

No. 35536-1-II  
COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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ALPINE QUALITY CONSTRUCTION SERVICES, INC.,  
a Washington corporation,

Appellant,

and

STEVEN A. WEISS and LINDA I. MILLER,  
husband and wife, and their marital community,

Appellants,

v.

BRETT JOHNSON and TERESA JOHNSON,  
husband and wife, and their marital community,

Respondents.

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AMENDED  
BRIEF OF APPELLANTS  
ALPINE QUALITY CONSTRUCTION SERVICES, INC.  
AND  
STEVEN A. WEISS AND LINDA I. MILLER

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Philip A. Talmadge, WSBA #6973  
Emmelyn Hart-Biberfeld, WSBA #28820  
Talmadge Law Group PLLC  
18010 Southcenter Parkway  
Tukwila, Washington 98188-4630  
(206) 574-6661  
Attorneys for Appellants  
Alpine Quality Construction Services, Inc. and  
Steven A. Weiss and Linda I. Miller

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A. INTRODUCTION

This appeal is the final phase of an ongoing dispute between respondents Brett and Teresa Johnson (the Johnsons) and appellants Alpine Quality Constructions Services, Inc. (Alpine) and Steve Weiss and Linda Miller (collectively the Weiss-Millers) involving the Johnsons' purchase of a lot and construction of a home in the Riverview Meadow subdivision developed by Alpine in Skamania County. The subdivision is subject to land use and home construction standards contained in covenants, conditions, and restrictions (CC&Rs) previously interpreted by this Court in Cause No. 32153-0-II.

On August 8, 2006, this Court issued an unpublished opinion in Cause No. 32153-0-II. *Alpine Quality Const. Servs., Inc., et al. v. Johnson*, 134 Wn. App. 1029, 2006 WL 2262027 (2006). The Court remanded the attorney fee award for entry of findings of fact and conclusions of law because it did not have an adequate record from which to determine whether Alpine and/or the Weiss-Millers acted in bad faith in bringing their claims at trial, as required by the CC&Rs for an award of attorney fees and costs. *Id.* at \*14-15.

On remand, the trial court did not carefully assess the issue of bad faith under the applicable CC&Rs and merely restored its original fee decision, to the penny.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in making finding of fact number 1, including all of its subparts.

2. The trial court erred in making finding of fact number 2.

3. The trial court erred in making finding of fact number 3.

4. The trial court erred in making finding of fact number 4, including all of its subparts.

5. The trial court erred in making finding of fact number 5, including all of its subparts.

6. The trial court erred in entering a final judgment on October 12, 2006.

(2) Issues Pertaining to Assignments of Error

1. Did the trial court err on remand by awarding attorney fees to the prevailing party when a provision in the applicable contract exonerates lot owners from liability for good faith enforcement of a subdivision's CC&Rs and there is no evidence the nonprevailing parties acted in bad faith when they attempted to enforce the CC&Rs? (Assignments of Error Nos. 1-3, 6)

2. Did the trial court abuse its discretion on remand by awarding an unreasonable and excessive amount of attorney fees where the award is unsupported by the record? (Assignments of Errors Nos. 4-6)

C. STATEMENT OF THE CASE

In 2000, the Johnsons purchased a lot in the Riverview Meadow subdivision being developed by Alpine near Stevenson, Washington. CP 5. In 2001, Alpine filed a complaint for injunctive relief and for damages, alleging the Johnsons violated certain CC&Rs applicable to the subdivision. *Id.* at 5, 19. The Weiss-Millers, who also purchased a lot in the subdivision, intervened in 2002 because they believed the Johnsons' house was of substandard construction and diminished the property values of neighboring homes, including their own. *Id.* at 5, 21.

After a six-day bench trial, the trial court determined the Johnsons did not violate the subdivision's CC&Rs when they placed a modular home on their lot and did not violate the CC&Rs relating to landscaping, set back requirements, and lot maintenance. *Id.* at 5. The court awarded the Johnsons substantial attorney fees but no costs. *Id.* Alpine appealed. *Id.* The Weiss-Millers later appealed from the denial of their CR 60 motion for relief from judgment. *Id.*

This Court issued an unpublished opinion in Cause No. 32153-0-II on August 8, 2006.<sup>1</sup> *Alpine Quality Const. Servs., Inc., et al., v. Johnson*, 134 Wn. App. 1029, 2006 WL 2262027 (2006).<sup>2</sup> The Court affirmed the trial court's conclusion that the Johnsons did not violate the CC&Rs relating to the modular nature of the home, set back requirements, lot maintenance, and landscaping. Significantly, the Court reversed the trial court's conclusion that the Johnsons did not violate the CC&Rs by leaving a rusted orange bulldozer on their property and ordered the Johnsons to remove it. *Id.* at \*12-13. The Court remanded the issue of the Johnsons' attorney fee award for entry of findings of fact and conclusions of law because it did not have a record of whether Alpine and/or the Weiss-Millers acted in bad faith in bringing their claims at trial, as required by the CC&Rs for an award of attorney fees and costs. *Id.* at \*14-15.

Alpine and the Weis-Millers noted a motion on remand before the trial court, the Honorable E. Thompson Reynolds, for consideration on

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<sup>1</sup> The Johnsons filed a petition for review to the Washington Supreme Court on September 7, 2006, arguing no remand for findings on attorney fees or bad faith was necessary. CP 46. The petition was denied.

<sup>2</sup> The Court's opinion is included in the Appendix.

October 12, 2006. CP 1-17. Alpine and the Weiss-Millers asked the trial court to enter an order finding they acted in good faith. *Id.* at 4, 7-14. By contrast, the Johnsons moved the trial court for an order finding Alpine and the Weiss-Millers acted in bad faith and awarding the Johnsons their reasonable attorney fees on the basis of that bad faith. *Id.* at 44-78. The Johnsons did not submit a new request for attorney fees; instead, they referred the trial court to the statements for attorney fees they submitted at the conclusion of the trial. *Id.* at 75-76.

The trial court heard argument from the parties and entered supplemental findings of fact and conclusions of law finding Alpine and the Weiss-Millers commenced the present action in bad faith. *Id.* at 276-78; RP 42-47. On remand, the trial court awarded the Johnsons the same amount of attorney fees, to the penny, that they had been awarded in the original judgment. CP 277-78.<sup>3</sup> Counsel for Alpine and the Weiss-Millers objected to the form of the proposed order because counsel for the Johnsons' presented it only moments before the hearing began. RP 48, 51. This untimely proposed order also contained several errors.<sup>4</sup> RP 50. This timely appeal followed. CP 272-73.

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<sup>3</sup> The trial court's supplemental findings of fact are included in the Appendix.

<sup>4</sup> For example, the order, as written, awards the Johnsons \$47,705 against Alpine and \$32,000 against the Weiss-Millers, for an apparent total fee award of \$79,705. CP 277-78. Yet such an award was clearly not intended by Judge Reynolds, who stated

D. SUMMARY OF ARGUMENT

The trial court erred in awarding attorney fees to the Johnsons because neither Alpine nor the Weiss-Millers acted in bad faith. The applicable CC&Rs permit the Court to award attorney fees to the prevailing party, but *only* if the action is brought in bad faith. While the CC&Rs do not define the term “bad faith,” no analogous legal standard for bad faith exists in this case. Lacking substantial evidence of bad faith, the trial court’s award of attorney fees to the Johnsons was error.

Bad faith is well-understood in Washington law in a variety of contexts. Although Alpine and the Weiss-Millers did not succeed on all of their claims at trial, their mere failure of proof at trial is not sufficient to justify the imposition of a penalty where there is no evidence they instigated their complaints for a bad faith purpose. Similarly, there is no evidence they acted unreasonably or with an improper motive.

The trial court’s supplemental findings plainly overlook the fact that the Johnsons violated the CC&Rs by keeping an unsightly orange bulldozer on their property and that this Court ordered them to remove it. Those findings also ignore the fact that this Court remanded the fee issue. The supplemental findings likewise ignore the fact that this Court found

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during his oral ruling that he was reinstating the original attorney fee award. RP 46-47. The original order awarded the Johnsons a *total* of \$47,705 in attorney fees. RP 47.

several of the CC&Rs ambiguous and therefore susceptible to more than one reasonable interpretation.

Even if this Court were to apply the principles of CR 11 by analogy, neither Alpine nor the Weiss-Millers' conduct constitutes bad faith. CR 11 permits the imposition of reasonable attorney fees and costs as a sanction where a bad faith filing of pleadings for an improper purpose or a filing of pleadings not grounded in fact or warranted by law has occurred. This case was not meritless on the facts and the law. Trial counsel for Alpine and the Weiss-Millers researched the facts and the law.

Even if the Court were to apply the bad faith/frivolous standard of RCW 4.84.185 to this case by analogy, the Johnsons are still not entitled to attorney fees. RCW 4.84.185 allows for the recovery of attorney fees and costs where the lawsuit is found to be frivolous. An action is frivolous if it cannot be supported by any rational argument on the law or facts. Here, Alpine and the Weiss-Millers prevailed on more than one claim at trial and their lawsuits were therefore not frivolous in their entirety. Moreover, it is evident from the record that the underlying complaints forced the Johnsons to comply with a number of the CC&Rs.

The Johnsons' continued reliance on *Scribner v. WorldCom, Inc.*, 249 F.3d 902 (9th Cir. 2001), *Riss v. Angel*, 131 Wn.2d 612, 934 P.2d 669 (1997), and *Day v. Santorsola*, 118 Wn. App. 746, 770-71, 76 P.3d 1190

(2003), to support their alleged entitlement to attorney fees on the basis of bad faith is misplaced. Those cases present materially different circumstances than those presented here and are easily distinguishable.

The trial court erred on remand by awarding the Johnsons an unreasonable and excessive amount of attorney fees. Washington courts have adopted the lodestar approach when assessing reasonable attorney fees. Here, the court's lodestar amount is unreasonable because it is not based on contemporaneous time records. Nowhere in the record is there evidence documenting how the time the Johnsons' attorney spent on the case secured his clients' successful recovery, nor is there evidence adequately explaining how his time was actually spent. Without such evidence, there is no way the court could have excluded any wasteful or duplicative hours or any hours relating to unsuccessful theories or claims. Under a lodestar analysis, the record must reflect the trial court evaluated the reasonableness of the rate, the reasonableness of the hours claimed, which claims merit an award, challenges to the hours claimed, and any multiplier factors. The court's failure to enter such findings here was error.

E. ARGUMENT

(1) Standard of Review

This Court engages in a two-step process when reviewing an award of attorney fees. *See Pub. Util. Dist. No. 1 of Klickitat County v. Int'l Ins. Co.*, 124 Wn.2d 789, 814, 881 P.2d 1020 (1994). First, the Court must determine whether the prevailing party was entitled to attorney fees. *Id.* Then, the Court must decide whether the amount of fees awarded was reasonable. *Id.*

Whether a party is entitled to attorney fees is a legal question which is reviewed de novo. *See Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 126, 857 P.2d 1053 (1993).

Whether the amount of fees awarded was reasonable is reviewed under an abuse of discretion standard. *See, e.g., Boeing Co. v. Heidi*, 147 Wn.2d 78, 90, 51 P.3d 793 (2002) (citing *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 665, 989 P.2d 1111 (1999)). A trial court abuses its discretion only when the exercise of that discretion is manifestly unreasonable or based upon untenable grounds or reasons. *Id.* Findings of fact and conclusions of law in support of an attorney fee award are mandatory. *See Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998). This Court's task is to review the trial court's findings of fact to determine whether they are supported by substantial evidence and, if so, whether they support the trial court's conclusions of law. *See Ridgeview Props. v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982).

“Substantial evidence” is evidence sufficient to persuade a fair-minded, rationale person of the truth of the declared premise. *See Holland v. Boeing Co.*, 90 Wn.2d 384, 390-91, 583 P.2d 621 (1978).

Here, the trial court erred by awarding attorney fees to the Johnsons because neither Alpine nor the Weiss-Millers acted in bad faith. The trial court abused its discretion because substantial evidence does not support the award and the amount of fees awarded was unreasonable and excessive.

(2) The Trial Court Erred In Awarding Attorney Fees To The Johnsons Because Neither Alpine Nor The Weiss-Millers Acted In Bad Faith

Construing the CC&Rs in their entirety, article 4, ¶ 2 authorizes an action to enforce their terms. That section provides:

Any Lot owner or Association of Lot Owners shall have the right to enforce by proceeding at law or in equity all restrictions, conditions, covenants, reservations, requirements, liens and charges now or hereafter imposed by the provisions of this Declaration.

CP 32. Article 4, ¶ 5 of the CC&Rs permits the Court to award attorney fees to the prevailing party:

In the event suit or action is instituted to enforce any terms of this Declaration or to collect unpaid assessments. The prevailing party shall be entitled to recover from the other party such sum as the court or tribunal may adjudge reasonable as attorney fees and costs incurred.

*Id.* Attorney fees may be awarded against the complaining party, but only if the action is brought in bad faith. Article 4, ¶ 3 of the CC&Rs specifically limits liability for good faith enforcement of the CC&Rs by exonerating lot owners from any liability for “act[s] and omissions done in good faith in the interpretation, administration and enforcement of this Declaration.” *Id.*<sup>5</sup> Accordingly, the prevailing party is entitled to recover attorney fees at trial only where the other party has acted in bad faith. *Alpine* at \*15.

A problem develops, however, because the CC&Rs do not define the term “bad faith.” When interpreting a contract, the Court must give an undefined term its “plain, ordinary, and popular” meaning. *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 877, 784 P.2d 507 (1990) (citations omitted).<sup>6</sup> Typically, this Court looks to standard English dictionaries to determine the ordinary meaning of an undefined term. *Id.* However, the term “bad faith” does not appear to have a standard English dictionary meaning.<sup>7</sup> Thus, the Court must look elsewhere for guidance in

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<sup>5</sup> This Court has already determined that article 4, ¶ 3 and article 4, ¶ 5 are consistent. *Alpine* at \*15.

<sup>6</sup> Contract interpretation rules apply to restrictive covenants. *See Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 696, 974 P.2d 836 (1999).

<sup>7</sup> For example, Merriam Webster’s Collegiate Dictionary does not define the term; however, it defines the term “good faith” as “honesty or lawfulness of purpose.” MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 539 (11th ed. 2003). Similarly, Webster’s Third New International Dictionary does not define “bad faith” but defines

interpreting the term and may do so by analogy. After synthesizing all of the available definitions and treatments of bad faith that follow, the Court will discover a common theme, namely, the reasonableness of, and motive for, each party's conduct.

Despite the paucity of definitions of "bad faith" in standard English dictionaries, the term has been similarly interpreted in Washington in a variety of contexts. For example, the tort of bad faith has been defined as "a breach of the obligation to deal fairly with an insured, giving equal consideration to the insured's interests." *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn. App. 323, 329, 2 P.3d 1029 (2000). In the insurance setting, the insured must show the insurer's breach of the insurance contract was "unreasonable, frivolous, or unfounded" to succeed on a claim of bad faith. *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 560, 951 P.2d 1124 (1998). In cases of prosecutorial bad faith, the term has

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"good faith" as "a state of mind indicating honesty and lawfulness of purpose." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 978 (1976). While Black's Law Dictionary defines "bad faith" as "[d]ishonesty of belief or purpose <the lawyer filed the pleading in bad faith>", BLACK'S LAW DICTIONARY 149 (8th ed. 2004), it is not a standard English dictionary. See *Lynott v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 123 Wn.2d 678, 702, 871 P.2d 146 (1994) (Guy, J., dissenting).

been defined as a “neglect or refusal to fulfill some duty . . . not prompted by an honest mistake as to one’s rights or duties, but by some interested or sinister motive.” *State v. Sizemore*, 48 Wn. App. 835, 837, 741 P.2d 572 (1987) (quoting BLACK’S LAW DICTIONARY 127 (5th ed. 1979)). *See also Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 929, 982 P.2d 131 (1999) (discussing the three equitable theories of bad faith as an exception to the American Rule on attorney fees and declining to award fees based on substantive bad faith because there was no evidence shareholder had intentionally set forth his claims with an improper motive or purpose). Bad faith can also be predicated upon a breach of the implied duty of good faith and fair dealing arising out of a contractual relationship between the parties. *See State v. Trask*, 91 Wn. App. 253, 272, 957 P.2d 781, 974 P.2d 1269 (1998). In that context, bad faith is often equated with actual or constructive fraud. *See Bentzen v. Demmons*, 68 Wn. App. 339, 349 n.8, 842 P.2d 1015 (1993) (reversing fee award in a dispute involving an oral contract to make a will where the trial court failed to enter findings that the action was brought in bad faith).

Other references to bad faith have been based upon court rules or statutes providing for attorney fees when a complaint is frivolous, or when a pleading not well-grounded in fact or warranted by law is filed. Although not directly applicable, this Court can reasonably apply by

analogy case law arising under CR 11 and RCW 4.84.185 to determine the intended meaning of “bad faith” as that term is used in the CC&Rs at issue here.

For example, CR 11 permits the imposition of reasonable attorney fees and costs as a sanction where a bad faith filing of pleadings for an improper purpose or a filing of pleadings not grounded in fact or warranted by law has occurred.<sup>8</sup> See, e.g., *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 217, 829 P.2d 1099 (1992) (noting the rule addresses two separate problems: baseless filings and filings made for an improper purpose).<sup>9</sup> In the context of CR 11, a finding that one party’s conduct was “inappropriate and improper” is tantamount to a finding of bad faith. *Wilson v. Henkle*, 45 Wn. App. 162, 175, 724 P.2d 1069 (1986).<sup>10</sup>

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<sup>8</sup> Under CR 11, an attorney’s signature constitutes a “certificate” that “to the best of the . . . attorney’s knowledge, information, and belief, formed after reasonable inquiry [the attorney’s pleading] is well-grounded in fact and is warranted by existing law[.]”

<sup>9</sup> Sanctions may be imposed under CR 11, however, only if the complaint lacks a factual or legal basis *and* the attorney failed to conduct a reasonable inquiry. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992). Sanctions may not be awarded unless the moving party has given the offending party prompt notice regarding a potential violation and an opportunity to cure or mitigate the alleged violation. See *Biggs v. Vail*, 124 Wn.2d 193, 198 n.2, 876 P.2d 448 (1994) (*Biggs II*). Without such notice, CR 11 sanctions are not warranted. *Bryant*, 119 Wn.2d at 224.

<sup>10</sup> Alpine and the Weiss-Millers do not suggest that CR 11 applies, except by analogy. An award of attorney fees under CR 11 would be inappropriate in any event because the Johnsons failed to provide notice to either Alpine or the Weiss-Millers that they intended to seek such sanctions. CP 19-20, 22. Even if they had, their fee request was ultimately not based on bad faith or CR 11. Instead, the Johnsons specifically argued they were entitled to recover attorney fees on the basis of an existing contract

Similarly, RCW 4.84.185 allows for recovery of attorney fees and costs for the prevailing party where the lawsuit is found to be frivolous.<sup>11</sup> An action is frivolous if it cannot be supported by any rational argument on the law or facts. *See, e.g., Bill of Rights Legal Found. v. Evergreen State College*, 44 Wn. App. 690, 723 P.2d 483 (1986). The statute was intended to apply to “actions which, *as a whole*, were spite, nuisance or harassment suits.” *Biggs v. Vail*, 119 Wn.2d 129, 135, 830 P.2d 350 (1992) (*Biggs I*) (reversing trial court’s award of fees where only three of four claims were frivolous and fourth claim advanced to trial). Thus, if any one claim has merit, an award of fees under RCW 4.84.185 cannot be sustained. *Id.* at 137.

Regardless of the definitions and analogies previously provided, the Court is still left to decide what “bad faith” means in the context of the specific CC&Rs in effect here because the term is undefined. Alpine and the Weiss-Millers suggest that the most appropriate definition of bad faith

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(the CC&Rs). Even the trial court acknowledged that bad faith was not argued as a basis for attorney fees. RP 43.

<sup>11</sup> RCW 4.84.185 specifically provides:

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

is a mixture of the definitions and treatments found in CR 11 and RCW 4.84.185. In other words, bad faith, as contemplated by the CC&Rs, requires a finding that the offending party has filed a lawsuit with no basis in fact or in law, without a reasonable inquiry, and for dishonest or improper purposes. Alternatively, the Court must find their actions were instigated for *a bad faith purpose*. See *In re Marriage of Mangiola*, 46 Wn. App. 574, 579, 732 P.2d 163 (1987), *overruled on other grounds*, *In re Marriage of Jannot*, 149 Wn.2d 123, 65 P.3d 664 (2003) (declining to award attorney fees on the basis of bad faith under RCW 26.09.260(2) in a custody modification proceeding where wife's petition was inadequate but not brought in bad faith). Applying this definition, the trial court erred in awarding attorney fees to the Johnsons because there is no evidence Alpine or the Weiss-Millers acted in bad faith.

Both complaints are based in law and fact. Alpine and the Weiss-Millers raised colorable issues concerning the interpretation of the CC&Rs, as this Court implicitly acknowledged by finding several of the CC&Rs ambiguous. Yet the trial court's supplemental findings ignore the rule of law that a written instrument is ambiguous when its terms are uncertain or capable of being understood as having more than one reasonable meaning. See, e.g., *Ladum v. Utility Cartage, Inc.*, 68 Wn.2d 109, 116-17, 411 P.2d 868 (1966). See also *Fagan v. Walters*, 115 Wash.

454, 459, 197 P. 635 (1921) (taken in its broadest sense, “ambiguity” means “doubtfulness, uncertainty, or double meaning”). That Alpine and the Weiss-Millers attempted to enforce ambiguous CC&Rs does not mean their complaints were not grounded in fact or law.

Moreover, Alpine and the Weiss-Millers provided evidence to support their claims and legal authority to support recovery had they established a prima facie case. The trial court did not consider their complaints totally baseless. Only after viewing the Johnsons’ property at the request of the parties and *weighing the evidence* did the trial court rule that the Johnsons did not violate the CC&Rs. *See* RP 45-46. Their mere failure of proof at trial is not sufficient to justify the imposition of fees as a penalty.

There is no evidence that Alpine and the Weiss-Millers acted unreasonably or with an improper motive. Nor is there evidence they acted dishonestly. In the first appeal, this Court found the Johnsons’ bulldozer to be an unsightly vehicle and ordered it removed. *Alpine* at \*12-13. This means Alpine and the Weiss-Millers successfully established that the Johnsons violated at least one provision of the CC&Rs. Yet the trial court’s supplemental findings plainly overlook this fact. More importantly, the supplemental findings also ignore the trial court’s previous finding that both complaints forced the Johnsons to

comply with a number of the CC&Rs. As the trial court stated in its original findings: “the plaintiffs claimed several violations of the CC&Rs. Many of these have been corrected prior to trial, and are not at issue.” CP 10. A condition precedent to finding that the Johnsons corrected a CC&R violation prior to trial is a determination that the violation existed to be corrected in the first place. The Johnsons most likely would not have landscaped their property, cleaned up the construction debris, or attempted to hide the bulldozer without the underlying lawsuit.

Alpine and the Weiss-Millers also prevailed on their argument on the standard for attorney fees, which necessitated a remand to the trial court for entry of findings of fact and conclusions of law. That they prevailed on more than one claim at trial precludes a finding that they acted unreasonably or dishonestly.

Both complaints were filed after a reasonable inquiry into the law and facts. Alpine and the Weiss-Millers presented unrebutted evidence that Timothy Dack, the attorney who represented Alpine, and Anthony “Tad” Connors, the attorney who represented the Weiss-Millers, performed due diligence before filing their client’s respective complaints to ensure that the complaints were warranted by existing law. CP 19, 22.

Where the evidence fails to establish that Alpine and the Weiss-Millers filed lawsuits with no basis in fact or in law, without a

reasonable inquiry, and for dishonest or improper purposes, the trial court erred by finding they acted in bad faith. Where bad faith cannot be shown, good faith is presumed. *See Larsen v. Betcher*, 114 Wn. 247, 250, 195 P. 27 (1921).

Additional evidence confirms Alpine acted in good faith. Alpine and the Johnsons attempted to mediate their dispute with attorney Brad Andersen.<sup>12</sup> Following the unsuccessful mediation, Andersen sent the parties a letter formally confirming that they had been unable to resolve their dispute. CP 41-43. In that letter, he noted that “[n]either side has acted purposely or in bad faith. It is simply one of those situations that better communication could have prevented.” *Id.* at 42. Andersen later commended both sides for “their earnest desire to settle.” *Id.* at 43. A simple lack of communication is not indicative of bad faith. Alpine’s willingness to mediate the dispute, coupled with the mediator’s comments, supports a finding that it was acting in good faith.

Similarly, the record is devoid of evidence that the Weiss-Millers acted in bad faith by intervening in the underlying lawsuit. The trial court permitted the Weiss-Millers to intervene in Alpine’s lawsuit against the

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<sup>12</sup> The Weiss-Millers were not involved in the mediation with Andersen because they did not intervene as interested parties until after Alpine filed the complaint for damages.

Johnsons, which presumably would not have happened if the court had believed the Weiss-Millers' claims were brought for an improper purpose.

The Johnsons will likely propose a definition of bad faith based on *Scribner v. WorldCom, Inc.*, 249 F.3d 902 (9th Cir. 2001), *Riss v. Angel*, 131 Wn.2d 612, 934 P.2d 669 (1997), and *Day v. Santorsola*, 118 Wn. App. 746, 770-71, 76 P.3d 1190 (2003), to support their alleged entitlement to attorney fees on the basis of bad faith. CP 47-50. Despite the trial court's ruling that those cases apply, RP 49, they present materially different circumstances than those presented here and are easily distinguishable.

In *Scribner*, the Ninth Circuit was faced with the dilemma of deciding what the words "termination without cause" meant in the context of a stock option contract between employee Donald Scribner and his employer, WorldCom. Scribner owned unvested options to purchase shares of WorldCom stock, which were to become immediately exercisable if WorldCom terminated him "without cause." *Scribner*, 249 F.3d at 905. A committee, appointed by the employer, possessed the discretion to interpret the applicable stock-option plan. *Id.* at 906. WorldCom eventually terminated Scribner, not because of poor work performance, but to facilitate the sale of the division in which he worked. *Id.* at 906. When Scribner attempted to exercise his options, WorldCom

claimed his termination was considered “with cause” for stock options purposes and refused his tender. *Id.* at 907.

Reversing the grant of summary judgment to the employer, the Ninth Circuit held that the committee had discretion to interpret the stock-option plan but not to redefine the plan beyond the plain meaning of its terms. *Id.* at 911-12. The Ninth Circuit held that the committee’s interpretation of “without cause” was so far afield from its plain and ordinary meaning that it amounted to an impermissible redefinition. In essence, the committee chose its desired result and then applied the label necessary to bring that result about. *Id.* at 911-12.

Here, the Johnsons will likely argue Alpine and the Weiss-Millers redefined terms within the CC&Rs in a way that undermined the Johnsons’ justified expectations. To the contrary, Alpine and the Weiss-Millers explained the standards they used to argue the Johnsons had violated the CC&Rs and pointed to specific instances they believed were violations. There was no attempt to redefine terms to affirmatively undermine the Johnsons’ expectations; instead, the evidence reflects the parties merely interpreted the terms of the various CC&Rs differently. This Court implicitly acknowledged the parties’ divergent but reasonable interpretations by finding certain terms “ambiguous.” In effect, the Court determined there were *two reasonable interpretations* of the CC&Rs but

deemed the Johnsons' the more reasonable. *See, e.g., Vashon Island Comm. for Self-Gov't v. Wash. State Boundary Review Board*, 127 Wn.2d 759, 771, 903 P.2d 953 (1995) (noting a statute is ambiguous if it can be reasonably interpreted in more than one way). That this Court held the Johnsons' interpretations were more reasonable does not mean that Alpine or the Weiss-Millers were trying in bad faith to redefine the terms to suit their own needs.

In *Riss*, the Risses owned a lot in Mercia Heights, a residential subdivision subject to restrictive covenants recorded by the developer providing that new construction and remodeling must be approved by the Mercia Corporation prior to construction.<sup>13</sup> 131 Wn.2d at 616. The Risses submitted their plans to remove the existing dwelling on their lot and construct a one-story home with a daylight basement to the homeowners' designee for compliance and review. *Id.* at 617. The board of directors rejected the proposed plans based on the height of the structure, its bulk, the design exterior finish, and proximity to neighboring houses. *Id.* at 618. The Risses appealed the Board's decision to the homeowners, who voted against approving the proposed plans. *Id.* at 619.

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<sup>13</sup> Mercia Corporation was originally a nonprofit corporation consisting of the homeowners in the development. It was later dissolved, and the subdivision is now governed by the homeowners as an unincorporated homeowners association, which acts through an elected board of directors.

The Risses sued, contending the CC&Rs were not enforceable, and, alternatively, that their plans complied with the CC&Rs and the Board and association acted unreasonably in rejecting their plans. *Id.*

The Supreme Court affirmed the trial court's determination that the Risses could build their proposed home. Although the Court held that the homeowners association had discretion to consider size, height, and proximity to neighbors in deciding whether to approve the proposed plans, it also held that the association's rejection of the plans was unreasonable and arbitrary. *Id.* at 627-29. The Court subsequently determined the Risses were the prevailing party because they would essentially be able to build the house they sought to have approved; accordingly, they were entitled to attorney fees under the CC&Rs. *Id.* at 633.

There, the CC&Rs specifically provided that any lot owner could sue to enforce the covenants and *the prevailing party* was entitled to reasonable attorney fees and costs. *Id.* at 617, 633. In affirming the trial court's award of fees, the Supreme Court was concerned only with defining the term "prevailing party" under the applicable CC&Rs. *Id.* at 633-34. Bad faith was discussed only in terms of whether the board exercised its consent to construct reasonably and in good faith. *Bad faith had nothing whatsoever to do with the Court's fee award.* There is no condition precedent in the CC&Rs, as there is here, requiring a finding of

bad faith before fees could be awarded. By contrast, the CC&Rs here permit the prevailing party to recover attorney fees only if the other party has acted in bad faith. *Alpine* at \*15. The Johnsons are not entitled to attorney fees simply because they are the prevailing party; instead, they are entitled to attorney fees as the prevailing party *only* if *Alpine* and the Weiss-Millers acted in bad faith.

Like *Riss*, *Day* involves CC&Rs requiring a homeowners association's architectural committee to consent to construction of a home. The Days submitted proposed plans for the construction of their home, which the committee rejected because the plans called for the construction of a home that would block the view of Santorsola, one of the committee members. 118 Wn. App. at 751-53. The Court of Appeals concluded the trial court was correct in finding that the only reference to view in the CC&Rs was with respect to the heights of trees and shrubs. With respect to houses, however, the CC&Rs stated that they could be no more than 2 stories in height "as limited by the power of the committee to limit the height of any structure in said premises." *Id.* at 756.

In affirming the trial court finding that the committee exercised its discretion in bad faith, the Court of Appeals found that Santorsola's refusal to recuse herself was improper and a breach of the committee's duty to act in good faith. The Court of Appeals also cited to other

instances in which the committee had previously approved plans calling for homes that would impact other homeowners' views in affirming the trial court's findings of bad faith. *Id.* at 758. The Court noted that rather than independently evaluating the Days' proposed plans, the committee relied on self-serving investigations conducted by Santorsola, the committee member whose view would be affected by the Day's proposed home. *Id.* at 758-59.

Finally, the Court concluded the trial court's award of fees to the Days was appropriate under the attorney fee provision in the CC&Rs. *Id.* at 769. Although the CC&Rs did not use the term "prevailing party," they referred to a "successful action." *Id.* The Court applied the prevailing party standard by analogy and, citing to *Riss*, determined the Days were the substantially prevailing party and their action was "successful" because they would be permitted to build a house nearly in accordance with the house they sought to have approved. *Id.* at 770. The Court made no reference to bad faith in determining the Days' entitlement to fees.

Here, by contrast, there is no evidence Alpine improperly deferred its authority to approve the Johnsons' home to the Weiss-Millers or any other homeowner in the subdivision adversely affected by the Johnsons' home. As the developer, Alpine had "the power to control the building, structures, location, improvements and initial landscaping placed on each

lot.” CP 29. Although this Court ultimately disagreed with Alpine’s interpretation of the CC&Rs by affirming the judgment entered against Alpine, it did not find its interpretation unreasonable. And contrary to the committee in *Day*, Alpine did not rely on self-serving investigations to claim the Johnsons were violating the CC&Rs. For example, Alpine retained the services of a geo-technical expert to address the alleged erosion control issues on the Johnsons’ property. Finally, unlike the CC&Rs in *Riss* and *Day*, the applicable CC&Rs here grant attorney fees to the prevailing party only where the other party acted in bad faith. Without a finding that Alpine or the Weiss-Millers acted in bad faith, the Johnsons are not entitled to attorney fees even where they are the substantially prevailing party.

The Johnsons’ proposed definition of good faith/bad faith for purposes of article 4, §§ 2 and 3 of the CC&Rs is based on the discussions of bad faith found in *Scribner*, *Riss*, and *Day*. Those cases have nothing to do with the concept of bad faith to which the CC&Rs here are addressed. The Johnsons totally ignored the cases relating to CR 11 and RCW 4.84.185, the more apt analogies to the issue confronting this Court, when interpreting bad faith below. Like the cases on CR 11/RCW 4.84.185 require, this Court must determine if there was no legitimate basis in law or fact for the position of Alpine and the Weiss-Millers at trial

and if their trial counsel did not undertake a legitimate inquiry on the law and facts before instituting this action.

The CC&Rs provide that the prevailing party at trial is entitled to recover attorney fees only on the basis of the other party's bad faith. Alpine and the Weiss-Millers did not act in bad faith by instituting this action where there was evidence the Johnsons were prompted to comply with the CC&Rs by the filing of the underlying complaints. Moreover, Alpine and the Weiss-Millers prevailed on more than one issue on appeal. Lacking substantial evidence of bad faith, the trial court's award of attorney fees to the Johnsons was error.

(3) The Court Erred By Awarding The Johnsons An Unreasonable And Excessive Amount of Attorney Fees

Only if this Court affirms the trial court ruling finding Alpine and the Weiss-Millers acted in bad faith should it consider the final question; namely, whether the amount of attorney fees the trial court awarded to the Johnsons was reasonable under the abuse of discretion standard.

Washington courts have adopted the lodestar approach when assessing reasonable attorney fees. *See Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 587-98, 675 P.2d 193 (1983). A lodestar award is arrived at by multiplying the number of hours reasonably worked by a reasonable hourly rate. *Id.* at 593. *See also Mahler*, 135 Wn.2d at 433-34

(expanding on the methodology established in *Bowers*). The first step when calculating the lodestar amount is to determine whether the attorney spent a reasonable number of hours securing his client's successful recovery. See *Mahler*, 135 Wn.2d at 434. Necessarily, this decision requires the Court to exclude any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims.<sup>14</sup> *Scott Fetzer Co. v. Weeks (Fetzer II)*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993). See also, *Pham v. City of Seattle*, 159 Wn.2d 527, ¶¶ 17-20, 151 P.3d 976 (2007) (noting unproductive hours, hours associated with unsuccessful motions, and hours not sufficiently related to the successful claim must be excised). Counsel must provide contemporaneous records documenting the hours worked; however, such documentation need not be exhaustive or provided in minute detail. *Bowers*, 100 Wn.2d at 597.

The next step is to determine the reasonableness of the attorney's hourly rate at the time he actually billed the client for the services. *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 377, 798 P.2d 799 (1990) (outside civil rights context, contemporaneous rates actually billed

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<sup>14</sup> As previously noted, Alpine's lawsuit forced the Johnsons to comply with a number of CC&Rs provisions. The Johnsons most likely would not have finally landscaped their property, cleaned up construction debris, or hidden their bulldozer without this lawsuit. Alpine received no credit for this successful outcome in the trial court's award.

rather than current rates or contemporaneous rates adjusted for inflation will be employed).<sup>15</sup>

Washington courts have repeatedly held that the absence of an adequate record on which to review a fee award will result in a remand of the award to the trial court to develop such a record. *Mahler*, 135 Wn.2d at 435.

Here, the trial court erred by awarding an unreasonable and excessive amount of attorney fees to the Johnsons because the award is unsupported by the record. As an initial matter, Alpine and the Weiss-Millers presented evidence their attorneys performed due diligence before filing the underlying complaints to ensure the complaints were warranted by existing law. CP 19, 22; RP 33. The Johnsons failed to rebut this credible evidence. Moreover, the trial court acknowledged that it was only after viewing the Johnsons' property at the request of the parties and weighing the evidence *at the time of trial* that it determined the Johnsons had not violated the CC&Rs. RP 45-46. This occurred three years after Alpine filed its complaint and the Weiss-Millers moved to

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<sup>15</sup> The final step would allow the Court to adjust the fee upward or downward to reflect other factors. *See, e.g., Fetzer II*, 122 Wn.2d at 150 (other factors include the difficulty of the questions involved, the skill required, customary charges of other attorneys, the benefit to the client, and the contingency or certainty in collecting the fee). *See also Mahler*, 135 Wn.2d at 433 n.20 (noting the factors in RPC 1.5(a) may be used to supplement a lodestar award). This step is not addressed here, however, because the Johnsons' trial counsel did not request a multiplier and the trial court did not consider other factors when calculating the award.

intervene. *Alpine*, at \*3. Yet the trial court made no effort to limit the fee award to the amount the Johnsons reasonably expended in responding to any alleged bad faith occurring at the time of trial as opposed to incurred in responding to the complaints. The un rebutted evidence demonstrates the complaints were not filed in bad faith.

The trial court found on remand that no duplicate fees were charged and that the fees were sufficiently itemized for the work performed. CP 269-70. The evidence does not support the findings. The Johnsons did not file a new fee request on remand or provide their attorney's actual invoices to the trial court. CP 75-76, 268. Nowhere in the record on remand is there evidence documenting precisely how the time the Johnsons' attorney spent on the case secured his clients' successful recovery nor is there evidence adequately explaining how his time was actually spent. RP 37-38. Without such statements or invoices, there is no way to verify the fee request was based on contemporaneous time records or to determine whether duplicative hours incurred in preparing for multiple trial dates or hours spent pursuing unsuccessful claims were excluded. Without such evidence the trial court may have miscalculated the award. *See State v. McCorkle*, 88 Wn. App. 485, 500, 945 P.2d 736 (1997). The existing record on remand is insufficient to determine whether the trial court's fee award was reasonable.

Despite the inadequacy of the Johnsons' fee request, the trial court nevertheless reinstated the original judgment against Alpine and the Weiss-Millers. CP 270; RP 46-47. This was error. *Biggs*, 124 Wn.2d at 202 n.3 (cautioning that reimposition of previous sanction, regardless of findings, would be presumptively unreasonable and an abuse of discretion). In addition, the trial court's oral decision does not explain how it calculated the fee award as required for review. *See Just Dirt, Inc. v. Knight Excavating, Inc.*, \_\_\_ Wn. App. \_\_\_, 157 P.3d 431, 436 (2007). The trial court's entire lodestar analysis boils down to the following brief statement given during the oral ruling:

I had previously addressed this issue on other argument as far as the reasonableness of the attorneys' fees.

Considering the amount of time that was involved in this case, the amount of preparation that was involved, I reviewed Mr. Hughes' attorneys' fees billings and I found them to be appropriate. Under the Lodestar method, I believe he accounted for his hours appropriately and with sufficient specificity to satisfy the Court that his attorneys' fees are reasonable.

RP 47. Yet the trial court never ruled on the reasonableness of the Johnsons' fee request; in fact, the court's previous findings and conclusions, as well as the judgment, were silent on the basis for the court's fee decision. While the trial court is not required to parse the billing record by each entry, it is required to make findings of fact in

response to particular challenges. *Mahler*, 135 Wn.2d at 435; *Mayer v. City of Seattle*, 102 Wn. App. 66, 82, 10 P.3d 408 (2000). The record must reflect the trial court evaluated the reasonableness of the rate, the reasonableness of the hours claimed, which claims merit a fee award and which do not, challenges to the hours claimed, and any multiplier factors. The court's failure to enter such findings here was error.

The trial court abused its discretion by awarding the Johnsons an unreasonable and excessive amount of attorney fees where the award was unsupported by the record. Moreover, the award is presumptively unreasonable where the trial court simply reinstated its original fee award. As the prevailing party, the Johnsons bore the burden to procure formal written findings supporting their position, and they must "abide the consequences" of their failure to fulfill that duty. *Peoples Nat'l Bank v. Birney's Enters., Inc.*, 54 Wn. App. 668, 670, 775 P.2d 466 (1989).

#### F. CONCLUSION

The Johnsons are not entitled to attorney fees simply because they are the substantially prevailing party; instead, they are entitled to attorney fees as the prevailing party pursuant to the applicable CC&Rs *only* if Alpine and the Weiss-Millers acted in bad faith. Where there is no evidence that Alpine or the Weiss-Millers acted in bad faith or that they

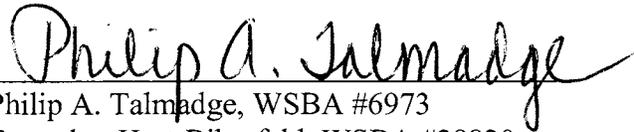
failed to present debatable issues supported by the facts and the law, the trial court erred by awarding the Johnsons their attorney fees.

The trial court abused its discretion by awarding attorney fees because the record does not contain substantial evidence to support the amount of fees awarded.

The trial court's order granting supplemental findings of fact should be vacated.

DATED this ~~28th~~ day of June, 2007.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973  
Emmelyn Hart-Biberfeld, WSBA #28820  
Talmadge Law Group PLLC  
18010 Southcenter Parkway  
Tukwila, Washington 98188-4630  
(206) 574-6661  
Attorneys for Appellants  
Alpine Quality Construction Services, Inc.  
and Steve Weiss and Linda Miller

# **APPENDIX**

## Westlaw.

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Not Reported in P.3d, 134 Wash.App. 1029, 2006 WL 2262027 (Wash.App. Div. 2)

(Cite as: 2006 WL 2262027 (Wash.App. Div. 2))

NOTE: UNPUBLISHED OPINION, SEE RCWA  
2.06.040

Court of Appeals of Washington,  
Division 2.  
ALPINE QUALITY CONSTRUCTION  
SERVICES INC., a Washington corporation,  
Appellant,  
and  
Steven A. Weiss And Linda I. Miller, husband and  
wife, and their marital  
community, Plaintiffs-Intervenors,  
v.  
Brett JOHNSON and Teresa Johnson, husband and  
wife, and their marital  
community, Respondents, Alpine Quality  
Construction Services, Inc., a  
Washington corporation, Plaintiff,  
and  
Steven A. Weiss and Linda I. Miller, husband and  
wife, and their marital  
community, Appellants, Plaintiffs-Intervenors,  
v.  
Brett Johnson and Teresa Johnson, husband and  
wife, and their marital  
community, Respondents.  
Nos. 32153-0-II, 33093-8-II.  
Aug. 8, 2006.

**Background:** Real estate developer and subdivision residents brought action against owners of subdivision lot for alleged violation of subdivision's covenants. The Superior Court, Skamania County, E. Thompson Reynolds, J., ruled that owners had not violated the covenants. Developer appealed and residents appealed from the denial of their motion for relief from judgment.

**Holdings:** The Court of Appeals, Bridgewater, J., held that:  
(1) developer approved owners' modular home for subdivision;

(2) vinyl siding on modular home did not violate subdivision's covenants;  
(3) modular home did not violate setback requirements of subdivision's covenants;  
(4) lot owners' garage complied with subdivision's covenants;  
(5) condition of lot during construction of home did not violate subdivision's covenant on property maintenance;  
(6) bulldozer was unsightly vehicle within meaning of subdivision's covenants and was not allowed on property; and  
(7) trial court failed to make formal findings of fact or conclusions of law related to award of attorney fees and any bad faith on part of developer and subdivision residents in bringing action to enforce covenants.  
Affirmed in part and remanded.

## West Headnotes

**[1] Evidence** ⚡213(4)

157k213(4) Most Cited Cases

Evidence rule barring admission into evidence of statements made in course of compromise negotiations did not bar mediator's testimony as to statements of real estate developer's president, in developer's action against owners of subdivision lot for owners' alleged violation of subdivision's covenants; mediator could have learned of statements made by president before settlement negotiations, and parties had agreed that mediator could testify on matters that occurred before mediation session was agreed on. ER 408.

**[2] Appeal and Error** ⚡1050.1(10)

30k1050.1(10) Most Cited Cases

Even if mediator's testimony as to statements of real estate developer's president was derived from settlement negotiations between parties and was irrelevant and unfairly prejudicial, admission of testimony in real estate developer's action against subdivision lot owners for owners' alleged violation

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of subdivision's covenants was harmless error; trial court would have reached same conclusion that owners had not violated covenants, even if trial court had excluded evidence. ER 401, 403, 408.

**[3] Covenants** ⤴69(2)

108k69(2) Most Cited Cases

Real estate developer approved subdivision lot owners' modular home for subdivision, and thus owners were not in violation of subdivision's covenants; developer did not draw distinction between modular homes and prefabricated homes, developer's president admitted that he and owner discussed owners' plans to place modular home on lot, and developer gave owners conditions to meet for their home and subsequently amended covenants to allow exception for prefabricated homes.

**[4] Covenants** ⤴69(2)

108k69(2) Most Cited Cases

Exception in subdivision's covenants, which permitted prefabricated homes on individual basis with developer's approval, was ambiguous; covenants intended to ban mobile homes and modular homes, but "modular" homes could be equated with prefabricated home.

**[5] Covenants** ⤴69(2)

108k69(2) Most Cited Cases

Vinyl siding on subdivision lot owners' modular home did not violate subdivision's covenants; vinyl was not prohibited siding material, and siding was channel and horizontal lap as permitted by covenants.

**[6] Covenants** ⤴69(2)

108k69(2) Most Cited Cases

Subdivision lot owners' modular home did not violate setback requirements of subdivision's covenants that required that dwellings observe 100 foot set back from hillsides; covenant on setback was ambiguous because it did not define "hillside" and did not state whether 100 foot setback was from top of hillside, middle, or toe of hillside, placement of home did not violate county ordinances or setback requirements, and placement of home met requirements established by geo-tech survey required for property in landslide control area.

**[7] Covenants** ⤴69(2)

108k69(2) Most Cited Cases

Subdivision lot owners' garage complied with subdivision's covenants that required that garage openings not directly face road; owner complied with covenants by having garage design changed so that garage doors opened to side.

**[8] Covenants** ⤴69(1)

108k69(1) Most Cited Cases

Condition of subdivision lot owners' lot during construction of their home did not violate subdivision's covenant on property maintenance; presence of construction material and debris during construction was normal and was nothing out of ordinary.

**[9] Covenants** ⤴69(1)

108k69(1) Most Cited Cases

Subdivision lot owners' bulldozer was unsightly vehicle within meaning of subdivision's covenants and was not allowed on property; bulldozer was orange and rusty and did not blend with natural landscape, lot owner placed tarp over bulldozer because of complaints, bulldozer had been sitting on property for long period of time after construction on lot had been completed, covenants did not make exception for unsightly vehicle that was out of sight, covered with tarp, and hidden by brush, and covenants permitted unsightly vehicle only within confines of enclosed garage.

**[10] Covenants** ⤴69(1)

108k69(1) Most Cited Cases

Subdivision lot owners did not violate subdivision's covenants with respect to landscaping of lot; covenant's did not define "landscaping," it was almost impossible to meet requirement of covenants that landscaping be completed in 90 days, owners planted grass, shrubs, and wild flowers around lot, owners planted more grass to control problems with weeds, and trial court viewed lot finding it to be neat, well-kept up, and nicely landscaped with nice yard and plantings.

**[11] Appeal and Error** ⤴1144

30k1144 Most Cited Cases

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(Cite as: 2006 WL 2262027 (Wash.App. Div. 2))

**[11] Covenants** ↪132(2)

108k132(2) Most Cited Cases

Trial court failed to make formal findings of fact and conclusions of law related to award of attorney fees and any bad faith on part of real estate developer and subdivision residents in bringing action against subdivision lot owners for owners' alleged violations of subdivision's covenants, and thus cause would be remanded for requisite findings of fact and conclusions of law; covenants permitted award of attorney fees to prevailing party in action to enforce covenants only if other party acted in bad faith.

**[12] Judgment** ↪378

228k378 Most Cited Cases

Subdivision residents did not meet requirements for relief from judgment based on newly discovered evidence, in residents' action against subdivision lot owners for owners' alleged violations of subdivision's covenants; that lot owner conducted used car sales business on property, in violation of covenants, could have been discovered through reasonable inquiry before end of trial, and, because issue of use of property to conduct business was never brought up at trial, newly discovered evidence was not material to trial. CR 60(b)(3).

**[13] Judgment** ↪343

228k343 Most Cited Cases

Failure of attorney, representing subdivision residents in their action to enforce subdivision's covenants, to file appeal following entry of judgment against residents was not extraordinary circumstance that would warrant grant of residents' motion for relief from judgment. CR 60(b)(11).

**[14] Costs** ↪260(5)

102k260(5) Most Cited Cases

Subdivision residents' appeal from denial of their motion for relief from judgment entered against them in their action against subdivision lot owners to enforce subdivision's covenants was in bad faith and frivolous, and thus lot owners were entitled to award of reasonable attorney fees for responding to appeal. CR 60(b); RAP 18.1.

Appeal from Superior Court of Skamania County; Hon. E. Thompson Reynolds, J.

Philip Albert Talmadge, Talmadge Law Group PLLC, Tukwila, WA, Terry Ryan (Appearing Pro Se), c/o Alpine Quality Construction, Vancouver, WA, for Appellant.

Robert Malden Hughes, Attorney at Law, Vancouver, WA, for Respondents.

Dale Halverson Schofield, Attorney at Law, Portland, OR, for Appellants, Plaintiffs-Intervenors.

## UNPUBLISHED OPINION

BRIDGEWATER, J.

\*1 Alpine Quality Construction appeals the trial court's judgment, which held that Brett and Theresa Johnson did not violate a subdivision's covenants when they placed a modular home on their lot. Among other things, we hold: (1) that an exception in the covenants, which permitted prefabricated homes on an individual basis with developer approval, was ambiguous; (2) that Alpine approved the Johnsons' modular home for the subdivision; (3) that vinyl siding on the home did not violate the covenants; and (4) that a bulldozer on site violated the covenants and must be removed. Steven Weiss and Linda Miller (Weiss-Millers), purchasers in the subdivision, also appeal the trial court's denial of their CR 60 motion, but we find their claim is meritless.

Because we do not have a record of whether Alpine and/or the Weiss-Millers acted in bad faith in bringing their claims at trial, as required by the covenants for an award of attorney fees and costs, we remand the award for an entry of findings of fact and conclusions of law. Should the trial court find that Alpine and/or the Weiss-Millers acted in bad faith in bringing their claims at trial, the Johnsons will be entitled to reasonable attorney fees and costs, both at trial and on appeal, as the prevailing party under the covenants. Nevertheless, because we independently find that the Weiss-Millers' appeal was meritless and brought in bad faith, we hold that the Johnsons currently are entitled to reasonable attorney fees and costs for responding to the Weiss-Millers' appeal.

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Therefore, we affirm in part, but remand for findings of fact and conclusions of law regarding the award of attorney fees and costs at trial.

amended and recorded the covenants. In fact, the Johnsons were not aware of the amended and recorded covenants until the middle of February 2001, when this dispute arose.

#### I. FACTS

In 2000, Brett and Teresa Johnson contacted Terry Ryan, president and owner of Alpine Quality Construction Services, Inc., and told him that they wanted to purchase a lot in the Riverview Meadow subdivision. [FN1]

\*2 According to Ryan, he indicated that he would allow the Johnsons to place the modular home on lot 7, subject to certain conditions. One of these conditions was that Ryan needed to approve the plans and specifications of the home.

FN1. This subdivision, which consists of 12 lots, is located near Stevenson in Skamania County.

After these discussions, the Johnsons signed an earnest money agreement to purchase lot 7 in the subdivision.

On April 22, 2000, the Johnsons, accompanied by a family friend, met with Ryan. During this meeting, the Johnsons discussed their plans to place a modular home, built by The Legacy Corporation (TLC Modular Homes), on lot 7. They showed Ryan many documents, which included: promotional materials, drawings, floor plans, and a materials specifications list, for their modular home. The materials list included interior and exterior construction materials and components, such as vinyl siding.

On May 18, 2000, Ryan recorded the covenants, which allowed prefabricated homes to be placed on the subdivision lots on an individual basis with developer approval. [FN3]

FN3. On June 9, 2000, Ryan signed another version of the covenants, but this version retained the amendment that allowed for prefabricated homes to be placed on the subdivision lots on an individual basis with developer approval.

During this meeting, the Johnsons and Ryan also reviewed the unrecorded covenants. The Johnsons understood that the unrecorded covenants prohibited all manufactured homes, mobile homes, modular homes, prefabricated homes, and similar structures on any subdivision lot. But, because they were planning to purchase a modular home, the Johnsons expressed their concern about these prohibitions to Ryan.

On July 18, 2000, the Johnsons took title to lot 7. During July, August, and September, the Johnsons prepared the lot by clearing it of trees and underbrush. They began preparing and excavating for the daylight basement in October. By the time the modular home units arrived in February 2001, the daylight basement was complete. During this time, Ryan frequently visited the construction site.

According to the Johnsons, Ryan indicated that he would allow them to place the modular home on lot 7. Thus, Ryan assured the Johnsons that he would amend the covenants before he recorded them. [FN2]

According to Ryan, the Johnsons had yet to provide him with any plans and specifications of their home; in fact, the Johnsons did not provide him with anything until March 2001. And Ryan never explicitly approved the plans and specifications of the Johnsons' home.

FN2. The Johnsons admit that they reviewed only the unrecorded covenants. They never reviewed the covenants before closing to determine whether Ryan actually

But, according to Mr. Johnson, he did not seek Ryan's approval of the plans and specifications because, 'I thought I already had it.' 7 Report of Proceedings (RP) (May 24, 2004) at 875. And

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regardless, Ryan never asked to see the plans and specifications of their home, except on two occasions. In September, Ryan met with Mr. Johnson and discussed the home's roofing composition. In early 2001, at a local gas station, Ryan asked Mr. Johnson if he could view the home's blueprints. Mr. Johnson offered to retrieve them from his vehicle, but Ryan said that he would have to view them at a later date. Upon leaving, Mr. Johnson encouraged Ryan to view the home's blueprints at the construction site. But Ryan failed to do so. And, although he had other opportunities to review the home's blueprints, Ryan admitted that he never reviewed them.

In early February 2001, Mr. Johnson informed Ryan that the modular home would be arriving in a week. And Ryan gave Mr. Johnson permission to store the modular home units on the subdivision road for a few days and to lock the gate at the entrance to the subdivision road.

On February 12, 2001, the first modular home unit arrived. According to the Johnsons, Ryan arrived at the lot and talked to Mr. Johnson for almost 30 minutes. Ryan was excited about the arrival of the modular home. But, according to Ryan, he was surprised and upset that the Johnsons were assembling a modular home with vinyl siding. Later that evening, Ryan informed Mr. Johnson that he would not be able to place the modular home on the lot and that the vinyl siding was unacceptable.

Weiss stated that he also had witnessed the arrival of the first modular home unit. Weiss complained to both Ryan and Ginger Townsend, Alpine's real estate agent, about the modular home and the vinyl siding. To allay Weiss's fears, Ryan responded that the Johnsons' home would 'be fine' when completed. 3 Clerk's Papers (CP) at 437; 5 RP (Mar. 31, 2004) at 539-42.

\*3 But on February 13, 2001, with assistance from counsel, Ryan sent a letter to the Johnsons, requesting them to cease and desist from any further assembly of the home because it violated the covenants. Ryan claims that the Johnsons replied to his letter by stating, '{S}ue me.' 2 RP (Mar. 29,

2004) at 142.

On February 23, 2001, Ryan sent another letter to the Johnsons, in which he requested documents and raised concerns regarding the appearance of the lot. The Johnsons ignored this letter. The Johnsons also ignored letters from Ryan's counsel and even ignored letters that were delivered to them in care of Brad Andersen, who was attempting to mediate the matter. [FN4]

FN4. The parties attempted to informally and formally mediate through Andersen before Alpine filed its complaint.

Thus, on May 4, 2001, Alpine filed a complaint for injunctive relief and for damages, alleging that the Johnsons violated the covenants. The Weiss-Millers moved to intervene; the trial court granted their motion.

After a six-day bench trial in March and May of 2004, the trial court ruled in favor of the Johnsons. The trial court entered findings of fact, conclusions of law, and a judgment on July 16, 2004. The trial court awarded attorney fees to the Johnsons. Alpine moved for entry of additional findings of fact and conclusions of law, but the trial court denied the motion. Alpine also moved for a new trial, which the trial court denied. Alpine timely appealed.

Believing that Alpine's appeal would dispose of the entire case, the Weiss-Millers did not file a timely appeal. Instead, the Weiss-Millers sought relief from the judgment under CR 60(b)(3) and (11). The trial court denied the Weiss-Millers' CR 60(b)(3) and (11) motion and entered a supplemental judgment against them for additional attorney fees. The Weiss-Millers timely appealed from the trial court's denial and supplemental judgment.

## II. EVIDENTIARY RULINGS

[1] Alpine argues that the trial court erred in allowing Andersen to testify under ER 408.

We review the trial court's admission of evidence for abuse of discretion. *State v. Pirtle*, 127

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Wash.2d 628, 648, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996). 'A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds.' *Havens v. C & D Plastics, Inc.*, 124 Wash.2d 158, 168, 876 P.2d 435 (1994). We may affirm on any ground adequately supported by the record. *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wash.2d 751, 766, 58 P.3d 276 (2002).

ER 408 states in part:

Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Here, Andersen initially acted as an informal 'conduit' between Ryan and the Johnsons in order to facilitate a settlement of their dispute. 2 RP at 207, 211; Br. of Appellant at 20. When this informal settlement failed, Alpine and the Johnsons sought a more formal mediation with Andersen.

\*4 Alpine argues that the Johnsons used Andersen's testimony to impeach Ryan's testimony. And Alpine contends, 'Clearly, Andersen learned of these alleged Ryan statements while he was acting as a 'settlement conduit' for the parties.' Br. of Appellant at 22. Thus, Alpine concludes that Andersen's testimony 'was inadmissible under ER 408 because it was evidence derived from the settlement process between the parties.' Br. of Appellant at 22.

But Alpine offers only conclusory statements about how Andersen learned of Ryan's statements. Alpine fails to recognize that Andersen could have learned of these statements before the settlement negotiations. And Alpine fails to recognize that ER 408 does not bar statements made outside the context of settlement negotiations. See 5A Karl B. Tegland, Washington Practice: Evidence Law and

Practice sec. 408.8, at 57-61 (4th ed.2005). In fact, Alpine, Andersen, and the Johnsons agreed that Andersen could testify to matters that occurred before the settlement negotiations. [FN5] And consistent with this agreement, the trial court ruled that Andersen 'could testify on matters that occurred before mediation session was agreed upon.' 2 RP at 215-16.

FN5. In section six of the mediation agreement, Alpine, Andersen, and the Johnsons agreed that:

The Mediator may not be called to testify as a witness (except to testify to matters that occurred before a mediation session was agreed upon), consultant or expert in any pending or future action relating to the subject matter of the mediation, including those between persons not Parties to the mediation.

Ex. 68 at 2 (emphasis added).

[2] Alpine next asserts that Andersen derived his testimony from the settlement process between the parties. And Alpine asserts that the trial court admitted Andersen's testimony under ER 408. Alpine also argues that the trial court erred in admitting Andersen's testimony because it was irrelevant under ER 401 and unfairly prejudicial under ER 403.

While ER 408 excludes evidence of settlement negotiations when offered to prove liability, courts may admit this evidence to prove bias or prejudice. *Northington v. Sivo*, 102 Wash.App. 545, 549, 8 P.3d 1067 (2000). Nevertheless, this evidence of settlement negotiations must satisfy all other evidentiary rules. *Northington*, 102 Wash.App. at 549, 8 P.3d 1067.

Assuming, without deciding, that Andersen's testimony was: (1) derived from the settlement negotiations between the parties; (2) irrelevant; and (3) unfairly prejudicial, we would not reverse because the error was harmless. See *Thomas v. French*, 99 Wash.2d 95, 104, 659 P.2d 1097 (1983) (error without prejudice is not grounds for reversal and will not be considered prejudicial unless it

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affects, or presumptively affects, the outcome of the trial).

The trial court would have reached the same conclusion even if it had excluded Andersen's testimony regarding when the Johnsons showed Ryan the home's plans and materials list. Mr. Johnson, Mrs. Johnson, and Ben Sciacca all testified that the Johnsons showed Ryan many documents about their home, which included: promotional materials, drawings, floor plans, and a materials specifications list. And Mr. Johnson testified about two occasions when Ryan asked to see the plans and specifications of their home.

Thus, whether the trial court admitted Mr. Andersen's testimony under ER 408 or not, there is no reversible error.

### III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

#### A. General Standard of Review

\*5 We review the trial court's findings of fact to determine whether they are supported by substantial evidence and, if so, whether the findings of fact in turn support the trial court's conclusions of law and judgment. *Ridgeview Props. v. Starbuck*, 96 Wash.2d 716, 719, 638 P.2d 1231 (1982). Substantial evidence is evidence that is sufficient to persuade a fairminded person of the truth of the declared premise. *Ridgeview Props.*, 96 Wash.2d at 719, 638 P.2d 1231. We review de novo the trial court's conclusions of law. *Rasmussen v. Bendotti*, 107 Wash.App. 947, 954, 29 P.3d 56 (2001).

#### B. Interpretation of the Covenants

Our primary objective in interpreting the covenants is determining the intent of the original parties. *Viking Props., Inc. v. Holm*, 155 Wash.2d 112, 120, 118 P.3d 322 (2005); *Riss v. Angel*, 131 Wash.2d 612, 621, 934 P.2d 669 (1997). And whether we apply the rules of strict construction or liberal construction in interpreting the covenants depends on the status of the parties.

Our Supreme Court expressly acknowledged that: where construction of restrictive covenants is necessitated by a dispute not involving the maker of the covenants, but rather among homeowners in a subdivision governed by the restrictive covenants, rules of strict construction against the grantor or in favor of the free use of land are inapplicable. The court's goal is to ascertain and give effect to those purposes intended by the covenants.

*Riss*, 131 Wash.2d at 623, 934 P.2d 669 (emphasis added). But, 'c} onstruction against the grantor who presumably prepared the deed is quite a different matter from construction of covenants intended to restrict and protect all the lots of a plat and future owners who buy and build in reliance thereon.' *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wash.2d 810, 816, 854 P.2d 1072 (1993). And in *Lakes at Mercer Island Homeowners Association v. Witrak*, 61 Wash.App. 177, 180, 810 P.2d 27, review denied, 117 Wash.2d 1013, 816 P.2d 1224 (1991), Division One of this court stated, 'While {rules of strict construction} may have some validity when the conflict is between a homeowner and the maker of the covenants, it has limited value when the conflict is between homeowners.'

Because Alpine is the grantor of the covenants and initiated this dispute, the trial court should have applied the rules of strict construction in interpreting the covenants. But whether the trial court decided to apply rules of strict construction or liberal construction is of little significance. After all, we give the covenants' language its ordinary and common meaning. *Riss*, 131 Wash.2d at 621, 934 P.2d 669. And we construe the covenants in their entirety. *Riss*, 131 Wash.2d at 621, 934 P.2d 669. Finally, we may resolve any ambiguity as to the intent of the original parties who established the covenants by considering evidence of the surrounding circumstances. *Riss*, 131 Wash.2d at 623, 934 P.2d 669.

#### C. Approval of the Johnsons' Home

[3] Alpine essentially argues that the trial court erred in its interpretation of article 1, paragraph 10

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of the covenants by treating modular homes as the equivalent of prefabricated homes. Among other things, Alpine assigns error to the trial court's finding of fact that 'both Mr. Ryan and the Johnsons considered the Johnson's {sic} home to be 'prefabricated.' The parties considered it a prefabricated house, drawing no distinction between prefabricated and modular.' 5 CP at 917. And Alpine claims that Ryan never made an exception for the Johnsons' home.

\*6 Article 1, paragraph 10 of the covenants states:

The use, placement or storage of mobile homes, modular or prefabricated homes, or manufactured homes, or similar structures, which are largely constructed off sight {sic} as living units, are prohibited. An exception for prefabricated home {s} can be considered if they meet the construction standards, on an individual basis by the developer.

Ex. 7 at 2.

Using this language, Alpine argues that it intended to ban mobile homes and modular homes from the subdivision because they are inconsistent with the intent to create a 'high-end' subdivision. Br. of Appellant at 29. Alpine also argues that because the trial court ignored the statutory definitions of modular, manufactured, mobile, and prefabricated homes, it failed to implement the covenants' intent.

[4] We find that the covenants' language is ambiguous because 'modular' homes may be equated with 'prefabricated' homes. Thus, after examining the covenants' language, our questions are three: (1) Did Alpine intend to use the terms modular and prefabricated interchangeably? (2) Did Alpine intend to make an exception only for the subcategory of prefabricated homes? and (3) Did Alpine intend to make an exception for both modular and prefabricated homes? Given the ambiguity of Alpine's intent, we agree that the trial court correctly looked beyond the document to ascertain intent from the surrounding circumstances. Therefore, we review whether substantial evidence supports the trial court's finding of fact.

Here, the evidence showed that Alpine never

distinguished between the definitions of modular homes, prefabricated homes, or manufactured homes before the trial. In his deposition, Ryan admitted, 'I told {Mr. Johnson} that if he was going to put in a modular home, that it would have to comply, and it would have to appear to be suitable.' 2 CP at 263 (emphasis added). When asked if he had ever discussed the difference between a modular home, a prefabricated home, or a manufactured home, Ryan replied, 'I don't believe we did.' 2 CP at 264.

Furthermore, in his declaration in support of summary judgment, Ryan stated, 'Brett Johnson approached me and requested that Alpine allow a prefabricated home on Defendants' lot.' Ex. 71 at 2 (emphasis added). Ryan also declared, 'In order to accommodate Mr. Johnson, and based on his express representations, {I} informed Mr. Johnson that he could place a prefabricated home, as long as it appeared site built and was of high quality.' Ex. 71 at 2 (emphasis added). And, Ryan stated, 'Mr. Johnson led me to believe that the company delivering the prefabricated home was also providing the garage.' Ex. 71 at 2 (emphasis added).

Yet, within his declaration, Ryan also stated, 'Defendants moved into their manufactured home on or about February 14, 2001.' Ex. 71 at 3 (emphasis added). Later in his declaration, Ryan stated, 'Unfortunately, given the condition of the prefabricated home ... sales activity have {sic} been minimal, at best.' Ex. 71 at 4 (emphasis added). And Ryan repeatedly stated that the manufactured home violated the setback requirements in the covenants. Ex. 71 at 4 (emphasis added). Finally, in his supplemental declaration, Ryan alternatively referred to the Johnsons' home as a modular home and a manufactured home. Ex. 72 at 1, 2, 3 (emphasis added).

\*7 And at trial, the evidence showed that a distinction between the definitions of modular homes and prefabricated homes may not even exist. Marlan Morat, a witness for the Johnsons, testified that modular homes are a subcategory of 'prefabrication' homes. 3 RP (Mar. 30, 2004) at 296. Sciacca, another witness for the Johnsons, testified

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that the difference between a modular home and a prefabricated home is 'a play on words.' 9 RP (May 25, 2004) at 1050. And Ray Wagner, an architect for TLC Modular Homes, testified, 'Well, that's what a modular home is, it's prefabricated in the factory.' 10 RP (May 26, 2004) at 1184. Finally, counsel for the Weiss-Millers suggested that although the statutes and building codes treat modular homes and manufactured homes differently, 'They're all prefabricated.' 6 RP (May 24, 2004) at 659.

Based on this substantial evidence, the trial court correctly found that Alpine intended to draw no distinction between modular homes and prefabricated homes.

Furthermore, substantial evidence refutes Ryan's claim that he never considered, nor made, an exception for the Johnsons' home. First, Mr. Johnson testified that on April 22, 2000, he and his wife met with Ryan and discussed 'what we were wanting to do, what we were building, everything from the size of the house, the dimensions of the house ... what it would look like.' 7 RP at 748. Mr. Johnson testified, 'This would have to be okayed by {Ryan} if we were to sign this earnest money. And he okayed it.' 7 RP at 748. 'Oh, {Ryan} was real agreeable. Just everything was yes, yes, yes, no problem, looks great. You know, he--we showed him the list, the materials list, how the house would look. It was going to be a rancher with a daylight basement.' 7 RP at 754-55.

In his supplemental declaration in support of summary judgment, Ryan argued that 'the 'plans' referenced by Mr. Johnson were, in actuality, 'floor plants' {sic}.' Ex. 72 at 2. Nevertheless, Ryan admitted that he 'did review several sets of floor plans prior to Defendants' placement of the modular home.' Ex. 72 at 2. And Ryan admitted that 'Brett Johnson and I discussed Defendants' placement of a modular home on the lot prior to closing of the sale of the lot.' Ex. 72 at 1.

But because the covenants at that time did not allow an exception for prefabricated homes, the Johnsons sought to change the covenants. And Ryan

testified, 'I gave them conditions. I told them that I would consider it, if they complied.' 3 RP at 326-27. Ryan again testified, 'I said that if--I would consider it, if they--if it--if they--I would consider--I gave them some guidelines and said I would consider it, if it met the guidelines.' 3 RP at 328. Thereafter, Ryan amended the covenants to allow an exception for prefabricated homes.

At trial, Alpine tried to assert that it had amended the covenants for Arnie Preban and not for the Johnsons. According to Alpine, this amendment was to allow the Prebans to place a prefabricated home on their lot. But Preban testified that: (1) he had not sought to amend the covenants to allow prefabricated homes; (2) he did not have any plan to build a prefabricated home at the time in question; and (3) he had not picked out any plan to build a home at the time in question. On cross-examination, Ryan admitted that he never saw the Prebans' building plan until 2002. Based on this substantial evidence, the trial court correctly found that Ryan 'knew that the Johnsons were going to place a pre-fabricated home on the property.' 5 CP at 920.

#### D. Vinyl Siding

\*8 [5] Alpine argues that the trial court erred in finding that the Johnsons' vinyl siding was channel or horizontal lap siding; Alpine also argues that the trial court erred in concluding that the vinyl siding did not violate the covenants. The main question here is whether the covenants' reference to 'channel or horizontal lap siding' includes the Johnsons' vinyl siding.

Article 2, paragraph 3 of the covenants states in part:

The exterior construction of all dwelling structures shall be double wall construction on all sides of the home with channel or horizontal lap siding, brick, masonry, or Cedar as the preferred siding material for home construction within the Properties. Said materials shall be used unless a substitute material is reviewed and approved by the Developer or Homeowners Association. T-111 siding shall be excluded under all circumstances.

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Ex. 7 at 3.

Alpine argues that the trial court's findings of fact do not consider the purpose of the covenants to maintain property values in the subdivision. Alpine argues that vinyl siding is cheaper and is of lower quality than brick, masonry, or cedar. Finally, Alpine argues that vinyl siding is neither overlapping nor interlocking.

In considering Alpine's arguments, the trial court initially found the term 'channel or horizontal lap siding' to be ambiguous. 5 CP at 921. But Dennis Webe, a witness for the Johnsons, testified that the Stevenson community would consider the Johnsons' vinyl siding to be horizontal lap siding. And on cross-examination, Webe testified that the vinyl siding is interlocked and overlapped. Even Mr. Johnson testified that the vinyl siding overlaps and interlocks. Thus, based on this evidence, the trial court found that 'the Johnsons' siding is standard vinyl siding, channellocked, and horizontal, and that it is channel or horizontal lap siding.' 5 CP at 921.

Whether the testimony of Mr. Webe and Mr. Johnson alone is substantial evidence to support the trial court's findings of fact, the Johnsons nevertheless argue that the language of the covenants cannot be read to exclude horizontal lap siding, whether made of vinyl, cedar, or any other common type of siding. We agree.

In its summary of argument, Alpine states that the covenants 'forbid vinyl siding; the Johnsons' home has shiny vinyl siding which is not permissible under the {covenants}.' Br. of Appellant at 18-19. In addition, in its issues pertaining to assignments of error, Alpine asks, 'Did home owners {sic} violate the {covenants} requiring channel or lap siding, preferably brick, masonry, or cedar, when they erected a modular home with vinyl siding?' Br. of Appellant at 3-4 (emphasis added). The Johnsons note that this interpretation would allow channel or lap siding consisting of preferably brick, masonry, or cedar. But this interpretation leads to an absurd result with regard to brick and masonry.

Instead, the Johnsons argue that the covenants, as

written, allow for the following siding choices: (1) channel; (2) horizontal lap; (3) brick; (4) masonry; or (5) cedar. According to the Johnsons, all these choices are preferred. And while T-111 is specifically excluded, vinyl siding is not excluded or even mentioned in the covenants.

\*9 Giving the covenants' language an ordinary and common meaning, the trial court agreed with the Johnsons' interpretation, finding that 'this vinyl siding does not violate the {covenants}, because it is channel, it is horizontal, and vinyl is not prohibited by the {covenants}. Therefore, there was no violation of that particular provision.' 5 CP at 921.

Finally, Alpine argues that the trial court erred in concluding that Alpine was equitably estopped from enforcing article 2, paragraph 3. [FN6] Because the covenants do not exclude the Johnsons' vinyl siding, [FN7] we do not address this argument.

FN6. Alpine incorrectly cites to article 2, paragraph 10.

FN7. After this dispute, Alpine amended the covenants to prohibit vinyl siding.

#### E. Setback Requirements

[6] Alpine argues that the Johnsons' home violates the covenants' setback requirements. Alpine argues that the trial court erred when it found this language to be 'ambiguous as to what constituted a 'hillside.' Br. of Appellant at 36-37.

Article 2, paragraph 11 states in part:

All dwellings and structures will observe a one hundred feet (100') set back from all hillsides, specifically but not restricted to, the southern hillsides on the lower portion of the properties. Grading or excavating into any hillside is strictly prohibited except for approved driveways.

Ex. 7 at 4.

Because this subdivision is located in a landslide control area, Skamania County required a geo-tech survey for each individual lot in order to determine

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the proper placement of the home. The Johnsons requested such a survey and Devry Bell, of Bell Design, performed a geo-tech survey on the Johnsons' property. The survey's results required that the placement of the Johnsons' home should be maintained in a horizontal distance of two times the vertical depth of the escarpment, plus 10 feet, from the 'toe,' or bottom of the escarpment on the southern half of the Johnsons' property. 3 RP at 357; 7 RP at 819-20. Thus, the Johnsons placed their home 130 feet north of the toe of the escarpment on the southern half of their property.

Also, Skamania County required that the subdivision's homes be placed no further than 50 feet from the centerline of the road to the north of the Johnsons' property. The Johnsons placed their home 57 feet from the centerline of this road.

In the beginning of this dispute, Alpine alleged that the Johnsons' home violated the covenants because it was within 100 feet of the sevenfoot high road embankment to the north of the Johnsons' property. Even though the Johnsons could not place their home further south because the geo-tech survey determined it was too close to the escarpment, Alpine responded, 'Irrespective of whether a geological survey or other engineering sources required placement of the home where it was, Defendants purchased the lot knowing full well what the {covenants} required.' 1 CP at 115.

At trial, though, Alpine tried to elicit testimony from Richard Bell that the Johnsons had placed their home too far south, within 100 feet of the top of the escarpment to the south of the Johnsons' property. In order to make this argument, Alpine abandoned its earlier argument that the Johnsons' home violated the covenants because it was within 100 feet of the road embankment to the north of the Johnsons' property.

\*10 But on cross-examination, Bell admitted that he had no knowledge of the relevant ordinances or setbacks for the road or the escarpment. In fact, with regard to one of the setbacks depicted on an exhibit, Bell admitted that Alpine's counsel simply asked him 'to make that on the drawing.' 1 RP (Mar.

29, 2004) at 43. Bell also admitted that he had erred in drawing this exhibit. [FN8]

FN8. In their reply brief, Alpine still relies on this exhibit for their argument that the Johnsons' improperly sited their home.

Finally, the Skamania County building inspector testified that he was not aware of any violations with respect to county ordinances or the setback requirements.

Based on this substantial evidence, the trial court correctly found:

'Hillside' is not defined in the {covenants}. On the property in question it would be difficult to tell what is a hillside, where the hillside starts, and where it stops. Nor do the {covenants} state whether the '100 foot setback' means from the top of the hillside, the middle, or from the toe of the hillside.

....

Because the {covenants} are ambiguous again, and because the location of the house meets the requirements for safe placement as defined by the County, and also by Mr. Bell's geo{-}tech survey, there is no violation of the {covenants} with respect to the {sic} where the house was placed on the lot.

5 CP at 921-22. [FN9]

FN9. Both Alpine and the Johnsons dispute whether the erosion control measures were adequate. But neither party has appealed this finding of fact. Thus, it is a verity on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 808, 828 P.2d 549 (1992).

The trial court did not err.  
F. Garage

[7] Alpine argues that the trial court erred in finding that the Johnsons complied with the covenants by having their garage oriented away from the roadway.

Article 2, paragraph 3 of the covenants states in

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part, 'Each dwelling shall be constructed with an attached and fully enclosed garage sufficient in size and design to house at least two full-size automobiles. A Carport in lieu of a garage is prohibited. Garages should be designed to open to the side of the house if at all possible.' Ex. 7 at 3. Article 2, paragraph 10 of the covenants states in part:

Wherever possible, buildings should be oriented so that the access is indirect, and garage openings do not directly face the road. From the garage, drives should move toward the roadway following the natural contours of the site. The surface of an access drive may not exceed 14 feet in width where it crosses the road right-of-way and the front setback of the lot.

Ex. 7 at 4.

After the Johnsons completed their home in 2001, Ryan advised them that their planned garage directly opened onto the subdivision's road. Ryan told the Johnsons that 'they couldn't face the road. That {they} had to put them on the end of the house.' 4 RP (Mar. 30, 2004) at 416. The Johnsons agreed to Ryan's request and rotated the garage 90 degrees; the planned garage now opened to the side of the house. Mr. Johnson testified, 'And in talking with him, this is--I thought, was going to be an agreeable--he okayed it. Great. It wasn't a big deal to change it. It wasn't any cost. It hadn't been built yet.' 5 RP at 618.

In his deposition, Ryan stated, 'It was changed. Well, it still faces the road, but it doesn't come in from the front.' 2 CP at 328. In response to whether the location of the garage was objectionable, Ryan stated, 'It's objectionable, but I agreed to it.' 2 CP at 328.

\*11 Based on this evidence, the trial court correctly found, 'Mr. Johnson complied by having the garage design changed so that the doors opened to the side, which is required by the {covenants}.... As they were built, the garage doors can be seen from driving up the roadway, but do not face the street directly.' 5 CP at 918-19. [FN10] There was no error.

FN10. The trial court also found that 'the only way to have the garage face, so that the doors could not be seen at all, would be on the bottom side, which would be very difficult construction wise, since it is set on the side of a hill.' 5 CP at 919.

#### G. Appearance and Upkeep of Property

Alpine argues that the trial court erred in finding: (1) that the Johnsons did not violate the restrictions about property maintenance; (2) that the Johnsons' bulldozer did not violate the restriction against unsightly vehicles; and (3) that the Johnsons did not violate the restrictions associated with landscaping.

Specifically, Alpine argues that despite these restrictions, 'the trial court dismissed the Johnsons' violations by evaluating compliance not from the time of Alpine's complaint, but at the time of trial.' Br. of Appellant at 40.

#### 1. Lot Maintenance

[8] First, Alpine alleged that the Johnsons did not maintain their lot during the construction of their home. Article 1, paragraph 1 states in part, 'Owners shall maintain their lots, dwellings and any and all appurtenances to the high standards of the development. Painting and landscaping must be kept in good order, condition and repair and lots must be kept clean, sightly and sanitary at all times.' Ex 7 at 1.

Bill Sullivan, a witness for Alpine, testified, 'It was an unsightly project. There was construction debris around.' 6 RP at 702. Sullivan continued:

Construction debris, I think there was--oh, part of his vinyl siding was around. His bulldozer was out front. And because of my job, I thought that was kind of unattractive nuisance. But he had the--just pieces of equipment around, pieces of wood, debris pushed up and placed.

6 RP at 702-03. Sullivan also testified that he never observed any 'garbage type receptacle' on the Johnsons' property during construction. 6 RP at 703.

Similarly, Ryan testified that the Johnsons had

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'junk sitting around the lot.' 2 RP at 157. He also testified that the Johnsons had 'buckets and broken trees and just, in general, refuse all over the lot.' 2 RP at 157.

On the other hand, in his affidavit in opposition to summary judgment, Mr. Johnson claimed:

I have kept the premises clean and orderly. Soon after each phase of construction was complete, I removed any debris resulting from that activity. Mr. Ryan took the opportunity to stop by at the various times during construction when there actually was wood scraps, or construction materials, or anything else on the grounds. Construction was neat and orderly, with only the usual temporary collection of construction debris.

1 CP at 104. And even Ryan admitted that 'a lot of that stuff ... {has} been picked up by Mr. Johnson.' 2 RP at 157.

Regardless of the appearance of the Johnsons' property in 2004, the trial court still found, 'During the building process, and during landscaping, there probably was rubbish and other materials, however, no more than was to be expected around a building site, and the court does not find that this was anything out of the ordinary.' 5 CP at 923. In its oral decision, the trial court stated, 'Well, of course during construction it was kind of a mess, but then construction lots are usually a mess.' 10 RP at 1319.

\*12 Based on the evidence before it, the trial court correctly found that the Johnsons did not violate the restrictions about property maintenance. [FN11]

FN11. In any case, this question should be moot. See *Westerman v. Cary*, 125 Wash.2d 277, 286-87, 892 P.2d 1067 (1994). At the time of trial, the Johnsons' lot was in compliance with this alleged breach of the covenants and we can no longer provide effective relief to Alpine.

## 2. Unsightly Vehicle

[9] Second, Alpine argued that the Johnsons' bulldozer was an unsightly vehicle under the covenants and that it was not allowed to be on the

property. Article 1, paragraph 5 of the covenants states, 'Parking of inoperable cars, junk cars, or other unsightly vehicles shall not be allowed on any lot or road or easement within the development except only within the confines of any enclosed garage. No auto dismantling allowed anywhere in development.' Ex. 7 at 1.

At trial, Mr. Johnson testified that the bulldozer was necessary for clearing and 'grubbing' the property. 7 RP at 768. He also testified that after the home and landscaping were completed, he made arrangements to keep the bulldozer out of sight. Mr. Johnson parked the bulldozer out of sight in some brush on the southern part of their property. In fact, Mr. Johnson testified, 'But, you know, you'd have to be within about a 50-foot section there, a certain spot, and you'd have to look for it. You couldn't--driving by or looking, you wouldn't know it was there.' 8 RP (May 25, 2004) at 1006.

But Ryan testified, 'You can still see it from the road.' 2 RP at 158. And Mr. Johnson testified that the bulldozer is colored 'orange' and is 'rusty.' 8 RP at 1004. Then, shortly after the trial started, Mr. Johnson placed a brown tarp over the bulldozer. On cross-examination, Mr. Johnson stated, 'You know, at the time I parked it, there was--back in the fall, you could not see it. And I guess over the course of the winter, some foliage had fallen.' 8 RP at 990. In response to why he bothered to place a brown tarp over the bulldozer and/or park the bulldozer in the brush, Mr. Johnson replied, 'Uh, just don't want to deal with the complaints.' 8 RP at 991. Finally, Mr. Johnson testified that he did not believe that the bulldozer was unsightly or that the bulldozer violated the covenants.

In its oral decision, the trial court stated:

I know that ... Washington law kind of goes all over the place now days as to whether or not how strictly they are to be construed.

But at least covenants have to be clear and unambiguous so that somebody that's buying property, whether it's from the developer or whether it's somebody fifty years from now ..., can look at the covenants and know what is prohibited, know what's allowed. And it's very

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important that the covenants be clear and unambiguous.

The covenant says that there's no unsightly vehicles allowed in the subdivision, and that's certainly understandable. But then again, what is an unsightly vehicle? Somebody's unsightly vehicle might be somebody else's classical car. Some people like old tractors, some people like old bulldozers, although most people wouldn't want their neighbors having them sitting in their front yards for a long period of time.

\*13 ....

In this case, if the bulldozer were sitting there forever in the front yard, I could find that there was a violation.... At this time the bulldozer is no longer in sight, and I cannot find that the Johnsons are in any violation at this time for having any unsightly vehicle.... And I can't find that this particular item was there any longer, reasonably longer than it needed to be.

10 RP at 1311-12.

Here, we hold that the trial court erred in entering its corresponding finding of fact. The ordinary and common meaning of the word 'unsightly' is not ambiguous in regard to the Johnsons' bulldozer. See Webster's Third New International Dictionary 2510 (1969).

First, the bulldozer is orange and rusty; neither the machine nor the color blends with the natural landscape. Second, Mr. Johnson admitted that he placed a brown tarp over the bulldozer because he did not want 'to deal' with the complaints. 8 RP at 991. Presumably, Mr. Johnson was trying to hide the bulldozer because he knew that it was 'unsightly.' [FN12] Third, although not on the front yard, the Johnsons' bulldozer has been sitting on their property for a long period of time after their home and garage were completed. In fact, construction on their property ended in 2002. In contrast to what the trial court stated, the bulldozer was there unreasonably longer than it needed to be. Finally, the covenants do not make an exception for an unsightly vehicle that is out of sight, covered with a tarp, and hidden by brush. The covenants permit an unsightly vehicle 'only within the confines of any enclosed garage.' Ex. 7 at 1. Thus, as to this

issue, we hold that there was error and that the covenant was violated. And Johnson should remove the bulldozer.

FN12. Otherwise, if he believed the bulldozer did not violate the covenants, he could have parked the bulldozer in plain view on his property.

### 3. Landscaping

[10] Third, Alpine argues that the trial court erred in finding that the Johnsons did not violate the covenants with respect to landscaping. Alpine argues that the trial court implicitly conceded that the Johnsons did not meet the requirements of the covenants related to landscaping.

Article 2, paragraph 9, states:

All dwellings and outbuildings must be landscaped within a fifty-foot (50') radius of the structure; landscaping work must be completed within ninety (90) days from owner's possession. Extensions will be granted for weather conditions, which prevent installation of plant materials or other landscaping improvements. Areas left in their natural state and lots prior to construction must be kept free of noxious weeds and field grass must be mowed at sufficient intervals to prevent a fire hazard.

Ex. 7 at 3. [FN13]

FN13. Article 1, paragraph 1 also states in part, 'Painting and landscaping must be kept in good order, condition and repair and lots must be kept clean, sightly and sanitary at all times.' Ex. 7 at 1.

At trial, Ryan testified that the Johnsons did not have any landscaping as of December 2001. [FN14] He did note that the Johnsons landscaped their front yard in 2002. But, until August of 2003, the Johnsons 'still hadn't done anything with the backyard or the side yard.' 2 RP at 168. Ryan noted that this activity coincided with the setting of this trial in August 2003. And, as of the trial, Ryan stated that the Johnsons still had not properly landscaped the backyard or the side yard of their

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lot. Even Mr. Weiss testified that the landscaping as of the trial appeared 'pretty raw.' 7 RP at 719-20.

FN14. The Johnsons did not complete their basic landscaping until after their garage and deck had been constructed in late 2001 or early 2002, more than 90 days after they had taken possession of their home in March 2001.

\*14 But Mrs. Johnson testified that they planted grass, shrubs, and wildflowers around the lot. And both Mr. and Mrs. Johnson testified that they wanted to leave much of the lot in its natural state. Because they were having so many problems with weeds, they ultimately decided to plant more grass around the lot.

In its finding of fact, the trial court stated, 'The Court notes that it is almost impossible in the area to meet a 90 day requirement on landscaping. The {covenants} did not define 'landscaping' in any way. The court finds no violation of the {covenants} with respect to landscaping.' 5 CP at 923. And, after viewing the property during the trial, the trial court found the Johnsons' lot 'to be extremely neat, well-kept up, nicely landscaped, with nice yard and plantings.' 5 CP at 922.

Based on the evidence before it, the trial court did not err in entering these findings of fact. [FN15]

FN15. In any case, this question also should be moot. See *Westerman*, 125 Wash.2d at 286-87, 892 P.2d 1067. At the time of trial, the Johnsons' lot was in compliance with this alleged breach of the covenants and we can no longer provide effective relief to Alpine.

#### IV. Attorney Fees

[11] In general, Alpine argues that the trial court's findings of fact, conclusions of law, and judgment do not support an award of attorney fees to the Johnsons.

At the hearing on attorney fees, the trial court

stated that 'the Defendants have submitted itemized attorney's fees.' 11 RP (July 16, 2004) at 1380. The trial court also stated that 'I find that the amount that they have requested {is} reasonable.' 11 RP at 1380. The court further stated that costs, except for deposition fees, would be allowed. But the trial court never entered these statements as findings of fact and conclusions of law.

As Alpine correctly notes, Washington courts have repeatedly held that the absence of an adequate record on which to review a fee award will result in a remand of the award to the trial court to develop such a record. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632, 966 P.2d 305 (1998).

But the Johnsons claim that we 'can look to the trial court's oral decision or statements in the record to assist in interpreting the findings, or to supplement inadequate findings.' Br. of Resp't at 48. The Johnsons rely on *Peoples National Bank v. Birney's Enterprises, Inc.*, 54 Wash.App. 668, 670, 775 P.2d 466 (1989).

We do not agree. First, we have no written findings of fact and conclusions of law regarding the attorney fees; thus, we cannot use the trial court's oral statements to interpret or to supplement absent findings of fact and conclusions of law. Second, the court in *Peoples National Bank* explicitly warned, 'We will not tolerate the practice of incorporating a court's remarks into the findings.... We consider it the prevailing party's duty to procure formal written findings supporting its position.' *Peoples Nat'l Bank*, 54 Wash.App. at 670, 775 P.2d 466.

More specifically, Alpine argues that the award of attorney fees for the Johnsons is unsupported because the trial court failed to make a finding that Alpine or the Weiss-Millers acted in bad faith.

Although article 4, paragraph 5 of the covenants allows the prevailing party 'to recover from the other party such sum as the court or tribunal may adjudge reasonable as attorney fees and costs incurred,' Alpine argues that article 4, paragraph 3 of the covenants exonerates lot owners for 'act {s} and omissions done in good faith in the

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interpretation, administration and enforcement of this Declaration.' Br. of Appellant at 42-43; Ex. 7 at 5.

\*15 On the other hand, the Johnsons argue that these two provisions cannot be read together because they are separate and inconsistent provisions. Citing *Mayer v. Pierce County Medical Bureau, Inc.*, 80 Wash.App. 416, 423, 909 P.2d 1323 (1995), the Johnsons argue that the specific provision qualifies the meaning of the general provision when there is an inconsistency between the two provisions.

We do not find the two provisions inconsistent. Construing the covenants in their entirety, article 4, paragraph 2 provides, 'Any Lot owner or Association of Lot Owners shall have the right to enforce by proceeding at law or in equity all restrictions, conditions, covenants, reservations, requirements, liens and charges now or hereafter imposed by the provisions of this Declaration.' Ex. 7 at 5 (emphasis added). And article 4, paragraph 5 provides, 'In the event suit or action is instituted to enforce any terms of this Declaration or to collect unpaid assessments. The prevailing party shall be entitled to recover from the other party such sum as the court or tribunal may adjudge reasonable as attorney fees and costs incurred.' Ex. 7 at 5 (emphasis added). Nevertheless, article 4, paragraph 3 provides, 'The Lot Owners shall not be liable to any person for act }s} and omissions done in good faith in the interpretation, administration and enforcement of this Declaration.' Ex. 7 at 5 (emphasis added).

In other words, giving the covenants' language its ordinary and common meaning, the prevailing party under these covenants will be entitled to recover attorney fees and costs only where the other party has acted in bad faith.

Because the trial court did not enter any formal findings of fact or conclusions of law related to attorney fees or bad faith, we remand the award to the trial court to develop such a record. These findings of fact and conclusions of law should also address whether the Weiss-Millers acted in bad

faith, as the trial court's award is also dependent on that finding.

Because the Johnsons are the prevailing party, we award them reasonable attorney fees and costs for responding to Alpine's appeal should the trial court find that Alpine acted in bad faith at trial.

#### V. The Weiss-Millers' CR 60 Motion

The Weiss-Millers appeal from the trial court's denial of their CR 60(b)(3) and (11) motion and the trial court's supplemental judgment against them for additional attorney fees.

We review the trial court's disposition of a CR 60(b) motion for abuse of discretion. *Pederson's Fryer Farms, Inc. v. Transamerica Ins. Co.*, 83 Wash.App. 432, 454, 922 P.2d 126 (1996), *review denied*, 131 Wash.2d 1010, 932 P.2d 1255 (1997). An abuse of discretion occurs only where it can be said that no reasonable person would take the view adopted by the trial court. *Eagle Pac. Ins. Co.*, 85 Wash.App. 695, 709, 934 P.2d 715 (1997) (quoting *State v. Blight*, 89 Wash.2d 38, 41, 569 P.2d 1129 (1977)), *aff'd*, 135 Wash.2d 894, 959 P.2d 1052 (1998). And the scope of review is generally limited to determining whether the trial court abused its discretion; an appeal from the trial court's disposition of a CR 60(b) motion does not bring the final judgment up for review. RAP 2.2(a)(10), 2.4(c)

\*16 [12] First, the Weiss-Millers argue that we can reverse the trial court's order under CR 60(b)(3), which permits relief from a judgment due to '{n}ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b).' During argument on this motion, the Weiss-Millers argued that new evidence showed that the Johnsons violated the covenants by using their property for a commercial purpose and that the Johnsons continuously accumulated debris on their property.

We will not grant a new trial on the ground of newly discovered evidence unless the evidence: (1) will probably change the result of the trial; (2) was

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discovered after trial; (3) could not have been discovered before trial even with the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. *Graves v. Dep't of Game*, 76 Wash.App. 705, 718-19, 887 P.2d 424 (1994).

In denying the Weiss-Millers' CR 60(b)(3) motion, the trial court stated, 'I'll hear your argument about anything that happened prior to the trial, but not anything that happened after the trial because nobody could have known what happened after the trial.' RP (March 3, 2005) at 4. [FN16] With respect to the Johnsons allegedly using their property for a commercial purpose, the trial court decided:

FN16. The trial court correctly understood that CR 60(b)(3) applies to evidence existing before the trial, not after the trial. See *In re Marriage of Knutson*, 114 Wash.App. 866, 872, 60 P.3d 681 (2003) ('CR 60(b)(3) applies to evidence existing at the time the decree was entered, not later.').

The new evidence that is proposed to be--the new evidence that's offered is evidence that supposedly the--Mr. Johnson had--was operating a used car business out of his--out of his home. I might be mistaken, but I can't recall the initial Complaint alleged that there--that was a violation of }the covenants}. I can't remember the whole time going to trial, that was never mentioned, so it's not like we had something that was--was litigated and then there was new evidence coming in that, well, at the time of trial, we didn't know he was a car dealer and now we do. That wasn't even brought up at trial.

RP (March 3, 2005) at 22.

On appeal, the Weiss-Millers argue that although the investigation occurred after the trial, the newly discovered evidence occurred before the trial. Regardless of this distinction, we hold that the trial court did not abuse its discretion in denying the Weiss-Millers' CR 60(b)(3) motion.

To begin, the Weiss-Millers did not satisfy the due diligence requirement of CR 60(b)(3). The initial

phase of the trial lasted from March 29 until March 31, 2004; the trial was then continued until May 24, 2004. The second phase of the trial lasted from May 24 until May 26, 2004. Clearly, the Weiss-Millers could have made a reasonable inquiry before the end of May that would have revealed the allegedly 'regular changing inventory of vehicles in front of the Johnsons' residence.' Br. of Appellant Weiss-Millers at 29.

Although the Weiss-Millers claim that Mr. Johnson was using his property for commercial purposes as a new or used car dealer, Weiss's affidavit is wholly insufficient to satisfy the requirements of CR 60(e). [FN17] To support the motion, Weiss claims that 'it was ascertained that the vehicles observed by Mr. Weiss were in fact all owned by different individuals.' Br. of Appellant Weiss-Millers at 29. Weiss also stated, 'Through his own internet investigation Mr. Weiss ascertained that Mr. Johnson had some prior affiliation with First Choice Auto Sales.' Br. of Appellant Weiss-Millers at 30. And Weiss stated that 'the Department of Licensing indicated that Mr. Johnson had been observed driving a vehicle with an expired dealer's license registered to Horizon Auto Sales.' Br. of Appellant Weiss-Millers at 30. Yet, even taken together, none of these statements proves that Mr. Johnson was using his property for commercial purposes as a new or used car dealer. In his affidavit, Mr. Johnson responded, 'I have purchased several cars at the Portland Auto Auction, which had temporary Oregon license plates, but which are for the personal use of myself, my wife, my son and my daughter.' CP (cause no. 33093-8-II) at 87. Mr. Johnson also stated, 'I have a brother-in-law who had an auto dealership in Spokane, named Horizon Auto.' CP (cause no. 33093-8-II) at 87.

FN17. In part, CR 60(e)(1) states that the application for relief from judgment shall be 'supported by the affidavit of the applicant ... setting forth a concise statement of the facts or errors.'

\*17 And, as the trial court correctly noted, the issue of whether the Johnsons violated the covenants by using their property for commercial purposes as a

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new or used car dealer 'wasn't even brought up at trial.' RP (March 3, 2005) at 22. Thus, this newly discovered evidence is not material to the trial.

With respect to the Johnsons allegedly accumulating debris on their property, the trial court was silent. Nevertheless, as the Johnsons correctly note, Ryan's observations occurred after the trial. [FN18] And, even if these observations had occurred before the trial, these observations would have been cumulative and probably would not have changed the result of the trial.

FN18. In his affidavit signed on February 4, 2005, Ryan stated, 'Recently, I have observed that on the western slope of Mr. Johnson's lot he is accumulating debris including limbs and large trees, which creates a fire hazard and is a violation of { the covenants}.' CP (cause no. 33093-8- II) at 79-80.

Based on this evidence, the trial court did not abuse its discretion in denying the Weiss-Millers' CR 60(b)(3) motion.

[13] Second, the Weiss-Millers argue we can reverse the trial court's order under CR 60(b)(11), which permits relief from a judgment due to '{a}ny other reason justifying relief from the operation of the judgment.' They argue that 'where, as here, appellants have relied to their detriment on advice of counsel in failing to file a timely notice of appeal, principles of equity should allow review of the courts {sic} findings and conclusions and judgment entered July 16, 2004.' Br. of Appellant Weiss-Millers at 14-15. [FN19]

FN19. The Weiss-Millers also argue that 'this case involves patent material inconsistencies within the trial court's findings and conclusions and the evidence which in effect amounts to a situation which prejudices the movant as much as an irregularity in the proceedings, which clearly can justify relief from judgment under CR 60(b).' Br. of Appellant Weiss-Millers at 15-16. But this argument

is not justified under CR 60(b)(11) as it relates to irregularities.

But the use of CR 60(b)(11) is to be confined to situations involving extraordinary circumstances not covered by any other section of the rule. *In re Marriage of Yearout*, 41 Wash.App. 897, 902, 707 P.2d 1367 (1985). 'Such circumstances must relate to irregularities extraneous to the action of the court.' *Yearout*, 41 Wash.App. at 902, 707 P.2d 1367. Although CR 60(b)(11) has been invoked in unusual situations that typically involve reliance on mistaken information, *In re Adoption of Henderson*, 97 Wash.2d 356, 359-60, 644 P.2d 1178 (1982), generally the incompetence or neglect of a party's own attorney is not sufficient grounds for relief from a judgment in a civil action. *Lane v. Brown & Haley*, 81 Wash.App. 102, 107, 912 P.2d 1040, review denied, 129 Wash.2d 1028, 922 P.2d 98 (1996).

Here, the Weiss-Millers' attorney, acting on their behalf, appeared in a fully adversarial setting in which the merits of the case were fully addressed. For whatever reason, he neglected or refused to file an appeal, choosing instead to rely on an erroneous legal theory that Alpine's appeal was sufficient for the Weiss-Millers. Based on these circumstances, the trial court did not abuse its discretion in denying the Weiss-Millers' CR 60(b)(11) motion.

[14] Although we have remanded for a determination of bad faith on the part of the Weiss-Millers in bringing their claims at trial, we hold that the Weiss-Millers' appeal of the denial of their CR 60 motion was in bad faith; the Johnsons are entitled to an award of reasonable attorney's fees for the appeal. Not only was the Weiss-Millers' appeal in bad faith, but it was also frivolous under RAP 18.9. Upon compliance with RAP 18.1, the commissioner will award reasonable attorney fees and costs on behalf of the Johnsons for responding to the Weiss-Millers' appeal.

\*18 Affirmed in part, remanded for entry of findings and conclusions regarding attorney fees.

A majority of the panel having determined that this

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opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

We concur: HUNT, J., and VAN DEREN, A.C.J.

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SKAMANIA COUNTY  
FILED  
OCT 12 2016  
LORENA E. HOLLS, CLERK  
REPHY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR THE COUNTY OF SKAMANIA

ALPINE QUALITY CONSTRUCTION  
SERVICES, INC., a Washington corporation

Plaintiff,

and STEVEN A. WEISS and LINDA I. MILLER,  
husband and wife, and their marital community,

Plaintiff-intervenors,

vs.

BRETT and TERESA JOHNSON,  
husband and wife, and their marital community

Defendants

No. 01-2-00062-6

ORDER GRANTING  
SUPPLEMENTAL FINDINGS OF  
FACT AND CONCLUSIONS OF  
LAW ON REMAND

THIS MATTER came on regularly for hearing before the undersigned judge of the Skamania County Superior Court on the motion of plaintiff Alpine Quality Construction Services, Inc. (Alpine) and plaintiff-intervenors Steve Weiss and Linda Miller (collectively the Weiss-Millers) for an order finding Alpine and the Weiss-Millers acted in good faith, and on the motion of defendants Brett and Teresa Johnson (the Johnsons) for an order finding that Alpine and the Weiss-Millers acted in bad faith in enforcing the CC&Rs and that the award of attorney fees to the Johnsons was reasonable. Alpine and the Weiss-Millers were represented by Philip A. Talmadge and Emmalyn Hart-Biberfeld of Talmadge Law Group PLLC, 18010 Southcenter Parkway, Tukwila, Washington 98188, and defendants Brett and Teresa Johnson were represented by

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ROBERT M. HUGHES  
Attorney at Law  
10011 NE Hazel Dell Avenue, #428  
P.O. Box 65160  
Vancouver, WA 98665  
(360) 573-6943 • FAX (360) 573-1114

ROBERT M. HUGHES  
ATTORNEY AT LAW  
10013 NE Hazel Dell Avenue, #428  
P.O. Box 65160  
Vancouver, WA 98685  
(360) 573-6913 - FAX (360) 573-1114

2 - ORDER GRANTING SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

1	Robert Hughes, Attorney at Law, 10013 NE Hazel Dell Avenue, #428, P.O. Box 65160,
2	Vancouver, Washington 98685. The Court considered the following pleadings:
3	Alpine and Weiss-Millers Motion Pursuant To R&P 7.2 To Address Attorney Fees
4	Declaration of Emilyn Han-Biberfeld
5	Declaration of Timothy Dack
6	Declaration of Anthony Connor
7	Johnsons Motion Pursuant to R&P 7.2 for Supplemental Findings of Fact and
8	Conclusions of Law
9	Declaration of Robert M. Hughes
10	Johnsons' Memorandum in Support of Motion For Order Granting Supplemental
11	Findings of Fact and Conclusions of Law
12	Findings of Fact and Conclusions of Law.
13	Based on the arguments of counsel and the evidence presented, the Court finds:
14	1. Alpine and the Weiss-Millers acted in bad faith in the enforcement of the COA's
15	in bringing the following claims:
16	(a) claim that vinyl siding was prohibited
17	(b) claims of violation in placing a modular home
18	(c) claims of violation in square footage of the home
19	(d) claims of violation in placement of the garage
20	(e) claims of violation in setbacks and placement of the house on the lot
21	(f) claims of failure to complete landscaping
22	(g) claims of discharge of culvert
23	(h) claims of erosion control violations
24	(i) claim of road damage
25	(j) claim that there was no licensed and bonded contractor
26	(k) claims of commercial activities in dealing cars

- 1 (l) claims of causing a diminishment in value of other lots
- 2 (m) claims of violations in upkeep and condition of the Johnsons' lot
- 3 (j) claims of commercial activities in dealing cars
- 4 in that the evidence presented at trial showed that:
- 5 a) these claims or complaints were made that were not actual violations of the CC&R's
- 6
- 7 b) these claims made too late to have allowed a reasonable time for the Johnsons to respond
- 8 without incurring substantial damages
- 9
- 10 c) these claims or complaints were made without a sufficient investigation of the claims
- 11
- 12 d) these claims or complaints were made without sufficient notice, or without any
- 13 notice before trial
- 14
- 15 e) these claims or complaints were made after having specifically approved the construction
- 16 done by the Johnsons.

- 18 2. Alpine and the Weiss-Millers acted in bad faith in the enforcement of the CC&R's
- 19 3. The Johnsons are entitled to attorney fees under the CC&R's as the substantially
- 20 prevailing party against both Alpine and the Weiss-Millers, both of whom acted in
- 21 bad faith in the enforcement of the CC&R's.
- 22 4. That the Johnsons' attorney fees requested in the amount of ~~\$52,295.00~~ <sup>\$47,705.00 ETR</sup> against
- 23 Alpine and \$32,000.00 against Weiss-Millers in the matters tried to the Court,
- 24 without a jury, from March 29 through March 31, 2004, and then continued from
- 25 May 24 through May 26, 2004, was reasonable considering,
- 26 (a) the hourly rate charged of \$150.00 was under the norm for this area,

3 - ORDER GRANTING SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

ROBERT M. HUGHES  
 ATTORNEY AT LAW  
 10013 NE Hazel Dell Avenue, #424  
 P.O. Box 65160  
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 (360) 573-6943 - FAX (360) 573-1114

- 1 (b) the amount of time spent in defending the case was reasonable considering the
- 2 complexity of the case and how it was prosecuted by Alpine and Weiss-Millers,
- 3 (c) that no duplicate fees were charged,
- 4 (d) that the fees were sufficiently itemized for the work performed.
- 5 5. That the additional attorney fees awarded to the Johnsons on March 17, 2005
- 6 against the Weiss-Millers for defense of the Weiss-Millers' CR 60 motion in
- 7 amount of \$1,930.50 was not objected to by Weiss-Millers at the time, and were
- 8 reasonable considering,
- 9 (a) the hourly rate charged of \$150.00 was under the norm for this area,
- 10 (b) the amount of time spent in defending the motion was reasonable considering
- 11 the complexity of the issues,
- 12 (c) that no duplicate fees were charged,
- 13 (d) the fees were sufficiently itemized for the work performed.
- 14

Based on the foregoing findings, it is hereby ORDERED:

- 16 1. The Weiss-Millers' motion for an order of restitution pursuant to RAP 12.8 for
- 17 attorney fees previously ordered and paid to the Johnsons is DENIED.
- 18 2. Alpine's motion for an order directing the Clerk of the Court to release the
- 19 supersedeas security posted by Alpine and on deposit in the Court's registry is
- 20 DENIED.
- 21 3. In the matters tried to the Court in this case, without a jury, from March 29
- 22 through March 31, 2004, and then continued from May 24 through May 26, 2004,
- 23 defendants Johnson are entitled to the awarded reasonable attorney fees in the
- 24 amount of ~~\$52,295.00~~ <sup>\$47,705.00 ETX</sup> against Alpine, and \$32,000.00 against Weiss-Millers.
- 25 4. That the Johnsons are entitled to the awarded additional attorney fees requested
- 26 against Weiss-Millers for their defense of the Weiss-Millers CR 60 motion in

4 - ORDER GRANTING SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

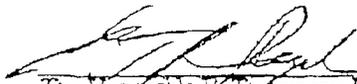
ROBERT M. HUGHES  
 Attorney at Law  
 10013 NE Hurd Dell Avenue, #423  
 P.O. Box 65160  
 Vancouver, WA 98685  
 (360) 573-6943 • FAX (360) 573-1114

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amount of \$1,930.50.

5. The above findings of fact and conclusions of law are made subject to the matters now pending before the Supreme Court of Washington in the Petition For Review filed by the Johnsons on September 7, 2006.

DONE IN OPEN COURT this 12<sup>th</sup> day of October, 2006.

  
The Honorable E. Thompson Reynolds

Presented by:



Robert M. Hughes, WSBA #17786  
10013 N.E Hazel Dell Ave., #428  
PO Box 65160  
Vancouver, WA 98685  
(360) 573-6943  
Attorney for Defendants Johnson

5 - ORDER GRANTING SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

ROBERT M. HUGHES  
Attorney at Law  
10013 NE Hazel Dell Avenue, #428  
P.O. Box 65160  
Vancouver, WA 98685  
(360) 573-6943 • FAX (360) 573-1114

