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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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COURT OF APPEALS FOR DIVISION II

STATE OF WASHINGTON

FLYING H. RANCH HOMEOWNERS ASSOCIATION,
a Washington non-profit corporation,

Appellant,

v.

JAMES L. GEARY and Janice GEARY, husband and wife; and
U.S. BANK NATIONAL ASSOCIATION N.D.,

Respondents.

BRIEF OF RESPONDENT

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I. ISSUES

1. Did the trial court apply the correct standard of review for interpreting the Covenants, Conditions, and Restrictions (“CC&Rs” or “covenants”) when one of the original drafters (a Declarant) was involved in the dispute and the two enforcement provisions directly conflict?
2. Does the clear and unambiguous language of the covenant govern the intent of the same?
3. Does the Architectural Control Committee (“ACC”) have discretion over all homeowner construction and alteration projects, as provided in Article V §2?
4. Did the Appellants fail to establish that it had a clear legal and equitable right to injunctive relief?
5. Did the trial court properly award attorneys fees and costs to the Gearys when (1) it reduced the Gearys’ attorney fee award for the time the Gearys spent on unsuccessful arguments and (2) when the CC&Rs and applicable statute provide for attorneys fees and costs, and the Respondent brought this action against the Gearys, asserting that the CC&Rs provided for attorneys fees in this type of action.

6. Should the Appellant be prevented from arguing that the CC&Rs did not provide for an award of attorney fees and costs in this litigation based on the doctrine of “judicial estoppel”?
7. Are the Gearys entitled to attorneys’ fees and costs on appeal as the prevailing parties, on the same grounds that they were entitled to the fees and costs as the trial court properly ruled.

II. STATEMENT OF THE CASE

1. **Facts. The CC&Rs.** Gloria Hill and her late husband Roy A.C. Hill were the original Declarants and grantors of the Flying H Ranch. CP 126. They developed the CC&Rs that are central to this lawsuit.

The CC&Rs are central to this dispute, particularly the following sections:

Article V §2. Article V §2(a) reads in relevant part:

“No building or other structure shall be constructed **or altered** until there has been filed with and approved by the [ACC] plans and specifications for the same. CP 285 (**Emphasis added**).

Article V §2(e) reads in its entirety:

The [ACC]’s approval or disapproval as required in these covenants shall be in writing. In the event that the [ACC], or its designated representative fails to approve or disapprove within thirty (30) days after plans and specifications have been submitted to it, **or in any event, if no suit to enjoin the construction has been commenced prior to the completion thereof, approval will not be required and the related covenants shall be deemed to have been fully complied with.** CP 285 (**Emphasis added**).

Article VII(51) which provides that any covenant violations that are not corrected within sixty (60) days after written notice from the association will incur a penalty of ten dollars (\$10.00) a day. CP 298.

Article VII(3), as amended reads in relevant part: “[n]o composition roofs shall be allowed and roofing materials shall be either shake or tile or other material as may be approved by the [ACC]. CP 287.

Article IV(1) and (7) provide for attorneys’ fees and costs in actions to foreclose upon a lien against a homeowner violating the CC&Rs. CP 282 and 284.

Gearys’ Urgent Situation. When the Gearys began seeking to replace their roof, it was leaking so much that they had to hire a contractor to put up tarps. CP 84; CP 206-208; CP 214-228. While the CC&Rs allowed the Gearys to replace their roof with “shakes or tiles,” the structure of the Gearys’ home could not support such heavy materials. CP 122. The Gearys’ failing roof was similar to light weight tiles and roofing contractors informed the Gearys that such a product (light weight tiles) would likely fail in the same manner that their current roof was failing. *Id.*

The Gearys reiterated and emphasized to the ACC and BOD their urgent situation the ACC and BOD. CP 144. They explained that the leaks were destroying their home and causing serious health and safety risks to their family. *Id.*; CP 206-208; CP 230-232; CP 340-342; CP 344-

345; CP 347. Left with no other choice, after submitting a full binder with all the plans and specifications for this roof alteration project to the ACC, the Gearys began replacing their roof. CP 22.

Homeowners' Association's ("HOA") enforcement. The parties agree on the same basic timeline surrounding the Gearys' roofing project: The Gearys purchased a home with existing FireFree lightweight tile roofing (a "composite/composition product") on it. CP 208-209. Both the BOD's President, Steven Hill, and a member of the ACC, KC Holms, testified that Mr. Lang was permitted to keep his composite roof under Article V §2(e)'s default provision requiring the HOA to bring a lawsuit to enjoin a homeowner's construction project prior to the homeowner finishing it. CP 209-210; CP 234-240.

In 2005, when the Gearys began having issues with their roof, they asked the BOD if the HOA would grant them an exception to the CC&Rs for their roof, or exercise discretion over their particular case. CP 20-21. The Gearys' construction and roof alteration project presented structural issues and the CC&Rs did not provide them with a practical solution. CP 122. The BOD immediately referred the Gearys to the ACC. *Id.* The BOD's President testified that the ACC has the responsibility to determine whether the materials that a homeowner uses on his or her premises are in compliance with the CC&Rs. CP 56. The ACC had reviewed other

homeowners' requests for composition roofing. CP 57; CP 200-201; CP 202-203.

The Gearys compiled information and, in late February 2006, submitted a binder of plans, specifications, and other information, as well as a formal request to the ACC for a higher quality roof that their relatively new home could structurally support. CP 82-90; CP 396-397. While the Appellant states that the Gearys did not submit plans to the ACC, the BOD's President testified, by way of declaration, that the ACC did not have an established system for maintaining its records until well into the action the HOA brought against the Gearys. CP 335. In addition, both the BOD and the ACC acknowledged that the Gearys submitted a thorough proposal. CP 21; CP 343. They had tarps and sandbags on their roof and pleaded with the ACC emphasizing the urgency of the situation. CP 206-248.

On March 6, 2006, the ACC responded with a letter asserting that it had discretion and denying the Gearys' request. CP 325. On April 15, 2006, the Gearys' informally appealed to the ACC, reiterating the urgent situation and asking permission to install their roof. CP 2. The ACC responded on April 17, 2006 and cited Article V §2(d), and stated that it would be forwarding the letter from the Gearys to the BOD for reconsideration. CP 325. All five members of the ACC included their

names on the letter, including the Declarant, Gloria Hill. *Id.* On April 25, 2006, the Gearys, in dire straights and needed to save their investment, began the roof alteration project on their home. CP 93.

On the first day that the Gearys began their roofing project, two BOD members, Steve Hill and Brian Holms came to the Gearys' property and discussed the project with Mr. Geary. *Id.* While the Gearys continued their construction project, the BOD consulted with their attorney. CP 22. The Gearys finished replacing their roof ten (10) days later (on May 4, 2006). CP 260.

In its letter dated May 8, 2006, the BOD stated that, since it didn't approve the Gearys' construction project prior to them starting it, the Gearys in violated Article V §2(a). CP 324. The BOD, and the ACC did not file suit to enjoin the Gearys' roof alteration/construction project before it was completed. *Id.*

After the Gearys finished their construction project, the HOA took a vote to amend the CC&Rs to add the type of material that the Gearys put on their roof as acceptable under the CC&Rs. CP 24, ¶12. Almost a year later, the Homeowners Association brought an action against the Gearys. CP 3.

Throughout their dealings with the Gearys, BOD and the ACC used the procedure set forth in Article V §2. CP 19-28. In his affidavit,

Mr. Hill stated that the ACC responded to the Gearys' request in only 6 days, despite them having thirty (30) (the CC&Rs do not have any other provisions for a 30 day review other than in Article V). *Id.*

2. Procedural History. Nine (9) months after the Gearys completed their construction project, the HOA brought an action against them asking the court for (1) a judgment against the Gearys; (2) an order requiring that the Gearys remove the composition roofing materials and replacing it with materials in compliance with the CC&Rs; (3) authorization for the Plaintiff do so, if the Gearys refuse; (4) for the Plaintiff's costs in bringing the Gearys into compliance with the CC&Rs to be considered a lien on the Geary's property; (5) and for Plaintiff's attorneys' fees and costs. CP 3-6.

The Plaintiff brought a Motion for Summary Judgment. CP 19-28. Plaintiff solicited the input of one of the original Declarants, Mrs. Gloria Hill, who testified, by way of affidavit, regarding the covenant's purpose and the design as well as her intentions when drafting the CC&Rs. CP 125-127. The court considered her testimony when it granted the Plaintiff's Motion, finding the Gearys in violation of Article VII, Section 3. CP 255-257. The court reserved Plaintiff's request for "an award of costs pursuant to the covenant of \$10.00 per day and for reasonable

attorneys' fees..." *Id.* The court also reserved the remedy available to the Plaintiff. *Id.*

On December 7, 2007, the Gearys moved for Summary Judgment relying on Washington state authority that (1) a court must construe CC&Rs by discerning the intent of the parties by clear and unambiguous language in the document; (2) CC&Rs will not be extended by implication beyond the clear meaning of the language in the document; and (3) any doubts as to the restrictions shall be resolved in favor of the free use of land. CP 258-271.

On December 26, 2007, Plaintiff responded with its own Summary Judgment Motion. CP 272-274. The Plaintiff did not cite any Washington state authority and asked the court for: (1) an order requiring the Gearys to remove their roof and prohibiting them from using composition roofing materials on their buildings; (2) an award of \$10.00 per day for the time the Gearys have had and continue to have the composition roofing material on their buildings; and (3) reimbursement of attorneys' fees and costs. Mrs. Hill testified again, by way of a declaration, as to the purpose and design of the ACC (CP 276) AND as to the intent of the provisions of Article V §2(e) (CP 276-77 ¶s 6-8).

The court considered all of the evidence and filings, including Mrs. Hill's testimony, when it granted the Gearys' Summary Judgment Motion

finding that, since the Plaintiff did not enjoin the Gearys' roofing project before they completed it, for purposes of a remedy, the Gearys were in compliance with the CC&Rs under Article V §2(e). CP 331-332; Verbatim Report of Proceedings (VRP) p 7. The court reserved the Gearys' request for attorneys' fees. *Id.*

The court specifically stated that it was required to attempt to give meaning to all the CC&Rs, construing any inconsistencies in the document against the drafter. VRP pp 3-4. The court noted that the HOA had acted as though Section V §2 applied, as evidenced in their letters. *Id.* at p 4. The court pointed out that Article V §2(e) and Article VII(51) could not be reconciled. *Id.* at pp 5-6. The court found that the two provisions were in direct conflict with each other, that the CC&Rs were very poorly drafted, and that the poor drafting goes against the HOA, not any specific homeowner who didn't draft them. *Id.*

The HOA brought a Motion for Reconsideration where it argued a "slippery slope" argument that a homeowner could construction something prohibited by the CC&Rs before the HOA could do anything about it. 358-361. The court denied the motion and rejected the above argument since those were not the facts of the present case. CP 398-399.

The Gearys brought a Motion for Attorneys' Fees and Costs. CP 424-434. The HOA opposed the Motion arguing (1) that it was the

prevailing party since the court determined that the CC&Rs were generally enforceable and (2) that the CC&Rs did not provide for attorneys fees in this kind of action. CP 373-382. The court granted the Gearys' Motion for Attorneys' Fees, holding that the HOA had interpreted its own CC&Rs to provide attorneys' fees for this type of action (and had asserted such three separate times). CP 405-406; VRP. The court did grant the HOA's request to reduce the Gearys' attorneys' fee award by the time spent on unsuccessful arguments. CP 403 @ ¶11.¹

III. STANDARD OF REVIEW

Orders for summary judgment are reviewed de novo. *City of Seattle v. Mighty Movers, Inc.*, 152 Wash.2d 343, 348, 96 P.3d 979 (Wash., 2004). Under CR 56(c), a court may grant summary judgment if the record presents no genuine issue of material fact and the law entitles the moving party to judgment. *Id.* Such facts must move beyond mere speculative and argumentative assertions. *Retired Pub. Employees Council of Wash. v. Charles*, 148 Wash.2d 602, 612-13, 62 P3d 470 (2003). The court should grant summary judgment only if reasonable persons could reach but one conclusion. *Id.* at 613.

The interpretation of restrictive covenants is a question of law and reviewed de novo. *Wimberly v. Caravello*, 136 Wash.App. 327, 149 P.3d

¹ The Gearys initially asked the court for an award of \$33,430.00. The court ultimately awarded the Gearys \$26,295.00.

402 (Wash.App., Div. 3, 2006) (citing *Parry v. Hewitt*, 68 Wash.App. 664, 668, 847 P.2d 483 (Wash.App. 1992)). Washington courts apply basic contract interpretation rules to restrictive covenants. *Id.* (citing *Lane v. Wahl*, 101 Wash.App. 878, 883, 6 P.3d 621 (2000)).

IV. LEGAL AUTHORITY AND ARGUMENT

A. The CC&Rs provisions governing the Homeowners' Association's remedies when a homeowner violates the same are directly conflicting and must be strictly construed against the drafter and resolved in favor of the free use of land.

Ambiguity exists where the meaning of a covenant is uncertain, or two or more reasonable and fair interpretations are possible. *White v. Wilhem*, 34 Wash.App. 763, 665 P.2d 407 (1983). A party claiming that the covenants have ambiguous language must show that the language is subject to more than one reasonable construction. *Hollis v. Garwall, Inc.*, 137 Wash.2d 683, 974 P.2d 836 (1999). If the party claiming an ambiguity in the covenant language is asserting that the parties did not intend for the language to have its usual meaning, it must provide evidence to that effect. *Id.*

When the covenants' language is ambiguous and the Declarant is involved in the conflict, or testifies therein, as to the intent of that language, the restrictive covenant will be strictly construed against the drafter in favor of the free use of land. *Viking Properties, Inc. v. Holm*,

155 Wash.2d 112, 118 P.3d 322 (2005); *White v. Wilhem*, 34 Wash.App. 763, 665 P.2d 407 (1983).

i. When the CC&R drafter is involved in the parties' dispute, the court reviews the CC&Rs and strictly construes any ambiguities in them against the drafter and in favor of the free use of land.

The Appellant advances its argument under an incorrect standard of review. When the original grantor is involved in, or testifying, in the conflict, the rules of strict construction of the covenants in favor of the free use of land apply. *Viking Properties, Inc.*, 155 Wash.2d at 120; *White v. Wilhem, supra*. The courts place special emphasis on the collective interests of the homeowners' collective interests only when the dispute is solely between homeowners and the grantor is not involved in the dispute. *Viking Properties, Inc.*, 155 Wash.2d at 120; *Riss v. Angel*, 131 Wash.2d 612,621-622, 934 P.2d 669 (1997); *White, supra*.

In *White*, homeowners brought an action against their neighbors in an adjoining lot for covenant violations. 34 Wash.App. at 765. The covenants in question required that the Architectural Control Committee ("ACC") approve building plans, specifications, architectural style, and other specified items. *Id.* Don Jacobs and Robert Yelland, the developers, and Alan Hill, a consulting engineer, originally served as the ACC. *Id.* The ACC had not functioned in the years leading up to the lawsuit. *Id.*

The dispute arose when the Respondents began constructing an enclosure to their swimming pool. *Id.* at 765. On appeal, the Petitioners raised the issue if the enclosure was too close to the Respondents interior lot. *Id.* The court found that the covenants reference to the “interior lot” was ambiguous. *Id.* at 772. The court reached this decision, in part, based on Mr. Yelland (the original developer and member of the ACC’s) testimony that he did not know exactly what “interior lot” meant as used in the covenants. *Id.*

The court found in favor of the unrestricted use of property, strictly construing the covenant. *Id.* (citing *Miller v. United Unitarian Ass’n*, 100 Wash. 555, 171 Pac. 520 (1918); *Granger*, 21 Wash.2d 597).

The issue before this Court is not IF the HOA has the right to enforce a covenant as the Appellant argues. Rather, it is HOW the HOA association can enforce the covenants. Respondent argues that the HOA must enforce its covenants as written and any ambiguity is to be construed against the HOA (as the “Drafter” thereof was involved in this lawsuit.)

In the present case, one of the developers, Mrs. Hill was both involved in, and testified about, the dispute between the HOA and the Gearys, and her intent as to the meanings of the arguably ambiguous

provisions of the CC&Rs². The dispute started when the Gearys first presented their binder with their plans and specifications to the ACC, of which Mrs. Hill was a member. Mrs. Hill had an active role in denying the Gearys' roof choice. Mrs. Hill included her name in the letter from the ACC, informing the Gearys they were violating Article V §2(d).

After the HOA initiated its lawsuit, when it brought its first Motion for Summary Judgment, Mrs. Hill testified as to the covenant's purpose and the design as well as her intentions when drafting the CC&Rs. She testified that the Gearys' roof violated the covenants. The court granted the HOA's Motion for Summary Judgment and entered an order reflecting that it based its decision, in part, on Mrs. Hill's declaration.

When the parties each brought a Motion for Summary Judgment several months later, Mrs. Hill testified as to the purpose and design of the ACC. She testified about its discretion and authority. She also testified about what specific words meant and how the articles should be interpreted, based in part on her intent. The court granted the Gearys' Motion for Summary Judgment, entering an order reflecting that it relied again, in part, upon Mrs. Hill's declaration testimony.

Since this dispute has involved Mrs. Hill since the very beginning, she was actively involved in enforcing the subject covenants against the

² Specifically the meaning and intent of Article V §2.

Gearys, and she testified for the Appellant in both Summary Judgment hearings, this is an action which involves her. Washington courts interpret covenants so as to give effect to the Declarant's intent and purpose. *Riss*, 131 Wash.2d at 621. When the Declarant is part of the dispute or available to testify regarding the intent and purpose, then the covenants must be strictly construed against the drafter in favor of the free use of land. *Viking Properties, Inc.*, 155 Wash.2d at 120, *White*, 34 Wash.App. 763.

ii. The Appellant has not presented one or more reasonable interpretations of the subject covenant.

Washington courts place a "special emphasis" on arriving at an interpretation that protects homeowners' collective interests only when the dispute does not involve the drafter and more than one reasonable interpretation of the covenants is possible. *Green v. Normandy Park*, 137 Wash.App. 665, 151 P.3d 1038 (Div. 1, 2007) (citing *Riss*, 131 Wash.2d at 621).

The covenant provisions regarding the HOA's enforcement against a homeowner violating the covenants are not ambiguous. They are in **direct conflict** with each other. The Appellant, by claiming that the court should interpret the covenants with a "special emphasis" to the HOA's rights, is asserting that the subject covenants are ambiguous. The Appellant must provide evidence that the covenants' meanings are

uncertain or that they have more than one reasonable interpretation. *White*, 34 Wash.App. 763.

The covenants contain two enforcement provisions when a homeowner violates the covenants. They directly conflict with each other and, even if the court did place a special emphasis on the collective interests, can not be reconciled. The Appellant has not presented evidence that the parties intended anything but the usual meaning of the language used and has not provided evidence that more than one reasonable interpretation exists. In fact, the Appellant has not attempted to reconcile the two provisions, or provided even one reasonable interpretation of the enforcement covenants.

Article V §2(e) provides that if the HOA does not bring a lawsuit against a homeowner to enjoin a construction project that violates the covenants, before the homeowner completes the project, then ACC “approval will not be required and the related covenants shall be deemed complied with.” In other words, this covenant puts the burden on the HOA to stop the homeowner’s construction project before she completes the same. If the HOA fails to do so, it is left without a remedy.

This covenant is very clearly intended to protect a homeowner from expending thousands of dollars on a construction project, only to have the HOA force her to change or remove it, later on. The covenant

clearly intended the HOA to act diligently in enforcing the covenants so as not to damage any homeowner.

Article VII(51) provides that, after the HOA gives a homeowner a written notice that she is violating the covenants, the homeowner has sixty (60) days to bring her property into compliance. If the homeowner fails to bring her property into compliance within those sixty (60) days, then the HOA will be entitled to a \$10.00 per day charge which acts as a lien on the property. In other words, this covenant puts the burden on the homeowner to bring her property into compliance. If the homeowner fails to do so, she is charged \$10.00 per day.

Given that one covenant puts the burden on the HOA to diligently act before the construction project is complete, and the other puts the burden on the homeowner to act within sixty (60) days, these two provisions are irreconcilable. As stated above, any conflicts or inconsistencies in the document must be strictly construed against the drafter in favor of the free use of land.

iii. The court must apply Article V §2(e) as the enforcement provision to strictly construe the covenants against the drafters (the Appellant herein) and in favor of the free use of land.

In order to strictly construe that covenants against the drafters, the court must apply Article V §2(e) as the governing enforcement provision and put the burden on the HOA to act, not the homeowner.

It is undisputed that throughout the course of the Gearys' construction project, one of the original drafters (Mrs. Hill) was directly involved in enforcing the covenants.³ It is also undisputed that the HOA sought legal counsel from its attorney⁴ before the Gearys completed their construction project. Even so, the HOA failed to follow the covenants' enforcement requirements and did not initiate suit until nine (9) months after the Gearys finished the roof alteration project on their home & hangar. Article V §2(e) unambiguously states that the HOA cannot bind a homeowner to the covenants when it, itself, failed to follow the procedures therein.

The covenants' default provision very clearly states that **whenever** a homeowner commences a construction project and the Board has not brought a suit to enjoin such project prior to completion, then approval of the project by the ACC is not required and the homeowner is considered in full compliance with all the related covenants.

The Gearys began to replace their roof on April 25, 2006 and completed the construction project on May 4, 2006. In those ten (10) days, the Board did not use the legal remedies available to it to attempt to

³ In fact, according the CC&Rs, "*The Declarant, ... shall be a member of the (ACC) so long as the Declarant, his heirs successors and assigns retain ownership of any Lot.*" CP 285 (Emphasis added). See also Gloria Hill's ACC membership @ CP 342 & 346.

⁴ The attorney firm which the HOA consulted was actually the one who aided the Declarants (Roy & Gloria Hill) in originally drafting, recording and making a number of amendments to the covenants, the Hammermaster Law Firm in Sumner.

stop the Gearys' construction project. Neither the Board nor the ACC sought immediate relief by attempting to secure a Temporary Restraining Order, which can be done in a matter of hours and, under proper circumstances, does not require notice to the other party. *See* Superior Court Civil Rule 65(2)(b)⁵. Prior to the completion of the project, neither the Board nor the ACC sought any injunction at all. In fact, the Board did virtually nothing about the Gearys' roof construction project until they filed the current lawsuit on February 7, 2007.

The Board knew of the construction project as two Board Members visited the Gearys' home on the first day of the project and discussed the situation and their objection to the construction project that was then underway, with the Gearys. They specifically discussed the CC&Rs indicating that the Board was aware of the relevant provisions and the terms thereof. The Board did not proceed according to enforce the provisions of CC&Rs terms in a timely matter.

The Board failed to follow the clear and unambiguous provisions of the CC&Rs that it is now seeking to enforce. The CC&Rs clearly state

⁵ **CR 65. INJUNCTIONS**

(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. ...

that since the Board did not bring a suit “to enjoin” the construction work being done, against the Gearys, until nearly nine (9) months after they had finished replacing the damaged sheathing and completely replacing all of the roofing materials that protect their home and hangar, “the related covenants (are) deemed to have been fully complied with”.

While the HOA argues that it pursued the covenants in good faith by taking a vote for an amendment change, the HOA did not take the vote until after its time to enforce the covenants had expired under the covenants as they were written. CP 23, ¶11.

Finally, while the Appellants alleged that the Gearys made a “calculated decision” to proceed with the roofing material, it was actually a matter of urgency. The Gearys told the HOA multiple times about the urgent situation. They submitted pictures and wrote the ACC and the BOD several letters pleading with them to either approve of the Gearys roof or help them with an alternative, since the only options that the Appellant offered the Gearys were impossible given the structure of their home. The Appellant did not seem to care that the Gearys failing roof was causing serious structural and health concerns and acted with as much urgency and diligence as it did when it took nine (9) months to bring a lawsuit that the covenants required it to bring immediately.

To construe the covenants in favor of the free use of land would allow the Gearys' to leave their roof on their home without penalty. The result is the same. The HOA is without a remedy and the Gearys may keep their roof.

B. The CC&Rs intent is governed by the clear and unambiguous language of the same, and, as such, Article V applies.

i. A court must construe restrictive covenants by discerning the intent of the parties as evidenced by clear and unambiguous language in the document.

A court must construe restrictive covenants by discerning the intent of the parties as evidenced by clear and unambiguous language in the document. *See, e.g., Mountain Park Homeowners' Association, Inc. v. Tydings*, 125 Wash.2d 337, 883 P.2d 1383 (1994).⁶ Restrictive covenants will not be extended by implication beyond the clear meaning of the language.⁷ The court must consider the document in its entirety. *Riss v. Angel*, 131 Wash.2d 612, 934 P.2d 669 (1997) (citing *Mountain Park Homeowners' Ass'n*, 125 Wash.2d 337 (1994); *Burton v. Douglas Cy.*, 65 Wash.2d 619, 621-22, 399 P.2d 68 (1965)). Only in the case of ambiguity

⁶ *See also, Burton v. Douglas Cy.*, 65 Wash.2d 619, 621-22, 399 P.2d 68 (1965); *Lenhoff v. Birch Bay Real Estate, Inc.*, 22 Wash.App. 70, 73, 587 P.2d 1087 (1978); *Leighton v. Leonard*, 22 Wash.App. 136, 141, 589 P.2d 279 (1978).

⁷ *See, e.g., Bersos v. Cape George Colony Club*, 10 Wash.App. 969, 521 P.2d 1217 (Wash.App., 1974) (citing *Weld v. Bjork*, 75 Wash.2d 410, 451 P.2d 675 (1969); *Burton v. Douglas County*, 65 Wash.2d 619, 399 P.2d 68 (1965)).

will the court look beyond the document to ascertain intent from circumstances. *Id.*⁸

Any doubts to as to restrictions shall be resolved in favor of the free use of land. *Burton*, 65 Wash.2d at 622 (citing *Granger v. Boulls*, 21 Wash.2d 597, 152 P.2d 352 (1994)). Restrictive covenants have often been found by Washington courts to be in derogation of the policy favoring free use of land. *See e.g., Granger*, 21 Wash.2d at 597.

Extrinsic evidence of the purported intent of restrictive covenants will not be considered if it directly contradicts the covenants' language. *Hollis*, 137 Wash.2d 683. Such evidence would require the court to redraft or add to the covenants' language. *Id.* Extrinsic evidence is to be used to illuminate what was written, not what was intended to be written. *Id.* (citing *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wash.2d 178, 840 P.2d 851 (1992)).

In *Granger*, Plaintiffs brought an action to restrain defendant's activities resulting in violations of covenants running with the defendant's land. *Id.* at 598. Despite the restrictive covenant restricting the defendant from doing so, the defendant erected livestock buildings on his land. *Id.* The restrictive covenants prohibited any buildings except single family

⁸ See also *Leighton*, 22 Wash.App. at 141, 589 P.2d 279; *Lenhoff*, 22 Wash.App. at 72-73, 587 P.2d 1087; *see also Mains Farm*, 121 Wash.2d at 815, 854 P.2d 1072.

residences and buildings necessary to sustain the same. *Id.* The trial court ruled in favor of the plaintiff and ordered the defendant to tear down the prohibited buildings and get rid of all the livestock. *Id.* at 599. The Washington Supreme Court reversed in part. *Id.* at 601.

The Supreme Court found that the language of the covenant clearly prohibited the livestock buildings but not the actual livestock. *Id.* at 599. The court held that restrictions were in derogation of the common-law right to use the land for all lawful purposes, will not be extended by implication to include any use not **clearly expressed**. *Id.* Doubts **must be** resolved in favor of the free use of land. *Id.* In holding this way, the court bypassed the seeming ambiguity (farming for personal versus commercial land use) and strictly construed the actual language of the restrictive covenant in favor of the defendant's free use of land. The court stated that, while the covenants were clearly intended to create a separate private residential district, as opposed to a farming district, the restrictive covenant's language failed to state that. *Id.* at 600. The language, **as it was written**, only prohibited farm buildings as distinguished from private residences, not the use of the land itself. *Id.*

The *Burton* court re-visited this issue. In that case, the Plaintiff brought a suit to enjoin the defendant from blacktopping its lots to create a parking lot for the neighboring golf country club. *Burton*, 65 Wash.2d

619. The Plaintiff cited a restrictive covenant prohibiting building on any lot except a single family dwelling and also a restrictive covenant prohibiting noxious or offensive or business trade. *Id.* at 620. The trial court found that the parking lot was neither noxious nor offensive but was a business trade and therefore violated the restrictive covenants. *Id.* at 621. The Supreme Court reversed. *Id.* at 624.

The court held that according to the covenants, land can be used without a structure and there is no express covenant prohibiting such use. *Id.* at 622. The court went on to state that if the CC&R's author(s) intent had been to restrict the lots to residential use only, the parties could have provided language evidencing the intent. *Id.*

In the present case, the CC&Rs' "consent before construction clause" requires that all construction and alteration projects be submitted to the ACC for approval. In the event that that homeowner does not seek or receive approval and proceeds with the construction project, the Board must file a lawsuit to enjoin the project BEFORE it is completed. If the Board does not do so, the homeowner is considered in compliance with the related covenants and the Board is left without a remedy.

The clear and unambiguous language of Article V §2(a) indicates that ALL construction and alterations must be submitted to the ACC for approval, whether or not it is a matter over which the ACC has discretion.

The Washington Supreme Court holds that the restriction must be clearly spelled out. The court must apply the language **as it is written** and cannot draw unwritten conclusions.

In the present case, Article V §2(a) applies to all construction and alterations, whether or not the project implicates a specific covenant. If the drafters wanted homeowners to submit plans and specifications for only the projects that the ACC had specific discretion over, they should have clearly indicated that in the language. By using the word “all” with its ordinary and usual meaning, it applies to every construction and alteration project.

The language in Article V §2(b) is consistent with the plain language of Article V §2(a) requiring that homeowners submit plans and specifications for ALL construction and alterations. Article V §2(b) states that the ACC can withhold approval if the proposed improvement is at variance with the covenants. A homeowner’s proposal would only be at variance to a specific covenant. In order to give meaning to both provisions, after considering the covenants in their entirety, the court must read Article V §2(a) to require homeowners to submit ALL plans for construction, alterations, and improvements to the ACC. At that point, the ACC may exercise discretion over all the project’s aspects except those

that are governed by specific covenants. The ACC may withhold approval for those projects that violate specific covenants.

This Court should hold that the Board, according to the clear and unambiguous provisions of the CC&Rs, did not seek to enjoin the Gearys' roof replacement construction project in a timely manner and, thus, the related covenants (regarding roofing materials) are deemed "complied with" and the project "approved." To hold otherwise would be extending the covenants "by implication beyond the clear meaning of the language," which Washington courts prohibit. The CC&Rs are not ambiguous. The Board's failure to act within the timelines required by the CC&Rs' invalidates any further relief that the Plaintiff seeks in this action.

As stated above, the Washington Supreme Court requires the covenants to specify the land use restriction. In the absence of such a specification, the court must use the clear language as it is written and favor the free use of land. Since the CC&Rs in question did not specify any particular type of construction project, it was referring to **ALL** construction, alterations, and improvements - including a complete roof replacement and new material installation project. According to the CC&Rs, the Board's failure to enjoin the Gearys' roof construction invokes the default "approval and compliance" provision and the Gearys' completed project is to be considered in compliance with the covenants.

The Gearys' CC&R compliance in conjunction with the free use of land gives them the right to use the land that they bought in the way that they see fit, including replacing their defective and poor quality (failing) roof with a high quality, lifetime guaranteed roof of their choosing. Enforcing the CC&R prohibiting composite roofing against the Gearys, under the circumstances of this case, would not only be against the public policy encouraging the free use of one's own land, but would require this Court to read beyond the clear language of the covenants, as they are written, allowing the HOA's failure to act in accordance with the CC&Rs to improperly damage the Respondents.

ii. The Gearys' project fell under the matters for which the ACC had discretion.

The covenants do not specify the specific matters over which the ACC has discretion. The ACC cannot have discretion over specific covenants. *Riss*, 131 Wash.2d at 625.

Article V §2(a) describes the plans that the homeowners must submit to the ACC and Article V §2(b) explains the reasons that the ACC may withhold approval. The reasons that the covenants allow the ACC to withhold approval are more expansive than the plans that the homeowner must submit to the ACC.

the HOA and that since they did not take action until after Mr. Lang installed his roof, they could not do anything. *Id.*

When the Gearys began having problems with their roof and needed an exception to the CC&Rs, they approached the BOD president, Mr. Hill. CP 122. The Mr. Hill immediately referred the Gearys to the ACC. *Id.* Mr. Hill later testified that the ACC had the responsibility to decide that a homeowner's materials are in compliance with the covenants. CP 56. In addition, the ACC regularly reviewed other homeowners' roofing materials proposals, including multiple requests for composition roofing, at least two identical to the Gearys' request. CP 57; CP 200-201; CP 202-203.

On April 17, 2006, the ACC wrote the Gearys a letter, cited Article V §2(d) regarding the HOA's appeal procedure and forwarded the Gearys letter to the BOD. CP 325. On May 8, 2006, the BOD wrote the Gearys' a letter stating the Gearys were violating Article V §2(a). CP 324.

Throughout the process, the BOD and the ACC used Article V's procedure. CP 19-28.

The HOA only alleged that Article V did not apply when it realized that it had failed to comply with the very covenant it was trying to

enforce and did not do so until nearly 2 years after the Gearys' initial proposal and almost a year after it brought the action against the Gearys.

iv. The covenants' consent before construction clause is enforceable and consistent with the specific covenant.

The Appellant relies on the Supreme Court's decision in *Riss v. Angel* for its premise that Article V does not apply. However, its reliance is misplaced. Even if the ACC did not have discretion over the Gearys' proposal, Article V §2(a), the consent before construction project would still apply.

In *Riss*, the subject covenants contained a consent before construction clause with express conditions on minimum square footage of residences, minimum set back requirements, and maximum height restrictions. *Riss*, 131 Wash.2d at 616. They also provided a discretionary clause as to "improvements, construction, and alterations", giving the association

"the right to refuse to approve the design, finishing, or painting of any construction or alteration which is not suitable or desirable in said addition for any reason, aesthetic or otherwise...[considering] harmony with other dwellings...the effect on outlook of adjoining neighboring property and any and all other factors which, in their opinion, shall affect the desirability or suitability of such proposed structure, improvement, or alteration." *Id.*

The Plaintiffs in *Riss* submitted their construction plans to the homeowners' association's covenant compliance and review designee. *Id.*

at 616-617. The designee told the Plaintiffs that their plans satisfied the covenants. *Id.* The covenants provided that final approval must come from the association and the board. *Id.* Although Plaintiffs' plans called for a roof height within the maximum restriction covenant height, many homeowners took issue with the Plaintiffs' plans. *Id.* at 617.

The association and the board held a vote and rejected the Plaintiffs' plans based on, among other things, the structure's height. The Supreme Court reviewed the issue of whether, under the consent before construction provision in the covenants, the association had the authority to impose restrictions on the Plaintiffs' plans that were more burdensome than the covenants' requirements. *Id.* at 619.

The *Riss* court stated that covenants providing for consent before construction or remodeling have been widely upheld (in other states), even where they vest broad discretion in a homeowners association or a committee or board through which it acts, so long as the authority to consent is exercised reasonably and in good faith. *Id.* at 624.⁹ Courts have

⁹ Citing *Hannula v. Hacienda Homes, Inc.*, 34 Cal.2d 442, 211 P.2d 302, 19 A.L.R.2d 1268 (1949); *Rhue v. Cheyenne Homes, Inc.*, 168 Colo. 6, 449 P.2d 361 (1969); *Alliegro v. Home Owners of Edgewood Hills, Inc.*, 35 Del.Ch. 543, 122 A.2d 910 (1956); *Winslette v. Keeler*, 220 Ga. 100, 137 S.E.2d 288 (1964); *McNamee v. Bishop Trust Co., Ltd.*, 62 Haw. 397, 616 P.2d 205 (1980); *Oakbrook Civic Ass'n, Inc. v. Sonnier*, 481 So.2d 1008 (La.1986); *Donoghue v. Prynwood Corp.*, 356 Mass. 703, 255 N.E.2d 326, 40 A.L.R.3d 858 (1970); *Kirkley v. Seipelt*, 212 Md. 127, 128 A.2d 430 (1957); *LeBlanc v. Webster*, 483 S.W.2d 647 (Mo.Ct.App.1972); *Raintree Homeowners Ass'n, Inc. v. Bleimann*, 342 N.C. 159, 463 S.E.2d 72 (1995); *Syrian Antiochian Orthodox Archdiocese v. Palisades Assocs.*, 110 N.J.Super. 34, 264 A.2d 257 (1970); *Palmetto Dunes Resort v.*

also held enforceable sets of restrictive covenants which have both objective specific covenants and a general consent to construction covenant. *Id.* (citing *Clark v. Rancho Santa Fe Ass'n*, 216 Cal.App.3d 606, 265 Cal.Rptr. 41 (1989); *Alpenwald Improvement Corp. v. Kelly*, 153 Vt. 405, 571 A.2d 624 (1989)).

The court in *Riss* went on to hold that a consent to construction covenant cannot operate to place restrictions on a lot which are more burdensome than those imposed by the specific covenants. *Id.* (citing *Bass v. Helseth*, 116 Cal.App.2d 75, 253 P.2d 525, 36 A.L.R.2d 853 (1953); *Seabreah Homeowners Ass'n, Inc. v. Gresser*, 517 A.2d 263 (Ct. Ch. 1986); *Davis v. Huey*, 620 S.W.2d 561 (Tex.1981)). The court also held that the specific covenants are not inconsistent with exercise of discretion as long as the specific covenants are satisfied. *Id.*

In other words, the *Riss* court found that a set of CC&Rs, which contain both a consent before construction covenant and a specific covenant, are enforceable. The homeowner must get consent from the association (or in the present case, the ACC) before it constructs or alters any building or structure, regardless of if that construction or alteration is governed by a specific covenant.

Brown, 287 S.C. 1, 336 S.E.2d 15 (1985); see generally John D. Perovich, Annot., *Validity and Construction of Restrictive Covenant Requiring Consent to Construction on Lot*, 40 A.L.R.3d 864 (1971 & Supp.).

In the present case, as in *Riss*, the subject CC&Rs contain both a consent before construction covenant (Article V §2(a)) and a specific covenant (Article VII(3)). Under *Riss*, even if the ACC does not have discretion to allow the Gearys to use composition roofing, the Gearys must submit their construction plans to the ACC under the consent before construction clause. Since the consent before construction clause contained in Article V applies to every homeowner doing any construction, alteration, and improvement, the procedures under Article V must be followed.

Article V §2 applies to **all** construction and alteration projects on **all** buildings and structures governed by the CC&Rs. Article V §2(e) governs the HOA's enforcement of the covenants. The failure of the Appellant HOA to properly follow this Article V §2(e) leaves them without further remedy, as held by the trial court.

v. The Gearys submitted plans and specifications for ACC approval.

Mr. Geary's undisputed testimony reflects that he submitted plans and specifications to the ACC. CP 84; CP 396-397. His counsel brought the actual binder containing the plans and specifications to the Plaintiff's Motion for Reconsideration. The Appellant did not provide any evidence or testimony to dispute Mr. Gearys' testimony that he submitted plans and specifications to the ACC. On the contrary, Mr. Hill (BOD President)

testified, by way of declaration, that “[t]he ACC informed the HOA Board that it had denied the Geary’s [sic] requested product. This determination by the ACC was made after a **thorough review**, resulting in a finding [that] those materials could not be approved as the CC&R’s prohibited composition roofing materials.” CP 21

In addition, in the ACC’s March 6, 2006 letter, it thanked the Gearys for their “thorough proposal”. CP 343 Finally, Mr. Hill testified that the ACC did not have an established system for maintaining records until well into the action the HOA brought against the Gearys. CP 335. Given the undisputed record, it is clear that the Gearys did submit plans and specifications to the ACC for its review.

Even if the Gearys had not submitted the plans, Article V §2(e) would still apply. The words “in any event” are not contingent on anything at all. It is clear from reading Article V, in its entirety, that all construction, alterations, and improvements fall under Article V, whether or not the homeowner violates the same. If a homeowner does violate the covenants, the HOA must use the enforcement provision in Article V §2(e). It is not triggered by the homeowner’s compliance of the same and does not contain language that says that Article V §2(e) does not apply unless the homeowner submits plans.

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vi. The court must apply the law to the facts of this case.

The Appellant misstates both the Gearys' argument and the facts of their case. The Gearys based their argument on the premise that the court must interpret the covenants as they are written. The HOA seems to take issue with the CC&Rs as they are written and believe that they would lead to "absurd results." As such, the HOA is asking the court to selectively apply the covenants, forcing the Gearys to comply with the covenants, but excusing the HOA from complying with the same.

The HOA is asking the court to rewrite the covenants so that Article V has a different intent and meaning than what the languages' ordinary and usual meaning is, asking that the clear meaning be disregarded. The Appellant supports its argument with an irrelevant "slippery slope" argument that does not reflect the facts of this case.

The record does not reflect a "rebellious owner" with an "opportunity to complete...a project before the Association would have the opportunity to stop it." Instead, the Gearys began discussing their roofing project with the HOA 7 months before submitting their plans to the ACC. CP 20. They submitted their plans and began pleading with the HOA 2 months before they started their project. CP 84. The Gearys and the HOA had several exchanges during those two months, many of which involved Mrs. Gloria Hill, as a member of the ACC. CP 19-28; CP 82-90;

CP 325. The first day of the project, two BOD members visited the Gearys' home. CP 4. While the Gearys replaced their roof, the BOD met to discuss the issue and subsequently consulted with its attorney. CP 22.

The Gearys tried working with the HOA until the situation got to the point that it was not longer feasible. They did not slap a roof on their house overnight. They carefully followed procedures set out in the CC&Rs and the HOA was aware of the Gearys' plans for 9 months before they started work. In addition, the Gearys' project took them 10 days which is easily a long enough period of time for the HOA to file suit and to at least obtain a temporary injunction under CR 65. The HOA also had the advantage of having one of the original Declarants/Drafters AND the attorney that assisted her, help it in enforcing the covenants. The HOA had every opportunity to initiate a lawsuit as required by the CC&Rs.

Even if the CC&Rs, as they are written, did lead to absurd results, that would not be a problem for the courts. Instead, the HOA should seek to amend them.

C. The Appellant has not established that it is entitled to injunctive relief.

Appellant misstates the equitable relief available to parties when a defendant is violating covenants. The *Hollis* court explains when a party is entitled to such relief. *Hollis*, 137 Wash.2d 683 (citing *Hagemann v.*

Worth, 56 Wash.App. 85, 782 P.2d 1072 (1989)). To establish the right to an injunction, the party seeking relief must show (1) that [it] has a clear legal or equitable right and (2) that [it] has a well-grounded fear of immediate invasion of that right. *Id.*

The Appellant has not established a clear right to an injunction. The covenants clearly state, and the trial court found, that since the Appellant did not bring a lawsuit to enjoin the Gearys' construction project in a timely fashion, as specified in the CC&Rs, that the Gearys were in compliance with the CC&Rs. The Appellant brought this action to obtain an injunction. CP 3-6. The Appellant lost when the court found that it did not have a clear legal or equitable right to such relief.

The Appellant's right to injunctive relief does not depend on the extent to which the Gearys can support the claim that they are "innocent defendants," as the Appellant erroneously claims. The Gearys have to prove that they are "innocent defendants," only when asking the court to weigh equitable factors in considering imposing an injunction upon them. *Hollis*, 137 Wash.2d at 699-700. Since the Appellant is not entitled to an injunction, the Gearys did not have to ask the court to weigh equitable facts or prove that they were "innocent defendants."

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D. The Gearys are entitled to attorneys' fees.

A trial court may award attorneys fees when authorized by a private agreement, statute, or a recognized ground of equity. *Riss v. Angel*, 80 Wash.App. 553, 564, 912 P.2d 1028 (Div. 1, 1996) (aff'd by *Riss v. Angel*, 131 Wash.2d 612, 633, 934 P.2d 669 (1997)). Where a contract provides for such fees RCW 4.84.330 requires that the court award them to the prevailing party. *Id.* Washington courts treat CC&Rs as contracts covered by RCW 4.84.330. *See e.g., Riss*, 131 Wash.2d 612; *See also Day v. Santorsola*, 118 Wash.App. 746, 76 P.3d 1190 (Div. 1, 2003). RCW 4.84.330 provides in relevant part:

In any action on a contract or lease...where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

Generally, the prevailing party is the party who receives an affirmative judgment in his or her favor. *Riss*, 131 Wash.2d at 633. If neither wholly prevails, then the determination of who is a prevailing party depends on who is the substantially prevailing party, and [that] question depends on the relief afforded the parties. *Id.*

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i. The court reduced the Gearys' attorney fee award for their unsuccessful claim.

The Appellant's assign error to one aspect of the court's attorneys' fees award and argued another aspect of it, violating RAP 10.3(4) & (6). Respondent objects to the Appellant arguing issues that it did not raise as a trial court error.

The Appellant contends that the trial court erred in granting attorneys' fees to the Gearys for time spent on the unsuccessful claim that their composition shingle roofing was not "composition roofing" under Article VII(3). However, the court's Findings of Facts and Conclusions of Law entered March 7, 2008, specifically reflects a reduction for time spent on that claim. CP 403. The trial court reduced the Gearys claimed amount in attorneys' fees from \$33,430.00 to \$26,395.00 stating that both parties prevailed on different aspects of the case and "the reduction in attorney fees requested by the Defendant to the amount as ordered, reflects the same." The Appellant's assignment of error is thus without merit.

ii. The Gearys prevailed in this action.

While the Gearys ultimately prevailed on this action since the court denied all of the HOA's relief and ultimately found the Gearys to have complied with the CC&RS and permitted the Gearys to keep their roof, the Court entered an order on November 16, 2007 stating that the Gearys were

in violation of Article VII, Section 3, of the CC&Rs by using composition roofing material on their home improvement.

Washington courts have looked at similar situations where a party ultimately prevailed on the relief he or she sought but all of the Court's decisions were not in his or her favor. *See e.g., Riss*, 131 Wash. 2d at 633. *See also Day*, 118 Wash.App. at 669.

In addition, as discussed above, the court allowed the Plaintiffs in *Riss* to build their home, while finding the covenants enforceable. *Id.* at 619. The *Riss* court nevertheless awarded the homeowner Plaintiffs delay damages and attorney fees and costs. *Id.*

The defendants appealed the Court's decision regarding the attorneys' fees award claiming that the homeowners prevailed since the court declared that the covenants were enforceable. *Riss*, 80 Wash.App. at 564. The court held that the case did not turn on the validity of the covenants and the exterior finish (another issue that the homeowners prevailed upon) was minor and did not have a significant impact on the expense of the trial. *Id.* (aff'd by *Riss*, 131 Wash.2d at 633). The Court went on to state that the "[p]laintiffs will essentially be able to build the house they sought to have approved [and that] the trial court correctly concluded that the plaintiffs are the prevailing party." *Riss*, 131 Wash.2d at 633.

The plaintiffs in *Day* brought a very similar legal action. *Day*, 118 Wash.App. at 748. In *Day*, the plaintiffs bought a lot in a subdivision subject to restrictive covenants requiring a committee to consent to the construction of a house. *Id.* Shortly after purchasing the lot, the plaintiffs complied with the requirements of the covenants and submitted plans for a house to the Committee for its approval. *Id.* at 751. The Board rejected the plaintiffs' plans. *Id.* The court entered judgment finding that the *Days* were entitled to build their proposed house as long as it complied with the height restrictions in the covenants. *Id.* at 754. The trial court concluded that the *Days* were prevailing parties and therefore entitled to an award of attorney fees. *Id.* at 769.

The Committee appealed and claimed error, asserting that the *Days* did not prevail on their claim for damages and because the Committee prevailed on other matters, such as whether it must approve the revised or compromise plans. *Id.* The Court cited *Riss* and held that "the trial court allowed the *Days* to build a house nearly in accordance with the house they sought to have approved. The *Days* were thus the substantially prevailing parties and their action can be called successful even though they did not prevail on their claim for damages." *Id.* at 770.

As in *Riss* and *Day*, although the court found that the covenants were ultimately enforceable (including Article VII(3), which it found that

the Gearys were violating), the Gearys were awarded the relief they sought and were permitted to keep their roof without having to pay damages. The action did not turn on the Court's initial determination that the Gearys had installed a composition roof, in violation of the CC&Rs. Even when the Court entered the order that the Gearys had installed composition roofing, it reserved remedy for later argument (upon which the Gearys were found to be compliance, per the CC&Rs, and ultimately prevailed). As the Washington Supreme Court held in *Riss*, when neither party completely prevails, the question of which party is the prevailing party for purposes of attorneys' fees turns on the **relief afforded the parties.** (**Emphasis provided**). *Riss*, 131 Wash.2d at 633. In the present case, the Gearys were afforded the exact relief they sought: to be dismissed as defendants and to be allowed to keep their roof without having to pay damages. The HOA was not afforded ANY of the relief it sought¹⁰. Under *Riss*, the Gearys are the prevailing party and are, therefore, entitled to an award of their reasonable attorney's fees and costs.

iii. The Appellant interpreted its own covenants to provide for attorneys' fees in the present action and asserted such three separate times.

As the Plaintiff stated in its Complaint (CP 5-6), in its Reply (sic) to Defendant's Counterclaim (CP 18), in its first Motion for Summary

¹⁰ Other than the minor victory that the HOA can in fact enforce the prohibition against "composition" roofing material, in the future.

Judgment (CP 24), and then a fourth time in its Responsive Legal Memorandum and Reply Re: Second Summary Judgment Motion that it filed with the court on January 11, 2008 (CP 308-9), it brought this action to enforce and foreclose upon a lien against the Gearys for violating the CC&Rs. As the Plaintiff states in its legal memorandum, Article IV, Sections 1 and 7 provide for an award of attorney fees in costs in such an action. *Id.* The record clearly reflects that the Appellant interpreted its own covenants to provide attorneys' fees for the present action. It asserted it at least four separate times and forced the Gearys to defend against that claim. It was not until the court ruled against the HOA (almost a year after it first claimed the rights to attorneys' fees) that the HOA decided that the CC&Rs did not provide for attorneys' fees for this action.

iv. The Appellant cannot take a contradictory position on appeal from that which it took at the trial court level regarding the right of the prevailing party to an award of attorneys' fees and costs.

The Appellant is precluded from taking this contradictory position under the doctrine of "judicial estoppel".¹¹

The Appellant admits that attorneys' fees are permitted when the Association prevails in a lien claim against a homeowner. The Appellant brought this action against the Gearys, in part, to establish and foreclose

¹¹ "Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." Arkison ex rel. Carter v. Ethan Allen, Inc., 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (quoting Bartley-Williams v. Kendall, 134 Wn.App. 95, 98, 138 P.3d 1103 (2006))

upon a lien on their property. CP 3-6. While the covenants do not specifically provide that a homeowner can recover attorneys' fees, RCW 4.84.330 provides that if a contract provides attorney's fees to one party, the prevailing party is entitled to the same, whether or not that party is specified as being entitled to attorneys fees in the contract.

The covenants provide that the HOA may recover attorney's fees and costs when it prevails in assessment and lien claims. RCW 4.84.330 requires that if the homeowner prevails against the HOA's claim, the HOA pay her attorneys' fees.

The court did not award the Gearys attorneys' fees based on RCW 64.38.050 and the Gearys did not appeal the trial court's findings. CP 405-406.¹²

v. The Gearys are entitled to attorneys' fees on appeal.

RAP 18.1 & RAP 14.2 provide that the prevailing party is entitled to the attorneys' fees and costs that she incurred on appeal, if she was so entitled at the trial court level. Under the CC&Rs, RCW 4.84.330, and the case law discussed above, the Gearys are entitled to the attorney's fees and costs that they incur in this appeal.

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¹² The Appellant is not entitled to claim a right to an award of attorney fees and costs under RCW Ch. 64.38 as it did not assign error nor identify such as an "issue".

V. CONCLUSION

Mrs. Hill was directly and actively involved in the Appellant's prosecution of its claim. As such, the court must strictly construe any CC&R ambiguities against the drafter and in favor of the free use of land.

The Appellant did not provide evidence that more than one reasonable interpretation of the covenants in question existed. The covenants directly conflict and the trial court properly construed the inconsistencies against the drafter.

Article V of the CC&Rs applies to the Gearys construction project and the Appellant failed to file suit to enjoin the construction project before it was completed. As such, the Appellant is without a remedy.

The covenants' plain and unambiguous language provides that the consent before construction clause applies to all construction, alterations, and improvements. The ACC had discretion over the Gearys' construction project and it exercised such discretion.

The trial court reduced the Gearys' attorneys' fee award by the amount spent on unsuccessful claims. It properly ruled that the Gearys prevailed in the action and properly awarded them attorneys' fees under the CC&Rs and RCW 4.84.330.

The trial court should be affirmed and the Geary's should be awarded their attorney fees incurred in this appeal, pursuant to the CC&Rs and RCW 4.84.330 and RAP 18.1, et seq..

RESPECTFULLY SUBMITTED this 4th day of **November, 2008**.

SNYDER LAW FIRM, LLC



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Of Attorneys for Respondents



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Of Attorneys for Respondents

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DIVISION II

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STATE OF WASHINGTON
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NO. 37536-2--II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

FLYING H. RANCH HOMEOWNERS
ASSOCIATION, a Washington
non-profit corporation,

Appellant,

vs.

JAMES L. GEARY and JANICE
GEARY, husband and wife;
Respondents

and
U.S. BANK NATIONAL ASSOCIATION
N.D.,

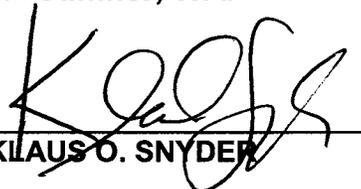
**CERTIFICATE OF
SERVICE**

I hereby certify that on **NOVEMBER 4, 2008**, I caused a true
and correct copy of the **BRIEF OF RESPONDENT** to be served on the
following counsel of record via email per prior agreement under GR 30

TALIS M. ABOLINS
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The undersigned declares under penalty of perjury, under the
laws of the state of Washington, that the foregoing is true and correct.

DATED this 4th day of **November**, at **Sumner, WA**.


KLAUS O. SNYDER