

No. 46823-9-II

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**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II**

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COLLEGE MARKETPLACE, LLC,

Appellant,

v.

OLHAVA ASSOCIATES, LP; HD DEVELOPMENT OF MARYLAND,  
INC.; and WAL-MART REAL ESTATE BUSINESS TRUST,

Appellees.

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**APPELLANT'S OPENING BRIEF**

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## I. INTRODUCTION

Shortly before trial in this matter, the Washington Supreme Court issued its decision in *Wilkinson v. Chiwawa Cmty. Ass'n.*, 180 Wn.2d 241, 327 P.3d 614 (2014), which effectively resolves the issues herein. The Supreme Court held that new restrictive covenants may not be imposed on property owners unless the governing instrument reserves the right to *add* restrictions; a governing instrument that reserves only the right to make *changes* to existing restrictions does not authorize the imposition of new, unrelated restrictions. The trial court failed to follow *Wilkinson*. Because the interpretation of the governing instrument in this case (the “2004 ECRs”) involves a question of law, this Court addresses these issues *de novo*.

The 2004 ECRs provide only that Wal-Mart and Olhava (the Developer) may “modify or cancel” the ECRs, but the trial court concluded that this impliedly gave them the *additional* right to create new restrictions in favor of another property owner (Home Depot) and impose those new restrictions on property owners such as Plaintiff. The court compounded its error by concluding that the new use restrictions were merely “modifications” of the pre-existing restrictions. Remarkably, this included a completely new restriction on paint stores, even though paint stores were permitted under the 2004 ECRs. The court also abused its discretion by granting a Motion in Limine that precluded Plaintiff from asserting in support of its Declaratory Judgment claim that the new

restrictions were contrary to public policy, and erred by awarding almost \$1 Million in attorneys' fees.

*Wilkinson* compels the conclusion that the new restrictions are unenforceable. Plaintiff College Marketplace LLC respectfully requests that this Court reverse the Judgment and remand with instructions to enter Judgment in its favor as a matter of law.

## II. ASSIGNMENTS OF ERROR

1. **The trial court erred when it entered Judgment in favor of Defendants and against Plaintiff College Marketplace LLC. For clarity and without limitation, this assignment of error includes the trial court's Judgment and its Order of October 3, 2014 and its oral ruling on August 20, 2014.**
2. **Conclusions of Law 2 through 12, adopted by the trial court in its Order of October 3, 2014, are erroneous, for the reasons set out herein. The full text of each Conclusion of Law ("C/L") is set out in the Appendix hereto. RAP 10.4(c).**
3. **The trial court abused its discretion by granting Home Depot's Motion in Limine, precluding evidence or arguments as to whether the restrictive covenants are contrary to public policy.**
4. **The trial court erred in entering Judgments for attorneys' fees and costs in favor of HD Development of Maryland, Olhava Associates, LP and Wal-Mart Real Estate Business Trust (all dated February 24, 2015). For clarity and without limitation, this assignment of error includes the Court's Memorandum Opinion on Defendants' Motion for Attorney Fees, dated November 26, 2014.**
5. **Conclusions of Law 2, 3, 5 through 7, 9 through 14, 15 through 17, 19 through 21, and 82, adopted by the Court in its Order of Feb. 20,**

2015 regarding attorneys' fees, are erroneous. The full text of each Attorneys' Fees Conclusion of Law ("Atty Fee C/L") is set out in the Appendix hereto. RAP 10.4(c).

### III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was it an error of law for the trial court to conclude that Defendants had the authority to add new use restrictions when the 2004 ECRs reserved only the right to "modify or cancel" covenants? *Wilkinson v. Chiwawa Cmtys. Ass'n.*, 180 Wn.2d 241, 327 P.3d 614 (2014). (Assignment of Error 1 and 2.)
2. Was it an error of law for the trial court to conclude that new use restrictions, such as the new restriction against paint stores, were merely "modifications" of existing restrictions? *Wilkinson v. Chiwawa Cmtys. Ass'n.*, 180 Wn.2d 241, 327 P.3d 614 (2014). (Assignment of Error 1 and 2.)
3. Was it an error of law for the trial court to conclude that Wal-Mart and Olhava could agree with a third party tenant, Home Depot, to impose new use restrictions for the benefit of Home Depot? (Assignment of Error 1 and 2.)
4. Was it an abuse of discretion for the trial court to exclude evidence that the 2008 ECRs violate public policy because, under the circumstances, they unreasonably restrain competition? (Assignment of Error 3.)
5. Where the attorneys' fee provision, drafted by Defendants, applies only to actions regarding a "breach or threatened breach" of the 2008 ECRs, and where Plaintiff sought a judicial declaration of its rights, in order to avoid a potential breach, did the trial court err when it concluded that Plaintiff threatened a breach merely by "preparing to execute a lease" that was never executed? (Assignment of Error 4 and 5.)

6. **Where the attorneys' fee provision, drafted by Defendants, applies only to actions regarding a "breach or threatened breach" of the 2008 ECRs, did the trial court err by awarding fees to Defendants for the defense of tort claims? (Assignment of Error 5.)**
7. **Did the Court abuse its discretion by awarding over \$950,000 in fees and costs, including fees for work for which Home Depot refused to provide support (by redacting their billing statements)? (Assignment of Error 4 and 5.)**

#### IV. STATEMENT OF THE CASE

2004 ECRs: In February 2007, Plaintiff College Marketplace, LLC ("College Marketplace") purchased commercial property known as Lot 7A from Defendant Olhava Associates, LP ("Olhava"). Clerk's Papers ("CP") 523 (Oct. 3, 2014 Findings of Fact ("FF") 22) Lot 7A was located in a shopping center in Poulsbo, Washington (the College Marketplace Center); Olhava was the developer of the Center. CP 521 (FF 1, 3) At the time the Lot 7A deal closed, the only recorded land use restrictions in the Center were contained in an instrument entitled "Easements with Covenants and Restrictions Affecting Land" (the "2004 ECRs"), which Olhava and Wal-Mart had recorded in June 2004. CP 521 (FF 8); CP 568-89 (Ex. 3, 2004 ECRs)

Prior to purchasing Lot 7A, College Marketplace reviewed the 2004 ECRs, which contained a number of specific land use restrictions. CP 521 (FF 9, 24) For example, Section 3 ("Competing Business") prohibits a number of specific uses that might be competitive with Wal-

Mart: membership warehouse club stores; pharmacies over 12,000 square feet; discount department store over 30,000 square feet; grocery store over 12,000 square feet; and variety, general or “dollar” stores.<sup>1</sup> CP 572 But the 2004 ECRs clearly permit other uses. For example, in at least two different sections of the 2004 ECRs, paint stores are explicitly contemplated for inclusion in the Center, subject to certain parking space requirements. CP 573-74, 576 (2004 ECRs, sections 4(e)(6) and 6(a)(2)) This case began as a dispute over a proposed lease to a paint store.

The 2004 ECRs contain several other provisions that are pertinent to this dispute and that the trial court should have considered :

- Section 14 (“Rights of Successors”) provides that the easements and restrictions run with the land and are binding on successors to the parties (CP 580);
- Section 19 (“Entire Agreement”) is an integration clause that provides that the 2004 ECRs constitute the entire agreement between the parties, and that they shall not be modified except by a writing (CP 581); and
- Section 15 (“Document Execution, Modification and Cancellation”) provides that the 2004 ECRs may be “modified or canceled only by the mutual agreement of” Olhava and Wal-Mart (CP 580).

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<sup>1</sup> Section 2 (“Use”) of the 2004 ECRs also contains restrictions. Section 2 restricts the following uses within 400 feet of the “Retail Tract” (Wal-Mart): cafeterias, restaurants deriving more than 50% of gross sales from alcoholic beverages, theaters, bowling alleys, health spas, billiard parlors, night clubs or other places of recreation or amusement, or any businesses selling alcoholic beverages except as allowed for restaurants. (CP 570-71)

Thus, at the time that College Marketplace (and several other buyers) purchased lots in the Center, the lots they purchased were encumbered by certain specific restrictions, and the buyers were on notice that Wal-Mart and Olhava might “modify or cancel” those restrictions. But there was nothing in the ECRs that allowed for the creation of *new* restrictions, particularly new restrictions that were created for the benefit of a third party, other than Olhava and Wal-Mart.

2008 ECRs: In late 2008, long after College Marketplace purchased Lot 7A, Olhava and Wal-Mart secretly entered into an agreement with Home Depot that culminated in the filing of an instrument entitled “First Amended and Restated Easements with Covenants and Restrictions Affecting Land” (“2008 ECRs”). CP 524 (FF28); CP 640-71 (Ex. 56, 2008 ECRs) These 2008 ECRs were the product of negotiations among Olhava, Wal-Mart and Home Depot. CP 524 (FF 25-28) The 2008 ECRs contained a number of additional use restrictions that went far beyond the 2004 ECRs; the new restrictions were added to benefit Home Depot by restricting uses of the Center that would compete with its store. CP 525 (FF 29) Among other new restrictions, the 2008 ECRs prohibited paint stores because they were considered to be a “competing business” with Home Depot. CP 525 (FF 29, 30); CP 648 (Ex. 56, 2008 ECRs, Section 3(b))

In fact, as the trial court found, the negotiations among Wal-Mart, Olhava and Home Depot regarding additional use restrictions at the Center had begun in 2004. CP 523 (FF 16) But the discussions were kept secret

from College Marketplace and other purchasers of land in the Center. At no time prior to February 2007, the closing date for the purchase of Lot 7A, was College Marketplace informed about even the negotiations, let alone the new, soon-to-be-added, use restrictions. Report of Proceedings (“RP”) (Aug. 19, 2014 Lien Direct Testimony, p. 10:9-14; Aug. 19, 2014 Zenger Testimony, p. 18:1-5, 19:6-11)

Defendants initially recognized that they could not add use restrictions without the consent of all owners of land in the Center that would be impacted by the restrictions. In order to obtain consent, they prepared several drafts of the new ECRs that included signature lines for all of the owners of land in the Center, including College Marketplace. CP 524 (FF 25) Eventually, Defendants abandoned the idea of obtaining consent from current owners and deleted the signature lines from the draft ECRs. CP 524 (FF 27) But Defendants continued to characterize the new ECRs as an “amended and restated” agreement, by which they meant that the 2004 ECRs would be terminated and an entirely new set of ECRs would be created and imposed on the Center. CP 523 (FF 18)

Further, there is no evidence that College Marketplace had knowledge that any new restrictions had been agreed to even after the 2008 ECRs were recorded. In 2011, College Marketplace began negotiations for a lease of Lot 7A under which Sherwin Williams would operate a paint store. CP 525 (FF 30) During its due diligence, Sherwin Williams discovered the restriction on paint stores in the 2008 ECRs. CP 1510 (Atty Fee FF 14) College Marketplace attempted to negotiate with

Defendants to lift the new restrictions. When Defendants refused, College Marketplace brought this action for a Declaratory Judgment that the new restrictions were invalid. CP 1510 (Atty Fee FF 15-17)

Defendants filed counterclaims for declaratory and injunctive relief, and College Marketplace also filed amended complaints alleging various tort claims. CP 162-180 (Plaintiff's Third Amended Complaint); CP 181-92 (Olhava's Ans., Aff. Defs and Counterclaims); CP 193-201 (Wal-Mart's Ans. and Aff. Defs.); CP 202-14 (Home Depot's Ans., Aff. Defs. and Counterclaims). The trial court granted summary judgment dismissing College Marketplace's slander of title, injurious falsehood and intentional and tortious interference claims. *See* CP 878-879 (Sept. 18, 2013 Order Partially Granting Defts' Partial Mot. for Sum. Judg.)

Trial on the declaratory judgment and quiet title claims took place on August 19 and 20, 2014. After College Marketplace concluded its case, Defendants moved for directed verdict pursuant to Civil Rule 41(b)(3) without presenting any evidence. RP (Aug. 20, 2014 Trial Transcript) The trial court granted the motion and ruled that the 2008 ECRs were valid and enforceable against Plaintiff and Lot 7-A. *Id.* College Marketplace subsequently voluntarily dismissed the remaining tort claims, and the court entered Judgment on October 13, 2014 in favor of Defendants. CP 518-19 (Aug. 29, 2014 Stipulation and Order of Dismissal); CP 533-36 (Oct. 13, 2014 Judgment) Defendants moved for attorneys' fees, and the court awarded Defendants more than \$950,000 in

fees and costs. CP 1527-1533 (Judgments in Favor of Home Depot, Wal-Mart and Olhava).

## V. ARGUMENT

In *Wilkinson v. Chiwawa Cmty. Ass'n.*, 180 Wn.2d 241, 327 P.3d 614 (2014) (“*Wilkinson*”), the Washington Supreme Court held that *new* restrictions could not be imposed on property owners by a homeowners’ association unless the governing covenants authorized the association to *create* new restrictions. *Id.* at 256. “[W]hen the general plan of development permits a majority to *change* the covenants but not create new ones, a simple majority cannot add new restrictive covenants that are inconsistent with the general plan of development or have no relation to existing covenants.” *Id.* (emphasis in original). The trial court erred as a matter of law when it ignored *Wilkinson*.

### A. **The trial court ignored the holding in *Wilkinson*, which compels a different result.**

#### 1. ***Wilkinson* controls the key issues in this case.**

*Wilkinson* clarified Washington law on several key issues that the trial court decision ignored. In *Wilkinson*, a homeowners association in a planned residential community attempted to impose a covenant that would have prohibited short-term rentals (less than 30 days). The covenant was challenged by individual homeowners who had purchased property before the ban was imposed. As with the 2004 ECRs in this case, the governing instrument allowed the association to *change* the covenants, but not to

*create* new restrictions unrelated to existing ones. *Id.* at 256. This distinction was central to the decision; thus, the Supreme Court held that, unless the power to create new restrictions was clearly reserved in the governing instrument, “a majority of Chiwawa homeowners cannot force a new restriction on a minority of unsuspecting Chiwawa homeowners unrelated to existing covenants.” *Id.* at 255.

*Wilkinson* established that the interpretation of the 2004 ECRs presents a question of law. *Id.* at 249. Thus, the trial court’s interpretation of the 2004 ECRs is reviewed *de novo* by this court. *Bauman v. Turpen*, 139 Wn. App. 78, 86, 160 P.3d 1050 (2007) (interpretation of a restrictive covenant presents a question of law and is reviewed *de novo*). In interpreting the 2004 ECRs, *Wilkinson* held that the court should apply the rules of contract construction, including:

- Covenant language is given “its ordinary and common use” and is not construed in such a way “so as to defeat its plain and obvious meaning.” *Wilkinson*, 180 Wn.2d at 250;
- The Court should “examine the language of the restrictive covenant and consider the instrument in its entirety.” *Id.*;
- “The lack of an express term with the inclusion of other similar terms is evidence of the drafter’s intent” to exclude the omitted terms. *Id.* at 251;
- The Court will not consider extrinsic “[e]vidence that would vary, contradict or modify the written word” or “show an intention independent of the instrument.” *Id.*

**2. The trial court decision cannot be squared with *Wilkinson*.**

The trial court decision simply ignores the rules of law set out in *Wilkinson*. First, and perhaps most significantly, the decision fails to grasp the critical distinction between governing instruments that permit only *changes* to existing covenants, on one hand, and those that expressly reserve power for the drafter to create *new* restrictions, on the other. Second, the decision does not protect the reasonable, settled expectation of landowners such as College Marketplace against new restrictions that deprive them of property rights.

In *Wilkinson*, the governing instrument provided that the association was empowered “to change these protective restrictions and covenants in whole or in part.” *Id.* at 256. The Court held that such a provision did not permit the creation of new restrictions. In this case, the 2004 ECRs provided that Olhava and Wal-Mart, by mutual agreement, were allowed to “modify or cancel” the restrictions in the 2004 ECRs. The plain and obvious meaning of this language is that existing restrictions might be changed (“modify”) or abolished (“cancel”). According to the Oxford Dictionary, “modify” means “[m]ake partial or minor changes to (something), typically so as to improve it or to make it less extreme.”<sup>2</sup> “Cancel” means to “annul or revoke (a formal arrangement which is in effect)” or to “abolish or make void.”<sup>3</sup> There is nothing in the 2004 ECRS that puts purchasers on notice that new,

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<sup>2</sup>[http://www.oxforddictionaries.com/us/definition/american\\_english/modify](http://www.oxforddictionaries.com/us/definition/american_english/modify)

<sup>3</sup>[http://www.oxforddictionaries.com/us/definition/american\\_english/cancel](http://www.oxforddictionaries.com/us/definition/american_english/cancel)

unrelated restrictions might be added and imposed on their property. *Id.* at 255.

The trial court's conclusions to the contrary are erroneous. In a remarkable passage, the decision holds that the power to cancel existing restrictions is equivalent to the power to add new restrictions.

Implicit in the term "cancel" is an expectation that something would replace the 2004 ECRs. In this real estate context and with these ECRs, it would be an absurd result to contemplate cancellation completely of the 2004 ECRs with nothing to take its (*sic*) place. It would be the equivalent of lawlessness, and in looking at the language of the 2004 ECRs, it is clear to the Court that would be an absurd result and was not contemplated by the parties. *In other words, cancellation implicitly demands something else would be enacted to replace it.*

CP 527 (Oct. 3, 2014 Conclusions of Law ("CL") 6 (emphasis supplied)

*See also* CP 528 (CL 7) (The phrase "modified or cancelled" includes the power to make "additions" to the restrictions in the 2004 ECRs.)

These conclusions cannot be squared with *Wilkinson*. The whole point of *Wilkinson* was to distinguish and reconcile two apparently contradictory lines of authority, involving cases like *Shafer v. Bd. of Trustees of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn. App. 267, 883 P.2d 1387 (1994), on one hand, and cases such as *Meresse v. Stelma*, 100 Wn. App. 857, 999 P.2d 1267 (2000), on the other. The critical distinction between these two lines of authority is whether or not the governing

instrument expressly reserves the power to impose new restrictions on property owners.

In *Shafer*, the court upheld the validity of new restrictions (limiting the outdoor storage of motor vehicles and commercial fishing), but only because the governing instrument expressly reserved the power to create such new restrictions. *Wilkinson*, 180 Wn.2d at 256 (the governing instrument [in *Shafer*] reserved the power “to enforce . . . restrictions, conditions and covenants existing upon *and/ or created* for the benefit of parcels of real property in the plat.”); *see also Shafer*, 76 Wn. App. at 269-70, 272, 277.

In *Meresse*, a new covenant (changing the location of an access road) was found invalid because the governing instrument did not expressly reserve the power to create new restrictions, but only to “change or alter them in full or in part.” *Wilkinson*, 180 Wn.2d at 258; *Meresse*, 100 Wn. App. at 864-67. After *Wilkinson*, then, the power to enact new restrictions depends on the presence of an express reservation of such power in the governing instrument. The language of the 2004 ECRs, retaining only the power to “modify or cancel” existing covenants, cannot reasonably be construed as an express reservation of the power to add new restrictions.

*Wilkinson* also makes it clear that this rule of law is designed to protect the property owner who purchased property in reliance on the

original restrictions. “This rule protects the reasonable, settled expectation of landowners by giving them the power to block ‘new covenants that have no relation to existing ones’ and deprive them of their property rights.” *Wilkinson*, 180 Wn.2d at 256 (quoting from *Meresse*, 100 Wn. App. at 866). In this light, the error in the decision is obvious. From a commercial property owner’s perspective (such as College Marketplace), the difference between cancelling an existing use restriction and adding a new use restriction is the difference between day and night. Cancelling a restriction on property adds to the owner’s existing property rights by expanding the uses for which it can lease the property; adding a restriction (such as the ones in the 2008 ECRs) deprives the owner of pre-existing rights. The trial court’s decision, equating subtracting with adding, stands the holding in *Wilkinson* on its head. The court’s conclusion that the 2004 ECRs provided “express notice” that additional restrictions could be created was an error of law. CP 528 (CL 8)<sup>4</sup>

**3. The additional use restrictions in the 2008 ECRs were not mere “modifications” of the earlier use restrictions.**

The trial court compounded its error with its conclusion that the 2008 ECRs would also pass muster under *Meresse* because they are

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<sup>4</sup> The trial court also noted that a map that was included in the 2004 ECRs showed that there would be two anchor stores in the Center. CP 528 (CL 9) But this map was insufficient to provide notice to purchasers that additional use restrictions would be added to protect a potential second anchor tenant. Indeed, as *Wilkinson* points out, the decision to include specific use restrictions in the 2004 ECRs for the benefit of Wal-Mart is evidence that the drafters did *not* intend to include additional restrictions that were not spelled out in the document, particularly where those new restrictions are for the benefit of a third party. *Wilkinson*, 180 Wn.2d at 251.

merely “a modification” of the pre-existing set of restrictions within the 2004 ECRs. CP 528 (CL 10) The court acknowledged that the 2008 ECRs created “additional restrictions” but found that they “did not present the case of a new covenant since restrictive covenants already existed.” CP 528 (CL 10) Apparently, the court reasoned, because *some* use restrictions existed in the original document, the additional use restrictions in the 2008 ECRs were merely “a modification of an existing set of restrictions that already existed within the 2004 ECRs.” CP 529 (CL 10)

Once again, this conclusion is inconsistent with *Wilkinson*. There were obviously many restrictive covenants in the original governing document in that case, but the Court held that valid new restrictions must be “*reasonably related to an existing covenant.*” The new restrictions here are not reasonably related to covenants existing in the 2004 ECRs because they would not have given notice to a reasonable purchaser that new commercial uses would be banned for properties in the Center. *Wilkinson*, 180 Wn.2d at 257.

The 2004 ECRs expressly banned a number of commercial uses from the Center and imposed conditions (parking space requirements, e.g.) on other uses. See discussion, *supra*, p. 6 and n.1. The 2008 ECRs added 80 new use restrictions. CP 482-85 (College Marketplace’s Trial Brief, Ex. A) Where, as here, the drafters of a governing instrument provide a

list of specific uses that are prohibited, a purchaser's reasonable expectation is that uses that are not in the list will be permitted.

*Wilkinson*, 180 Wn.2d at 251 (“The lack of an express term with the inclusion of other similar terms is evidence of the drafter’s intent.”) As the Supreme Court found, “[t]he drafters included detailed provisions outlining what residents cannot do. From this it is evident that had the drafters wanted to prohibit [other uses], they would have done so.” *Id.*

The use restrictions in the 2008 ECRs are unrelated to the earlier restrictions in yet another sense. The use restrictions in the 2004 ECRs were intended to benefit Wal-Mart. See, for example, Section 3 of the 2004 ECRs (“Competing Business”), which restricts a number of specific uses that might compete with Wal-Mart’s store. Section 15 of the 2004 ECRs provides that these restrictions might be “modified,” but only by the agreement of Wal-Mart and the Developer. But the 2008 ECRs impose 80 new use restrictions for the benefit of Home Depot. CP 525 (FF 29) The new restrictions for Home Depot’s benefit are not *reasonably related* to the earlier Wal-Mart restrictions, nor were property purchasers on notice from the 2004 ECRs that such new, unrelated restrictions could be imposed on the Center.

Moreover, some of the newly-restricted uses in the 2008 ECRS were clearly *permitted* under the 2004 ECRs. For example, Section

4(e)(6) (“Outparcel(s) Development”) (CP 573) of the 2004 ECRs provides that a parcel may be used as a “paint store,” so long as the store maintains a parking ratio of five spaces per 1,000 feet of building space. See also Section 6(a)(2) (“‘Parking Area’ Ratio”) (CP 682) Yet the 2008 ECRs ban paint stores altogether. CP 525 (FF 30) Under similar circumstances in *Wilkinson*, the Court reasoned that an express restriction on the size of “For Rent” signs “proves not just that the [original] covenants allow some rentals but that the drafters anticipated rentals and consciously decided not to limit their duration, restricting just the appearance of rental signs.” *Wilkinson*, 180 Wn.2d at 251. Likewise, here, a reasonable purchaser under the 2004 ECRs would conclude that paint stores would be permitted, so long as the required parking space ratio was maintained. Paraphrasing the holding in *Wilkinson*, “[b]ased on the drafters’ detailed discussion about what [purchasers] could not do, their clear expression that [paint stores] were permissible uses [...] reasonable minds could reach but one conclusion – that the drafters intended to permit [paint stores].” *Id.* at 252.

For all these reasons, it is clear that the 80 new use restrictions in the 2008 ECRs go far beyond the specific use restrictions in the original document and are not mere “modifications” of existing restrictions. As the Supreme Court concluded in *Wilkinson*, the 2004 ECRs are “the

contract into which the parties bought and the expectation that we must uphold.” *Id.* at 258.<sup>5</sup> For all these reasons, the trial court erred as a matter of law when it concluded that the new use restrictions in the 2008 ECRs were reasonably related to existing covenants.

**4. The ECRs must be strictly, not broadly, construed.**

The trial court held that the phrase “modified or cancelled” in the 2004 ECRs should be broadly construed, so as to allow Olhava and Walmart to add new restrictions to the commercial properties covered by the ECRs. CP 527-28 (CL 5, 7) To the contrary, covenants that restrict commercial properties must be strictly construed, as a matter of law. *Riss v. Angel*, 131 Wn.2d 612, 934 P.2d 669 (1997).

“Historically, Washington courts [...] held that restrictive covenants, being in derogation of the common law right to use land for all lawful purposes, will not be extended to any use not clearly expressed, and doubts must be resolved in favor of the free use of land.” *Id.* at 621. This rule applied to all such restrictive covenants, whether they involved commercial

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<sup>5</sup> In their trial briefs in the Superior Court, Defendants relied on the argument that knowledge of Mr. Ruggiero, who served as a dual real estate agent for College Marketplace and Olhava, regarding the secret negotiation of the 2008 ECRs was “imputed to Plaintiff as a matter of law.” *See, e.g.*, CP 454 (HD Development of Maryland, Inc.’s Trial Brief, p. 14). But RCW 18.86.100(1) abrogated the traditional rules relating to agents in this context. Therefore, even if Mr. Ruggiero had knowledge, such knowledge cannot be imputed to College Marketplace. *See* CP 477-78 (Plaintiff’s Trial Brief, pp. 20-21) Defendants appear to have abandoned this argument at the trial.

land or housing developments. In *Riss*, the Supreme Court partially abandoned the rule, but only as to disputes among homeowners in a residential community. “[W]here construction of restrictive covenants is necessitated by a dispute not involving the maker of the covenants, but rather among homeowners in a subdivision governed by the restrictive covenants, rules of strict construction against the grantor or in favor of the free use of land are inapplicable.” *Id.* at 623. The rule of strict construction still applies in this case, because the drafters of the covenants (Olhava and Wal-Mart) are parties to the dispute and because it involves commercial property, rather than a residential housing development. Where the Supreme Court has clearly ruled, there is no need to analyze the policy behind their decision. But in any event there are several valid reasons for the distinction in *Riss*.

Unlike restrictive covenants in residential subdivisions, which are intended to protect and enhance the residential character of neighborhoods, use restrictions in commercial settings like shopping centers are intended to restrict competition. Similar to covenants not to compete in employment agreements and agreements for the sale of businesses, in which courts strictly construe the language and terms, shopping center use restrictions also should be strictly construed. *See Genovese Drug Stores, Inc. v. Connecticut Packing Co., Inc.*, 732 F.2d 286, 289 (2nd Cir. 1986) (“[S]ince restrictive covenants, especially those

endeavoring to restrict commercial activity for competitive advantage, are not favorites of the law, those who seek to benefit from them must expect that their terms and effectiveness will be strictly construed.”), citing *inter alia*, C. Clark, *Real Covenants and Other Interests Which “Run with the Land”* 105, n.38 (2d ed. 1947) and 3M. Friedman, *Friedman on Leases* § 28.1 at 1239-40 (2d ed. 1983); *Norwood Shopping Center, Inc. v. MKR Corp.*, 135 So.2d 448, 449 (D.C. Fla. 1961) (a covenant not to lease the property for the purpose of conducting a business in competition with the lessee must be positively expressed, and being in the restraint of trade, must be strictly construed.)

Moreover, this commercial dispute -- unlike most homeowners’ disputes -- involves the parties that drafted the original covenants. As such, any ambiguities in those documents should be construed against the drafter as a matter of law. *Berg v. Hudesman*, 115 Wn.2d 657, 677, 801 P.2d 222 (1990). Thus, the trial court erred when it concluded that the 2004 ECRs should be broadly construed, by expanding the power of the drafters to add new use restrictions. CP 527-28 (CL 5-7)

**5. Home Depot had no right to modify existing restrictions, let alone to add new use restrictions.**

The 2008 ECRs were unauthorized under Section 15 of the 2004 ECRs for another reason. Section 15 provides that *only Wal-Mart and*

*Olhava* may modify or cancel the 2004 ECRs, but does not authorize Home Depot to impose use restrictions for its benefit. (The document defines “Retail Owner” as Wal-Mart and “Developer” as *Olhava*. CP 569)

15. Document Execution, Modification and Cancellation. .... **This Agreement (including exhibits) may be modified or canceled only by the mutual agreement of (a) Retail Owner** as long as it or its affiliate has any interest as either owner or Lessee of the Retail Tract or its successors in interest, **and (b) Developer**, as long as it or its affiliate has any interest as either owner or Lessee of the Developer Tract, or its successors in interest. (Emphasis added.)

Yet it is undisputed that Home Depot actively negotiated for, and ultimately agreed to impose, use restrictions in the 2008 ECRs that benefit only Home Depot. CP 523-25 (FF 16, 18, 27-29). This went far beyond the authority reserved by Wal-Mart and *Olhava* in Section 15 of the 2004 ECRs.

In rejecting this argument, the trial court misunderstood its significance. The trial court concluded that “there is no language in the [2004] ECRs that would preclude *Olhava* and Wal-Mart from agreeing to allow Home Depot to be a party and signatory to the Amended ECRs.” CP 526 (CL 3). But the important point in this context is that there is nothing in the 2004 ECRs that gives *Olhava* and Wal-Mart the right to agree with a third party to interpose new use restrictions for its benefit, when those new restrictions go far beyond the restrictions in the 2004 ECRs. CP 525 (FF 29) (The scope of the new use restrictions is discussed at CP 482-85 (Plaintiff’s Trial Brief, Ex. A).) As such, there is nothing in the 2004 ECRs that put

purchasers (such as College Marketplace) on notice that new, unrelated restrictions for the benefit of a different tenant might later be added and imposed on their property. *Wilkinson*, 180 Wn.2d at 255.

**B. The trial court wrongly excluded evidence and argument to establish the unreasonableness of the 2008 ECRs.**

As discussed below, Washington courts have long recognized that restrictive covenants are unenforceable if they are unreasonable or contrary to the public policy of the State. Restrictive covenants in a commercial setting, such as these, are disfavored as a matter of public policy because they restrain competition. Thus, in order for the court to determine whether *any* such restrictive covenant is enforceable, it must consider: (1) whether the restriction is ancillary to an otherwise valid transaction; and (2) whether the restriction is reasonable, in light of the legitimate interests to be protected and other circumstances. Restatement (Second) of Contracts §§ 186-88. The proponent of enforcing the restrictive covenant has the burden to show that it is reasonable, under the circumstances. *Sheppard v. Blackstock Lumber Co., Inc.*, 85 Wn.2d 929, 933, 540 P.2d 1373 (1975). Because such contracts can have a negative impact on the general public, the Supreme Court has held that the right to challenge enforceability on public policy grounds cannot be waived. *Waring v. Lobdell*, 63 Wn.2d 532, 533-34, 387 P.2d 979, 981 (1964). The trial court therefore abused its discretion when it granted Defendants' Motion in Limine to exclude evidence and arguments bearing on these

issues. *In re Marriage of Scanlon*, 109 Wn. App. 167, 174-75, 34 P.3d 877 (2001) (“A court necessarily abuses its discretion if its decision is based on an erroneous view of the law.”)

**1. The restrictive covenants in the 2008 ECRs are contrary to public policy and unenforceable.**

Promise in Restraint of Trade

- (1) A promise is unenforceable on grounds of public policy if it is unreasonably in restraint of trade.
- (2) A promise is in restraint of trade if its performance would limit competition in any business or restrict the promisor in the exercise of a gainful occupation.

Restatement (Second) of Contracts § 186 (1981).

Courts and legal scholars have for many years opined that restraints on competition in the form of use restrictions or covenants against competition within shopping centers are potentially harmful to competition and to consumers.

These restrictive covenants pose severe anti-competitive threats, possibly excluding businesses from given trade areas, reducing price competition in those areas, and restricting the freedom of developers to choose tenants that they would prefer to have in their centers.

Note, *The Antitrust Implications of Restrictive Covenants in Shopping Center Leases*, 86 Harv. L. Rev. 1201, 1248 (1973). *See also*, *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959); *Gamco v. Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952).

The law in Washington is similar. As the Supreme Court noted in *Colby v. McLaughlin*, 50 Wn.2d 152, 157, 310 P.2d 527 (1957), “[t]he

only limits imposed by law on [covenants involving commercial use restrictions] . . . are those imposed by public policy” (citing *Messett v. Cowell*, 194 Wash. 646, 79 P.2d 337 (1938) (quoting 3 Williston on Contract 2888 § 1642). “As a matter of law, ‘[c]ontract terms are unenforceable on grounds of public policy when the interest in its enforcement is clearly outweighed by a public policy against the enforcement of such terms.’” *LK Operating, LLC v. The Collection Group, LLC*, 181 Wn.2d 48, 85, 331 P.3d 1147 (2014) (quoting *State v. Noah*, 103 Wn. App. 29, 50, 9 P.3d 858 (2001) (citing Restatement (Second) of Contracts § 178 (1981)). “The underlying inquiry when determining whether a contract violates public policy is whether the contract ‘has a tendency “to be against the public good, or to be injurious to the public.’”” *Id.* at 86 (citations omitted). *See* Restatement (Second) of Contracts § 178 (1981) (listing factors court may consider in weighing interest in enforcement of contract against public policy). “A contract which is contrary to the terms and policy of an express legislative enactment is illegal and unenforceable.” *Waring v. Lobdell*, 63 Wn.2d 532, 533-34, 387 P.2d 979, 981 (1964), quoting *Hederman v. George*, 35 Wn.2d 357, 212 P.2d 841 (1949).<sup>6</sup>

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<sup>6</sup> Washington's public policy in favor of competition and against agreements in restraint of trade is clearly set forth in RCW 19.86.030:

Every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is hereby declared unlawful.

A party cannot waive the rule that makes such contracts unenforceable. *Waring*, 63 Wn.2d at 533-34. “If illegality appears, the court will deny relief on its own motion. The rule does not allow a defendant to waive the defense of illegality.” *Id.* at 533.

**2. Restrictive covenants in shopping centers are permitted only if they are ancillary to a valid real estate transaction and reasonable under the circumstances.**

The law will allow restrictive covenants to be enforced only so long as they are reasonable *and* the restrictions are ancillary to a transaction between the parties that gives rise to an interest the law deems worthy of protection.

In order for a promise to refrain from competition to be reasonable, the promisee must have an interest worthy of protection that can be balanced against the hardship on the promisor and the likely injury to the public. [citations omitted] The restraint must, therefore, be subsidiary to an otherwise valid transaction or relationship that gives rise to such an interest.

Restatement (Second) of Contracts § 187, cmt. b (1981).<sup>7</sup> Unlike the 2004 ECRs, the 2008 ECRs were not covenants from a seller of land to its buyer; nor were they ancillary to the sale of land. Instead, the 2008 ECRs involved an agreement among three entities, including two retail property owners that were competitors (or, at least, potential competitors), and the agreement was made years after either of the competitors closed its

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<sup>7</sup> Washington law is consistent with the Restatement. *Colby v. McLaughlin*, 50 Wn.2d 152, 154-55, 310 P.2d 527, 528 (1957).

purchase on the land. CP 524 (FF 28) Under these circumstances, the 2008 ECRs are unenforceable as a matter of law. “A promise to refrain from competition that imposes a restraint that is not ancillary to an otherwise valid transaction or relationship is unreasonably in restraint of trade.” Restatement (Second) of Contracts § 187 (1981).

**3. The 2008 ECRs are not ancillary to an otherwise valid transaction among Home Depot, Wal-Mart and Olhava.**

In order for a restraint to be ancillary to a transaction or relationship the promise that imposes it must be made as part of that transaction or relationship. A promise made subsequent to the transaction or relationship is not ancillary to it.

Restatement (Second) of Contracts § 187 cmt. b (1981).

The use restrictions in the 2008 ECR are not “ancillary to” a valid transaction among the parties to the ECRs. In the first place, there is no evidence in the trial court record of any “otherwise valid transaction” between Wal-Mart and Home Depot that would support an agreement between them to restrain competition in the Center. Neither retailer sold or leased any property in the Center to one another; to the contrary, they were *competitors* who agreed in the ECRs to restrain competition in the Center. Such an agreement is contrary to public policy, as a matter of law.

Nor were the 2008 ECRs ancillary to the purchase of real estate by the retail competitors. The Court found that the additional use restrictions in the 2008 ECRs were negotiated long after the latter defendants had closed the purchases on their parcels. CP 523-24 (FF 17-18, 27-28) Wal-

Mart closed its purchase of land in the Center in 2004; Home Depot closed in 2006. CP 521 (FF 6, 7)

Indeed, Defendants have admitted that the 2008 ECRs were not ancillary to their purchases of land in the Center. In their Motion for Summary Judgment on Plaintiff's Tort Claims, defendants argued that Olhava had no duty to disclose Home Depot's secret plan to encumber the Shopping Center with additional use restrictions at the time that plaintiff purchased Lot 7-A, because the 2008 ECRs did not exist as of 2007.

. . . Olhava owed no duty to Plaintiff to disclose any *proposed encumbrances that did not exist at the time Plaintiff purchased lot 7 A*. Plaintiff, admittedly, purchased the property in February 2007 – over a year before the Amended ECRs [2008 ECRs] were finalized and recorded.

CP 854-877 (Defts' Mot. for Partial Sum. Judg. on Pltf's Tort Claims, p. 10) (emphasis added). *See also* RP (Aug. 19, 2014 Zenger Testimony, p. 18:2-18) Obviously, if the 2008 ECRs did not exist in 2007, they cannot be ancillary to real estate transactions that closed in 2004 and 2006, respectively.

**4. The 2008 ECR use restrictions are not ancillary to a valid relationship that the law deems worthy of protection.**

Restrictive covenants may be enforceable, notwithstanding their potential impact on the public, in a few contexts. For example, reasonable restrictive covenants are enforceable in the employment context, if the employer can establish its need to protect a valid commercial interest, such as trade secrets or other confidential information to which the employee

had access. See *Perry v. Moran*, 109 Wn.2d 691, 700, 748 P.2d 224, 229 (1987); *Sheppard v. Blackstock Lumber Co., Inc.*, 85 Wn.2d 929, 933, 540 P.2d 1373, 1376 (1975) (holding that covenants not to compete in employment agreements are enforced to the extent they are reasonable and lawful, giving special consideration to time and area restrictions). Likewise, restrictive covenants by the seller may be enforceable in connection with the sale of a business, particularly if the buyer paid for the good will associated with an ongoing business and competition from the seller would erode the value of that good will. Restatement (Second) of Contracts §188(2)(a). But in each of these situations, the parties stand in a vertical relationship to one another, such as buyer and seller or employer and employee, and their relationship gives rise to some other legitimate interest that is deemed “worthy of protection” by a restrictive covenant. Restatement (Second) of Contracts § 187, cmt. B.

But the relationship between direct competitors such as Wal-Mart and Home Depot is not a vertical relationship and it gives rise to no such legitimate interest. An agreement between competitors constitutes a horizontal agreement in restraint of trade. *Bus. Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 730, 108 S. Ct. 1515, 1522-23, 99 L. Ed. 2d 808 (1988) (“Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints.”). Simply put, there is no Washington case that upholds a restrictive covenant between two competitors under similar

circumstances. Such agreements between competitors are contrary to public policy in Washington and therefore unenforceable. *See* RCW § 19.86.030 (Legislative declaration that agreements in restraint of trade are illegal.)

**5. The trial court wrongly excluded evidence that Wal-Mart and Home Depot are competitors and precluded this public policy challenge to enforceability.**

At trial, College Marketplace was prepared to offer evidence that Wal-Mart and Home Depot are competitors and that the 2008 ECRs would unreasonably restrict competition at the Center. *See* CP 379-80 (Plaintiff's disclosure of Evidence Rule 1006 Summary of Documents) (Ex. 11 to Harris Decl. in Support of Defendant HD Development of Maryland, Inc.'s Motion in Limine). College Marketplace was further prepared to argue that the 2008 ECRs are unenforceable, as contrary to public policy, for all the reasons discussed above. But on August 15, 2014, the trial court granted Defendant Home Depot's Motion in Limine and precluded College Marketplace from presenting argument or evidence in support of this theory. RP (Aug. 15, 2014 Transcript of Hearing on Motions in Limine, p. 39)

In its Motion in Limine, Home Depot argued that it had just discovered that College Marketplace "intends to assert at trial an entirely new claim that was not [previously] alleged." CP 290-98 (HD Development's Motion in Limine) Home Depot mischaracterized these arguments as a "new claim" and argued that the evidence discussed above

is not relevant to the issues raised in the pleadings. *Id.* Home Depot was wrong in all of its arguments, but the trial court erroneously granted the Motion in Limine, precluding both evidence and argument on the public policy issues.

As a threshold matter, Plaintiff never intended to assert a “new claim,” as Home Depot argued. Plaintiff intended to pursue two claims at trial: a Claim for Declaratory Judgment that the 2008 ECRs were invalid and unenforceable; and a Claim to Quiet Title that Lot 7A was not subject to the new use restrictions. These two claims were asserted in the Original Complaint For 1) Declaratory Relief; and 2) To Quiet Title, and in each of the Amended Complaints that followed the original. CP 1-63 (Summons and Complaint), CP 73-132 (First Amended Complaint), CP 150-61 (Second Amended Complaint) and CP 162-80 (Third Amended Complaint). Each of the Complaints included a “short and plain statement” of these two claims, as required by CR 8(a).

It is well established that pleadings are to be liberally construed; their purpose is to facilitate proper decision on the merits, not to erect formal and burdensome impediments to the litigation process. [Citations omitted] If a complaint states facts entitling the plaintiff to some relief, it is immaterial by what name the action is called. [Citations omitted] Furthermore, initial pleadings which may be unclear may be clarified during the course of summary judgment proceedings.

*State v. Adams*, 107 Wn.2d 611, 732 P.2d 149 (1987).

Contrary to Home Depot’s Motion, College Marketplace never intended to assert a new antitrust claim, and College Marketplace’s

counsel made that clear to the trial court on several occasions. *See, e.g.*, CP 385-93 (Pltf’s Opp. to Home Depot’s Mot. in Lim., p. 1) (“[P]laintiff has no intention of making an antitrust claim in this case.”) To the contrary, College Marketplace intended to argue – in support of its Declaratory Judgment and Quiet Title claims – that the 2008 ECRs were invalid because, among other reasons, they are unreasonable and contrary to public policy for the reasons stated above.

It is true that the underlying principles of public policy that support these arguments are similar to the principles that support the antitrust laws, but that does not convert a Declaratory Judgment claim based on those common law principles into an antitrust claim. The claims asserted here were based on the common law relating to restrictive covenants, rather than the antitrust statutes. There is nothing unusual about this approach. “Parties who have challenged such [restrictive covenants] have ordinarily been content to assert their unenforceability under the common law and have not sought relief under federal or state legislation.” Restatement (Second) of Contracts § 187, cmt. A.

Moreover, the public policy issues and the question of the reasonableness of the covenants were clearly relevant to the Declaratory Judgment and Quiet Title Claims that were spelled out in each of the Complaints. Under Washington law, restrictive covenants such as the use restrictions in the 2008 ECRs are enforceable only if they are shown to be reasonable under the circumstances. *See Sheppard*, 85 Wn.2d at 931-32; *Knight, Vale and Gregory v. McDaniel*, 37 Wn. App. 366, 369, 680 P.2d

448 (1984). In this case, once the enforceability of the restrictive covenants was called into question by the Declaratory Judgment claim, *Defendants* had the burden to show that the restrictions are both reasonable and consistent with public policy. *Sheppard*, 85 Wn.2d at 933 (“[T]he burden must be on the employer to establish the reasonableness of any restrictions sought to be imposed on former employees ...”) The lack of any evidence on this point, let alone a ruling by the court, is yet another reason why the decision must be reversed.

Finally, the record shows that Home Depot misstated the record when it argued that it learned about these issues in August 2014, “less than two weeks before trial.” CP 290-98 (Defendant HD Development’s, Motion in Limine, p. 1, 4-5) In fact, Home Depot’s counsel knew by no later than October 2013, some ten months prior to trial, that College Marketplace intended to make this argument at trial. CP 394-405 (Gandara Declaration in Opposition to Home Depot’s Motion in Limine) At that time, Defendants, including Home Depot, filed an Opposition to Plaintiff’s Motion for Continuance in which Defendants stated their understanding that College Marketplace would assert what it characterized as “a new legal theory based on principles of antitrust law.” CP 399 (Gandara Decl., Ex. A) Home Depot was not surprised by a new claim at the 11<sup>th</sup> hour; the argument that it learned of this legal theory for the first time on the eve of trial was contradicted by the record. For all these reasons, it was an abuse of discretion for the trial court to grant Home

Depot's Motion in Limine, precluding evidence and argument of these theories at trial.

**C. The trial court erred by awarding almost \$1 Million in attorneys' fees and costs to Defendants.**

As noted above, more than four months after the Judgment on the merits was entered, the Court awarded Judgments for Attorneys' Fees and Costs to each of the three Defendants; the total award was in excess of \$950,000.<sup>8</sup> These Judgments were erroneous for at least two reasons. First, under the applicable fee provision, attorneys' fees and costs are to be awarded only to a "prevailing party." CP 1512 (Atty Fee FF 32) Thus, the awards were predicated on the Court's Judgment in favor of Defendants on the Declaratory Judgment and Quiet Title claims. For all the reasons discussed above, the Judgment on the merits was erroneous; Defendants were improperly found to be prevailing parties. Second, even if for the sake of argument Defendants were actually found to be prevailing parties on the merits, the award of fees and costs is not supported by the language of the ECRs, which Defendants drafted.

**1. The attorney fee provision should be construed strictly.**

Whether a contract provision authorizes an award of fees is a question of law that is reviewed de novo by this court. *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 126, 857 P.2d 1053 (1993). Because the award

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<sup>8</sup> Pursuant to RAP 2.4(g), the Notice of Appeal of the earlier Judgment also brings these decisions up for appeal.

of attorneys' fees in litigation is contrary to the common law rule,<sup>9</sup> attorneys' fees clauses must be strictly construed. *See Rexam Beverage Can Co. v. Bolger*, 620 F.3d 718 (7th Cir. 2010); *North Bergen Rex Transport, Inc. v. Trailer Leasing Co.*, 158 N.J. 561, 730 A.2d 843 (1999); 16 David K. DeWolf et al., *Washington Practice Tort Law and Practice* §6.16, p. 292 (4th ed. 2013) (noting that a contract attorneys' fee provision is strictly interpreted in Washington). As such, Washington courts have declined to extend an attorneys' fee clause beyond its express terms. DeWolf, *Tort Law*, p. 292, citing *Hindquarter Corp. v. Property Development Corp.*, 95 Wn.2d 809, 631 P.2d 809, 23 A.L.R.4th 897 (1981) (lease authorized attorney's fees only for curing default; the award of fees should only reflect services rendered toward that end).

In this case, it is also undisputed that the Defendants drafted the attorney fee clause. CP 524 (FF 27, 28) As such, even if the trial court had found the clause to be ambiguous, it would have been appropriate to construe it strictly against the Defendants. *See, e.g., Lynott v. National Union Fire Ins. Co.*, 123 Wn.2d 678, 690, 871 P.2d 146 (1994); *Berg v. Hudesman*, 115 Wn.2d 657, 677, 801 P.2d 222 (1990); *Guy Stickney, Inc. v. Underwood*, 67 Wn.2d 824, 827, 410 P.2d 7 (1966).

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<sup>9</sup> Washington courts have long followed the "American Rule," which provides that each party is responsible for paying its own attorneys' fees and costs, unless there is some specific authority granted by statute, contract or recognized ground in equity requiring one party to pay the fees of the other. *See Berryman v. Metcalf*, 177 Wn. App. 644, 656, 312 P.3d 745 (2013); *Cosmopolitan Engineering Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 296, 149 P.3d 666, 669 (2006). *See also Macri v. City of Bremerton*, 8 Wn.2d 93, 111 P.2d 612 (1941) (detailed analysis of the American Rule in Washington).

**2. The attorney fee clause only applies to actions regarding a breach or threatened breach of the ECRs, but there was no breach or threatened breach in this case.**

The attorney fee provision at issue applies only to actions “regarding a breach or threatened breach of the 2008 ECRs.” CP 1513 (Atty Fee CL 2)<sup>10</sup> Defendants conceded in the trial court that there had been no breach. CP 1486-1503 (Nov. 26, 2014 Mem. Op. on Defts’ Mot. for Attys Fees, p. 4) (“All parties are in agreement that there has not been an actual breach.”) But Defendants argued that College Marketplace had “threatened breach” in two ways.

First, Defendants argued that College Marketplace threatened breach when it threatened litigation after Defendants would not agree to lift the use restrictions. *Id.* However, the trial properly rejected this argument, finding that neither the filing of this lawsuit by College Marketplace nor the “threat” of filing the lawsuit were a threatened breach of the ECRs. CP 1513 (Atty Fee CL 4)

There is no provision in either the 2004 or 2008 ECRs that forbids a party to sue to determine the validity of the contract, the validity of the amendment, or to determine a party’s rights under the agreement. Since there is no provision forbidding litigation, there was no threatened breach of the agreement when plaintiff threatened to file a lawsuit.

*Id.* The trial court, however, accepted Defendants’ argument that “Plaintiff threatened to breach the 2008 ECRs by negotiating and nearly

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<sup>10</sup> Defendants tried to argue that the clause applied to “any action ... regardless of whether there is a breach or threatened breach of the contract.” CP 1486-1503 (Mem. Op. on Defts’ Mot. for Attys Fees, p. 4). The trial court properly rejected that argument. *Id.*

completing a lease agreement with Sherwin Williams, even though Plaintiff did not go forward with the lease agreement and sought declaratory relief.” CP 1514 (Atty Fee CL 5) This erroneous conclusion was repeated in Conclusions of Law 7 and 9-11, each of which concludes that College Marketplace “threatened to breach” the 2008 ECRs when it negotiated a potential lease with Sherwin Williams.

These conclusions (that College Marketplace “threatened breach”) are unsupported by the Findings of Fact; indeed, these conclusions are contradicted by undisputed evidence in the trial court record. The undisputed facts that pertain to this issue are as follows:

- There is no evidence that College Marketplace knew about the 2008 ECRs at the time they were recorded, and there is no evidence showing that College Marketplace was aware of the new use restrictions in 2011 when it negotiated a potential lease with Sherwin Williams.
- College Marketplace first learned of the new use restrictions when Sherwin Williams discovered the restrictions. Sherwin Williams then told College Marketplace that it would not enter any lease agreement for the property unless the use restriction prohibiting paint stores were lifted. CP 1510 (Atty Fee FF 14)
- College Marketplace attempted to persuade Defendants to lift the use restrictions, but Defendants refused. CP 1510 (Atty Fee FF 15-17) College Marketplace told Defendants that if the restrictions were not lifted, it would file a lawsuit for declaratory relief to invalidate the 2008 ECRs. CP 1510 (Atty Fee FF 16) Notably, College Marketplace did *not* tell Defendants that if the restrictions were not lifted, it would proceed to enter into a lease with Sherwin Williams.
- When Defendants refused to lift the restrictions, College Marketplace then filed its Complaint seeking a Declaratory

Judgment that its property was not bound by the 2008 ECRs. CP 1510 (Atty Fee FF 17); CP 1-63 (Complaint).

- During the litigation, College Marketplace made it clear that it would not (and could not) go forward with a lease unless the Court first granted it relief from the 2008 ECRs. CP 1510-1511 (Atty Fee FF 14, 20)

Importantly, there is no evidence in the record, let alone a finding by the trial court, that College Marketplace ever communicated to Defendants that it intended to go forward with the lease to Sherwin Williams *unless* the Defendants consented to that lease or the court ruled that it was free to do so *without breaching the ECRs*. In fact, the trial court found that “Sherwin Williams would not enter any lease agreement with Plaintiff unless the restrictions against selling paint in the 2008 ECRs were lifted.” CP 1510 (Atty Fee FF 14) In other words, there was never a threat to go forward with a lease in violation of the ECRs.

The common meaning of “threat” requires proof of a communication to the “threatened party.” See *State v. Edwards*, 84 Wn. App. 5, 10, 924 P.2d 397 (1996) (“Webster's Third New International Dictionary (1969), defines threat as ‘an indication of something impending and . . . : **a**: *an expression of an intention to inflict evil, injury, or damage on another*’ . . .”) (emphasis supplied). See also RCW 9A.04.110 (“‘Threat’ means *to communicate, directly or indirectly the intent [to cause harm]*”) (emphasis supplied). There is no record of any “threat” by College Marketplace to proceed with the lease unless and until the court had ruled it could do so without breaching the ECRs. In fact, the record is clear that Sherwin

Williams refused to go forward with the lease unless the legal issue was favorably resolved, and that this occurred before College Marketplace had any communication with the Defendants about the lease.

**3. College Marketplace chose to seek a judicial declaration of its rights *to avoid a breach.***

When Defendants refused to lift the use restrictions, College Marketplace could have chosen to go forward with a lease in violation of the 2008 ECRs. It chose instead to seek a declaratory judgment of its rights. A claim for declaratory judgment and quiet title does not constitute a breach or threatened breach of the 2008 ECR. Seeking judicial resolution of legal disputes is the *antithesis* of a breach or threatened breach.

The purpose of a Declaratory Judgment is to settle and afford relief from uncertainty and insecurity with respect to rights, status and other legal relations and to settle actual controversies ***before they ripen into violations of law or breach of duty*** by providing an immediate forum for an adjudication of rights and obligations in an actual controversy where such controversy may be settled in its entirety and with expediency and economy. . . .

22A Am. Jur. 2d, Declaratory Judgments § 11 (emphasis supplied). *See also Tuyen Thanh Mai v. American Seafoods Co., LLC*, 160 Wn. App. 528, 547-48, 249 P.3d 1030 (2011) (“a purpose of the Declaratory Judgment Act is ‘to provide a means of settling an actual controversy before it ripens into a violation of the civil or criminal law, or a breach of a contractual duty.’”)

A Quiet Title action is no different. It seeks a declaration from the court to resolve conflicts over title. *Kobza v. Tripp*, 105 Wn. App. 90, 18 P.3d 621 (2001) (“An action to quiet title is equitable and designed to resolve competing claims” over title.) *See also* Am. Jur. 2d, Quieting Title § 1. College Marketplace’s declaratory judgment and quiet title action was an attempt to resolve the controversy over the validity of the 2008 ECR, without risking the possibility of a breach, or even a threatened breach.

For the same reasons, the court’s Conclusion 10 is without factual support; indeed, it is contrary to the record. Conclusion of Law 10 provides: “Plaintiff would have entered the lease with Sherwin Williams, a course of action that would constitute a violation of the 2008 ECRs, if not enjoined or otherwise declared unlawful by the Court.” CP 1514 (Attys Fee CL 10) But, the whole point of filing the Declaratory Judgment and Quiet Title claims was to obtain a judicial declaration of rights; there is no evidence that either College Marketplace or Sherwin Williams was willing to enter the lease unless the Court had declared it possible to do so *without breach*. CP 1510 (Atty Fee FF 14)

Even after the trial court granted a Declaratory Judgment in favor of the Defendants, it did not *enjoin* College Marketplace from entering the lease with Sherwin Williams. CP 533-36 (10-3-14 Judgment) Indeed, there was never a time that Defendants could have obtained such an injunction because as soon as College Marketplace and Sherwin Williams became

aware of the 2008 ECRs (and before they informed Defendants of their interest in a lease), they made it clear they would not sign the lease unless and until the restrictions were lifted. As such, Defendants could never have established a “well-grounded fear” of an “immediate” violation of the ECRs, which is a prerequisite to any injunction:

It is an established rule in this jurisdiction that one who seeks relief by temporary or permanent injunction must show (1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him.

*Tyler Pipe Indus. v. State*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982), quoting *Port of Seattle v. International Longshoremen's & Warehousemen's Union*, 52 Wn.2d 317, 324 P.2d 1099 (1958). Conclusion 10 is erroneous.

**4. The trial court erred by awarding Defendants fees for defending the tort claims.**

The trial court concluded that the attorney fee provision at issue applied only to actions “regarding a breach or threatened breach of the 2008 ECRs.” CP 1513 (Atty Fee CL 2) This clause, drafted by the Defendants, should be narrowly construed. *See* cases cited in Section C.1., *supra*. Instead, the court construed it broadly, holding that the clause covers “claims other than breach of contract when the dispute arises from the contract.” CP 1486-1503 (Nov. 26, 2014 Mem. Op. on Defts’ Mot. for Attys Fees, p. 7) As a result of this erroneous conclusion, the trial court awarded fees for defense of tort claims that did not “regard[] a breach of

threatened breach of the [agreement.]” This was an error of law. *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 66, 738 P.2d 665 (1987).

In *Nordstrom*, we held that when a number of actions are argued and only some of those allow for recovery of attorney fees, it would give the prevailing party an unfair benefit to award attorney fees for the entire case. Rather, attorney fees should be awarded only for those services related to the causes of action which allow for fees.

The trial court reasoned that “a court may award attorneys’ fees for claims other than breach of contract when the dispute arises from the contract.” CP 1516 (Atty Fee CL 19) In another case, with a different attorneys’ fee provision, this might be correct. But this fee provision is narrowly drafted (by Defendants) and applies only to claims “regarding a breach or threatened breach of the 2008 ECRs.” CP 1513 (Atty Fee CL 2) The language of *this clause* does not cover tort claims, even if they might have arisen from the contractual relationship.<sup>11</sup>

**5. Defendants cannot seek fees for their work and, at the same time, redact the time entries that reveal the nature of their work.**

Even if this Court were to affirm Defendants’ right to an award of some attorneys’ fees, notwithstanding the arguments set forth above, the amount of the fee award is grossly excessive on its face. Among other

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<sup>11</sup> The language of the Purchase and Sale Agreement between Olhava and College Marketplace is broader and is the type of attorneys’ fee clause that might support an award of fees for the tort claims. CP 1516 (Atty Fee CL 23) However, for the reasons discussed above, Olhava should not be considered a “prevailing party” in this litigation.

problems, the trial court awarded Defendant Home Depot almost \$20,000 in fees, as to which Home Depot submitted no evidence of the reasonableness of the hours worked. Indeed, Home Depot *redacted* the descriptions of work on the grounds that the descriptions contain “attorney-client privileged information.” CP 1081-1124 (Amster Decl., p. 2) Home Depot cannot have its cake and eat it too.<sup>12</sup>

When a party places into issue the reasonableness of its fees, the billing statements on which it relies must be produced without redaction. *See e.g., Ideal Elec. Sec. Co., v. Int’l Fid. Ins. Co.*, 129 F.3d 143, 151 (D.C. Cir. 1997); *O’Neal v. United States*, 258 F.3d 1265, 1276 (11<sup>th</sup> Cir. 2001) (refusing to permit attorney fees while hiding behind assertion of attorney-client privilege as to billing records). It was abuse of discretion for the trial court to award fees for this work without any showing that the fees were reasonably incurred by Home Depot in the successful defense of a claim that is covered by the attorneys’ fee clause. *Id.*

## VI. CONCLUSION

Appellant College Marketplace, LLC, respectfully asks this Court to reverse the Judgment in favor of Defendants and against Plaintiff College Marketplace LLC (dated October 3, 2014) and the Judgments in favor of HD Development of Maryland, Olhava Associates, LP and Wal-

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<sup>12</sup> This included roughly 24.7 hours of work by attorney Steve Roland (\$545/hour) and 19.4 hours by Mr. Amster (\$390/hr.). See CP 1444-1460 (Pltf’s Opp. to Defits’ Mots for Attys Fees & Costs, p. 15)

Mart Real Estate Business Trust (all dated February 24, 2015), and to remand this case to the trial court with directions to grant Judgment to College Marketplace on its Declaratory Judgment and Quiet Title claims.

DATED this 23rd day of March, 2015.

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**CERTIFICATE OF SERVICE**

I do hereby certify that on this 23rd day of March, 2015, I caused to be served a true and correct copy of the foregoing *Appellant's Opening Brief* to the following:

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# APPENDIX

For the convenience of the Court, Appellant College Marketplace, LLC provides the following *verbatim* text of each of the Conclusions of Law that is specifically mentioned in the Assignments of Error herein:

**Conclusions of Law in connection with October 3, 2014 Order and Judgment:**

2. Plaintiff first argues that Home Depot could not be included as a party to the Amended ECRs and that Home Depot's presence as a signatory renders the Amended ECRs ineffective, null and void. However, it is clear, under a plain reading of Section 15 of the Original ECRs, that the Original ECRs "may be modified or canceled only by the mutual agreement of" Olhava and Wal-Mart. Thus, what is required is that Olhava and Wal-Mart agree on any modification or cancellation. The Court reads Section 15 to mean that so long as Wal-Mart and Olhava have agreement on an amendment then the Original ECRs may be amended. As Olhava and Wal-Mart were signatories to the Amended ECRs, the Court finds that Olhava and Wal-Mart agreed to the Amended ECRs, and this is all that is required under Section 15 of the Original ECRs to give effect to an amendment.

3. The Court finds that whether Home Depot was involved, and perhaps even instrumental, in the drafting of the Amended ECRs is immaterial because the Amended ECRs were agreed to by Olhava and

Wal-Mart. Under Section 15 of the Original ECRs, Olhava and Wal-Mart were entitled to have Home Depot participate in the preparation of the Amended ECRs and to draft the same, and Olhava and Wal-Mart were entitled to agree to bring in Home Depot as a signatory. Section 15 does not preclude discussions, drafting, or any work done by Home Depot to create the Amended ECRs. Furthermore, the Court finds no language in the Original ECRs that precludes a third party from being a signatory to any future modifications to the Original ECRs. Thus, there is no language in the Original ECRs that would preclude Olhava and Wal-Mart from agreeing to allow Home Depot to be a party and signatory to the Amended ECRs.

4. Plaintiff also argues that the inclusion of signature blocks of third party lot owners in draft versions of the proposed Amended ECRs (particularly in March and April of 2008) evidences recognition by Olhava, Wal-Mart, and Home Depot that they were required to obtain the consent of other lot owners in the Center to any amendment to the ECRs. However, the inclusion of these signature blocks in certain 2008 drafts of the Amended ECRs is immaterial and cannot alter the actual requirements for amendment or create law that the signatures of the other lot owners were required in order to effectuate an amendment to the Original ECRs. The fact that there may be two or three or however many ways to

accomplish a result does not mean that because there was some effort to obtain additional signatures, that becomes the state of the law under or as applied to the contract. It simply means that, as a practical matter, there was a proposition put forward by the contracting parties to consider getting all the signatures. That does not create law or law of this case that there had to be signatures obtained by all of the other property owners in the Center. The plain and unambiguous language of Section 15 of the Original ECRs shows an intent by the drafters of the Original ECRs (Olhava and Wal-Mart) to allow amendments of the Original ECRs without the consent of other lot owners.

5. Lastly, Plaintiff argues that the phrase “modified or canceled” in Section 15 of the Original ECRs does not provide authority for Olhava and Wal-Mart to enact the changes contained in the Amended ECRs. The Court disagrees. The Court finds that the three words “modified or canceled” in the Original ECRs must be read together, as opposed to parsing out the words “modified” or “canceled.” In reading these words together, the Court finds that Olhava and Wal-Mart, as the drafters of the Original ECRs, intended to preserve broad authority to make any changes, whether small or large – even all the way to cancellation, which would be an extreme and extraordinary event, but

expressly allowed under the Original ECRs. This language demonstrates the breadth of the reservation of power intended.

6. The Court notes that Olhava and Wal-Mart specifically allowed the Original ECRs to be “cancelled” upon mutual agreement. Implicit in the term “cancel” is an expectation that something would replace the Original ECRs. In this real estate context and with these ECRs, it would be an absurd result to contemplate cancellation completely of the Original ECRs with nothing to take its place. It would be the equivalent of lawlessness, and in looking at the language of the Original ECRs, it is clear to the Court that would be an absurd result and was not contemplated by the parties. In other words, cancellation implicitly demands something else would be enacted to replace it.

7. Importantly, the phrase “modified or canceled” demonstrates the overall broad preservation of power to Olhava and Wal-Mart to be able to make changes, and the nature of that power, whether additions, subtractions, explanations, or cancellation.

8. Regarding the question of whether or not notice was provided to others of this broad preservation of power, the Court finds, based on a plain reading of the Original ECRs, that express notice was provided, and was provided consistent with Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc., 76 Wn. App. 267, 883 P.2d 1387

(1994). Section 15 of the Original ECRs contains express notice that the Original ECRs allow for additional restrictions, provided that the provisions included are consistent with the general plan.

9. Exhibit 3, with the attached Exhibit A-1, shows the general plan and demonstrates that two anchor stores were contemplated as part of the plan. The Court specifically notes that Exhibit A-1 to Exhibit 3 contains a map of two anchor stores in the Center. The general plan of the Center was to develop the Center with two anchors. This was contemplated, and it would be consistent with that general plan to develop the new restrictions that were added in the Amended ECRs to accommodate the second anchor. The provision of additional restrictions in the Amended ECRs for the second anchor is reasonable and consistent with the general plan for the Center.

10. Therefore, under Shafer, there is an ability to create new restrictions unrelated to those that already exist so long as the restrictions are reasonable and consistent with the plan. If the Court is to consider the Amended ECRs to be a modification as defined under Meresse v. Stelma, 100 Wn. App. 857, 999 P.2d 1267 (2000), the Court still concludes that the additional restrictions contained in the Amended ECRs are reasonable. The Court notes that the Original ECRs already contained restrictive covenants regarding certain uses within the Center. Under Meresse, a

property owner cannot create a new covenant under a modification, but the present case does not present the creation of a new covenant since restrictive covenants already existed. The Amended ECRs are a modification of an existing set of restrictions that already existed within the Original ECRs.

11. Under Meresse, Shafer and Wilkinson v. Chiwawa Communities Assoc., 180 Wn.2d 241, 327 P.3d 614 (2014), the Court finds that there has been fair notice provided to Plaintiff of the ability of Olhava and Wal-Mart to amend and the broad power that was preserved to Olhava and Wal-Mart to modify or cancel the Original ECRs.

12. Therefore, the Court finds that the Amended ECRs did not create new restrictions, but simply modified the restrictions that were already present in the Original ECRs consistent with the general plan of development for the Center. Moreover, even if it was a creation of new restrictions, it was consistent with Shafer because there was clear notice provided, and the inclusion of additional restrictions for the second anchor is consistent with the general plan for the Center and hence reasonable.

**Conclusions of Law in connection with February 20 Order and February 24 Judgments (attorneys' fees):**

2. When reading paragraph 13 of the 2008 ECRs in its entirety, that paragraph applies to “any action” regarding a breach or

threatened breach of the 2008 ECRs. Id. at 4:17-19.

3. Defendants are entitled to recover their reasonable attorneys' fees and costs pursuant to paragraph 13 of the 2008 ECRs for their work on the declaratory judgment and quiet title claims asserted by Plaintiff, as well as the counterclaims asserted by Olhava and Home Depot, because there was a threatened breach of the 2008 ECRs by the Plaintiff. Id. at 6:27-28.

5. Plaintiff threatened to breach the 2008 ECRs by negotiating and nearly completing a lease agreement with Sherwin Williams, even though Plaintiff did not go forward with the lease agreement and sought declaratory relief. Id. at 5:10-18.

6. Plaintiff's Third Amended Complaint sought more than just clarification through declaratory judgment as it contained numerous causes of action, including declaratory relief, quiet title, and five tort claims, which is significant because three of these tort claims (injurious falsehood, slander of title, and intentional interference with contract) were related to Plaintiff's near lease with Sherwin Williams. Id. at 5:19-25.

7. Plaintiff's actions in 2011 in preparing to execute a lease with Sherwin Williams was a "threatened breach" under paragraph 13 of the 2008 ECRs. Id. at 5:26-6:10.

9. A threatened breach in paragraph 13 of the 2008 ECRs encompasses a course of action that would constitute a breach if not enjoined or otherwise enjoined or declared unlawful by the court. Id. at 6:23-24.

10. The Plaintiff would have entered into the lease with Sherwin Williams, a course of action that would constitute a breach of the 2008 ECRs, if not enjoined or otherwise declared unlawful by the Court. Id. at 6:20-26.

11. These actions by Plaintiff in 2011 constituted a “threatened breach” of the 2008 ECRs. Id. at 6:25-26.

12. Plaintiff’s declaratory relief and quiet title actions were “on the contract” because these claims arose out of the 2008 ECRs and the contract is central to the dispute. Id. at 7:7-9.

13. Plaintiff’s declaratory relief and quiet title actions were based on a determination of the Defendants’ right to amend the agreement and the applicability of the 2008 ECRs to Plaintiff’s property. Id. at 7:2-5.

14. The entire dispute in the declaratory relief and quiet title actions was based on the interpretation of a provision in the 2004 ECRs and whether the 2008 ECRs applied to Plaintiff, so that the outcome of the litigation was based on a reading of the contract. Id. at 7:5-7.

15. Defendants may recover their reasonable attorneys' fees and costs for their work on the three tort claims (injurious falsehood, slander of title, and intentional interference of contract) because these tort claims were based on Defendants' actions under the contract, and because paragraph 13 of the 2008 ECRs is broad enough to allow recovery of fees for these causes of action. Id. at 8:1-4.

16. Washington law allows for an award of reasonable attorneys' fees and costs for claims other than breach of contract when the dispute arises from the contract. Id. at 7:11-12.

17. The word "only" in paragraph 13 describes the entities that can institute an action for breach or threatened breach, and is not limited to the type of claim for which a party could recover fees. Id. at 7:17-25.

19. With regard to three of the tort claims (injurious falsehood, slander of title, and intentional interference of contract), a court may award attorneys' fees for claims other than breach of contract when the dispute arises from the contract. Id. at 7:10-12.

20. A broad reading of "any action" makes sense here, as it indicates that the party can recover for any claims in an action regarding a breach or threatened breach. Id. at 7:25-8:1.

21. Since the alleged tortious behavior arises from Defendants' actions under the contract and the provision is broad enough to allow

recovery of fees for tort causes of action, Defendants may recover their reasonable attorneys' fees and costs for their work on the three tort claims. Id. at 8:1-4.

82. Home Depot may recover fees for the redacted entries. Id. at 13:5-6.

**KIPLING LAW GROUP PLLC**

**March 23, 2015 - 10:40 AM**

**Transmittal Letter**

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