigation below, so are not appropriate candidates for an award of damages as attorneys' fees. *Cf. Rorvig*, 123 Wn.2d at 862, 873 P.2d 492. Third, even if they obtain a remand, they have not prevailed on the merits. The case will go on and they may ultimately lose. If there is a remand, the determination of prevailing party should await a decision on the merits.

## VI. CONCLUSION

For the reasons explained above, this court should affirm the superior court's final judgment, permanent injunction, and award of attorneys' fees as damages. This court should also award the Larsons their attorneys' fees and costs on appeal.

If this court were to reverse the superior court's decision, it should remand the matter to the superior court to address the validity and applicability of the recently amended CC&Rs to the Mas proposed construction, as the Commissioner of this Court ruled in response to the Larsons' Motion to Dismiss.

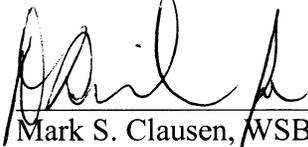
Dated this 24<sup>th</sup> day of March, 2016.

Respectfully submitted

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

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

Appellants,

v.

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

Respondents.

NO. 73715-5-I

DECLARATION OF SERVICE

STATE OF WASHINGTON        )  
  )  
COUNTY OF KING            )

ss.

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2016 MAR 28 AM 11:30

I, PEGGY S. CAHILL, under penalty of perjury under the laws of  
the State of Washington, declare as follows:

I am the legal assistant for Bricklin & Newman, LLP, attorneys for  
Antonette Smit Lysen, James Larson, and Patricia A. Larson herein. On

the date and in the manner indicated below, I caused the Brief of

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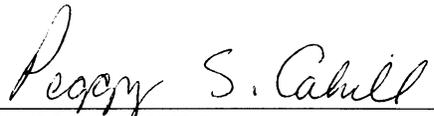
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\_\_\_\_\_  
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