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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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COURT OF APPEALS

DIVISION II

OF THE STATE OF WASHINGTON

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JOHN J. HADALLER

An individual, Appellant (plaintiff)

V

.MAYFIELD COVE ESTATES HOMEOWNERS ASSOCIATION, a Washington non-profit corporation, DAVID A. and SHERREY LOWE, individually and the marital community thereof; RANDY FUCHS An individual; CLIFFORD and SHEILAH SCHLOSSER, individually and the marital community thereof : and MAURICE and CHERYL C. GREER, individually and the marital community thereof

Respondents ( defendants)

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APPELLANTS OPENING BRIEF

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Appellant Pro Se

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## INTRODUCTION

This review focuses on a Washington homeowner association member's right to a homestead and timely notice to involuntarily sacrifice it. It is a first impression review of a 1988 amendment to RCW 6.13.080(6)<sup>1</sup> and notice and lien priority.

Secondarily; it compares this case to *Mahler v. Szucs* 135 Wn.2d 398 in regards to adequacy of a record of how much attorney fees were awarded to whom and for what.

Third its an appeal to this Court to "do the right thing" under RAP2.5(c)(2) to prevent the statute of frauds from creating a fraud by remanding for a trial on whether Randy Fuchs' signature on a contract is genuine or he perjured it. That created fraud which has cost John J. Hadaller ( Hadaller) over \$800,000 and unjustly enriches Fuchs and Lowe.

The facts stated below show the underlying case and the five other related State Court cases, plus one Bankruptcy that began in 2006 are a legal war over who gets to develop land on Lake Mayfield in Lewis County. The ultimate benefits of this are worth in the millions of dollars and were originally in Hadaller's ownership and control for his retirement plan and home. In March

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<sup>1</sup> At the time it was paragraph (5)

2016 he was ejected from his \$590,000 home, resulting from Fuchs perjury forwarded by Lowe.

Two trials, numerous summary judgments and appeals were held in the seven cases briefed here in introduction (not counting appeals) were all forced, by unethical attorney, David A. Lowe (Lowe), representing his personal interests, while disguised as a homeowners association, in order to obtain the development rights. He now owns Hadaller's assets. But what are Hadaller's homestead rights?? Though the facts wander through several appealable issues the opportunity for an appeal on the merits appears to have passed due to inability to finance them timely.

### **ASSIGNMENT OF ERRORS**

#### **1. The Trial Court erred in disregarding the intent and effect of the notice provision in RCW 6.13.080(6)**

(a) To collect HOA assessment liens, RCW 6.13.080 was recently amended against the homestead of HOA members who "acquired title" subject to the HOA lien. The law plainly states in order to obtain that right, within 30 days of learning of a new member, the HOA **must** notify a member by mail their homestead is subordinate to the assessment lien. Failure to give the notice specified in this subsection affects an association's lien only for debts accrued up to the time an association complies with the notice provisions under this subsection. This HOA finally

complied with the required notice to Hadaller four years after incorporating and imposing their new government over his existing home and over 18 months after obtaining the judgment Did that late notice comply with the statute to void Hadaller's homestead? .....And also

**(b) The Trial Court passed to this Court for law on finding whether Hadaller's homestead was subordinate to the HOA lien. The CCR lien of the new special assessment is subordinate to Hadaller's homestead.**

A lien for a deed restriction created subsequent to establishment of a homestead is subordinate to the homestead. Hadaller established his homestead in 2005. In 2007 he subordinated it to maintenance CCR's for assessments for road, water system dock maintenance and special assessments exclusively only for capital improvements for only those facilities. Lowe and Fuchs created a homeowners association (HOA) in 2008 against Hadaller's objection, they caused adoption of a new set of CCR's that allows for unlimited special assessments which they used to obtain a large judgment. Shouldn't Hadaller's homestead be superior to that lien?

**2. The cost bill, findings of fact and conclusion of law seriously fail to conform to the holdings set by *Mahler V. Szucs* 135 Wn.2d 398:**

In *Mahler* the Supreme Court set precedence that requires the trial courts to enter findings and a cost bill that reviewing courts

can easily determine which costs were awarded for what and their basis and to whom. The Courts oral findings after trial, the Cost Bill , The entered Findings and Conclusions and Judgment are not itemized nor correlate per rule and that precedence. The bankruptcy court could not decipher them, nor can Hadaller. Did the Trial court err when it entered these non itemized accountings?

**3. This Court should use the provisions of RAP 2.5(c) (2) to get itself out of the position of causing the statute of frauds to aid and abet a \$800,000 fraud scam.**

In the interest of justice, RAP 2.5 (c)(2) provides this Court authority to review the February 28,2012 decision in previous co appeal case No.404265 , which held even if Randy Fuchs' signature on a covenant could be proven the mere fact it was not acknowledged would still void the 2006 Amended Covenant under the statute of frauds. The results of that resulted in fraud and an \$800,000 unjust enrichment to Fuchs and Lowe at Hadaller's expense. He is now next to homeless at age 64. In these cases the statute of frauds obviously created a fraud. Should Fuchs' and Lowes's continuing fraud be prevented by remanding for trial on the merits of the issue with a ruling from this court holding; If the signature can be proven the lack of acknowledgment does not support a statute of frauds defense that avoids the validity of the 2006 amended covenants ?

## STATEMENT OF FACTS

This begins when ..... Appellant John J. Hadaller

(Hadaller) bought two of three six acre plots of land ( segregation survey lots 1 and 3) and obtained a first right of refusal to the third (segregation survey lot 2)<sup>2</sup>, in January 2002, from the Fortman Trust (Fortman). Shortly thereafter it was rezoned to allow for ½ acre lots. Although the land fronts approximately 1,100 feet on Mayfield Lake, in Lewis County, only about 300 feet of it is not a high(80'+-) virtual cliff to the water. Hadaller chose the parcel that contained that 300 feet of lower bank that is practical to access to a dock and nearest to an area where a very nice swim beach exists to ultimately build his home which his homestead is part of.

But before moving on to that parcel in 2005<sup>3</sup>, he first moved onto segregation lot 1 in May 2002 and short platted it into four lots . He recorded CCR's to maintain the road, water system and provide for dock maintenance. He recorded that first plat in September 2003<sup>4</sup>. He sold lot 1 (101 Virginia Lee Lane) to Clifford and Sheliah Schlosser (Schlosser) in October 2003<sup>5</sup>. He sold lot 2 (105 Virginia Lee Lane) to Maurice and Cheryl Greer (Greer) in

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<sup>2</sup> CP323 ¶1 Ex 3

<sup>3</sup> EX 17 Pg12 Ex 40 (Note date and address)

<sup>4</sup> CP 323 ¶2 & Ex 4 & the relative CCR's were rerecorded in 2007 on a second plat and in the record at EX 12 see Pg 4

<sup>5</sup> CP 324 ¶7

July 2004<sup>6</sup>.

Hadaller lived on what became lot 3 (106 Virginia Lee Lane) from May 2002 until he moved to what became his present homestead land, in January 2005, which was and still is 135 Virginia Lee Lane<sup>7</sup> living there from January 2005<sup>8</sup> until the Sheriff ejected him in March 2016. It is part of segregation lot 3.

Back to the first plat, Hadaller retained lot 4 (104 Virginia Lee Lane) improving it with a residence and leasing it to Dean and Pam Rockwood<sup>9</sup> (Rockwood) Hadaller structured it that way and retained fee title to the lot at the time because the lot contained most of the first 100 feet of the road, he built, that accesses the plats and crosses segregation lot 2. After Hadaller was successful in platting, Fortman reneged on selling segregation lot 2 for the agreed price and was shopping around for as much as he could get in years 2003-2008, Hadaller had a right to match any price. The agreed price of \$66,333 in 2002 ballooned to \$250,000 when it sold to Lowe with Hadaller's improvements in 2008<sup>10</sup>. Fortman's Segregation lot 2 did not reserve an easement that allowed for subdivision. Only Hadaller had the right to add it to his road, which was part of the original sale structure in 2002. The reserved

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<sup>6</sup> CP 324 ¶8

<sup>7</sup> Ex 40 note address and date

<sup>8</sup> Ex 40 Ex17

<sup>9</sup> CP325 ¶12 CP 402

<sup>10</sup> CP 326 ¶16

easement to Segregation lot 2 and 3's would only support a single family homesite, by code. It burdened the Schlosser's and Greer's prime building sites and Hadaller orally promised the Schlosser's and Greer's he would move it when he purchased segregation lot 2 and that agreement became consideration for and part of a written covenant that amended the CCR's in 2006<sup>11</sup>.

In September 2005 Hadaller sold lot 3 of the first plat ( 106 V.L) to land developer Randy Fuchs<sup>12</sup>, which was done only under an agreement to Amend the CCR's to protect Hadaller's developers' interest<sup>13</sup>. The amendment was recorded in August 2006<sup>14</sup> (Commonly known as the 2006 Amended Covenants),

A year later, after Hadaller built the roads and utilities<sup>15</sup>, Fuchs attempted to overtake Hadaller's development rights by offering to buy segregation lot 2 from Fortman for \$200,000. Once Fuchs discovered the easement restrictions the lot was clouded with, he quit the sale. Fortman refused a purchase offer from Hadaller. Instead Fuchs bought a five acre sub-dividable parcel contiguous on the east site of Mayfield Cove Estates subdivision .

January 2005 Hadaller moved his residence

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<sup>11</sup> Ex 12 Pg 11-13

<sup>12</sup> CP 324 ¶9

<sup>13</sup> CP 649 -652 Cp 646-648

<sup>14</sup> Ex 12 pg. 11-13

<sup>15</sup> CP 326 ¶16

(homestead) on to segregation survey lot 3 which became 135

Virginia Lee Lane Mossyrock Wa<sup>16</sup>.

Two years after moving his homestead onto segregation lot 3, Hadaller recorded his second short plat and relative CCR's in April and May 2007<sup>17</sup>. He created four lots retaining the 3.42 acres which held his home and contains the only usable lake front in the area and is known as lot 4 of short plat 05-00017 and 135 Virginia Lee lane. That 3.42 acres provided for platting off 2 more waterfront lots with dock rights after May 17, 2012. The plat also recorded three other ½ acre lots in May 2007.

In early October 2007 David Lowe called Hadaller out of the blue. He had no advertising of the lots for sale. David Lowe came and bought all three ½ acre lots that day in a matter of hours of discussion with a substantial real estate contract<sup>18</sup>. An appearance of friendship was portrayed by Lowe over the winter of 2007 and 2008.

In May 2008 The Lowes (mis)represented an arrangement with Hadaller to get him to not enjoin the sale when they bought segregation survey lot 2 from Fortman. When they reneged on the plan, that got Hadaller to not exercise his right of refusal, Hadaller

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<sup>16</sup> Ex 40 (note date and address) Cp 323 ¶1

<sup>17</sup> Ex 12 Ex 6 and 5 (Exhibit 5 and 6 were filed backwards of their description)

<sup>18</sup> [CP 325 ¶11] [CP 325- 326 ¶14] [ CP 245 ¶93] [ CP 346¶95]

became protective of the use of road and utilities he built across it to serve twelve home sites worth potentially \$750,000. Hadaller relied entirely on the 2006 Amended Covenant to protect his investments into the roads and utilities.<sup>19</sup>

Without notice to Hadaller in the summer of 2008, Lowe secretly orchestrated drafting and filing new by-laws and articles of incorporation, to incorporate a HOA, filing them with the secretary of State on September 3, 2008<sup>20</sup>.

The first notice to Hadaller of Lowes actions was a December 12, 2008 letter Lowe sent to Hadaller of a pending meeting to install that newly incorporated HOA, Lowe and Fuchs created to govern the subdivisions. That meeting was held on December 30, 2008. It was attended by Lowe, Fuchs, Schlosser, and Hadaller which is all of the owners but the Greer's, they voted in proxy. All but Hadaller voted to adopt the articles of incorporation and by-laws, officially creating and incorporating the HOA for the first time.<sup>21</sup> Offices were officially established for the first time and elected. Voting; David Lowe as president, Randy Fuchs as secretary, Cheryl Greer as treasurer, Clifford Schlosser and Maury Greer were voted as board members. Hadaller opposed

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<sup>19</sup> CP 326 ¶16

<sup>20</sup> [Ex 19 Pg 1]

<sup>21</sup> [CP 325 ¶ 14] [Ex 19]

it all<sup>22</sup>. The new officers traded the easement to Lowes segregation lot 2 off of Schlosser's and Greer's waterfront portion of their lots and placed it on Virginia Lee Lane, recording it that day.<sup>23</sup>

Hadaller cited the provision which was amended to the original CCR's in August 2006 that identified that only Hadaller had the authority to add lot 2 of survey to the roads he had built and placed utilities upon to serve 12 homesites at his expense prevented their action. The 2006 amend covenants also stated that any amendment to the CCR's had to be approved by him until he had sold his lots.<sup>24</sup>

**The HOA made NO actual notice to Hadaller, or even constructively, per RCW 6.13.080 (6) of its right to void his homestead until December 26, 2012, one and a half years after obtaining the judgments being foreclosed upon.**<sup>25</sup>

That December 30, 2008<sup>26</sup> easement ran across the portion of the road that crossed Hadaller's lot 4 while he still owned it. No agreement with Hadaller occurred on that. Lowe unilaterally recorded the easement on Hadaller's land. Hadaller strongly

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<sup>22</sup> [ Ex 19]

<sup>23</sup> CP 326-329 [ Ex 19] CP

<sup>24</sup> Ex 19 CP 286 ¶3.11 CP 289

<sup>25</sup> CP 411 last paragraph

<sup>26</sup> Ex 22 Ex 28 CP 327¶18

opposed Lowe's brazen act(s) . Hadaller owned that road until August 13, 2010<sup>27</sup>. That action was the beginning cause and main part of this quiet title "frivolous ?" suit which began in January 2009.

### **STATEMENT OF THE CASE(S)**

Hadaller refused to turnover the original road and water system management documents. Relying on the provisions of the 2006 Amended Covenant which he recorded to protect his investments in the plats. The HOA, filed a show cause hearing, creating co-pending case 09-2-00052-1, against Hadaller to obtain the original documents. In support of the show cause motion Randy Fuchs filed a declaration falsely stating Hadaller forged Fuchs' signature to the 2006 Amended Covenant<sup>28</sup>. Hadaller submitted declarations from two eyewitnesses that personally watched Fuchs sign the document<sup>29</sup>. Hadaller counterclaimed for quiet title to challenge the easement trades and declaratory judgment of the 2006 Amended Covenant. At the show cause hearing the HOA argued that Hadaller's CCR's were deficient in the way they were not supported by articles of incorporation, identification of officers or means of electing officers. They

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<sup>27</sup> CP 328 ¶22

<sup>28</sup> CP 626-630

<sup>29</sup> Cp 646- 652

argued that Hadaller in essence had not set up a valid homeowners association and the other owners desired to have by-laws defining the means of electing officers and managing a valid homeowners association.<sup>30</sup> They argued the CCR's were an interim deficient set of CCR's at best. The Court agreed with the HOA, found the new HOA was duly formed and in power and ordered Hadaller to turn over the original documents<sup>31</sup>.

Hadaller quickly arranged ( risking contempt) to have the 2006 amended covenant examined then filed a report by a forensic document examiner confirming Fuchs' signature to be genuine<sup>32</sup>.

On April 3, 2009 the Court dismissed Hadaller's counterclaims from the HOA suit for these quiet title issues without prejudice so they could be filed in what became this suit<sup>33</sup>

In May 2009 Lowe drafted a complaint for a breach of contract and prosecuted a suit against Hadaller in behalf of Dean and Pam Rockwood, Hadaller's renters on lot 4 of the first plat<sup>34</sup>.

On June 26, 2009 this suit was filed for declaratory judgment/quiet title asking the Court to confirm the 2006 amended covenants prevented anyone but Hadaller the right to add

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<sup>30</sup> RP 01/29/2009 Pg 5 L. 12 – Pg 14 L. 21

<sup>31</sup> RP 01/29/2009 Pg 45 L. 15 – Pg 46 L. 18

<sup>32</sup> CP 631-652

<sup>33</sup> CP126 L. 6- Cp 127 L10

<sup>34</sup> [CP 325 ¶12] [ CP 345¶93] [CP 346¶95] [CP 347¶98]

additional property to the roads he had built. Also to void the easement to segregation lot 2, (it was amended in 2010 to include confirmation of an easement across the Schlosser's and Greer's lot to benefit Hadaller's segregation survey lot 3<sup>35</sup>)

Because the issue of the validity of the 2006 Amended Covenant was ambushed and voided by surprise at a previous trial in co-pending Cause No. 09-2-00052-1<sup>36</sup> and was on appeal. Hadaller attempted to dismiss the HOA in September 2010<sup>37</sup>.

In November 2010 the "Association" amended their answer and counterclaims, which still included claims for Hadaller to :

(a) Pay to place an electric meter on the pump house for water system #2, (which had already been concluded in co-pending 09-2-00052-1 case and was dismissed once they got the HOA into the April-May 2010 trial in this case<sup>38</sup>)

(c) Collection of fine and penalty for Hadaller storing an old mobile home (which existed before any lots were platted and not within view of the roads as the original CCR's require, Lowe had his new CCR's amended to not within view of another lot and

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<sup>35</sup> Ex 19 CP 286 ¶3.11 CP 289

<sup>36</sup> RP 12/10/2009 Vol 2 Pg 65 L. 19-24

<sup>37</sup> CP 443 -449

<sup>38</sup> CP 359 (b)

sued from that , The court found no basis for fine or penalty<sup>39</sup>) A reading of the findings and conclusions and cost bill neither confirms or denies whether the HOA attorney obtained fees for that issue from costs or identify if any time was billed to the lost claim, in their compilation of attorney fees. None was awarded by the court on this issue nor was any fine or penalties awarded for this<sup>40</sup>.

End of HOA issue... The HOA was only granted judgment in their favor for non payment of the “special assessments” to sue and defend from Hadaller.

Lowe argues he is acting on behalf of the HOA, but it is his own private segregation lot 2 that is benefitted with that free easement which Hadaller paid to build and includes a county approved roadway and utilities in place at Hadaller’s expense supporting development of 12 homes.<sup>41</sup> The lake access the lots are worth \$750,000 which Hadaller was expecting to have the benefit of when he built those roads under the first right of refusal and standing of 2006 Amended Covenant.<sup>42</sup>

The Schlosser and Greer’s (private) parties counter

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<sup>39</sup> [RP 05/10/2011 Pg 21 L.3Pg 22 L.13] [CP234 L. 3 –CP 235 L. 13]

<sup>40</sup> [CP 234 L. 3- Pg 235 L13] [RP 05/10/2011 Pg 21?3-Pg 22 13]

<sup>41</sup> Ex 22 Ex 28 CP 327¶18 CP 326-327 ¶16 CP 361 ¶7

<sup>42</sup> [RP 05/10/2011 Pg 33 L.11-Pg 35 L.5] and/or [CP246L.11-CP 248 L.5]

claimed for misrepresentation, by Hadaller on their south side easement description, They defended against Hadaller's claim that he reserved an easement across their south side, which is not maintained by the CCR's.<sup>43</sup> Almost all of the pretrial motions and trial was devoted to this issue. The court found fees based on Schlosser's REK<sup>44</sup> (RCW 4.84.185 and CR 11. The Cost Bill<sup>45</sup> and Findings<sup>46</sup> and Conclusions<sup>47</sup> state most of the fees were for that.

Private party Lowes counter-claimed that Hadaller had breach a contract to timely build a dock. The court found Hadaller was not even obligated by contract.<sup>48</sup> Were fees awarded for this?? Who knows, The court did answer one question on December 19, 2014 when Hadaller attempted to have the Court account for the fees.<sup>49</sup>

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<sup>43</sup> CP 332 ¶38-CP341 ¶65 stated as Ex 5 but filed as exhibit 6 see map in Ex 6) (Filed backwards)(note of easement on south side of map No. 3280378) CP 290 (reservation of the easement) see MKKI v. Kruger 135 Wa. App.647 how frivolous was that claim???

<sup>44</sup> Hadaller had sold only the receivables of the contracts first half and pled an interest in whether Schlosser could encumber it with another easement. The Court found Hadaller did not have an ownership sufficient interest to object to the easement, thence later granted foreclosure upon that same (\$56,000)receivable in supplemental proceedings against Hadaller's objection, which Lowe bid on and recieved for \$7,000 of the "judgment money". Seems if Hadaller did not own a right to object to the easement, thence the attorney fees clause of the contract also merged into the deed when it was sold. That leaves only the frivolous statutes for attorney fees. Regardless its mute except for issues of equity in this decision.

<sup>45</sup> CP 297 -321

<sup>46</sup> CP 351- 359

<sup>47</sup> CP 367369

<sup>48</sup> CP 238L.21-CP 239 L.3 RP 05/10/2011 Pg 25 L.21-Pg 26 L.3

<sup>49</sup> RP 12/19/2014 Pg 13 L23- Pg 21.L 18

The Lowes also counterclaimed issues from another suit, who were not even members of the HOA. The issue was that Hadaller had fraudulently transferred the ownership of the REK made on the lots Lowe bought from Hadaller to Deborah Reynolds for the hard honest work she contributed in the development. The court found that it was fraudulent and awarded unspecified amount of fees per the attorney fee clause in the contract.<sup>50</sup> Lowe was successful in eliminating over half of the \$110,000 real estate contract he owed Hadaller, by the Rockwood case and on this issue and got an easement across their lot<sup>51</sup>. In August 2009, contrary to the plain terms of a Lease/Option contract and with opposing declarations of the terms of the option agreement the Rockwood Trial Court granted summary judgment against Hadaller<sup>52</sup>. The Trial Court entered , under objection by Hadaller and only because of order of the Court, Hadaller passed lot 4's (104) title to the Rockwood's on August 13, 2010. The Court granted them \$58,980.00 in fees and damages. Which Lowe traded for an easement across that lot which is the first 100 feet of the road Lowe unilaterally recorded an easement over<sup>53</sup>.

Lowe's claim for conversion was patently frivolous

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<sup>50</sup>[CP 345 ¶93-CP351 ¶109] [RP 05/10/2011Pg.28L.3-Pg 245L.23]  
[CPCP241L.3-245]

<sup>51</sup> CP 347 ¶98

<sup>52</sup> It was appealed but dismissed as untimely, the merits were tactfully avoided

<sup>53</sup> [CP 325 ¶12] [ CP 326 ¶16] [ CP 328 ¶22]

falsely trumped up by Fuchs and Lowe<sup>54</sup> it was dismissed at trial.<sup>55</sup>

Private party Fuchs successfully defended

Hadaller's claim his fence that was ten feet into Hadaller's easement had to be removed. The Court dismissed that claim after trial and appear to have awarded fees under CR 11 and or RCW 4.84.185 which one or both and how much ?

On May 10,2011 the Court made oral findings on each issue at trial. It clearly identified the basis for fees were the contracts between the parties including the CCR's, the real estate contracts, and also RCW 4.84.185 and CR 11. Lowe questioned the Court's findings for the fees basis to the HOA:

[By]Mr. Lowe: ..... *"The second thing is the Court identified a number of alternative bases for an award of attorney's fees. I wanted to clarify if the Court intended to include among them RCW 64.38, which is the homeowners [Association] statutes, with respect to the homeowners [HOA] (sic)defense?"*

The Court: *I Did Not.[firmly] I'm not including that. I'm including the language of the Real Estate Contracts, with respect to..... Because we're really litigating the issue of real estate contracts. We're talking about the easements CR11 and 48.84.185*

Mr. Lowe: *Also, with respect to the Association within the [C]CR['s] (sic)provides for a collection of attorney fees in the amended CCR's.*

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<sup>54</sup> CP 484¶2

<sup>55</sup>CP 359 (c)

The Court: *That in essence amounts to a private right of collection of attorney fees. I'm going to go with what I have said. I think that's a sufficient basis for me to do what I'm going to do*<sup>56</sup>.

The CCR's have no provision in them to provide legal defense or attorneys to its members for private litigation.<sup>57</sup>

The "Association" drafted a cost bill<sup>58</sup> and proposed draft of the Findings of Facts and Conclusions of law. Hadaller opposed the cost bill which argued the same as he does in this review.<sup>59</sup>

On June 10, 2011 The Court entered a judgment,<sup>60</sup> findings of facts<sup>61</sup> ( opinionatedly written by Lowe, like a tabloid at a checkout stand, with no accounting at all) and conclusions of law<sup>62</sup> containing attorney fees based what appears to Hadaller to be substantially all for the private party claims based on the oral findings made at trial<sup>63</sup> and conclusions of law<sup>64</sup>, Hadaller relied upon that. The Cost bill<sup>65</sup> does not identify any or imply much fees attributable to the claim(s) the HOA prevailed on.

On **December 26, 2012** the HOA sent Hadaller a notice, **which was the first time they noticed him of this**, that his homestead exemption provided under RCW 6.13 was excepted

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<sup>56</sup> [RP 05/10/2011 Pg 43L. 6-25] and /or [CP 256 L. 6-15]

<sup>57</sup> Ex 12 CP 391- 407

<sup>58</sup> CP 297-315

<sup>59</sup> CP 507-513

<sup>60</sup> CP 514-517

<sup>61</sup> CP 351-359

<sup>62</sup> CP 367-369

<sup>63</sup> RP 05/110/2011

<sup>64</sup> CP 367 -369

<sup>65</sup> CP 297-321

to their judgment lien by operation of RCW 6.13.080(6). The

HOA has admitted this fact and not contested it<sup>66</sup>

In January 2013 the bulk of Hadaller's personal property, valued at over \$80,000, including the vender's interest in the Schlosser REK was sold by sheriff sale<sup>67</sup>. Mostly purchased by David Lowe, who paid for it with the judgments awards.

In May 2013 Hadaller's last two speculative lots were sold under the HOA suit judgment. They were appraised at \$72,000 each or \$144,000 total.<sup>68</sup> Six days after the foreclosure sale the "HOA" quit claimed them directly to David and Sherry Lowe.<sup>69</sup> which they still own. As will be the \$590,000 residence Hadaller they are using as a second home.

On February 28, 2014, the trial Court entered the decree of foreclosure we are addressing in this review.<sup>70</sup> Hadaller went to the hearing prepped to argue the points of law he made in his response brief<sup>71</sup> in regards to insufficient meaningful notice mandated by RCW 6.13.080(6), The court was not in agreement with Hadaller's legal reasoning on that statute. However, the Court

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<sup>66</sup> CP 411, 412 (last Paragraph)

<sup>67</sup> CP 518 L. 24-26

<sup>68</sup> [ Ex 368]

<sup>69</sup> CP 45

<sup>70</sup> CP 32

<sup>71</sup> CP 1-20

had its own view, which seems to end the same. The Report of proceedings state

Mr. Hadaller: *I've got other things to argue. If you have 14 minutes, I better get on, because I don't think I'm going to change your mind. I can see that already.*

The Court: *Well, You may be surprised where I'm going to go with this, Mr. Hadaller, so don't presume anything here.*<sup>72</sup>

**The trial Court deferred on the issue of whether the attorney fees can be foreclosed upon open,** it did not conclude they could be foreclosed, in fact it was questioned on that issue , the Court simply concluded the HOA could foreclose on the HOA judgment which includes fees per its CCR's which leaves open whether the CCR' s will provide for derogation of the homestead.

The Court: ..... *The issue of whether they can include the attorney fees is an open question at this point. I Haven't necessarily decided that. The issue of interest Is not an open issue, ....*

*The issue of attorney fess, I'm.....If you want to research that, I would be open to let you research that, ....*<sup>73</sup>

The Court: *I'll tell you what, I am gonna make a ruling and as you are known to do, if you don't like my ruling, which is just about every one of them that I make you don't like, you can appeal it to the Court of Appeals.*

*Here's what I'm going to do: First of all I'm going to grant the Homeowners Association the authority to foreclose, with respect to the existing judgment, plus accrued interest on the existing judgment, plus accrued interest on the existing judgment, at the statutory rate, which is 12 percent*<sup>74</sup>.

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<sup>72</sup> RP 02/28/2014 Pg. 17L. 9- Pg 39 (Particularly Pg 29L.10 -Pg 30 L. 15)

<sup>73</sup> RP 02/28/2014 Pg 29 L. 14- Pg 30 L. 9

<sup>74</sup> RP 02/28/2014 Pg 34L.9 -18

On March 31, 2014 Hadaller appealed the February 28, 2014 decree of foreclosure<sup>75</sup>, supersedeas was out of reach.

The “Association” forced the Lewis County Sheriff to execute on the writ, the sheriff sale was scheduled for May 9, 2014.

On May 8, 2014 Hadaller filed for bankruptcy protection<sup>76</sup>.

On October 10, 2014 the Bankruptcy Court entered orders voiding the liens of all private parties in this suit.<sup>77</sup>

On October 30, 2014 the Bankruptcy Court granted the HOA’s motion and entered the order relieving them of stay to foreclose on Hadaller’s residence.<sup>78</sup>

On November 14, 2014 the HOA served the writ of execution, to sell Hadaller’s residence, upon the Lewis County Sheriff containing an ambiguous and overstated judgment amount.

<sup>79</sup> The sheriff scheduled the sale for January 9, 2015.

Hadaller scheduled a hearing in the Trial Court, for

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<sup>75</sup> Notice of this Appeal

<sup>76</sup> CP 107L.5

<sup>77</sup> CP107 L. 6-10

<sup>78</sup> Appdx Pg 5

<sup>79</sup> CP108 L.5-7

66 CP 108 L. 8

December 5, 2014, to have the Court itemize the attorney fees it awarded to whom in May, 2011 and placed in the June 10, 2011 judgment<sup>80</sup> Also to set a new supersedeas amount,<sup>81 82</sup>in accordance with the affirmed judgment balance. The Courts findings in December 2014 first concluded the HOA “*bore the laboring oar*”to litigate for all the private party issues.

On January 9, 2014 the sheriff sold Hadaller’s residence.

Redemption and or supersedeas was financially beyond Hadaller’s means so on March 10 ,2016 the Sheriff delivered the deed for Hadaller’s residence to David Lowe, in the name of the HOA which is recorded in their name at this time.

On March 25, 2016 The Sheriff ejected Hadaller against his will from his home at 135 Virginia Lee Lane, Mossyrock, Wa.

The Lowes are now using it for their weekend/summer home.

## ARGUMENT

This underlying fact glows in the background: Due to the ignorance of the obscure<sup>83</sup> law at issue, a 64 yr. old nearing retiring contractor was swiftly displaced from not just his

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<sup>80</sup> CP 514-516

<sup>81</sup> CP 105-266

<sup>82</sup> RP 12/05/2014 Pg1-34

<sup>83</sup> PG 1 of appendix (Third St. Law blog)

retirement and personal property but also his home, (combined over \$800,000) by the acts of an unethical attorney who appears to be improperly taking advantage of the law and personally pocketing what has been handed to him under the HOA laws. Other benefits to that carpetbagging attorney also includes access to the lake and potential marina across Hadaller's homestead for 24-36 more homes. Hadaller installed the utilities for 12 of those future homes at his expense. The Trial Court gave that to Lowe for no compensation. His unethical gains at this point are potentially over \$1,000,000.

Hadaller is asking this Court to review if his homestead is superior to the "HOA" lien. The court should keep in mind, what is the purpose of the Homestead Act? How does it apply in this instance? What is the intent of RCW 6.13.080(6)

**1(a). All liens held by the HOA on and before December 26, 2012 are subordinate to Hadaller's homestead, per the notice requirement in RCW 6.13.080(6)**

**STANDARD OF REVIEW** The first issue for review is for a determination of whether any of the HOA attorney fees or assessments, awarded in the June 10, 2011 judgment are exempted from foreclosing on Hadaller's homestead. This is a review of the

intent and effect, of a 1988 amendment to RCW 6.13.080 which added what is now subparagraph (6)<sup>84</sup>. The issue involves CCR's contract interpretation and statutes which is a question of law, reviewed de novo.<sup>85</sup>

This is a first impression of the authority and effect of RCW 6.13.080(6) to the fundamental rights<sup>86</sup> of a homestead and notice, as the legislature obviously intended in amending RCW 6.13.080 with explicitly strict notice conditions before derogating it. The relevant part provides:

**(6) On debts secured by a condominium's or homeowner association's lien. In order for an association to be exempt under this provision, the association must<sup>87</sup> have provided a homeowner with notice that nonpayment of the association's assessment may result in foreclosure of the association lien and that the homestead protection under this chapter shall not apply. An association has complied with this notice requirement by mailing the notice, by first-class mail, to the address of the owner's lot or unit. The notice required in this subsection shall be given within thirty days from the date the association learns of a new owner, but in all cases the notice must be given prior to the initiation of a foreclosure. The phrase "learns of a new owner" in this subsection means actual knowledge of the identity of a homeowner acquiring title after June 9, 1988, and does not require that an association affirmatively ascertain the identity of a homeowner. **Failure to give the notice specified in this subsection affects an association's lien only for debts accrued up to the****

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<sup>84</sup> Originally enacted as (5)

<sup>85</sup>, *Meresse v. Stelma*, 100 Wash.App. 857 @864 999 P.2d 1267 (2000) Citing *Wallace Real Estate Inv., Inc. v. Groves*, 72 Wash.App. 759, 766, 868 P.2d 149, *aff'd*, 124 Wash.2d 881, 881 P.2d 1010 (1994). *Parry v. Hewitt*, 68 Wash.App. 664, 668, 847 P.2d 483 (1992).

<sup>86</sup> "Fundamental rights are those rights which have their source, and are explicitly or implicitly guaranteed, in the federal Constitution and state constitutions.... Challenged legislation that significantly burdens a 'fundamental right'... **will be reviewed under a stricter standard of review**". Citing: *Blacks' Law Dictionary* 465 (6th ed. 1991):

<sup>87</sup> See ELPOC 1.3 Definitions ¶ (w) Words of authority (2) "Must" means "is required to" citing Washington Regulation Text State Supreme Court WSR 16-05-078 Amended order No. 25700-A-1137

time an association complies with the notice provisions under this subsection; or.<sup>88</sup>[emphasis added]

The decision of this review should hold that in order to overcome a homestead, the notice requirement amended to RCW6.13.080(6) must be actual notice per the language of the statute<sup>89 90</sup> and not a liberal constructive notice, as the Trial Court and HOA imply, which would have to be read into the clear language. “Where meaning of statute is clear, the court must accept plain and unambiguous language”.<sup>91</sup>

Hadaller did not “*acquire title*” subject to a HOA nor did a legal HOA exist when he established his homestead in 2005. He did record maintenance CCR’s in 2007 with an intent for assessments exclusively for maintenance expense for exclusively capital improvements to the road, water systems and dock<sup>92</sup>. The CCR’s provided for the formation of a HOA intended after he completed his development and all future planned lots were owned by the final members<sup>93</sup>. A reasonable Court may construe Hadaller “...*acquired title* ...” subjected to only the original covenants / restrictions when he recorded the CCR’s in April 2007<sup>94</sup> against his homestead. BUT, by the plain language of the new statute he

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<sup>88</sup> Wa. Leg. Web site RCW 6.13.080(6)

<sup>89</sup> *In Re Bankr. Petition of Wieber*, 182 Wn. 919@¶16

<sup>90</sup> Majorie Dick Rombauer Wa. Prac. Vol 28 §7.22 see Foot Note 7

<sup>91</sup> *Biggs V., Vail* 119Wash. 2d 129 30P.2d 350 (1992)

<sup>92</sup> See Ex12 Pg 4

<sup>93</sup> That foolishly good faith plan was hijacked by Lowe and Fuchs

<sup>94</sup> Ex12

subordinated his homestead only if he had received actual notice as RCW 6.13.080(6) requires. But no homeowners association existed to comply with the statute to notice him at that time. Hadaller not a legal HOA and was obviously unaware of the statute, so no actual notice was possible at that time to overcome any member's homestead position.

Importantly, those 2007 CCR's<sup>95</sup> did not give any notice of the new 2009 restrictions<sup>96</sup> the HOA created after they formed in 2008, then counterclaimed upon in 2009 and won their judgment upon.

**The analysis begins** with the meaning and effect of the phrase in the statute "*..acquired title...*" which identifies by plain language the Court should construct its effect in this case to be when the HOA was first created and incorporated, which is December 30, 2008<sup>97</sup>. As a March 2016 decision in this court<sup>98</sup> held t, an unincorporated organization such as Hadaller and the CCR's then were is not an "*...other legal entity.*" as RCW 64.38.010(11) defines a HOA. Thus no HOA legally existed to pull in RCW 6.13.080(6) until December 30, 2008. Opposition to that is estopped by the HOA's argument in the show cause hearing on

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<sup>95</sup> Ex 12 Pg 4 Art.III §1-4

<sup>96</sup> CP 393-394 Art.III (The appeal of the validity of the new restriction was lost by lack of timely money to pay to move the record which was over \$10,000)

<sup>97</sup> Ex 19

<sup>98</sup> *Halme v. Walsh* No. 47129-9-II March 8,2016

January 29, 2009. They cannot have it both ways, then the HOA's argument<sup>99</sup>, which merged into the Trial Court's reasoning<sup>100</sup> and order that legally imposed the HOA for the first time, which placed the HOA in power then for the first time, parallels with the *Halme v. Walsh Id* court,. Once in power the HOA had to strictly follow the statute, e.g. mail Hadaller notice they may avoid his homestead by January 30, 2009, in order to displace Hadaller's homestead. They did not do that. It is undisputed they mailed that required notice three years later on December 26, 2012<sup>101</sup>. But that was eighteen months after nurturing this huge judgment that was growling at his homestead. The judgment was obtained for a purported violation of an equitable restriction enacted, by the new HOA, on July 6, 2009<sup>102</sup>. Where meaning of statute is clear, the court must accept plain and unambiguous language.<sup>103</sup>

When no Washington precedence exists for on point analysis of an issue, the Court regularly looks for guidance from other states, with comparable laws in place..<sup>104</sup> Because the

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<sup>99</sup> RP 01/29/2009 Pg 13 L2 - Pg 14 L.21 Pg 45 L. 15-Pg 46 L.18 Co-case 09-2-00052-1

<sup>100</sup> RP 01/29/2009 Pg 45 L. 15-Pg 46 L.18 . Co-case 09-2-00052-1

<sup>101</sup> Final paragraph of CP 411

<sup>102</sup> CP 393-394 (Note auditor stamp)

<sup>103</sup> *Biggs V., Vail* 119Wash. 2d 129 30P.2d 350 (1992)

<sup>104</sup> Washington Courts used a Missouri case to make some of its first holdings in regards to assessments in one of the most cited potentially the grandfather of Washington covenant law. see *Rodruck v. Sand Point Maintenance Commission*, 48 Wash.2d 565 @ 578 [17], 295 P.2d 714 (1956) stating "Reliance is had upon *Van Deusen v. Ruth*, 343 Mo. 1096, 125 S.W.2d 1." Thus the very beginnings of the bases of our covenant laws spawns from older states

legislature's intent in enacting the law and comparable other-state rulings are readily available this Court should construe the law on this issue in view of both together.<sup>105</sup>

**First in position first in right:** In the vast majority of HOA cases the facts are the HOA lien is in place and attached to and runs with the land before the owner/member takes the deed that becomes his homestead<sup>106</sup> (if it is his primary residence) In those typical cases the buyers homestead cannot displace an existing lien condition on the title of the land and the homestead is subordinate to the preexisting lien<sup>107</sup>. The legal mechanics work like this. A valid covenant, condition or restriction ( equitable restrictions<sup>108</sup> commonly referred to as CCR's ) attaches to the land in such a way that it must pass from owner to owner is said to run

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laws which have been in effect longer and had previous experience to consider our positions from. Also see *Meresse v. Stelma*, 100 Wash.App. 857 @866, 999 P.2d 1267 (2000) holding *We adopt the pertinent rationale of the Nebraska Supreme Court in Boyles v. Hausmann, 246 Neb. 181, 517 N.W.2d 610, 617 (1994)*"

<sup>105</sup> Such as was done in *Clark v. Pacificorp*, 116 Wash.2d 804@ 820, 809 P.2d 176 @ 185 (1991)*Balch v. Smith*, 4 Wash. 497 @500-502 30 P. 648 @601-603(1892), *State ex rel. Wilson v. King County*, 7 Wash.2d 104@107 109 P.2d 291@293 (1941)

<sup>106</sup> RCW 6.12 *When the homestead exemption is established prior to judgment, this court has held that the judgment does not become a lien upon the property, Lien v.Hoffman* 49Wash. 2d 642 (1957 Citing;*Barouh v. Israel*, 1955, 46 Wash.2d 327, 332, 281 P.2d 238; *Traders' National Bank v. Schorr*, 1898, 20 Wash. 1, 54 P. 543, 72 *Am.St.Rep.* 17, except in certain specified situations fixed by statute,. See RCW 6.12.100.)

<sup>107</sup> *Hoffman Id*

<sup>108</sup> See Stoebuck Wa Prac Vol 17 §310-321

with the land<sup>109</sup>. Typically the CCR's contain language that burdens each owner to equally pay assessments for certain benefits that are the burden of the HOA to collect for and perform the duty of. That becomes a lien which in essence is an equitable restriction upon each lot or unit created upon recording the CCR's against the subdivisions lots<sup>110</sup>. Once properly recorded all the benefits and burdens within the recorded CCR's legally provide notice<sup>111</sup> to subsequent purchasers of the restrictions identified or sometime implied in the recorded CCR's<sup>112</sup>. When someone buys a lot with such restrictions including the lien in place, the lien is already fixed to the land they constructively, at least, have been provided notice.<sup>113</sup> Usually sales addenda and title reports or disclosure by sales agents will provide actual notice of the CCR's. If the purchaser has acquired a legal homestead it is still effective in protecting the member's interest from foreclosure against collection of assessment liens<sup>114</sup> until the HOA follows the due process of notice the legislature obviously intends.<sup>115</sup>

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<sup>109</sup> *Rodruck v. Sand Point Maintenance Commission*, 48 Wash.2d 565 295 P.2d 714 (1956)

<sup>110</sup> See *Stoebuck Wa Prac Vol 17 §310-321*

<sup>111</sup> *Lake Limerick Country Club v. Hunt Mfg. Homes, Inc.*, 120 Wash.App. 246 @ 254 [4][5] P.3d 295 (2004), *Leighton v. Leonard*, 22 Wash.App. 136, 589 P.2d 279 (1978)

<sup>112</sup> *Johnson v. Mt. Baker Park Presbyterian Church*, 113 Wash. 458, 194 Pac. 536 (1920)

<sup>113</sup> *Hunt Id*

<sup>114</sup> *Pinebrook Homeowners Ass. v. Owen* 48 Wash app.424 39 P 2d 110(1987)

Prior to June 1988, Washington law was that HOA liens were subordinate to a homestead in foreclosing upon the assessment lien<sup>116</sup>. In June 1988, in response to this Court's decision in *Pinebrook, Id*, RCW 6.13.080<sup>117</sup> was amended by SHB 1329 to protect HOA's that are obligated to provide material and labor<sup>118</sup>. It is important to note the legislature did not pass the first draft of HB1329, it did not provide for notice to a member that their fundamental right to a homestead was at risk<sup>119</sup>. The bill was amended by adding very strict requirements for notice to members burdened upon the HOA<sup>120</sup>. If the law is strictly followed it benefits the HOA to the exception to a members homestead for collecting on an assessment lien. But only if the HOA had performed the notice burden the law requires<sup>121</sup> of providing a meaningful notice of the provisions of it to the members that the law will void their homestead rights. That notice must be actual and provided to each member being subjected to the risk.<sup>122</sup> The statute is clear and explicit, any member who "*Acquired title*" with mailed notice that their homestead is ineffective against the HOA's assessment ( not attorney fee) lien, within thirty days of

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<sup>115</sup> RCW 6.13.080(6) SHB 1329 House Bill Report in Appdx @ Pg 7-8 and Final Bill Report in Appdx @Pg 2--3

<sup>116</sup> *Pinebrook Id*

<sup>117</sup> Then RCW 6.12.100

<sup>118</sup> House Bill Report Appdx Pg 7

<sup>119</sup> First draft of Bill 1329 Appx Pg 4-6

<sup>120</sup> Bill amendment in Appdx @ Pg 7-8

<sup>121</sup> *Dickson v. Kates* 132 Wash. App 724 @Pg.735¶25, 133P 3d 498 (2006)

*Hollis v. Garwall, Inc* 13 Wash 2d 683 974 P 2d 836 @841

<sup>122</sup> RCW 6.13.00(6) [ Majorie Dick Rombauer Wa. Prac. Vol 28 §7.22 FN7]

learning of the member, then takes title with their homestead subordinate behind the HOA in lien priority. Our new statute and Texas' holdings, to their like law, are harmonious<sup>123</sup> <sup>124</sup>.

Our law became comparable with Texas' when we amended RCW 6.13.080. But here the HOA has the strict duty to inform each member within thirty days of learning of each member taking title to be effective.<sup>125</sup> If the HOA does not, then any liens it may foreclose are legally done without notice against a homestead, having no priority to the land over the homestead exemption.<sup>126</sup> Though our statute implies an HOA may cure the err of not noticing the member(s) by mailing a notice later, the dire consequence to that late notice is that any liens incurred prior the notice date are subordinate to a member's homestead<sup>127</sup>. The HOA first complied with the statute by notice to Hadaller on

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<sup>123</sup> RCW 6.13.080(6) *Inwood North Homeowners ass. v. Harris* 736 S.W. 2d 632 @ 633 -637

<sup>124</sup> *A restrictive covenant should be liberally construed "to give effect to its purposes and intent."* *Wvch Ldef v. Wilchester West Fund*, 177 S.W.3d 552 @563 (Tex. App. 2005) Citing 177 S.W.3d 552 TEX. PROP.CODE ANN. § 202.003(a) (Vernon 1995); *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wash.2d 241@ 250 [5] 327 P.3d 614 (2014)

<sup>125</sup> RCW 6.13.080(6) Appdx Pg1 Wa. Pract. Vol 28 §7.22 [FN 7]

<sup>126</sup> *Boudreaux Civic Ass'n v. Cox*, 882 S.W.2d 543, (Tex.App.-Houston [1st Dist.] ( 1994, no writ) *Brooks v. Northglen Ass'n*, 141 S.W.3d 158 @170 [14], 47 Tex. Sup. Ct. J. 719(2004) Citing Tex. Att'y Gen. Op. LO-97-019 (1997) In appdx @ Pg.4 Also see *Andres v. Indian Creek Phase III-B Homeowner's Ass'n*, 901 So.2d 182 (2005) 30 Fla. L. Weekly D800

<sup>127</sup> RCW 6.13.080(6) Wa. Pract. Vol 28 §7.22 [FN 7] Appdx Pg1

December 26, 2012<sup>128</sup> so per the statute all judgment liens prior to that date are subordinate to his homestead.

**1(b). The lien based on the new restriction for unlimited special assessments cannot rise above Hadaller's homestead regardless of whether the HOA followed RCW6.13.080(6) because he was not noticed with the new special assessment when he subordinated his homestead**

This court is not faced with reversing the decision nor under any obligation to a previous conclusion of law on this homestead issue, the Trial Court expressly deferred on it<sup>129</sup>. Hadaller asserts the decision should conclude none or a very small amount of the assessment lien can derogate his homestead.

Even if the court somehow liberally finds constructive notice worked in favor of the HOA per RCW 6.13.00(6), Hadaller's homestead is still superior to their special assessment lien the judgment is based upon. That is because the 2009 special assessment,<sup>130</sup> Hadaller objected to and suffered the underlying judgment from, is obviously a new contract born after Hadaller subordinated his homestead in 2007<sup>131</sup>.<sup>132</sup> Even if the Court were

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<sup>128</sup> CP 411 (final Paragraph)

<sup>129</sup> See RP 02/28/2014 Pg. 17L. 9- Pg 39 (Particularly Pg 29L.10 –Pg 30 L. 15)

<sup>130</sup> CP 394 §3.4

<sup>131</sup> “...they did not buy into the creation of new restrictions unrelated to existing ones”. *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wash.2d 241 327 P.3d 614 @622[15] (2014) “...did not place a purchaser or owner on notice.” *Chiwawa Id* Citing: *Meresse v. Stelma*, 100 Wash.App. 857, 865–66, 999 P.2d 1267 (2000) @ 866-67

<sup>132</sup> 29 Williston on Contracts § 73:17 (4th ed.) *Wes-Tex Tank Rental, Inc. v. Pioneer Natural Resources...*, 327 S.W.3d 316 @ pg.319[4] (2010) Citing: *Boudreaux Civic Ass'n v. Cox*, 882 S.W.2d 543, 547–48 (Tex.App.-Houston [1st

to construct a bridge to lug in the new special assessments, for anything and everything, not just capital improvements. That equitable restriction may possibly be enforced and foreclosed upon but it cannot derogate Hadaller's homestead. That is due to a fundamental right to a homestead preexisted the new lien. An adequate fundamental right of notice must be proven to have been had to displace it,<sup>133</sup> which is chronologically impossible.

**Analysis** An all states, all content ,Westlaw search has shown Texas is a state that parallels Washington in review of CCR law<sup>134</sup> and their Courts holdings of their law comports with the one Washington passed in 1988. Texas is one of the few states that has decided this issue many times. In 1997 the Texas Supreme Court decided *Inwood North Homeowners Association, Inc. V. Harris* 736 S.W. 2d 632(1987) . The case became a Texas landmark decision in holding that regardless of their the homestead being mandated

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Dist.] 1994, no writ). "The new contract includes the new, modified provisions and the unchanged old provisions". *Greenbelt Elec. Coop., Inc. v. Johnson*, 608 S.W.2d 320, 324–25 (Tex.Civ.App.-Amarillo 1980, no writ); *see also BACM 2001–1 San Felipe Rd. Ltd. P'ship v. Trafalgar Holdings I, Ltd.*, 218 S.W.3d 137, 146 (Tex.App.-Houston [14th Dist.] 2007, pet. denied) "(a modification alters only those terms of the original agreement to which it refers, leaving intact those unmentioned portions of the original agreement that are not inconsistent with the modification)".

<sup>133</sup> *Harris Id, Cox Id, Brooks Id, and Andres Id*

<sup>134</sup> *Wwch Ldef v. Wilchester West Fund*, 177 S.W.3d 552 @563 (Tex. App. 2005) Citing 177 S.W.3d 552 TEX. PROP.CODE ANN. § 202.003(a) (Vernon 1995); *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wash.2d 241@ 250 [5] 327 P.3d 614 (2014)

and jealously protected in their constitution<sup>135</sup>, if members of a homeowners association voluntarily contracted (purchased) with notice of covenants to pay assessments, which were attached and ran with the land prior to taking their deed. Then a lien was attached to the deed at time of purchase and the purchaser/member's homestead was affixed subordinate to the HOA lien and can be foreclosed in derogation of their homestead. Since that case other HOA cases were decided citing that as precedence in favor of an HOA<sup>136</sup> Acquiring title with notice of the covenants was the key factor in derogating the constitutionally protected homestead.

Comparably Washington's homestead rights are also rooted in the State Constitution<sup>137</sup>. Our legislature allowed the exception to the homestead in 1988 with a strict requirement for notice and conditioning to acquiring title subject to the CCR's. By the statement "acquires title" the law implies a homestead cannot rise above a lien that exists before the homestead is established<sup>138</sup>. In the vast majority of HOA lien cases an owner takes possession with the lien in place and its homestead takes effect subordinate to

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<sup>135</sup> Texas Const. Art. 16, § 50

<sup>136</sup> i.e. *Sloan v. Owners Ass'n of Westfield, Inc.*, 167 S.W. 3d 401 (2005)  
Holding attorney fees were contractual part of assessments predating members homestead.

<sup>137</sup> Art XIX§1

<sup>138</sup> RCW 6.13.080(6) compares to *Inwood North Homeowners ass. v. Harris*  
736 S.W. 2d 632 @ 633 -637

the HOA lien recorded per its CCR's. In *Harris*, Harris took his homestead typically subject(subordinate) to the CCR lien he had violated, so the restriction/lien was in place before he acquired title. Several cases confirm that holding. But, the deciding fact in all those cases are opposite than this case here.

The Texas Supreme Court has considered at least one case<sup>139</sup> and their Appellate Courts have considered at least one<sup>140</sup> where the facts are same as this case. Here, Hadaller's homestead was affixed to the land (2005)<sup>141</sup> prior to original CCR's (2007)<sup>142</sup>, the HOA itself (2008)<sup>143</sup> and certainly prior to notice of the change in the CCR's in 2009<sup>144</sup> which contains the new restriction the HOA obtained its judgment upon.

The *Cox* and *Brooks* Courts each distinguished from *Harris* using the same holdings to find that the first in right is in the superior position. *Cox* is particularly parallel to this case. In *Cox*, Cox had vehicles on his lot that the CCR's disallowed. Although Cox had taken his homestead subject to the covenant limiting vehicles, their CCR's did not provide for attorney fees to litigate the issue. Shortly after the HOA sued Cox for relief, the HOA also

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<sup>139</sup> *Brooks v. Northglen Ass'n*, 141 S.W.3d 158 @170 [14], 47 Tex. Sup. Ct. J. 719(2004) Citing Tex. Att'y Gen. Op. LO-97-019 (1997) In appdx @ Pg.4

<sup>140</sup> *Boudreaux Civic Ass'n v. Cox*, 882 S.W.2d 543, (Tex.App.-Houston [1st Dist.] ( 1994, no writ)

<sup>141</sup> Ex 40

<sup>142</sup> Ex 12 Pg 4

<sup>143</sup> Ex19

<sup>144</sup> CP 394 §3.4 (note auditors stamp date)

amended the CCR's to provide for attorney fees, just like this case's special assessment. The *Cox* Trial Court granted the HOA relief requested and also attorney fees per its new amendment , but at foreclosure denied derogation of Cox's homestead because the attorney fee amendment was enacted subsequent to Cox's homestead. The Court held because the homestead was affixed prior to the covenant allowing attorney fees, Thus any attorney fees awarded to the HOA could not be foreclosed ahead of applying Cox's homestead right on his residence. The Appellate Court affirmed, they held the HOA could amend the CCR's to allow for fees just like Washington precedence has held. The Court held the HOA could sue and the Court can grant those fees just as here. But by law the homestead attached to the land prior to the attorney fees (unlimited special assessments here) restriction coming into existence, it cannot be derogated without his consent, which would only have been the case if the amendment came before he established his homestead or he could lose it by subjecting it, like a mortgage or home improvement agreement, which he did neither. Hadaller, like Cox, was not noticed when he "*acquired title*" (April 2007) of a pending 2009 new contract containing unlimited special assessments . Because the special assessment provision was enacted after he established his homestead it is a new restriction creating a new contract he did not

voluntarily subject to <sup>145</sup>, his homestead is superior to the lien for the new special assessment. This trial Court indicated the same in deferring on this <sup>146</sup>. Therefore even if the HOA may possibly obtain its judgment and foreclose, <sup>147</sup> it may not foreclose on the homestead portion of Hadaller's residence.

**2. The cost bill, findings of fact and conclusion of law seriously fail to conform to holdings set by *Mahler V. Szucs* 135 Wn.2d 398**

**STANDARD OF REVIEW :** Itemizing which fees were awarded per which statute or contract and to which specific parties and for which claims separately is absolutely required for subsequent appellate reviewing and bankruptcy courts proceedings. Whether they are is a matter of law reviewed de novo. <sup>148</sup> The courts have wide discretion to determine what is a reasonable amount, after it is properly accounted for, is reviewed for abuse of discretion. <sup>149</sup>

This case has two classes of fees, which are:

Class (a) fees were awarded to the HOA which become a part of their lien which becomes a security interest upon Hadaller's home and lots he owned in Mayfield Cove

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<sup>145</sup> *Chiwawa Id, Mereese Id, Cox Id, Brooks Id, Williston Id*

<sup>146</sup> RP 02/28/2014 Pg 34L.9 -18 See FN 75 reference

<sup>147</sup> The appeal of the merits of this issue was lost as explained previously

<sup>148</sup> *Mcgreevy v. Oregon Mut. Ins. Co.* 289 90 Wn. App. 283, 951 P.2d 798

*Mahler v. Szucs*, 135 Wash. 2d 398, 957 P.2d 632 (1998)

<sup>149</sup> *Mcgreevy Id*

Estates.<sup>150</sup> Class (b) are the fees awarded to the individual parties which became a judicial lien against Hadaller's personal and real property<sup>151</sup>.

The Trial Court's basis for awarding fees to the private parties in class (b) was based upon CR 11, RCW 4.84.185, private contracts between the private parties.<sup>152</sup> The vast bulk of successful defense and counterclaim litigation (apprx. 95+%) in this suit was in this class as is proven by the cost bill.<sup>153</sup> Which does not itemize a single expense specifically to the HOA's litigation.

The Trial Court awarded fees to the HOA based only upon the language in the CCR's<sup>154</sup> for the claim(s) they prevailed upon. That being the issue of whether the new special assessments, created two years after Hadaller recorded the original CCR's, was valid. The court found they could<sup>155</sup> and granted the HOA judgment and an award of fees based on the issue. The Court found no damages for the counterclaim against the storage yard and old mobile home<sup>156</sup>. The HOA's counterclaim issue of setting up a meter on a pump house was dismissed<sup>157</sup>. After the 2006

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<sup>150</sup> Appdx Pg 12 HOA order for relief of stay

<sup>151</sup> CP 130-134

<sup>152</sup> [RP 05/10/2011 Pg 35 L6. – Pg.37 L19 Pg 43 L. 9-25]. [CP 351 ¶110-115 (note contradiction of RCW 64.38 as a possible basis ] [ CP 367 ¶ 39 note RCW 64.38 not a basis]

<sup>153</sup> CP 358 ¶135CP 297-321

<sup>154</sup> RP 05/10/2011 Pg 43 L. 9-25

<sup>155</sup> RP 05/10/2011 Pg 37 L8 – L19

<sup>156</sup> [ RP 05/10/2011 Pg 22 L. 3-Pg 22 L. 13] [CP 394 ¶84]

<sup>157</sup> CP 359 ¶135L. 2-7

Amended Covenant was found void, Hadaller attempted to dismiss the HOA from this suit<sup>158</sup> and did dismiss the issue that the HOA had no authority to annex additional land to the road several months before trial and did not pursue it at trial. Accordingly The HOA's entire basis for attorney fees appears to be litigating the issue of whether the new special assessments were enforceable. Hadaller admitted he refused to pay it<sup>159</sup>. The entire litigation was within the four corners of that one page document. Indeed the Court even made a finding that Hadaller did not have a claim against the HOA at trial, it simply was not tried nor at issue for much fees<sup>160</sup>.

The HOA was not a necessary party nor had standing to defend any of the private party issues<sup>161</sup>. The Lowe's segregation lot two is not in the HOA<sup>162</sup> the HOA has no standing to defend the issue of its, or any other's easements<sup>163</sup>. The remanding error<sup>164</sup> is

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<sup>158</sup> CP 443

<sup>159</sup> CP 345 ¶89

<sup>160</sup> Cp 250 L. 22- Pg 255 L. 25 or RP 05/10/2011 Pg 37 L22- Pg 42

<sup>161</sup> *Creek Pointe Homeowner's Ass'n, Inc. v. Happ*, 146 N.C.App. 159@165-168 552 S.E.2d 220 @225-227 (2001) Citing *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977) *River Birch Associates v. City of Raleigh*, 326 N.C. 100@ 129 388 S.E.2d 538 @555 (1990) *Saunders v. Meyers*, 175 Wash.App. 427 @ 437--438 306 P.3d 978 @ 983-984 (2013)

<sup>162</sup> CP 327 ¶17 The HOA contacted Lowe?? How did he stand in front of a mirror and talk to himself? That is the bulk of the reasoning the fees are based upon and is supported by the facts almost all of Hadaller's real and personal property seized for the "HOA" is now owned by the Lowes purchased for David's "work" for the "HOA"

<sup>163</sup> *Happ Id, Hunt Id, River Birch Id*

<sup>164</sup> *Mcgreevy Id Also Tulsa Litho Co. v. Tile and Decorative Surfaces Magazine Pub., Inc.*, 69 F.3d 1041 (1995) Citing *Christie-Lambert Van & Storage Co. v. McLeod*, 39 Wash.App. 298, 693 P.2d 161, 166 (1984) *Tulsa*

that nobody or document has yet identified the exact proper amount due to the HOA or each successful claim.

Although the findings<sup>165</sup> and cost bill,<sup>166</sup> which Hadaller opposes on same grounds here on appeal<sup>167</sup> seems very clear that the vast bulk ( 95-99%) of fees should apply to class (b) fees to the private parties. The Trial Court erred by concluding opposite on December 5, 2014<sup>168</sup>. The present issue sprouted in the Bankruptcy Court, when the HOA argued that they obtained all the fees (survives bankruptcy) and the private party fees (voided in bankruptcy) were nonexistent. The Bankruptcy Court could make no new findings, per the Rooker Feldman Doctrine, of who got what. It entered an order voiding all class (b) fees which total \$124,463 .95<sup>169</sup> and which were not opposed by the private parties and are stated sufficiently in the order to for this court to conclude, that as a matter of law, all \$124, 563.95 was voided. The bankruptcy Court granted the HOA relief from stay to foreclose, based on a \$103,798.05 June 2011 judgment<sup>170</sup> entered in this case. When the Bankruptcy Court entered those three orders,

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*Scott v. Art of Optiks Cherry Creek, Inc.*, 60 P.3d 770 @771 (2002) Citing *Christie Lambert Id* , and *Litho Co. v. Tile and Decorative Surfaces Magazine Pub., Inc.*, 69 F.3d 1041 (1995) (citing *Hanson v. Blackwell Motor Co.*, 143 Wash. 547, 255 P. 939, 942 (1927) All holding the same that trial Court MUST consider and award judgments separately

<sup>165</sup> CP 358 ¶135

<sup>166</sup> [CP 297-305] [ CP 317]

<sup>167</sup> CP 507- 513]

<sup>168</sup> RP 12/05/2014

<sup>169</sup> CP 130-134

<sup>170</sup> [CP 514-517] HOA bankruptcy order in Appdx Pg 5

the total owing at that time was \$124,463.95. Where did the other \$103,798.05 come from and where did it go? The Bankruptcy Court left the issue to this court. The argument fell back upon the Trial Court to determine .

Hadaller immediately filed a motion in the Trial Court<sup>171</sup> to have the surviving judgment balance itemized and moved for supersedeas<sup>172</sup> pending this appeal. The hearing was held on December 5, 2014. Hadaller argued all or almost all the attorney fee awards were discharged in the Bankruptcy Court orders voiding the class (b) fees<sup>173</sup>. The HOA argued no fees were voided because they had all the fees awarded to them. The trial Court then took a ninety degree turn from its May 5, 2011 oral findings<sup>174</sup> and its findings and conclusions entered June 10, 2011<sup>175</sup> and stated he awarded 100% of the fees to the HOA because ‘*they bore the laboring oar*’ to litigate even the private party issues.<sup>176</sup> A follow up hearing was held on December 19, 2014, Hadaller questioned the Court how the HOA may obtain the entire award The Court again changed course forty five degrees back and said that at least the Lowes private litigation fees were not awarded to the HOA but stopped fielding questions prior to answering for the remaining

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<sup>171</sup> CP 105-121

<sup>172</sup> RP 12/05/2014 Pg 19 L. 23 Which was set beyond Hadaller by then and now means @ \$180,000.00

<sup>173</sup> CP 108-121 CP 203-20

<sup>174</sup> CP 248 L. 6- CP 250 L. 21 CP 43 L. 6- L25

<sup>175</sup> [ CP 358 ¶¶135 ] [ CP 369 ¶ ¶44-46 ]

<sup>176</sup> RP 12/05/2014 Pg 23 L9 Pg 24 L. 14.

private parties<sup>177</sup> which Hadaller was attempting to make sense of. Regardless the Court entered the Writ of Execution<sup>178</sup> based on a Decree of Foreclosure<sup>179</sup> including every cent of the attorney fees as if they were all awarded to the HOA and voided Hadaller's homestead<sup>180</sup> with those private party awards. That is reversible error as a matter of law<sup>181</sup>. Hadaller appealed the order resulting from those two hearings January 5, 2015 which is consolidated herein with the original March 2014 appeal.

**Analysis** “[T]he general rule [is] that attorney fees and costs in multi-party cases as well as in certain consolidated cases are awarded to different parties on the basis of the separate judgments obtained, not the overall trial result.”<sup>182</sup>

Its a matter of law, the Trial court is obligated to enter an itemized amount of fees awarded to, at least, each of the two classes of fee awards, at issue in this case. In doing so the Trial Court must enter findings and conclusions of law and force a cost bill that specifically itemizes at least the basis, and amounts awarded to each class of parties.<sup>183</sup>

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<sup>177</sup> RP 12/05/2014 Pg 13 L. 23 – Pg22 L. 15

<sup>178</sup> CP 518- 520

<sup>179</sup> Cp 32-34

<sup>180</sup> CP 33 ¶1

<sup>181</sup> *Mcgreevy Id, Mahler Id*

<sup>182</sup> *Tulsa Litho Co. v. Tile and Decorative Surfaces Magazine Pub., Inc.*, 69 F.3d 1041 (1995) Citing *Christie-Lambert Van & Storage Co. v. McLeod*, 39 Wash.App. 298, 693 P.2d 161, 166 (1984) *Hanson v. Blackwell Motor Co.*, 143 Wash. 547, 255 P. 939, 942 (1927)

The court found the legal basis for an award to the HOA was exclusively from the provisions of the CCR's.<sup>184</sup> Neither the original CCR's or current amended CCR's provide a possibility for the HOA to defend for private parties.<sup>185</sup> Indeed it would be a conflict of interest for an HOA to litigate one member's private issue against another.<sup>186</sup> Only the issue of violation of the CCR's can be based on the CCR's and collected per the assessment lien provision within them, for a basis to award fees to the HOA.

Hadaller admitted to not paying the special assessments and pled to the Court they were not valid because they were a separate restriction not grounded in the original CCR's<sup>187</sup>. Accordingly the HOA attorney was required to only obtain a decision from the Court of whether they were or were not. Very minimal discovery and argument was necessary and conducted. But a literal reading of the writ for foreclosure on Hadaller's home can only conclude the HOA obtained over \$82,000 of fees awarded for their work plus the interest and more fees on supplemental proceeding totaling over \$140,000 by time foreclosure occurred.

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<sup>183</sup>, *Mcgreevy Id Mahller Id Christie-Lambert v. Mcleod* 39 Wn. App. 298, 693 P.2d 161(1984) Holding courts grant fees separately to parties in multi party cases

<sup>184</sup> CP 256 L 9-25

<sup>185</sup> Ex 12 CP 391-407

<sup>186</sup> *Happ Id, Hunt Id, River Birch Id*

<sup>187</sup> CP 345 ¶89

That , Your Honor is an abuse of discretion.

The Court made an award Hadaller was willing and able to supersede, which should have been less than a \$12,000 judgment to supersede and appeal the validity of the special assessment.

The Court found that the fees were all borne by and owing to the HOA, it is an error of law reviewed de novo<sup>188</sup>. The cost bills<sup>189</sup> specifies no time was even spent on the counter claims of the HOA. Therefore a very small portion of the trial brief<sup>190</sup> and Hadaller's motion to dismiss the HOA<sup>191</sup> from the suit prior to trial can be implied from the cost bill to support their fees. All others are voided by bankruptcy. The Trial Court must enter a cost bill, findings and conclusions that itemize the amount.<sup>192</sup>

**3. This Court should use the provisions of RAP 2.5(c) to get itself out of the position of causing the statute of frauds to aid and abet a \$800,000 fraud scam.**

*"The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review".<sup>193</sup>*

*"Such a holding should be overruled if it lays down or tacitly applies a rule of law which is clearly erroneous, and if to apply the doctrine*

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<sup>188</sup> *Mcgreevy Id Mahller Id, Tulsa Litho Co Id, Christie-Lambert Id, Happ Id, Hunt Id, River Birch Id*

<sup>189</sup> CP 297-321

<sup>190</sup> CP 521-625

<sup>191</sup> CP 443-449

<sup>192</sup> *Mcgreevy Id Mahller Id, Tulsa Litho Co Id, Christie-Lambert Id, Happ Id, Hunt Id, River Birch Id*

<sup>193</sup> RAP2.5(c) (2)

*would work a manifest injustice to one party, whereas no corresponding injustice would result to the other party if the erroneous decision should be set aside.*<sup>194</sup>.

Hadaller respectfully moves for a new holding that prevents the statute of frauds from continuing a fraud upon him by Randy Fuchs and David Lowe. They will not be prejudiced by denying them a privilege of legal fraud.

On February 28, 2012 this Court entered a decision in a preceding appeal, co- case No. 404265<sup>195</sup>, holding the statute of fraud voids an unacknowledged covenant/contract Fuchs signed that enabled and abetted Randy Fuchs and David Lowe to proceed with fraud on Hadaller to white collar steal his land development we are at issue on. Because of that holding the fraud is proceeding as if it is legal, in fact it is plain theft in a \$500 suit. The Court abetted the fraud by holding that even if Hadaller can prove Fuchs' signed the 2006 Amended Covenants, it is immaterial because the covenant failed to meet the statute of frauds simply because it was not acknowledged.

The issue of that covenant was pled and pending for declaratory judgment in this

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<sup>194</sup> *First Small Business Inv. Co. of California v. Intercapital...*, 108 Wash.2d 324 @333 738 P.2d 263@268 (1987)

<sup>195</sup> *Mayfield Cove Estates Homeowners Association v. Hadaller* 166 Wash App 1036 (2012)

case<sup>196</sup>, but was raised by surprise in that preceding case at a trial set for a separate issue. Neither of Hadaller's fact<sup>197</sup> and expert witness<sup>198</sup> were in court to defend it and it was ambushed and slaughtered. Then, because of that unjust holding the Trial Court granted summary judgment and avoided a trial on the merits in this case. The appeal of that was dismissed by tactics of Lowe.

Hadaller has been defrauded from over \$800,000 based only upon the death of that contract which occurred only because it did not receive a fair trial on the merits which occurred because the holding made the trial immaterial because of lack of acknowledgement. Hadaller is 64 years old, that was his only hope of a retirement plan and because Lowe now owns that retirement plan, which was his developable lake access real estate. Lastly, Hadaller now no longer has equity in a home.

His new, present , home( a free 1973 mobile home on a tax sale lot ) has no running water, sewer nor electrical connection, yet. It wasn't just \$800,000, It was his only \$800,000 accumulated from 40 years of honest labor and credit, which was destroyed by these associated judgments obtained by an unethical attorney for his personal greed on the fraud of his partner in crime developer Randy Fuchs. That \$800,000 plus the expected

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<sup>196</sup> CP 282-289 [CCR's @ Ex 12 Pg 11-13 at issue is Fuchs' signature on Pg 13]

<sup>197</sup> CP 646-648

<sup>198</sup> CP 631-645

proceeds (not included in the \$800,000) from his road and utilities investment in development of segregation lot 2 is now all owned by David Lowe (via his HOA) paid for by his “winnings” obtained per the fraud. Randy Fuchs construction equipment is poised on his contiguous developable land aimed at Hadaller’s now ex development awaiting the final words from this case to become connected to the lake with Lowes new development.<sup>199</sup>

Hadaller acknowledges he is now seeking extraordinary relief, in asking this Court to make a holding the statute of frauds should not work a fraud and part performance and estoppels will work to prevent a fraud.

Part performance and estoppels may remove a contract from the statute of frauds.<sup>200</sup> This Court has held that an oral contract for sale of land may meet the statute of frauds if one party, in reliance of the assumed valid contract performs his part.<sup>201</sup> In *Remilong Id*, Wyoming has made a holding even more exactly on point here in regards to enforcing a covenant created by oral agreement.<sup>202</sup> The elements of performance and estoppels in this case are virtually identical. It does not seem right or logical that in view of those oral agreements an unacknowledged written

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<sup>199</sup> These unsupported statements can be proven in a trial that was avoided.

<sup>200</sup> *Remilong v. Crolla*, 576 P.2d 461 (1978)

<sup>201</sup> *Miller v. McCamish*, 78 Wash.2d 821@829 479 P.2d 919@924 (1971) (which has been cited by courts forty times on this issue)

<sup>202</sup> *Remilong v. Crolla*, 576 P.2d 461 (1978) The analysis in this case is dead on to here

covenant must fail for lack of acknowledgement if the signature is proven, would it be closer to the statute had it not even been written? That sounds absurd.

In avoiding similar past cases of fraud<sup>203</sup> the Court analyzed the performance of the victim to the pending fraud, like this case. Here, Hadaller sold Fuchs a home in 2005 under faith of the written agreement Fuchs would not interfere in Hadaller's development plans<sup>204</sup>. Fuchs sat back in his house, purchased per the agreement and watched Hadaller invest in roads and utilities on segregation survey lot 2 under a trust of the covenant agreement with Fuchs from May 2005 – Dec 2006.<sup>205</sup> He then attempted to displace Hadaller's position by offering to pay the owner a large sum for the Hadaller improved segregation lot 2 in August of 2006. When Fuchs realized lot 2's easement would not support development and had to use Hadaller's new road, which he had agreed not by his signature on the 2006 Amended covenant, he quit the sale and partnered with David Lowe and falsely stated his signature was forged<sup>206</sup>. January 2007 Fuchs bought a large developable lot contiguous with the plat at issue and October 2007

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<sup>203</sup> *Miller Id, Remilong Id*

<sup>204</sup> CP 649-652 CP 646-648

<sup>205</sup> CP 326¶16

<sup>206</sup> CP 626-630 RP 12/10/2009 Case No. 09-2-00052-1 Pg 65 L. 19-23 (The associated unsupported claims of facts can be made facts by a trial yet to occur hereby moved for) CP 631-652,

Lowe bought three lots from Hadaller<sup>207</sup> . Hadaller sold to Fuchs, built plat 05-00017, sold Lowe the lots under the reliance he was protected by the 2006 Amended Covenant. In 2008 Lowe misrepresented a partnership with Hadaller to get Hadaller to not enjoin a sale of segregation lot 2 . Lowe immediately reneged after he owned lot 2, he created a homeowners association government he took control of<sup>208</sup> then unilaterally recorded himself an easement across Hadaller's fee owned land In December 2008<sup>209</sup> . This suit was spawned from those facts.

A substantial amount of specific performance and estoppels is prima facie evident here, which provides authority for this court to remove the issue of lack of acknowledgment on the covenant and make a holding here the statute works to protect from fraud both ways. Thus it must be waived as a defense if the signature can be proven<sup>210</sup> in trial. The issue is a matter of law this court can remedy de novo.<sup>211</sup>

## CONCLUSION

1. The HOA Lien is subordinate to Hadaller's homestead by lack of notice on two levels. Accordingly the Court erred by

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<sup>207</sup> CP 325 ¶11

<sup>208</sup> EX 19

<sup>209</sup> EX 22,

<sup>210</sup> <sup>210</sup> *Miller Id, Remilong Id*

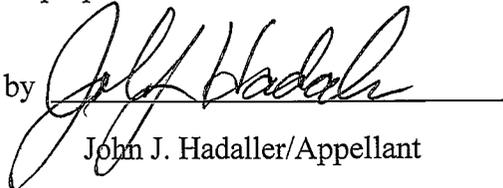
<sup>211</sup> *First Small Business Inv. Co. of California v. Intercapital...*, 108 Wash.2d 324 @333 738 P.2d 263@268 (1987)

allowing his residence to be foreclosed upon without allowing the exemption. This Court should void the sheriff sale and remand the matter back for application of Hadaller's homestead prior to any other potential sale.

2 The Court must remand this back for accounting of the fees per precedence and a strict warning that only the HOA counterclaims of the special assessment collection litigation shall be included in a "reasonable fee amount"<sup>212</sup>. This court should make a holding the Sheriff sale is null/ void until this issue is finalized.<sup>213</sup>

3 The Court should remand the issue of the standing of the 2006 Amended Covenant back for a trial on the merits with a holding part performance, estoppels and this ongoing fraud removes the covenant from the statute of frauds. Then when a finding of fact is found that Fuchs 's signature is genuine, the covenant in force. In doing so, this court would be fulfilling the purpose of RAP 2.5(c) and serve the justice of its purpose.

Respectfully submitted by



John J. Hadaller/Appellant

On May 27, 2016

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<sup>212</sup> *Mcgreevy Id Mahller Id*

<sup>213</sup> *Lien v. Hoffman*, 49 Wash.2d 642 306 P.2d 240 (1957)

FILED  
COURT OF APPEALS  
DIVISION II

2016 MAY 31 AM 9:02

STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

COURT OF APPEALS, DIVISION II OF THE STATE OF  
WASHINGTON

JOHN J. HADALLER	)	COA No. 46094-7-II
An individual,	)	
Plaintiff	)	
	)	LCSC No. 09-2-934-0
v.	)	
	)	
MAYFIELD COVE ESTATES	)	
HOMEOWNERS ASSOCIATION, a	)	
Washington non-profit corporation,	)	DECLARATION OF SERVICE
DAVID A. and SHERRY LOWE, individually and the	)	
Marital community thereof; RANDY FUCHS,	)	
An individual; CLIFFORD L. and SHEILAH	)	
SCHLOSSER, individually and the marital com-	)	
Munity thereof; and MAURICE L. and	)	
CHERYL C. GREER, individually and the	)	
Marital community thereof; LEWIS COUNTY	)	
TITLE COMPANY a Washington corporation	)	
Defendants	)	

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John J. Hadaller Declares as follows:

That I am now and all times here-in mentioned, was a citizen of the United States of America and a resident of the state of Washington over the age of eighteen (18) years, plaintiff/appellate to the above action and competent to be a witness therein.

That on the 31<sup>st</sup> day of May 2016 I served the following documents:

- *DECLARATION OF SERVICE*
- *OPENING BRIEF*

On the following: by the indicated method of service.

To:

David A. Lowe  
Black, Lowe & Graham pllc  
701 5<sup>th</sup> Ave. STE 4800  
Seattle, Wa. 98104-7009

e.-Mail  U.S. Mail

Personal service

The fore-going statements are made under the penalty of perjury under the laws of the state of Washington and are true and correct.

Signed this 31<sup>st</sup> day of May 2016 at Mossyrock, Wa.

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John J. Hadaller

“Nothing is more  
satisfying than helping  
people solve problems.”

Stephen W. Hansen

## Homestead Exemption & Foreclosure of Association Liens

by Stephen W. Hansen – December 17th, 2012

A relatively obscure Washington statute (RCW 6.13.080) now requires Homeowner Associations (“HOAs”) to mail notice to its members explaining that no “homestead exemption” will be recognized if an Association lien for unpaid assessments is foreclosed against their property. Such Homestead Exemption, which applies to the enforcement of judgments and a few other types of liens against real estate, serves to protect a homeowner’s first \$125,000.00 of equity in their residence. Thus, the elimination of this exemption is very important should it become necessary to foreclose an Association lien.

Accordingly, it is advisable for all HOAs to comply with this statute by sending out notices to all members that comply with the statute. Furthermore, when the Association learns of a change of ownership, a notice needs to be sent to the new owner within 30 days from the date the Association learns of the new owner. Untimely notices are ineffective to eliminate the Homestead Exemption as to pre-notice arrearages.

On the other hand, the law is less clear as to whether Condominium Owner Associations (“COAs”) must comply with this notice requirement in order to eliminate the Homestead Exemption in lien foreclosure actions. There is an apparent conflict between RCW 64.34.364 of the Condominium Act and RCW 6.13.080 of the Homestead Act that is not easily reconciled. According, in view of this uncertainty, it is my strong recommendation that COAs, like HOAs, transmit the required notice to all unit owners to fully insure their assessment priority respecting homestead property.

We would be pleased to answer your questions or provide assistance in preparing a satisfactory statutory notice in this regard if helpful.

### Archives

[view all](#)

November 24th, 2015

**Simple Wills and Lawyer Lingo**

November 13th, 2015

**\*\*UPDATE\*\* CAN AN ASSOCIATION AMEND ITS CCRS TO RESTRICT RENTAL OF UNITS?**

October 22nd, 2015

**Don't Write On It!**

July 24th, 2015

**Probate**

May 18th, 2015

**Adopting A Homeowners' Bill Of Rights**

FINAL BILL REPORT

SHB 1329

C 192 L 88

BY House Committee on Judiciary (originally sponsored by Representatives Crane, Brough, Sutherland, Lewis, Heavey, Padden, Nutley, Peery and Hargrove)

Changing provisions relating to the homestead exemption.

House Committee on Judiciary

Senate Committee on Law & Justice

SYNOPSIS AS ENACTED

BACKGROUND:

The use of real property may be restricted, or certain obligations associated with ownership of the property may arise, through legal agreements. These agreements, commonly called covenants, conditions, and restrictions, are often permanent and are passed from owner to owner when the property is conveyed or transferred.

A condominium or homeowner association may be created or operated based on a covenant that permanently runs with the real property. The association often manages and maintains areas that the individual real property owners own in common, or provide other services to all the owners. Examples of common areas include hallways in condominiums and swimming pools or clubhouses in planned subdivisions.

Generally the individual property owners elect persons to govern the condominium or homeowner association, and the owners vote on other major matters such as the budget. Typically an association has the power to assess and collect dues to carry out its duties, and unpaid dues constitute a lien on the real property of the individual owners.

A homestead exemption protects certain property from seizure by creditors. The state constitution mandates that the legislature protect a certain portion of the homestead. It applies to property used as a primary residence.

The legislature has excluded some liens from homestead protection. These excluded liens include: mechanic's and materialmen's liens; mortgages or deeds of trust; certain debts arising out of a

bankruptcy filed by one spouse within six months of the other spouse's bankruptcy; and child support debts.

A Court of Appeals has held that the lien for unpaid homeowner assessments is subject to the homestead protection.

SUMMARY:

A lien for unpaid condominium or homeowner association assessments is excluded from the homestead protection.

Notice that nonpayment of the association fees may result in foreclosure on the real property must be given by the association to each new owner when the association learns of a new owner. The notice must also state that the homestead protection does not apply. An association does not have a duty to seek out and find new owners.

VOTES ON FINAL PASSAGE:

House	95	0
Senate	47	1

EFFECTIVE: June 9, 1988

BILL NO. \_\_\_\_\_

State of Washington      52nd Legislature      1988 Regular Session  
by \_\_\_\_\_

AN ACT relating to homesteads: and amending RCW 6.12.100 and RCW 64.32.200(2).

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1. Section 16, chapter 260, Laws of 1984 as amended by Section 208, chapter 442, Laws of 1987 and RCW 6.12.100 are each amended to read as follows:

The homestead exemption is not available against an execution or forced sale in satisfaction of judgments obtained:

(1) On debts secured by mechanic's, laborer's, materialmen's or vendor's liens upon the premises;

(2) On debts secured by purchase money security agreements describing as collateral the mobile home that is claimed as a homestead or by mortgages or deeds of trust on the premises, executed and acknowledged by the husband and wife or by any unmarried claimant;

(3) On one spouse's or the community's debts existing at the time of that spouse's bankruptcy filing where (a) bankruptcy is filed by both spouses within a six-month period, other than in a joint case or a case in which their assets are jointly administered, and (b) the other spouse exempts property from property of the estate under the bankruptcy exemption provisions of 11 U.S.C. Sec. 522(d);

(4) On debts arising from a lawful court order or decree or administrative order establishing a child support obligation or obligation to pay spousal maintenance; or

(5) On debts for assessments arising from a condominium's or home owner association's covenant.

Sec. 2. RCW 64.32.200(2) is amended to read as follows:

(2) All sums assessed by the association of apartment owners but unpaid for the share of the common expenses chargeable to any apartment shall constitute a lien on such apartment prior to all other liens except only (a) tax liens on the apartment in favor of any assessing unit and/or special district, and (b) all sums unpaid and all mortgages of record. Such lien is not subject to the ban against execution or forced sales of homesteads under RCW 6.12.100 and may be foreclosed by suit by the manager or board of directors, acting on behalf of the apartment owners, in like manner as a mortgage of real property. In any such foreclosure, the apartment owner shall be required to pay a reasonable rental for the apartment, if so provided in the bylaws, and the plaintiff in such foreclosures shall be entitled to the appointment of a receiver to collect the same. The manager or board of directors, acting on behalf of the apartment owners, shall have power, unless prohibited by the declaration, to bid on the apartment at foreclosure sale, and to acquire and hold, lease, mortgage and convey the same. Upon an express waiver in the complaint of any right to a deficiency judgment, the period of redemption shall be eight

(8) months after the sale. Suit to recover any judgment for any unpaid common expenses shall be maintainable without foreclosing or waiving the liens securing the same.

Appropriation:

Revenue:

Fiscal Note: 7/12

HOUSE BILL REPORT

HB 1329

BY Representatives Crane, Brough, Sutherland, Lewis, Heavey, Padden, Nutley, Peery and Hargrove

Changing provisions relating to the homestead exemption.

House Committee on Judiciary

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. (13)

Signed by Representatives Armstrong, Chair; Crane, Vice Chair; Appelwick, Brough, Hargrove, P. King, Lewis, Locke, Meyers, Moyer, Padden, Patrick and Scott.

House Staff: Charlie Gavigan (786-7340)

AS REPORTED BY COMMITTEE ON JUDICIARY FEBRUARY 2, 1988

BACKGROUND:

The use of real property may be restricted, or certain obligations associated with ownership of the property may arise, through legal agreements. These agreements, commonly called covenants, conditions, and restrictions, are often permanent and are passed from owner to owner when the property is conveyed or transferred.

A homeowner association may be created or operate based on a covenant that permanently runs with the real property. A homeowner association often manages and maintains areas that the individual real property owners own in common, or provide other services to all the owners. Examples of common areas include hallways in condominiums and swimming pools or clubhouses in planned subdivisions.

Generally the individual property-owners elect persons to govern the association, and the owners vote on other major matters such as the budget. Typically a homeowner association has the power to access and collect dues to carry out its duties, and unpaid dues constitute a lien on the real property of the individual owners.

A homestead exemption protects the owners of certain property from seizure by creditors. The state constitution mandates that the legislature protect a certain portion of the homestead. The current homestead exemption amount is \$30,000. It applies to property used as a primary residence and to the proceeds of the sale of property used as a primary residence.

The legislature has excluded some liens from homestead protection. These excluded liens include: (1) mechanic's and materialmen's liens; (2) mortgages or deeds of trust; (3) certain debts arising out of a bankruptcy filed by one spouse within six months of the other spouse's bankruptcy; and (4) child support debts.

A Court of Appeals has held that the lien for unpaid homeowner assessments is subject to the homestead protection.

SUMMARY:

SUBSTITUTE BILL: A lien for unpaid homeowners association assessments is excluded from the homestead protection.

SUBSTITUTE BILL COMPARED TO ORIGINAL: Notice that nonpayment of the association fees results in a lien on the real property of the owner must be given by the association when the association learns of a new owner. The notice must also state that the homestead protection does not apply. An association does not have a duty to seek out and find new owners.

Fiscal Note: Not Requested.

House Committee - Testified For Original Measure in Committee:  
Barbara Peterson, Pinebrook Homeowners' Association; Bill Crowell;  
Bill Wilken.

House Committee - Testified Against Original Measure in Committee:  
Greg Bass, Evergreen Legal Services.

House Committee - Testimony For: A homeowners association lien is similar to the other exclusions permitted by statute, such as mechanic's liens and mortgages and deeds of trust. The property and the homeowner are being benefited. Purchasers should be aware of the obligation when they buy the property. Also, other homeowners are hurt when some members do not pay because services must decline or fees must be increased.

House Committee - Testimony Against: This goes against the policy for the homestead protection. Associations have other remedies available to collect delinquent dues.

Tex. Atty. Gen. Op. LO-97-019 (Tex.A.G.), 1997 WL 133428

Office of the Attorney General

State of Texas  
Letter Opinion No. 97-019  
March 13, 1997

\*1 Re: Whether Property Code section 204.010(a)(11), (12) authorizes a property owners' association to foreclose on a homestead in order to collect costs spent by the association to enforce deed restrictions (ID # 39292)

The Honorable Rodney Ellis  
Chair  
Senate Jurisprudence Committee  
Texas State Senate  
P.O. Box 12068  
Austin, Texas 78711-2068

Dear Senator Ellis:

You ask whether Property Code section 204.010(a)(11), (12) authorizes a property owners' association to foreclose on a homestead in order to collect costs spent by the association to enforce deed restrictions. Section 204.010 -- a provision of chapter 204 added to the Property Code in 1995<sup>1</sup> that applies only to certain subdivisions in certain counties<sup>2</sup> -- provides, in pertinent part, as follows:

(a) Unless otherwise provided by the restrictions or the association's articles of incorporation or bylaws, the property owners' association, acting through its board of directors or trustees, may:

....

(11) if notice and an opportunity to be heard are given, collect reimbursement of actual attorney's fees and other reasonable costs incurred by the property owners' association relating to violations of the subdivision's restrictions or the property owners' association's bylaws and rules;

(12) charge costs to an owner's assessment account and collect the costs in any manner provided in the restrictions for the collection of assessments.

Prop. Code § 204.010.<sup>3</sup> The term "restrictions" is defined for purposes of chapter 204 as follows: "one or more restrictive covenants contained or incorporated by reference in a properly recorded map, plat, replat, declaration, or other instrument filed in the county real property records, map records, or deed records." *Id.* §§ 201.003, 204.001(1). "Restrictive covenant" means "any covenant, condition, or restriction contained in a dedicatory instrument, whether mandatory, prohibitive, permissive, or administrative." *Id.* §§ 202.001(4), 204.001(2).<sup>4</sup>

Attached to your request is an analysis of chapter 204 prepared by an attorney for property owners' associations that states that section 204.010(a), subsections (11) and (12) "allow community associations to charge a homeowner for attorney's fees and other reasonable costs" (including presumably management company charges for demand letters) spent to enforce the deed restrictions and *foreclose on the homeowner in order to collect them.*" (Emphasis added.) You express concern that section 204.010(a)(12) authorizes a property owners' association "to foreclose [on a homestead] in order to collect charges outlined in section 204.010(a)(11), in cases where homestead rights do not precede a covenant with the association."

Subsection (11) authorizes the board of a property owners' association to "collect reimbursement of actual attorney's fees and other reasonable costs incurred by the property owners' association relating to violations of the subdivision's restrictions or the property owners' association's bylaws and rules." Subsection (12) provides that the board of the property owners' association may "charge costs to an owner's assessment account and collect the costs in any manner provided in the

restrictions for the collection of assessments." Presumably, the term "costs" in subsection (12) refers to the costs described in subsection (11), that is costs incurred by the property owners' association relating to violations of the subdivision's restrictions or the property owners' association's bylaws and rules.

\*2 Your inquiry raises two issues: (i) whether a cost is authorized by section 204.010(11), and (ii) whether a lien for subsection (11) costs may be enforced by foreclosure of a homestead. To be authorized by subsection (11), a cost must relate to violations of the subdivision's restrictions or the property owners' association's bylaws and rules and must be reasonable. The determination whether any particular cost is reasonable and relates to violations of the subdivision's restrictions or the property owners' association's bylaws and rules will depend upon the facts of the particular case. The second issue raises more complex legal and factual issues. Although we cannot ultimately resolve it, we can provide the following guidance.

The Texas Supreme Court addressed homestead rights and foreclosure to collect subdivision assessment liens in *Inwood North Homeowners' Association, Inc. v. Harris*, 736 S.W.2d 632 (Tex. 1987). As that case makes clear, homestead rights, although constitutionally created, may not be construed to avoid or destroy preexisting rights. 736 S.W.2d at 635. When the property has not become a homestead at the execution of the mortgage, deed of trust, or other lien, the homestead protections have no application even if the property later becomes a homestead. *Id.* With respect to the relationship between a homestead right and a subdivision assessment lien, the court determined that the critical issue is when the lien attaches on the property and whether the lien is the result of a covenant that runs with the land:

If [the lien] occurred simultaneously to or after the homeowners took title, there is authority which would deem the homestead right superior. *See Freiberg v. Walzem*, 85 Tex. 264, 20 S.W. 60, 61 (1892). On the other hand, if the lien attached prior to the claimed homestead right and the lien is an obligation that would run with the land, there would be a right to foreclose.

In Texas, a covenant runs with the land when it touches and concerns the land; relates to a thing in existence or specifically binds the parties and their assigns; is intended by the original parties to run with the land; and when the successor to the burden has notice.

*Id.*

In *Harris*, the developer had filed a declaration of covenants and restrictions in 1980 that stated that each person receiving a deed for a lot in the subdivision is deemed to agree to pay to the association annual assessments and special assessments for capital improvements. *Id.* at 633. Homeowners purchased lots in subsequent years. The deeds made specific reference to the maintenance charges or to the property records where the declaration was filed. *Id.* at 634. On the basis of these facts, the court concluded that the restrictions were placed on the land before it became the homestead of the homeowners. *Id.* at 635. The court also concluded that the restrictions contained valid contractual liens that ran with the land. *Id.* As a result, "an order of foreclosure would have been proper." *Id.* at 635-36.

\*3 Whether a property owners' association may foreclose on a homestead to collect the costs outlined in section 204.010(a)(11) will depend upon whether the lien for those costs (i) attached to the property prior to the homestead right and (ii) is the result of a restriction that runs with the land. The answers to both these questions will ultimately depend upon the facts of the particular case and are beyond the purview of an attorney general opinion. With respect to the first issue, however, we note that the determination whether a lien for costs incurred by a property owners' association relating to violations of the subdivision's restrictions or the property owners' association's bylaws and rules preexisted a homestead right will depend upon the terms of the applicable restrictions and whether the assessment of these costs is contemplated by an existing lien under the restrictions or creates a new lien. *Cf. Boudreaux Civic Ass'n v. Cox*, 882 S.W.2d 543, 547 (Tex. App.--Houston [1st Dist.] 1994) (suggesting in dicta that if amendment to restrictions creates a new lien made subsequent to homestead declaration, it is not enforceable; if it is a modification of the maintenance fee lien, it is a lien preexisting the homestead right and is enforceable).<sup>5</sup> We do not believe that a claim for costs arising merely by virtue of an action taken by a board of a property owners' association under section 204.010(a) would create a lien that would precede a homestead right dating from before the board's action.

#### Summary

To be authorized by Property Code section 204.010(11), a cost must relate to violations of the subdivision's restrictions or

the property owners' association's bylaws and rules and must be reasonable. Whether a property owners' association may foreclose on a homestead to collect the costs outlined in section 204.010(a)(11) will depend upon whether a lien for those costs (i) attached to the property prior to the homestead right and (ii) is the result of a restriction that runs with the land. A claim for costs arising merely by virtue of an action taken by a board of a property owners' association under section 204.010(a) does not create a lien that would precede a homestead right dating from before the board's action.

Yours very truly,

Mary R. Crouter  
Assistant Attorney General  
Opinion Committee

Footnotes

- <sup>1</sup> See Act of May 27, 1995, 74th Leg., R.S., ch. 1040, § 2, 1995 Tex. Gen. Laws 5170, 5171.
- <sup>2</sup> Chapter 204 applies only to certain subdivisions located in whole or in part in a county with a population of 2.8 million or more. Prop. Code § 204.002(a). In some cases, provisions of chapter 204 will apply to other counties. See *id.* ch. 205. Chapter 204 sets forth procedures to create a property owners' association in certain subdivisions with restrictions that do not provide for one. See *id.* § 204.006.
- <sup>3</sup> This office addressed subsection (9) of section 204.010(a) in Letter Opinion No. 96-123 (1996).
- <sup>4</sup> The terms "regular assessment" and "special assessment" are defined in chapter 204 as follows:  
(3) "Regular assessment" means an assessment, charge, fee, or dues that each owner of property within a subdivision is required to pay to the property owners' association on a regular basis and that are to be used by the association for the benefit of the subdivision in accordance with the original, extended, added, or modified restrictions.  
(4) "Special assessment" means an assessment, charge, fee, or dues that each owner of property within a subdivision is required to pay to the property owners' association, after a vote of the membership, for the purpose of paying for the costs of capital improvements to the common areas that are incurred or will be incurred by the association during the fiscal year. A special assessment may be assessed before or after the association incurs the capital improvement costs.  
Prop. Code § 204.001.
- <sup>5</sup> Chapter 204 sets forth procedures for amending existing deed restrictions. See Prop. Code § 204.005. Express designation in a document creating restrictions providing for amendments to restrictions by a designated number of owners of real property in the subdivision prevails over these provisions. *Id.* § 204.003.

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Tex. Atty. Gen. Op. LO-97-019 (Tex.A.G.), 1997 WL 133428

End of Document

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Below is the Order of the Court.



*Paul B. Snyder*

**Paul B. Snyder**  
**U.S. Bankruptcy Judge**

(Dated as of Entered on Docket date above)

**UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF WASHINGTON AT TACOMA**

In re:

**JOHN JOSEPH HADALLER,**

Debtor.

**Case No. 14-42607**

**ORDER GRANTING MOTION FOR  
RELIEF FROM STAY**

This matter came before the Court on October 23, 2014, on Mayfield Cove Estates Homeowners Association's (Association) Motion for Relief from Stay to proceed with a pending judicial foreclosure of its interest in real property owned by John Hadaller (Debtor), located at 135 Virginia Lee Lane, Mossyrock, Washington (Property). The Association also seeks waiver of the 14-day stay imposed by Fed. R. Bankr. P. 4001(a)(3). The Debtor objects and has filed lengthy responsive pleadings. Based on the pleadings and arguments presented, the order of the Court is as follows:

The Property is subject to a Declaration of Covenants, Conditions, Restrictions, Road Maintenance Agreement, Water System (CCRs). The CCRs create a continuing lien as to assessments, interest, costs and reasonable attorney's fees owed to the Association. The Debtor has admittedly not paid assessments, costs, penalties and fees owed the Association pursuant to the CCRs since 2009. The Association filed a lawsuit to enforce its lien against the

**ORDER GRANTING MOTION  
FOR RELIEF FROM STAY - 1**

1 Debtor in Washington State Superior Court for Lewis County (State Court). A judgment was  
2 entered by the State Court on June 10, 2011, in the principal amount of \$103,798.05. On  
3 February 28, 2014, the Association obtained a Decree of Foreclosure and Order of Sale from  
4 the State Court. The State Court denied two motions for reconsideration filed by the Debtor  
5 and the Association obtained a Writ of Execution based on Decree of Foreclosure and Order of  
6 Sale. On May 8, 2014, one day prior to the scheduled sheriff's sale, the Debtor filed the  
7 present bankruptcy petition under Chapter 7. The foreclosure sale has been stayed by the  
8 bankruptcy filing.

9 On June 23, 2014, Debtor's counsel filed a motion to withdraw as counsel for the  
10 Debtor. An order granting the motion to withdraw was entered on August 29, 2014. The  
11 Debtor is currently proceeding pro se.

12 On August 14, 2014, the Debtor filed a motion in this Court to avoid multiple liens,  
13 including the Association's lien. After a hearing held on September 25, 2014, the Court  
14 entered an order denying the Debtor's motion to avoid the Association's lien. On October 8,  
15 2014, the Debtor filed a Motion to Alter, Amend or Clarify Order Denying Hadaller's Motion to  
16 Discharge Association's Secured Lien. The Court treated the Debtor's pleading as a motion for  
17 reconsideration and set the matter for oral argument pursuant to Local Rules W.D. Bankr.  
18 9013-1(h). After a hearing, an Order Denying Hadaller's Motion for Reconsideration was  
19 entered on October 24, 2014.

20 The Association filed its motion for relief from stay on October 1, 2014. The Debtor filed  
21 an objection and contemporaneously filed a motion to convert his Chapter 7 case to Chapter  
22 13. The motion to convert is scheduled for hearing on November 20, 2014.

23  
24  
25  
ORDER GRANTING MOTION  
FOR RELIEF FROM STAY - 2

1 The Association seeks relief from stay pursuant to 11 U.S.C. § 362(d)(2).<sup>1</sup> Under this  
2 section, the Court shall grant relief from stay if (A) the debtor does not have equity in the  
3 property; and (B) such property is not necessary to an effective reorganization.

4 Equity for purposes of 11 U.S.C. § 362(d)(2)(A) is the difference between the value of  
5 the property and all the encumbrances on it. Sun Valley Newspapers, Inc. v. Sun World Corp.  
6 (In re Sun Valley Newspapers, Inc.), 171 B.R. 71, 75 (9th Cir. BAP 1994) (citing Stewart v.  
7 Gurley, 745 F.2d 1194, 1196 (9th Cir. 1984)). As provided in 11 U.S.C. § 362(g)(1), the  
8 moving party has the burden of proof on the issue of the debtor's equity in the property. Once  
9 a movant establishes that a debtor has no equity in a property, "it is the burden of the debtor to  
10 establish that the collateral at issue is necessary to an effective reorganization." United Sav.  
11 Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd. (In re Timbers of Inwood Forest  
12 Assocs., Ltd.), 484 U.S. 365, 375 (1988).

13 According to the Debtor's Schedule D, the total encumbrances against the Property  
14 equal \$556,851.75. The encumbrances consist of a Chase Bank mortgage in the amount of  
15 \$320,376.02, a Sterling Savings Bank secured line of credit in the amount of \$19,629.75, a  
16 Security State Bank mortgage of \$92,382.03, and the Association's judgment lien of  
17 \$124,463.95. See ECF No. 11 at 9-10; ECF No. 63-1; ECF No. 72 at 8:4-7; ECF No. 80 at 1.  
18 Although the judgment upon which the Association's lien is based is apparently on appeal, as  
19 of the date of this Order, the judgment has not been overturned and is therefore a current  
20 encumbrance that must be included in determining equity.

21 The Debtor alleges that the Property has a value of \$692,125. Deducting  
22 encumbrances of \$556,851.75 from this value would indicate equity of \$135,273.25. To  
23 support this value, the Debtor has submitted a declaration to which he attaches information

24 \_\_\_\_\_  
25 <sup>1</sup> In its reply, the Association also sought relief from stay pursuant to 11 U.S.C. § 362(d)(1). As 11 U.S.C.  
§ 362(d)(2) was the only basis for relief sought in the original motion, the Court did not consider whether  
relief was also warranted pursuant to 11 U.S.C. § 362(d)(1).

ORDER GRANTING MOTION  
FOR RELIEF FROM STAY - 3

1 regarding other lot sales. The Court does not find this evidence to be credible. The Debtor is  
2 not an appraiser and his opinion as to value is not supported by the documents attached. By  
3 his own admission, the Debtor acknowledges "[n]o identical properties sold near Mayfield Lake  
4 in the past year." ECF No. 104 at 5:11-12. Little weight is therefore given to the six  
5 "comparable" lot sales. *Appraisal*

6 In addition, the Debtor's alleged value directly conflicts with the value he placed on this  
7 same Property when he filed his bankruptcy schedules on May 22, 2014. On Schedule A, the  
8 Debtor indicated that the value of this Property was \$537,775.16. The schedules are signed by  
9 the Debtor under penalty of perjury. See ECF No. 11 at 29. No credible explanation has been  
10 provided as to why the Debtor valued the Property at \$537,775.16 in his schedules on May 22,  
11 2014, but now asserts the Property is worth almost \$160,000 more. *controversy*

12 The Debtor has also submitted an appraisal dated September 15, 2008 (2008  
13 Appraisal). The 2008 Appraisal was prepared on behalf of West Coast Bank for refinancing  
14 purposes and valued the Property at \$523,000. See ECF No. 86 at 13. According to the  
15 Debtor, this value is low because he has made subsequent improvements to a house and shop  
16 on the Property that was then substantially incomplete. However, the Debtor admits that the  
17 house and shop are still incomplete and that he does not have the funds to complete them at  
18 this time. The Debtor also argues that the 2008 Appraisal value is low because it did not take  
19 into account his future plan to subdivide the Property. The Debtor, however, has not presented  
20 any evidence that a subdivision is feasible and again he admits that he does not have the  
21 funds at this time to complete the process. The more credible evidence indicates that the value  
22 in the 2008 Appraisal is likely high as the appraisal admittedly occurred when the real estate  
23 market was at its height.

24 The evidence indicates that the actual value of the Property is likely even lower than  
25 asserted by the Debtor on Schedule A or in the 2008 Appraisal. For instance, a reaffirmation

ORDER GRANTING MOTION  
FOR RELIEF FROM STAY - 4

*R125*

*ged decl. from Kurt & Ottis*

1 agreement was entered into between Chase Bank and the Debtor and filed with the Court on  
2 September 30, 2014, which states a "Current market value" for the Property of \$338,400. See  
3 ECF No. 80 at 1. This agreement was signed by the Debtor on September 5, 2014.

4 The most credible evidence indicates that there is no equity in this Property. Even if the  
5 Court were to accept the 2008 Appraisal value or value from the Debtor's schedules, the  
6 encumbrances against the Property exceed the value. The only value that would provide for  
7 equity is the Debtor's self-serving statement that the value is now approximately \$700,000.  
8 This statement is not credible given the lack of admissible evidence in support and weight of  
9 evidence in opposition, particularly as all of the conflicting evidence was either provided by the  
10 Debtor or agreed to by him.

11 As the Association has established that there is no equity, the burden shifts to the  
12 Debtor to establish that the Property is necessary for an effective reorganization. Under 11  
13 U.S.C. § 362(d)(2), to establish that the property is necessary to an effective reorganization,  
14 there "must be a reasonable possibility of a successful reorganization within a reasonable  
15 time," and the property must be necessary to that reorganization. Timbers, 484 U.S. at 375-  
16 76.

17 As of the date of this Order, the Debtor is still in a Chapter 7. Reorganization is  
18 therefore not an option at this time and this element is necessarily established. The Debtor,  
19 however, has filed a motion to convert that is pending. The Court will therefore evaluate this  
20 factor even though the case is still in Chapter 7.

21 The Debtor states that his intent is to convert to Chapter 13 and file a plan that provides  
22 for the sale of the Property. The Debtor admits, however, that a sale is only feasible if the  
23 Property is first subdivided. No credible evidence has been provided that a subdivision is  
24 likely. The Debtor admits that a plat has not been approved and he indicated at the hearing  
25 that the earliest he could have the Property subdivided and ready for market is summer of

ORDER GRANTING MOTION  
FOR RELIEF FROM STAY - 5

16

1 2015. This assumes that subdivision of this Property is even possible and that the Debtor has  
2 the ability and financial means to complete the process.

3 The Debtor, who in the past worked as a contractor, is currently unemployed and does  
4 not hold a valid contractor's license. According to Schedule I, the Debtor makes minimal  
5 income each month as a handyman (\$1000/month), but with stated expenses of \$2,658.06, the  
6 Debtor's monthly net income is negative \$1,658.06. See ECF No. 11 at 22. Although he  
7 indicates that he hopes to reinstate his contractor's license and find employment, he has not  
8 demonstrated any ability to make payments under a Chapter 13 plan, let alone pay the  
9 expenses and costs needed to subdivide the Property.

10 The purpose of Chapter 13 is to allow a debtor an opportunity to reorganize through a  
11 wage earner plan. The Debtor has indicated his intent to convert to Chapter 13. In such a  
12 situation, this Court evaluates a motion for relief from stay carefully and would not grant relief if  
13 there was any possibility that the Debtor could confirm a plan that would allow him to  
14 reorganize. Pursuant to 11 U.S.C. § 362(e), the Court could consider this a preliminary hearing  
15 and continue the Association's motion to be heard in conjunction with the motion to convert, set  
16 for evidentiary hearing, or even require the Association to re-note the motion if converted. The  
17 Debtor, however, has not provided any evidence that he has sufficient income to propose a  
18 plan that has even a remote possibility of being confirmed. The Debtor has made minimal  
19 payments, if any, to the Association since 2009. The Debtor has other secured creditors,  
20 including Chase Bank that he recently entered into a reaffirmation agreement with, agreeing to  
21 make a payment of \$1,134.80 each month. The Association has submitted unrefuted evidence  
22 that real estate taxes on the Property are owing and that interest and penalties are  
23 accumulating. It is not feasible that an unemployed Debtor with negative net income of \$1,658  
24 each month will be able to fund a plan that has even a remote possibility of being confirmed.  
25

ORDER GRANTING MOTION  
FOR RELIEF FROM STAY - 6

1 Pursuant to 11 U.S.C. § 362(e), there is no reason to continue the motion as there is not a  
2 "reasonable likelihood that the [Debtor] will prevail at the conclusion of such final hearing."

3 The Debtor's proposal to fund such a plan though the sale of the Property is too  
4 speculative. The Debtor admits that the Property only has equity if it is subdivided. The  
5 Debtor, however, has no funds to complete the process and has not provided any evidence  
6 that subdivision is even possible. A debtor must do more than merely assert that it can  
7 reorganize if only given the opportunity to do so. See, e.g., Am. State Bank v. Grand Sports,  
8 Inc. (In re Grand Sports, Inc.), 86 B.R. 971, 975 (Bank. N.D. Ill. 1988). "Courts usually require  
9 the debtor to do more than manifest unsubstantiated hopes for a successful reorganization."  
10 Sun Valley Newspapers, Inc. v. Sun World Corp. (In re Sun Valley Newspapers, Inc.), 171 B.R.  
11 71, 75 (9th Cir. BAP 1994).

12 Relief from stay must be granted under 11 U.S.C. § 362(d)(2) if the Debtor has no  
13 equity and the Property is not necessary to an effective reorganization. The most credible  
14 evidence is that there is no equity in this Property and the Debtor has failed to establish that  
15 the Property can be used to successfully reorganize given the secured debt, accumulating  
16 property taxes, and the Debtor's lack of income.

17 The Court disagrees however, with the Association that the Debtor has acted in bad  
18 faith in filing this case or in seeking to convert to Chapter 13. The Court is unwilling to waive  
19 the 14-day stay imposed by Fed. R. Bankr. P. 4001(a)(3). The circumstances of this case do  
20 not merit depriving the Debtor of that additional time.

21 Accordingly, it is hereby

22 **ORDERED** that Mayfield Cove Estates Homeowners Association's motion for relief  
23 from stay is granted; it is further

24 **ORDERED** that the 14-day stay imposed by Fed. R. Bankr. P. 4001(a)(3) is not waived.

25 *///End of Order///*

ORDER GRANTING MOTION  
FOR RELIEF FROM STAY - 7