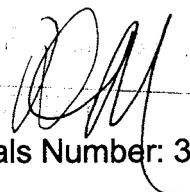


STATE OF  
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Court Of Appeals Number: 36572-3-II

COURT OF APPEAL, DIVISION II  
STATE OF WASHINGTON

FAWN LAKE MAINTENANCE COMMISSION, RESPONDENT

v.

ALDONS ABERS and INESE ABERS, APPELLANTS

BRIEF OF APPELLANTS

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred in entering an Order Re Partial Summary Judgment on February 12, 2007 granting partial Summary Judgment to the Plaintiff.

2. The trial court erred in entering an Order Re Motion For Summary Judgment On Remaining Claims of Plaintiff on June 4, 2007.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. The Defendants in this action were advised by representatives of the Plaintiff to combine two lots in a subdivision into one lot for the purpose of reducing their homeowners dues by one half. The Defendants followed the advice of the representative of the Plaintiff and combined their two building lots into one lot, through the procedures adopted by Mason County, Washington. Under these circumstances, is it appropriate to allow the Plaintiff to recover dues for two lots when the Defendants, following the advice of the Plaintiff, have combined their property into a single residential lot? (Assignment of Error 1.)

2. Under the circumstances identified and described in issue 1., above, is the plaintiff estopped by its actions from collecting dues for two lots? (Assignment of Error 1.)

3. Has the plaintiff waived its right to collect dues on multiple lots? (Assignment of Error 1.)

4. Where an attorney for the prevailing party is requesting payment of attorney fees and costs, is that attorney required to provide authority justifying the payment of fees and costs and must the attorney provide a detailed analysis of why the fees and costs requested are appropriate? (Assignment of Error 2.)

## **II. STATEMENT OF THE CASE**

Fawn Lake is a planned unit development (subdivision) in Mason County, Washington. CP 238. The Fawn Lake Maintenance Commission is the homeowner's association for that subdivision. CP 238. The Fawn Lake Maintenance Commission (hereinafter Fawn Lake) is the Plaintiff in this action.

The Defendants, Mr. and Mrs. Abers, purchased two lots as recreational property many years ago. CP 108. In the early nineties, Mr. Abers began to experience substantial health problems which drained the couple financially and threatened their ability to continue

to pay homeowners dues to Fawn Lake. CP 108. Because of the financial crisis, Mr. and Mrs. Abers contacted Fawn Lake to determine if they could get a deferral of their homeowners dues or some other relief. In response, they were told to set an appointment to discuss this issue in person at the Fawn Lake office. CP 109.

Mr. and Mrs. Abers went to the office of Fawn Lake in Mason County. CP 109 At that time, they met with the board president. CP 109. The board president explained that there was no authority for deferral of dues. Instead, he suggested that Mr. and Mrs. Abers consider officially combining their two lots in to one. CP 109. He explained that, once the lots were combined, Mr. and Mrs. Abers would be required to pay dues on only a single lot. CP 109. He went on to explain that there were "downsides" to combining the lots including, without limitation, the fact that Mr. and Mrs. Abers would only be allowed to erect only one home on their lot, that they would lose a second vote on maintenance commission issues, that they would lose one set of water rights which accrued to each individual lot, and that they would lose similar duplicate rights if the lots were combined. CP 109.

Mr. and Mrs. Abers considered these alternatives and ultimately decided to combine the two lots. The Fawn Lake president directed his assistant/secretary to provide contact information for Mason County. The assistant provided that information to the Mr. and Mrs. Abers. CP 109.

The lot combination was ultimately completed in 1998. CP 109. The lot combination was completed with the assistance of the Mason County Department of Community Development. CP 109. Mr. and Mrs. Abers have since been taxed on a single lot by Mason County, Washington. CP 109.

Thereafter, Fawn Lake treated the Defendants as if they had only one lot. CP 110. Fawn Lake provided only one water hookup for the two lots. CP 110. Fawn Lake acknowledged that there was a single lot and accepted dues for a single lot for some time after the combination. CP 110. Mr. and Mrs. Abers were provided with only a single ballot and treated as if they had only a single lot for purposes of voting in Fawn Lake elections. CP 110. Mr. and Mrs. Abers were provided only one access key to the Fawn Lane Community (it is a gated community). CP 110. Mr. and Mrs. Abers were treated in every respect as if they were the owners of a single lot.

At some point, the administration managing Fawn Lake Maintenance Commission changed. Thereafter, Fawn Lake made a blanket statement that the Fawn Lake Bylaws and Articles Of Incorporation authorized charging double dues for a single combined residential lot. CP 119. Mr. and Mrs. Abers asked for copies of the Bylaws and/or Articles Of Incorporation which supported this proposition. CP 119. Mr. and Mrs. Abers asked for a complete list of all property which had been combined to determine whether they were being treated similarly or differently than others in the division. CP 119 and 120. In response, the then president of Fawn Lake wrote back to say that in the interest of "privacy" the information requested could not be provided. CP 120.

When the parties were unable to resolve this issue between them, Fawn Lake filed an action in Mason County Superior Court to determine whether Mr. and Mrs. Abers should be paying dues for one lot or two. That Declaratory Judgment action was filed on December 20, 2001. CP 564. Thereafter, Fawn Lake filed an Amended Complaint on August 28, 2003.

The litigation between the parties proceeded to summary judgment. On February 12, 2007, the trial court heard cross motions

for summary judgment. CP 66. The trial court at that time was faced with deciding whether it was appropriate to assess dues for a single lot or two lots as argued by Mr. and Mrs. Abers and Fawn Lake, respectively. CP 66. The trial court sided with Fawn Lake and entered an Order Granting Summary Judgment to Fawn Lake determining that Mr. and Mrs. Abers owe dues for two lots. CP 66.

Thereafter, a second Motion for Summary Judgment was argued on May 21, 2007 with an order entered on June 4, 2007. CP 5 through 9. The trial court entered Judgment in favor of Fawn Lake, including Judgment for the dues which were unpaid as well as attorney fees and costs. CP 5 through 9.

### **III. ARGUMENT**

#### **1. Standard of Review**

As to issues which were decided on Summary Judgment below, this Court reviews those decision de novo. The Court engages in the same inquiry as the trial court to determine whether the moving party is entitled to Summary Judgment as a matter of law and whether there are genuine issues of material fact requiring a trial. Michak vs. Transnation Title Insurance Company, 148 Wn.2d 788, 64 P.3d 22 (2003). The trial court's determination of factual disputes on

Summary Judgment is entitled to no weight. The appellate court reviews the record de novo. All facts and reasonable inferences therefrom must be viewed in the light most favorable to the party resisting the motion. Even if the facts are undisputed, if reasonable minds could draw different conclusions, summary judgment is not appropriate. Chelan County Deputy Sheriffs Association vs. Chelan County, 109 Wn.2d 282, 745 P.2d 1 (1987).

Next, a trial court's determination of attorney fees and costs is reviewed for abuse of discretion. However, discretion must be exercised on articulable grounds. Awards must be based upon proper findings of fact and conclusions of law. Mahler vs. Szucs, 135 Wn.2d 398, 957 P.2d 632 (1998). The appellate court is entitled to written findings in support of the award of attorney fees and the trial court is to provide a detailed discussion of the principals governing such award. This is necessary in normal course to allow the appellate court to have a meaningful review of the decision below.

**2. Mr. and Mrs. Abers own one residential lot subject  
to one set of fees and assessments.**

The central issue in this case is whether or not Mr. and Mrs. Abers own one residential lot or two residential lots for purposes of

assessment by Fawn Lake. Fawn Lake has taken the position that dues should be based on the "original configuration" of lots within the Fawn Lake division. Mr. and Mrs. Abers take the position that the bylaws mean what they say and that assessments are based upon the number of residential lots owned by each property owner within the Fawn Lake division.

The critical inquiry boils down to whether or not the Defendants own one "residential lot." The authority for assessing lots by Fawn Lake is contained in Article 1, section 3 of the covenants. That section reads, in relevant part, as follows:

Charges and assessments by the Commission shall be levied in equal proportions against each and every residential lot, or in accordance with service rendered directly to each such residential lot...

CP 70 (emphasis added). These covenants were adopted in 1968 and recorded contemporaneous with their adoption. CP 269. They have remained unchanged to this date.

The plain language of the covenants supports the position of Mr. and Mrs. Abers. The language allows the Commission to assess dues proportionately against each residential lot. The phrase

"residential lot" is nowhere defined in the covenants. At this point, having completed their lot combination with Mason County, Washington, Mr. and Mrs. Abers are able to build only one residence on their lot and it is suitable for only one residence. There is nothing to indicate that they own more than one residential lot.

Beyond that and as additional support for the position of Mr. and Mrs. Abers, the section identified above allows Fawn Lake to assess proportionately "in accordance with service rendered directly to each such residential lot." The clear language of this section anticipates that assessments will be based upon services provided. Recall that Mr. and Mrs. Abers receive only one water hookup, one gate key, and, until this litigation was filed, only one ballot for purposes of voting in Fawn Lake Maintenance Commission elections. Because they are allowed to build only one residence, they will be limited to residential traffic for one home only. No matter how it is viewed, Mr. and Mrs. Abers are consumers of only one set of services and should be assessed only one set of dues.

As additional support for this proposition, it would be helpful if we were able to define the term "residential lot." As stated above, nowhere in the covenants is this term defined. We are left to look

elsewhere for a definition of the term lot or residential lot. Language in covenants which is undefined is given its ordinary and common meaning.

For purposes of the law of real estate and particularly the law of subdivisions, the term "lot" is defined in RCW 58.17.020(9). That section defines "lot" as follows:

A fractional part of divided lands having fixed boundaries, being of sufficient area and dimension to meet minimum zoning requirements for width and area. The tract shall include tracts or parcels.

The term "residential lot" is not statutorily defined. For whatever reason, those who drafted the covenants at issue in this case chose to add the descriptive word "residential" rather than to simply allow assessments on a per lot basis. Presumptively, the word residential has some meaning in this context. The logical conclusion is that the word residential was added to address the issue of proportionate charges for proportionate consumption of services. That is, no matter how many lots are owned by an individual property owner, if parcels are all combined into a single residential lot, then they will consume only a single set of services.

Beyond this logic, the dictionary definition of "residential"

provides additional support for the position of Mr. and Mrs. Abers. As used in this context, "residential" is an adjective meaning "pertaining to, containing, or suitable for a residence." Webster's Third Dictionary, World Publishing Company, 1990. Again, this is support for Mr. and Mrs. Abers' position; assessments should be made based upon whether the lot is "containing or suitable for a residence." Mr. and Mrs. Abers have only one such lot.

As an analysis of the relevant section in the covenants leads to the conclusion that Mr. and Mrs. Abers should have been assessed on the basis of one residential lot only, it was inappropriate for the trial judge below to grant summary judgment in favor of Fawn Lake. Summary judgment should have been granted in favor of Mr. and Mrs. Abers on this issue. Mr. and Mrs. Abers are requesting the this Court enter an Order requiring that summary judgment be entered confirming that they are the owner of only one lot for purposes of assessment.

**3. Fawn Lake is estopped to collect dues for multiple lots.**

In Washington, estoppel is the effect of voluntary conduct by a party where it is absolutely precluded at law and in equity from

asserting rights which might otherwise have existed as against another person, who has in good faith relied upon such conduct and has thereby been lead to a change of position. Markley vs. Markley, 31 Wn.2d 605, 198 P.2d 486 (1948). Equitable estoppel is based upon the principal that a party should be held to a representation made or a position assumed where inequitable consequences would otherwise result to the party who has justifiably relied upon those representations.

In order to find estoppel, the Court must find the following elements:

1. Acts, statements, or admissions inconsistent with the claims subsequently asserted;

2. A change of position on the part of the other party in reliance upon the acts, statements, or admissions; and

3. A resulting injustice to the other party if the first party is allowed to contradict or repudiate its former acts. Witzel vs. Tena, 48 Wn.2d 628, 295 P.2d 1115 (1956). All of these elements are present in the case now before the Court.

First, it was the president of the homeowners association who recommended to Mr. and Mrs. Abers that they combine their lots in

order to reduce dues and assessments. This is clearly an act and statement inconsistent with the position that Fawn Lake is now taking. Second, Mr. and Mrs. Abers clearly changed their position in reliance upon this advice. Specifically, they contacted the appropriate officials at Mason County using the information which had been provided by the president of the homeowners association. They combined their lots into one lot in direct reliance upon these representations. With regard to the element of injustice, it would be inappropriate to allow Fawn Lake to charge two sets of dues when Mr. and Mrs. Abers have surrendered valuable property rights to achieve the benefit of a single residential lot. Recall that Mr. and Mrs. Abers gave up the right to two full building lots and surrendered other valuable rights within the Fawn Lake subdivision, including water rights, voting rights, access rights, and other considerations.

This appears to be a text book case of estoppel. Mr. and Mrs. Abers do not concede that Fawn Lake's reading of the covenants is correct, but even if it is, Fawn Lake is prohibited from charging two sets of dues because it is estopped from that position. The Court is asked to enter summary judgment in favor of Mr. and Mrs. Abers on this issue.

**4. Fawn Lake has waived its right to collect  
dues for multiple lots.**

Unlike the doctrine of estoppel, waiver requires only a unilateral relinquishment of a right, advantage, or benefit. That is, there is no element of justifiable reliance. Waiver may be proven by an express agreement or it may be inferred from circumstances indicating the intent to waive a known right. See, e.g., *Wagner vs. Wagner*, 95 Wn.2d 94, 621 P.2d 1279 (1980).

Again, this is a text book case of waiver. The president of the homeowners association unequivocally stated that Fawn Lake would waive its right to collect dues on multiple lots. Further, the president actually instructed and assisted Mr. and Mrs. Abers in providing information to complete the lot combination process. This is a clear waiver.

Following up on his unequivocal statements, Fawn Lake did, in fact, ratify the statement by charging only one set of dues and taking away the privileges that go with multiple lot ownership. That is, after following the president's advise, Mr. and Mrs. Abers were billed for only a single lot. Mr. and Mrs. Abers were also provided with only one set of services including, without limitation, a single water hookup,

a single key to access the property, and limitation of other multiple services that they had previously enjoyed. On this basis as well, Mr. and Mrs. Abers are asking the Court to return this matter to the trial court for entry of summary judgment in their favor.

**5. There is no authority for the award of attorney fees and costs assessed by the trial court.**

Turning first to the issue of attorney fees, the trial court made absolutely no attempt to analyze whether the attorney fees sought by Fawn Lake's attorney were appropriate. In fact, the attorney for Fawn Lake presented what can only be described as nothing more than a printout listing the hours that counsel alleges that he worked and a conclusory statement as to the charges assessed to the client. See CP 83, CP 30, and CP18. The third fee application (titled by counsel "Second Supplemental Declaration Of Stephen Whitehouse Re Attorney Fees") was actually delivered to the trial court and Mr. and Mrs. Abers' counsel in the midst of the second Summary Judgment argument. That is, the second Motion for Summary Judgment was argued on May 21, 2007 and the declaration of counsel regarding attorney fees was delivered in the middle of that hearing. CP 18.

First on this issue, it is the prevailing party's burden to establish

that an award of attorney fees is appropriate at any level. Washington follows the general American rule with regard to an award of attorney fees. Attorney fees will generally not be awarded to a prevailing party unless authorized by contract, statute, or on certain equitable grounds. Barnett vs. Buchen Baking Company, 108 Wn.2d 405, 738 P.2d 1056 (1987); City of Sequim vs. Malkasian, 157 Wn.2d 251, 138 P.3d 943 (2006).

In the court below, Fawn Lake offered little or no support for its request for attorney fees. It offered up statutes which don't apply, referred to sections of the bylaws which contain no attorney fee authorization, and generally argued that attorney fees are "costs" encompassed in a section of the bylaws allowing costs of collection. Without analysis, the trial court simply indicated that it was going to award attorney fees. More is required.

Washington courts have long been concerned with the need for trial courts to rigorously examine attorney fee applications. The courts must take an active role in assessing the reasonableness of attorney fees, rather than simply rubber stamping a request for fees. The court should not simply accept unquestioningly fee affidavits from counsel. Nordstrom, Inc. vs. Tampourlos, 107 Wn.2d 735, 733 P.2d 208

(1987); Mahler vs. Szucs, 135 Wn.2d 398, 957 P.2d 632 (1998). As the Court in Mahler stated

Consistent with such an admonition is the the need for an adequate record on fee award decisions. Washington courts have repeatedly held that the absence of an adequate record upon which to review a fee award will result in a remand of the award to the trial court to develop such a record. [citations omitted] Not only do we reaffirm the rule regarding adequate record on review to support an award, we hold findings of fact and conclusions of law are required to establish such a record.

Mahler, at 435.

In this case, not only was there no record established, the trial court did nothing to analyze whether the award of attorney fees was necessary or appropriate. In fact, without even reviewing the material provided, the trial court simply awarded the fees requested by the attorney for Fawn Lake. Even as to the declaration which was handed forward in the middle of the argument on the summary judgment motion, the trial court neither questioned the fees nor offered the attorney Mr. and Mrs. Abers a chance to read that Declaration. It was truly, as characterized by the Mahler court, "a litigation afterthought"

as far as the trial court was concerned.

Mahler vs. Szucs sets up a specific, detailed list of factors which the Court should consider in analyzing an award of attorney fees or costs. On the record before the trial court and the record before this Court, there is no basis to make any determination of the appropriateness of the fee award made below. It is appropriate that that attorney fee award be vacated. The trial court neither analyzed whether an award of attorney fees and costs was justified under a statute or contract nor analyzed the appropriateness of the amount of fees that were being requested. Certainly, given the size of the principal judgment and the limited substantive issue before the trial court, a request for fees and costs which is more than double the principal amount at stake seems inappropriate.

Similarly, with regard to the costs incurred, the trial court exceeded its authority. Specifically, one of the items requested in the fee request identified in the July 18, 2006 declaration of the attorney for Fawn Lake was a request for reimbursement of "Corblet Corp-Service Latvia... \$1,365.00." CP 90. Additionally, and again without discussion, that same declaration identified "process server- attempts to locate & serve... \$480.00." CP 90.

Thus, of the roughly \$2,400.00 that the Plaintiff was requesting in costs, \$1,845 apparently relates to process service which was incomplete. Again, without analysis or even inquiry, the trial court awarded all of the costs sought by Fawn Lake. This was inappropriate.

It appears that RCW 4.84.010(2) allows for an award of costs for process service only when the service is actually obtained. That is, if service is by a public officer, the fee is fixed as of the time of service. If service is by a private process server, then service costs are only allowed if incurred "in effecting service." Both sections contemplate an award of cost for service of process only if service is completed. There doesn't seem to be any authority for the proposition that a Plaintiff can flail about, spend \$1,800.00 in not completing service, and then charge the Defendant for those failures. Certainly, more is required.

It is interesting to note that counsel for Mr. and Mrs. Abers actually accepted service on their behalf. Thus, not only was the attempted service never accomplished, Mr. and Mrs. Abers were never served personally. Of course, this is largely due to the fact that

they reside in Latvia.

In the court below, the attorney for Fawn Lake acknowledged that there was no authority for an award of service costs in this circumstance. CP 62 at line 18. Instead, Fawn Lake alleged, without citation or any factual verification, that the "Washington courts are loathe to reward someone's intransigence in litigation." It is true that Mr. and Mrs. Abers live in Latvia. It is difficult to tell how we get from that geographic fact to an allegation of intransigence. Certainly, the trial court should have done more than simply rubber stamp the fee and cost application presented by Fawn Lake.

#### **IV. CONCLUSION**

Mr. and Mrs. Abers are requesting that the summary judgment Orders entered on February 12 , 2007 and June 4, 2007 be reversed. Mr. and Mrs. Abers are requesting that this Court remand this case to Mason County Superior Court with direction to enter summary judgment in favor of Mr. and Mrs. Abers on the issue of whether they should be assessed for one residential lot. Additionally, Mr. and Mrs. Abers are requesting that the court below be instructed to enter an award of attorney fees and costs to the Mr. and Mrs. Abers, if justified by contract or statute. This should include recovery of attorney fees

and costs on appeal.

Dated: December 10, 2007

Respectively submitted.

A handwritten signature in black ink, appearing to be 'J. Frawley', written over a horizontal line.

John Frawley, WSBA #11819  
Attorney for Appellants

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

FAWN LAKE MAINTENANCE  
COMMISSION,  
  
Respondent,  
  
vs.  
  
ALDONS ABERS and INESE ABERS,  
  
Appellants.

No. 36572-3-II  
DECLARATION OF MAILING

The undersigned declares that on December 17, 2007 I placed in the United States Postal Box with correct prepaid postage an original and copy of the Brief Of Appellants, addressed to the following: Washington State Court of Appeals, Division Two, 950 Broadway, Suite 300, Tacoma, WA 98402-4454 and a copy of the Brief Of Appellants addressed to Stephen Whitehouse, P.O. Box 1273, Shelton, WA 98584-0952.

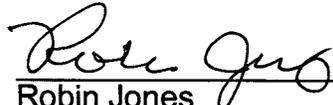
I declare pursuant to RCW 9A.72.085 and under penalty of perjury under the laws

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of the State of Washington that the foregoing is true and correct.

Date: 12/17/07

  
Robin Jones

Mountlake Terrace, Washington  
Place of Signing

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