original

NO. 36458-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

HARRIS STOCKARD and PAMA STOCKARD,
husband and wife,

Respondents,

v.

JOHN HARER and JANE DOE HARER,
husband and wife, d/b/a AZALEA GARDENS, LLC; and
COMMONWEALTH PROPERTY MANAGEMENT
SERVICES COMPANY, an Oregon corporation, d/b/a
COMMONWEALTH REAL ESTATE SERVICES,

Appellants,

CHRISTINA MAYS and JOHN DOE MAYS,
wife and husband,

Defendants.

BRIEF OF APPELLANTS

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A. INTRODUCTION

Azalea Gardens is a manufactured home community in Graham in Pierce County, which is owned by Azalea Gardens LLC ("the LLC")[1] and managed by Commonwealth Property Management Services Company d/b/a Commonwealth Real Estate Services ("Commonwealth"). The LLC leases plots to tenants for manufactured homes. In the rental agreements for Azalea Gardens, the LLC reserved the right to approve all improvements in the community, a right common in various property regimes in Washington.

The Stockards decided they wanted to build a permanent 586-square foot addition to their Azalea Gardens manufactured home. Although the LLC exercised its contractual right to deny them permission to build the addition, the Stockards proceeded to build it anyway.

When their construction was halted by Pierce County's refusal to grant them a building permit, the Stockards sued the LLC, principals of the LLC, Commonwealth, and its staff for the right to build the improvement and for damages. The trial court ruled as a matter of law that the approval clause in the lease was unenforceable.

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[1] The appellants will be referenced herein as the LLC as the LLC is the owner and landlord for Azalea Gardens, unless a specific reference to the Harers, Commonwealth, or Mays is pertinent to the particular argument.

The trial court misconstrued the approval clause in the rental agreement. Its decision is plainly inconsistent with the language of the rental agreement between the LLC and the Stockards, which is specifically authorized by the Mobile Home Landlord Tenant Act ("MHLTA"). The trial court relied on case law involving covenants for subdivisions in making its decision, although a mobile home park or community is different than a subdivision. Even those covenant cases clearly authorize developers or architectural committees of homeowners associations to approve construction within a subdivision.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in granting summary judgment on May 18, 2007 to the Stockards.

2. The trial court erred in denying defendants' motion for summary judgment.

3. The trial court erred in denying defendants' motion for reconsideration.

(2) Issues Pertaining to Assignments of Error

1. Did the trial court err in considering a cross-motion for summary judgment where the moving party gave 11 days notice and failed

to give the 28 days notice for the motion required by CR 56(c)? (Assignments of Error Numbers 1, 3).

2. Did the trial court err in refusing to dismiss mobile home park tenants' claim for declaratory relief against the principals and agent of a limited liability corporation that owned the park and the interpretation of the tenants' lease was the sole remaining issue before the court? (Assignments of Error Numbers 1-3).

3. Where a provision in the lease of a plot in a mobile home park reserves the owner's authority to approve any improvements to the leased property, did the trial court err in refusing to enforce such a provision against tenants who commenced construction of a permanent addition to their leased property without the owner's permission? (Assignments of Error Numbers 1-3).

4. Did the trial court err when it ruled as a matter of law that the owner waived a lease provision giving it the right to approve permanent improvements to the leased premises when there was substantial evidence the owner consistently enforced such a provision in other leases in the mobile home park? (Assignments of Error Numbers 1-3).

5. Are the appellants entitled to their attorney fees at trial and on appeal? (Assignments of Error Numbers 1-3).

C. STATEMENT OF THE CASE

Azalea Gardens is a manufactured home community located in Graham, Pierce County, Washington. CP 13, 33. It is owned by the LLC. *Id.* Steven Harer is the managing member of the LLC. *Id.* Commonwealth is Azalea Gardens' property manager pursuant to a management agreement executed between Commonwealth and the LLC. CP 33, 39-46. Christina Mays is an employee of Commonwealth. CP 13, 33.

The Stockards are tenants in Azalea Gardens, first moving into the community in 2002. CP 34. The Stockards executed a written rental agreement with the LLC. *Id.*; CP 48-51. Paragraph 15 of the agreement provides:

> **Improvements**. Tenant agrees not to make or permit any construction, alteration, additions, painting, or improvements to the Manufactured Home Lot, nor to permit placement of a storage shed thereon, *without the prior written consent of Landlord.*

CP 50 (emphasis added). The LLC also has rules and regulations for Azalea Gardens. CP 53-68. The community rules make clear that prior approval means "written approval in advance" by the LLC. CP 53. Landlord approval is required for any excavation:

> ***X.3 Exterior Improvements and Utilities and Meters.*** No exterior improvements, *excavation*, or other work (including but not limited to exterior painting) may be

> made without Azalea Gardens' prior approval, or be subject to removal.
>
> Written approval must be obtained before digging or driving anything into the ground that could damage underground utilities. Resident should inform Azalea Gardens' management before doing any digging so that underground utilities can be located and marked. If damage should occur, resident shall bear all incurred repair costs.

CP 59 (emphasis added). The agreement required the Stockards to comply with Azalea Gardens' rules and regulations. CP 49. The Stockards also signed the regulations acknowledging they read them and agreed to comply with them. CP 66.

Despite lacking written permission from the LLC, the Stockards decided to build a permanent addition to their mobile home, and paid for certain preliminary steps to construct the addition they later asked the LLC to reimburse. CP 73. The Stockards filed an initial request for approval of the large addition on March 1, 2006 with Commonwealth, indicating they would be their own general contractor on the project. CP 34, 70-71. The request was denied on March 17. CP 70. Mays sent a letter to the Stockards on March 24, 2006 indicating the request had been denied. CP 73. The Stockards retained counsel who resubmitted the plans on July 19, 2006, indicating construction would commence in two weeks unless the plans were approved. CP 75-77. Acting on the LLC's behalf,

Commonwealth again denied the request. CP 79. In March 2007, the LLC's attorney, Walter H. Olsen, Jr., contacted the Stockards' counsel and explained to him that the Stockards' requested addition was being denied because of its size. CP 199.

Despite two denials of their request to erect the large permanent addition to their mobile home, Ms. Stockard claimed that based on a conversation with a sales agent, Pat Loomis, she and her husband had "tacid [sic] approval" from the LLC to commence construction. CP 91-92. This "tacit," oral approval stands in stark contrast to the requirement that the LLC's approval be *in writing*. CP 53. However, Loomis testified he was contacted "in early 2006" by the Stockards and, after speaking with Steve Harer, communicated to them that the addition was denied because such construction "would deteriorate from the quality of the community in the long term, and its precedent would result in over construction of this already high-density community." CP 197. In October 2006, despite the discussion with Loomis, the Stockards removed their patio, cleared topsoil, and began excavating on the LLC's property. CP 34-35, 92. Again, the Stockards' actions were without written approval *in advance* of such construction by the LLC. CP 53.[2] They applied for a

[2] The regulations for Azalea Gardens also made clear that any construction work to be done in the park would be done only by qualified contractors, after notice to the LLC *in advance*. CP 65. The Stockards initially acted as their own general contractor.

Pierce County building permit. CP 34. The Stockards only stopped their construction after Pierce County was informed that they did not have permission from the LLC to build the permanent addition. CP 23, 31, 35, 92. Pierce County subsequently informed the Stockards that it was not issuing them a residential building permit until they received the permission of the LLC for the improvement. *Id.*

After learning that they would not be allowed to build their permanent addition on the LLC's land, the Stockards filed this action in the Pierce County Superior Court on January 24, 2007, claiming they are entitled to proceed with their construction and that the defendants were guilty of intentional infliction of emotional distress, the tort of outrage. CP 1-6. The case was assigned to the Honorable Frank E. Cuthbertson.

On April 20, 2007, the LLC, the Harers, Commonwealth, and Mays timely filed and served their motion for summary judgment, and scheduled it for hearing on May 18, 2007. CP 12-21. On May 7, 2007, eleven days before that hearing, the Stockards filed their memorandum in opposition to the motion and in support of their cross-motion for summary

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CP 70. Again, the Stockards ignored these regulations that assured all lot owners that any work undertaken in the park would be done by qualified, responsible contractors.

judgment. CP 129-39. The Stockards noted a cross-motion for summary judgment on May 18, 2007, without a motion to shorten time. CP 157. The Stockards contended that the LLC withheld approval of their addition "unreasonably." CP 134-35. In its reply, the defendants objected to the Stockards' cross-motion, as it was filed without sufficient notice to them under CR 56. CP 140.

The trial court granted summary judgment to the Stockards and denied the LLC's motion, allowing the Stockards to erect their addition. CP 159. The trial court did not dismiss the Harers, the LLC's principals, Commonwealth or its employee Christina Mays from the lawsuit, CP 158-60, although the Court's oral ruling suggested the court saw no basis for their liability. RP 25-27. The trial court dismissed the Stockards' outrage claim. RP 22-23; CP 160. The Stockards have not sought review of the trial court's decision to dismiss their outrage claim.

The LLC filed a timely motion for reconsideration. CP 161-72. The LLC reiterated its concern about the untimeliness of the Stockards' cross-motion. CP 164-66. The trial court denied the motion on June 22, 2007 and dismissed the defendants' counterclaims. CP 298-99.[3] This timely appeal ensued. CP 300-06.

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[3] In this order, the trial court dismissed Christina Mays and her spouse from the case. CP 299.

D. SUMMARY OF ARGUMENT

The trial court erred in considering the Stockards' cross-motion for summary judgment as they failed to give proper notice for such cross-motion. CR 56(c).

The trial court failed to dismiss the LLC's managing member and his wife or Azalea Gardens' property manager from this lawsuit. The only live issue still pending before the trial court was the lease dispute between the LLC, as owner/landlord of Azalea Gardens, and the Stockards as tenants because the Stockards' damages claim is dismissed. The Harers and Commonwealth were not properly parties in the case.

The trial court should have enforced paragraph 15 of the rental agreement giving the LLC the authority to approve any additions to buildings in Azalea Gardens according to its terms. That paragraph is specifically authorized by RCW 59.20.070(2). The LLC did not exercise its authority reserved to it by that paragraph of the agreement unreasonably or in bad faith merely by exercising its discretion, approving some additions by tenants and rejecting others.

The trial court erred in awarding attorney fees to the Stockards. The LLC is entitled to its attorney fees at trial and on appeal in enforcing paragraph 15 of the agreement.

E. ARGUMENT

(1) Standard of Review

The trial court resolved issues on the interpretation of the agreement and the LLC's alleged waiver of paragraph 15 on summary judgment. This Court reviews orders on summary judgment de novo. *Mains Farm Homeowners Ass'n v. Worthington,* 121 Wn.2d 810, 813, 854 P.2d 1072 (1993). Under CR 56(c), a court grants a motion for summary judgment only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. With respect to the facts, this Court must consider the facts, and all inferences from them, in a light most favorable to the LLC as the nonmoving party on the Stockards' cross-summary judgment. *Wilson v. Steinback,* 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

(2) The Trial Court Erred in Considering the Stockards' Untimely Cross-motion for Summary Judgment

CR 56(c) provides that a party filing a motion for summary judgment must give the opposing party 28 days notice. *Cole v. Red Lion,* 92 Wn. App. 743, 749, 969 P.2d 481 (1998). The Stockards failed to do so here, giving only 11 days notice to the LLC of their cross-motion, to the LLC's prejudice.

The trial court was under the mistaken belief that the parties had stipulated to both motions being heard on May 18, 2007. RP 21. However, this is not the case, as the LLC objected to the timeliness of the Stockards' cross-motion for summary judgment. CP 140; RP 21-22. Moreover, in fact, at the summary judgment hearing on May 18, 2007, defense counsel requested that the trial court continue the motions so that further evidence could be obtained and presented. RP 29. The trial court abused its discretion in failing to even address that motion. RP 30-31.

Motions for a continuance of summary judgments motions under CR 56(f) to allow a party to obtain additional affidavits or declarations are addressed to the discretion of the trial court. *Qwest Corp. v. City of Bellevue,* ___ Wn.2d ___, 166 P.3d 667 (2007). The party seeking a continuance must have a good reason for the delay in obtaining the evidence, must indicate the evidence to be sought in future discovery, and the evidence must raise a genuine issue of material fact. *Butler v. Joy,* 116 Wn. App. 291, 298-99, 65 P.3d 671, *review denied,* 150 Wn.2d 1017 (2003). Here, the LLC met this standard. RP 21. Moreover, the evidence submitted in support of the motion for reconsideration made this clear. CP 173-200. The trial court abused its discretion by failing to even address this issue.

The trial court's granting of the Stockards' cross-motion for summary judgment on an inadequate record prejudiced the LLC. Had the LLC known that the trial court intended to hear the Stockards' untimely motion, it could have presented evidence sufficient to defeat the Stockards' motion, exactly as it did when it timely filed its motion for reconsideration. CP 173-200. The LLC demonstrated that it was entirely reasonable and consistent for it to deny the Stockards' request to erect an enclosed structure of 576 square feet, when the next largest addition which has ever been constructed by any resident involved an unenclosed patio of less than half (236 square feet) the size of the Stockards' proposed addition. CP 164, 173-95.

There are circumstances where a court can grant a summary judgment to a nonmoving party. *See, e.g., Impecoven v. Dep't of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752 (1992) (when facts are undisputed, court can order summary judgment for nonmoving party). However, such cases involve situations where the facts are not in dispute and the court determines which disputed issues of law are applicable to those facts. Here, the Stockards raised a new legal issue on distinct facts in their cross-motion. They should have complied with CR 56(c).

Because the trial court allowed the Stockards' untimely cross-motion to be heard, the LLC was denied a fair hearing.

(3) The Trial Court Erred in Failing to Dismiss all Non-LLC Defendants

The trial court here dismissed the Stockards' damages claim as a matter of law, CP 160, and they have not cross-appealed from that decision. That decision is the law of the case. *Davenport Nat'l Bank v. Ditmar,* 134 Wash. 439, 442-43, 235 P. 955 (1925). The only party with whom they actually have a live dispute is the LLC.

With respect to the dispute over the lease, only the LLC may be a party. RCW 25.15.125(1) states:

> Except as otherwise provided by this chapter, the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, shall be solely the debts, obligations, and liabilities of the limited liability company; and *no member or manager of a limited liability company shall be obligated personally* for any such debt, obligation, or liability of the limited liability company solely by reason of being a member or acting as a manager of the limited liability company.

(emphasis added). As noted in Kelly Kunsch, 1B *Washington Practice* § 70.17, "When it comes to liability to a third party, no member or manager of an LLC is personally obligated on any debt or liability of the LLC solely by reason of being a member or acting as a manager." The Harers cannot be liable in their individual capacity to the Stockards for the trial court's decision in interpreting the lease.

Similarly, Commonwealth should not be a party to the present dispute. An agent is not liable for acts done in a representative capacity. *Yuan v. Chow,* 96 Wn. App. 909, 913-14, 982 P.2d 647, *review denied,* 140 Wn.2d 1006 (1999). A person making a contract with another as agent for a disclosed principal does not become a party to the contract. *Hopkins v. Anderson,* 7 Wn. App. 762, 766, 502 P.2d 473 (1972) (citing *Restatement (Second) of Agency* § 320 (1958)). Further, when an agent makes a contract on behalf of a disclosed or partially disclosed principal whom he has power to bind, he does not thereby become liable for his principal's nonperformance. *Griffiths & Sprague Stevedoring Co. v. Bayly, Martin & Fay, Inc.,* 71 Wn.2d 679, 685, 430 P.2d 600 (1967) (citing *Restatement (Second) of Agency* § 328 (1958)).

Pursuant to their management contract, CP 39-46, Commonwealth is an agent of the LLC. It cannot be liable for any acts taken in its representative capacity as the property manager for the LLC. Further, it cannot be liable for a breach of a contract claim, because, as described above, Commonwealth is not a party to the contract between the Stockards and the LLC. The trial court erred in failing to dismiss Commonwealth.

(4) The Trial Court Erred in Failing to Enforce Paragraph 15 of the Agreement According to Its Terms

Paragraph 15 of the rental agreement unambiguously provides for landlord written approval before tenants like the Stockards may erect any addition or improvement on their lot. Moreover, the community regulations also made it abundantly clear that the Stockards could not make permanent additions to structures on their lot without "prior approval." CP 59. Failing such approval, any such additions were "subject to removal." *Id.* It could not be clearer from the rental agreement and the regulations for Azalea Gardens that the Stockards had no authority to erect permanent structural additions on their lot without the LLC's approval. Lacking such approval, any additions must be removed.

Lease provisions like paragraph 15 of the agreement are *expressly* authorized by the Mobile Home Landlord Tenant Act. RCW 59.20.070(2) provides:

> A landlord shall not:
>
> (2) Restrict the tenant's freedom of choice in purchasing goods or services *but may reserve the right to approve or disapprove any exterior structural improvements on the mobile home space. . .*

(emphasis added). The language of the statute has not been construed in a reported Washington opinion, but it unambiguously authorizes lease

provisions like paragraph 15.[4] The trial court erred in failing to enforce paragraph 15 according to its terms.

The language of paragraph 15 is clear and enforceable. Contracts should be construed to reflect the intent of the parties. *Corbray v. Stevenson*, 98 Wn.2d 410, 415, 656 P.2d 472 (1982). Words should be given their ordinary meaning, and courts, under the guise of construction or interpretation, should not make another or different contract for the parties. *Id.* at 415. Also, when construing a contract, the court should apply construction that will give effect to each part of the instrument. *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 705, 952 P.2d 590 (1998) (citing *Pub. Employees Mut. Ins. Co. v. Sellen Constr. Co.*, 48 Wn. App. 792, 740 P.2d 913 (1987)).

In this case, paragraph 15 of the lease afforded the LLC, as the owner/landlord of Azalea Gardens, the right to approve any permanent addition to *its property* by tenants. The trial court failed to give effect to the clear language of that lease provision.

The Stockards assert the LLC's consent to construction cannot be "unreasonably" withheld, citing various cases involving covenants. CP

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[4] Division III recognized in *Gillete v. Zakarison,* 68 Wn. App. 838, 841, 846 P.2d 574 (1993) that a landlord may impose aesthetic standards in a mobile home park.

134-35. They even tried to analogize the landlord's authority to withhold approval of permanent additions to the landlord's own property to the authority of the landlord to deny approval of assignments of a tenant's lease under RCW 59.20.073. CP 135. That statute requires the denial of approval to be in writing and the landlord may not unreasonably withhold approval. However, that statute deals with the assignment of *the tenant's* lease rights and not permanent additions to *the landlord's* property. RCW 59.20.070(2) does not contain limitations like those in RCW 59.20.073. Here, the LLC denied approval to the Stockards in writing. The Stockards were *twice* told in writing their addition was disapproved. The LLC withheld approval reasonably. The Stockards were told Harer had concerns about such large additions on a high-density community and the community's quality in the long term. Their attorney was told the addition was too large. These concerns were reasonable.

The Stockards argued that the trial court should have looked to language in covenants for subdivisions relating to approval of improvements to property within such subdivisions for guidance in construing paragraph 15. CP 134-35.

Although covenants for subdivisions are not the same as a lease because the lot owners in a subdivision own their property unlike tenants like the Stockards here, Washington courts have routinely allowed

committees of homeowners associations for subdivisions to approve design and construction by lot owners in such divisions. In *Green v. Normandy Park, Riviera Section, Community Club,* 137 Wn. App. 665, 151 P.3d 1038 (2007), for example, the Court of Appeals upheld the authority of a community club to enforce restrictive covenants set forth in a plat as a successor to the subdivision's developer. The court upheld the trial court's decision to order homeowners who proceeded without club approval of their construction, as required in the covenants, to remove offending portions of their construction. Like the homeowners in *Green,* where the Stockards claim the equitable remedy of a court order to authorize them to proceed with construction of their addition despite paragraph 15 of the agreement, they lacked clean hands in proceeding with construction without approval of the LLC. Similarly, in *Wimberly v. Caravello*, 136 Wn. App. 327, 149 P.3d 402 (2006), Division III upheld a trial court decision to enjoin further construction of a substantially completed three-story garage erected in violation of the covenants for a subdivision overlooking Lake Roosevelt. *See also, Bauman v. Turpen,* 139 Wn. App. 78, 160 P.3d 1050 (2007) (neighbors enforced covenant restriction limiting homes in subdivision to one story). Thus, even in the subdivision context, covenant provisions giving authority to homeowners associations or committees of such associations to approve construction

within the subdivision are routinely enforced by Washington courts, even to the extent of enjoining unapproved construction or ordering the removal of offending construction.

Here, the agreement, based on the authority of RCW 59.20.070(2), stated that a tenant could not alter the structures on a lot within Azalea Gardens without the written permission of the LLC. Despite being told on at least two occasions that they did not have permission to build a permanent addition to their manufactured home, the Stockards began excavating the ground on their lot thereby damaging the LLC's land. This is an express breach of the agreement and the rules for Azalea Gardens.

(5) The Trial Court Erred in Determining the LLC "Unreasonably" Withheld Approval of the Stockard Addition

The Stockards also argue that paragraph 15 should not apply because the LLC unreasonably withheld approval of their addition. They assert other tenants made improvements which were approved by the LLC and cite *Riss v. Angel,* 131 Wn.2d 612, 934 P.2d 669 (1997) and *Day v. Santorsola,* 118 Wn. App. 746, 76 P.3d 1190 (2003), *review denied,* 151 Wn.2d 1018 (2004) in support of their contention that the LLC acted unreasonably. CP 134-35, 236-39. Again, these cases dealt with restrictive covenants and situations where the parties actually *owned* the land on which they were seeking to either build or remodel structures.

Here, the Stockards do not own the land on which they reside. The land is owned by the LLC. The LLC simply exercised its right under the lease when it rejected the Stockards' request.

But even under subdivision cases, the burden of proving unreasonable withholding of approval is exceedingly high and rests with the party claiming the withholding of approval was unreasonable. The question of whether approval is unreasonably withheld or withheld in bad faith is generally a *question of fact. Green,* 137 Wn. App. at 693. The Supreme Court in *Riss* stated that "[C]ovenants providing for consent before construction or remodeling will be upheld so long as the authority to consent is exercised reasonably and in good faith." 131 Wn.2d at 625. In *Riss*, the Court found approval of a home's construction in a subdivision was unreasonably withheld by a homeowners association board where the board made its decision about height, bulk, and neighbor effect without comparing the proposed home with other homes in the neighborhood or actually investigating the project thoroughly. Moreover, board members actively campaigned against the residence. *Id.* at 630. Here, the Stockards' proposed addition did not compare favorably to other additions in Azalea Gardens.

Similarly, in *Day*, a proposed house was rejected without significant independent investigation by the homeowners association

committee as to the alleged impact of the house on neighboring views. 118 Wn. App. at 757. The court concluded the committee acted unreasonably, and in bad faith in rejecting the construction because it focused on views, rather than height of construction, as required by the covenants, and relied solely on inaccurate information provided by opponents of the house to make its decision. *Id.* at 758-59.

However, in *Heath v. Uraga,* 106 Wn. App. 506, 24 P.3d 413 (2001), *review denied,* 145 Wn.2d 1016 (2002), this Court affirmed a trial court decision that the review committee for subdivision did not act in bad faith simply because one member of the three-member committee that denied approval happened to live uphill from the lot of the person whose plans were rejected.

In this case, at a minimum, there is a question of fact as to whether the LLC acted reasonably and in good faith. The Stockards offered insufficient evidence the LLC exercised its authority under paragraph 15 unreasonably or somehow acted in bad faith. The LLC had discretion under paragraph 15 to approve or reject proposed additions by Azalea Gardens tenants. Pursuant to such discretion, the LLC did not act unreasonably or in bad faith merely by approving some projects and rejecting others.

The Stockards fail to establish as a matter of law that the LLC waived its rights under paragraph 15 or that it acted unreasonably or in bad faith. There is no evidence the LLC acted unreasonably or in bad faith. The LLC here considered the Stockards' plans appropriately and rejected the addition because of the disproportionate size of the addition. CP 173-95, 199. On this point, the May 29, 2007 declaration of Christina Mays is critical. She surveyed other approved additions to homes in Azalea Gardens and these additions are clearly *smaller* than that proposed by the Stockards. CP 173-95. This Court should reverse the trial court's decision that the LLC withheld approval of the Stockards' addition unreasonably or in bad faith because that issue is, at a minimum, a fact question. The Court could rule as a matter of law that the LLC acted reasonably and in good faith in denying approval to the Stockards' addition in the absence of proof by the Stockards to the contrary.

(6) The Trial Court Erred in Awarding Reasonable Attorney Fees to the Stockards

The trial court awarded attorney fees to the Stockards on the basis of the agreement. CP 160.[5] The trial court's fee award should be reversed because the Stockards should not prevail in this case.

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[5] Paragraph 27 of the agreement states:

The trial court has not ruled on the amount of fees to which the Stockards are entitled. Azalea Gardens reserves the right to contest the amount of fees, if excessive.

(7) Appellants Are Entitled to Their Reasonable Attorney Fees on Appeal

As noted *supra*, the agreement provides that the prevailing party in an action under the agreement shall recover its reasonable attorney fees. CP 51. *Riss,* 131 Wn.2d at 633-34. Under RAP 18.1, the LLC should recover its fee on appeal.

F. CONCLUSION

Paragraph 15 of the agreement, based on RCW 59.20.070(2), gave the LLC express authority to approve additions to buildings on the Stockards' leased premises. The LLC was entitled to invoke that provision and reject the Stockards' permanent improvement to their leased premises in Azalea Gardens.

> **Attorneys' Fees.** In any action arising out of this Rental Agreement, including eviction, the prevailing party shall be entitled to its reasonable attorneys' fees and costs.

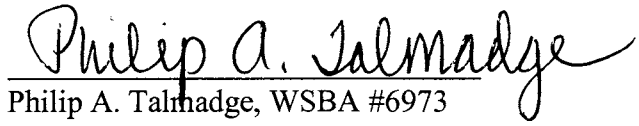
CP 51.

The trial court should not have reached the issue of the LLC withholding approval of the Stockards' addition unreasonably or in bad faith because the Stockards failed to give timely notice to the LLC or Commonwealth of the cross-motion. CR 56(c). Even if the trial court properly considered the cross-motion, the trial court applied the incorrect legal standard on withholding approval of the addition, and there were genuine issues of material fact on whether the LLC acted unreasonably or in bad faith.

The Court should reverse the trial court's summary judgment in favor of the Stockards and direct that judgment be entered in favor of the LLC on the basis of paragraph 15 of the agreement. In the alternative, the summary judgment should be reversed, the Harers and Commonwealth should be dismissed from the case, and a trial should be ordered on the LLC's decision not to approve the addition. Costs on appeal, including reasonable attorney fees, should be awarded to the LLC, the Harers and Commonwealth.

DATED this 3d day of October, 2007.

Respectfully submitted,



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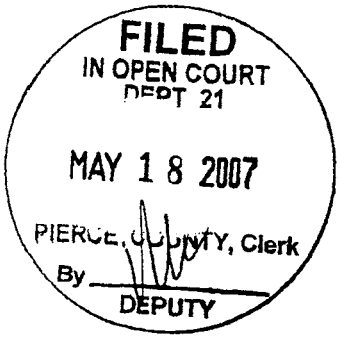
Attorney for Appellants

APPENDIX



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

HARRIS STOCKARD and PAMA STOCKARD, husband and wife, Plaintiffs, vs. JOHN HARER and "JANE DOE" HARER, husband and wife, dba AZALEA GARDENS, LLC; CHRISTINA MAYS and "JOHN DOE" MAYS, wife and husband, and COMMONWEALTH PROPERTY MANAGEMENT SERVICES COMPANY, an Oregon corporation dba COMMONWEALTH REAL ESTATE SERVICES, Defendants	NO: 07-2-04680-7 ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

THIS MATTER having come on regularly before the above entitled Court on Plaintiffs' Motion for Summary Judgment and the Court reviewing the files and records herein to include the following pleadings:

1. Defendants' Motion for Summary Judgment
2. Declaration of Troy R. Nehring

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ORIGINAL

3. Declaration of Christina Mays

4. Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment/In Support of Plaintiffs' Cross Motion for Summary Judgment

5. Declaration of Pama Stockard

6. Declaration of David Omoth

7. Declaration of Marijo Montgomery

8. Defendants Response to Plaintiffs' Motion for Summary Judgment and Reply Regarding Defendants' Motion for Summary Judgment

9. Plaintiffs' Reply Memorandum in Support of Cross Motion for Summary Judgment

And hearing argument of counsel and being fully advised in the premises, now therefore it is hereby

ORDERED, ADJUDGED, and **DECREED** that Defendants' Motion for Summary Judgment shall be and the same hereby is DENIED and it is further

ORDERED, ADJUDGED, and **DECREED** that Plaintiffs' Motion for Summary Judgment shall be and the same hereby is GRANTED in the following particulars:

a. Plaintiffs' proposed remodel/addition to their home is deemed approved and may proceed as designed, in accordance with applicable terms and conditions of the Azalea Gardens Community Guidelines;

b. Defendants and each of them are restrained from interfering with Plaintiffs' remodel construction, but may monitor the same for purposes of assuring compliance with applicable terms and conditions of the Azalea Gardens Community Guidelines;

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claims for

Plaintiffs ~~are hereby awarded~~ damages for intentional infliction of emotional distress ~~in an amount to be hereafter determined by the Court;~~ are dismissed.

may present a motion for

c. Plaintiffs ~~are awarded~~ attorneys fees and costs in an amount to be hereafter determined by the Court upon presentation of appropriate documentation of the same.

DONE IN OPEN COURT this 18th day of May, 2007.

FRANK E. CUTHBERTSON, JUDGE

Presented by:

BRIAN L. MCCOY, WSBA #9565
Attorney for Plaintiffs

Copy Received:
~~Approved by~~:

~~TROY NEHRING~~, WSBA # 24462
Attorney for Defendants

FILED
IN OPEN COURT
DEPT 21
MAY 18 2007
PIERCE COUNTY, Clerk
By DEPUTY

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DECLARATION OF SERVICE

On said day below I deposited in the U. S. mail a true and accurate copy of the following document: Brief of Appellants, Court of Appeals Cause No. 36458-1-II, to the following:

Walter H. Olsen, Jr.
B. Tony Branson
Troy R. Nehring
Olsen Law Firm PLLC
604 W. Meeker Street, Suite 101
Kent, WA 98032

Copy sent by ABC Legal Messengers
Mark Dietzler
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Original sent by ABC Legal Messengers for filing with:
Court of Appeals, Division II
Clerk's Office
950 Broadway, Suite 300
MS TB-06
Tacoma, WA 98402-4427

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

DATED: October 3, 2007, at Tukwila, Washington.

Paula Chapler, Legal Assistant
Talmadge Law Group PLLC