

MULLIN, CRONIN,  
CASEY & BLAIR

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SPOKANE, WA 99201

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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 315827-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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JAMES WALTZ and MARIYLN MILLER, Appellants,

v.

TANAGER ESTATES HOMEOWNER'S ASSOCIATION, *et al.*,  
Respondents,

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On Appeal from Spokane County Superior Court  
Cause No. 11-2-02155-1

Judge Linda G. Tompkins

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**BRIEF OF APPELLANT**

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## **I. INTRODUCTION**

The Appellants, James Waltz and Marilyn Miller (“Waltzes”), were denied their rights under the governing documents of the Tanager Estates Homeowner’s Association (“Association”). Two outspoken members of a nine-person Architectural Committee were adamantly opposed to the Waltzes’ plan to add a livable and useable bonus room above their garage. When the Chair of the Committee refused to allow these two individuals to filibuster the voting by the Committee, these two members enlisted the help of the Association’s President, Kirk Firestone.<sup>1</sup> Without any authority from either the Association’s Board or from the Architectural Committee, Mr. Firestone unilaterally declared the voting null and void. Had he not done so, a majority of the Committee would likely have approved the Waltzes’ proposed bonus room.

Mr. Firestone did not stop there, however. He then usurped the authority of the Committee and dictated to the Waltzes the manner in which they could construct their bonus room.

By acting unilaterally and without authority, Mr. Firestone ignored the governing documents of the Association. Unfortunately, when Mr. Firestone breached his duty to follow the governing documents of the

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<sup>1</sup> One of the vocal opponents was Marie Firestone, who was married to the Board’s President at the time.

Association, the rest of the Board turned a blind eye, despite knowing of Mr. Firestone's wrongful conduct.

The consequence to the Waltzes is that they were forced to lower the roof and wall height of their addition by 1' 7". While this does not seem significant, the lowering rendered the space above their garage unusable as living space.

The governing documents of the Association set forth express obligations owed by the Association to its residents. Whether to comply with the governing documents of the Association is not a matter of discretion for the Board or an individual officer. In this case, the trial court rendered the governing documents meaningless when it concluded that Mr. Firestone's and the Board's failure to follow the governing documents could be excused by inexperience, lack of sophistication, or the absence of "knowing" bad faith.

Because the Waltzes are entitled to have the Association and the Board comply with the governing documents, the trial court erred in failing to declare the Board's actions to be invalid and in denying the Waltzes their right to construct a bonus room that is livable and usable. The decision of the trial court should be reversed, declaratory judgment should be entered against the Association, and damages should be awarded against the Association and the Board.

## **II. ASSIGNMENTS OF ERROR AND ISSUES**

### **A. Assignments of Error.**

1. The trial court erred in its Conclusion #3, when it held that the Waltzes' construction plans were not "deemed approved" by the Architectural Committee's failure to act. (Conclusion #3, CP at 829)

2. The trial court erred in its Conclusion of Law #2, when it held that the President and the Board acted within their authority under the governing documents of the Association. (Conclusion #2, CP at 829)

3. The trial court erred in its Conclusion #5, when it held that the Board members did not breach their fiduciary duties. (Conclusion #5, CP at 829)

4. The trial court's findings of fact contained within Conclusions #2, #3, and #5 that the Board and the Association acted in accordance with the governing documents and met their fiduciary duties are not supported by substantial evidence. (Conclusions #2, #3, and #5, CP at 829)

5. The trial court erred when it applied the doctrine of equitable estoppel in its Conclusion #6. (Conclusion #6, CP at 829-30)

6. The trial court's findings of fact in support of equitable estoppel are not supported by evidence demonstrating a high probability of the necessary elements for estoppel. (Conclusion #7, CP at 829-30)

7. The trial court abused its discretion when it declined to award costs, including attorney's fees, to the Waltzes. (Conclusion #8, CP at 830)

8. The trial court abused its discretion when striking the Waltzes' jury demand. (CP at 51-52)

**B. Issues Pertaining to Assignments of Error.**

1. The CC&Rs state that a resident is deemed to have complied with the Architectural Guidelines if the Architectural Committee fails to approve or disapprove proposed construction plans within thirty days. The undisputed evidence is that the Architectural Committee failed to act on the Waltzes July 29<sup>th</sup> and August 2<sup>nd</sup> plans. The issue is whether the Waltzes are entitled to construct the bonus room pursuant to these plans due to the failure by the Committee to take any action on these plans. (Assignment of Error #1)

2. The governing documents of the Association expressly vest the authority to approve or disapprove proposed construction plans with the Architectural Committee. The Committee acts by majority vote. (RP at p. 324, l. 18-20) In the absence of a decision by the majority of the Committee to turn the approval of the Waltzes' plan over to the Board, the unilateral actions of Kirk Firestone to take the matter away from the Committee violated the governing documents of the Association. The

issue is whether the actions of Mr. Firestone and the Board beginning on July 31, 2008, and continuing thereafter, are invalid due to their failure to comply with the Association's governing documents. (Assignment of Error No. #2)

3. Board members owe a fiduciary duty to comply in all respects with the governing documents of the Association and to act reasonably and in good faith. The evidence is that Mr. Firestone ignored the governing documents and that the remaining Board members knowingly acquiesced in Mr. Firestone's violations of the governing documents. There is also a lack of evidence to support the Board's position on the Waltzes' proposed plans. The issue is whether Board members breached their fiduciary duty by failing to follow the governing documents of the Association and by failing to act reasonably and in good faith in imposing arbitrary restrictions on the Waltzes' proposed construction. (Assignments of Error #3 and #4)

4. Article 10.1 of the CC&Rs states that the failure by a resident to immediately act to enforce his or her rights under the CC&Rs will not preclude the resident from enforcing rights at a later date. The issue is whether the trial court improperly applied the doctrine of equitable estoppel in the face of Article 10.1 of the CC&Rs. (Assignment of Error #5)

5. In order to prove equitable estoppel, there must be clear, cogent, and convincing evidence of three necessary elements: (1) an admission, statement, or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement, or act; and (3) injury to such party resulting from allowing the first party to contradict or repudiate such admission, statement, or act. *McDaniels v. Carlson*, 108 Wn.2d 299, 308, 738 P.2d 254 (1987). The defendants failed to present any evidence to support the last two elements of equitable estoppel. The issue is whether there is evidence establishing a high probability of detrimental reliance. (Assignment of Error #6)

6. When a resident establishes that an Association or its Board has failed to comply with statutory obligations and the governing documents, the resident may be awarded its costs, including reasonable attorney's fees. RCW 64.38.050. The issue is whether the trial court abused its discretion by failing to award the Waltzes their costs, including attorney's fees, under RCW 64.38.050. (Assignment of Error #7)

7. The relief sought by the Waltzes was primarily legal in nature. The trial court ruled that the Waltzes' relief was primarily equitable in nature, denying the Waltzes' their right to a jury trial. The issue is whether the trial court abused its discretion when denying the Waltzes their right to a jury trial. (Assignment of Error #8)

### III. STATEMENT OF THE CASE

#### A. The Parties and the Governing Documents.

In 2007, the Waltzes purchased a lot and residence located at 3906 E. Siskin Lane, Mead, Washington (“residence”). (Finding #2, CP at 816-17) The Waltzes continue to own the lot and the residence. *Id.* The residence is located within a planned unit development known as the Tanager Estates. (Finding #3, CP at 817)

The Association is a nonprofit corporation organized and existing under the laws of the State of Washington. (Finding #4, CP at 817) The Association is governed by an executive Board. (Finding #13, CP at 818) During the events of this case, which largely occurred in the summer of 2008, the executive Board consisted of the following individuals:

President:	Kirk Firestone
Vice President:	Gary Wilson (until July 31, 2008)
Vice President:	William Murray (beginning August 1, 2008)
Secretary:	Lou Wilmot (a/k/a Lolita Wilmot)
Board Member:	Ann Marie Perry <sup>2</sup>
Board Member:	Janet Engle (a/k/a Jeanette Engle)

(Finding #5-10, CP at 817)

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<sup>2</sup> By stipulation of the parties, defendant Perry was dismissed from the case as she is deceased and no claim was pursued against her estate. (Finding #8, CP at 817)

As a corporation, the Association is governed by the Articles of Incorporation and the Bylaws of the Association. (Finding #11, CP at 818; Ex. P-01; Ex. P-03) Furthermore, the Association and all lot owners in the development are subject to the Declaration of Covenants, Conditions and Restrictions (the "CC&Rs"), including certain architectural guidelines. (Finding #12, CP at 818; Ex. P-02)

Under the Bylaws, actions of the Executive Board are subject to certain requirements and procedures. The material provisions of the Bylaws for purposes of this action are:

All meetings of the Board will be open for observation by all owners of record and authorized agents. The Board shall keep minutes of all actions taken by the Board, which shall be available to all owners.

(Finding #16, CP at 818-19; Ex. P-03, Section IV)

The Directors shall have the right to take any action in the absence of a meeting which they could take at a meeting by obtaining the written approval of two thirds (2/3) of the Directors.

(Ex. P-03, Section VI)

No officer will act for the Association or any individual member except as is provided for in applicable state law, Covenants or Bylaws.

(Ex. P-03, Section VII)

In the event of death, resignation or removal of a Board member, his successor shall be selected by the remaining

Members of the Board and shall serve until the next annual meeting.

(Ex. P-03, Section VIII)

The Board of Directors duties are to: 1. Cause to be kept a complete record of all its acts and corporate affairs and to present a statement thereof to the Members at the annual meeting of the Members; . . . .

(Ex. P-03, Section X)

The Board of Directors shall appoint an Architectural Committee of no less than three (3) and no more than nine (9) Members. There will always be an odd number of positions. This committee shall perform the function(s) as described in Article Nine (9) of the Articles of Incorporation for the Tanager Estates Homeowner's Association.

(Ex. P-03, Section XVII)

Under the CC&R's, actions of the Association and lot owners are subject to certain requirements and procedures. The material provisions of the CC&Rs for purposes of this action are:

**9.1 Approval of Plans by Architectural Committee.** No building, fence, wall or other structure shall be commenced, erected or maintained upon the Project, nor shall, any exterior addition to or change or alteration therein be made until the plans and specifications showing the nature, kind, shape, height, materials, and location of the same shall have been submitted to and approved in writing as to quality of workmanship and materials, and harmony of external design and location in relation to the surrounding structures and topography by an architectural committee composed of three (3) or more representatives appointed by the Board of Directors of the Association. In the event said committee fails to approve

or disapprove such design and location within thirty (30) days after said plans and specifications have been submitted to it or if no suit to enjoin the erection of such structures has been commenced prior to the completion thereof, approval will not be required and this Article will be deemed to have been fully complied with.

(Finding #17, CP at 819-20; Ex. P-02, Art. 9.1)

In any case where the Architectural Committee shall disapprove any plans and specifications submitted hereunder, or shall approve the same only as modified or upon specified conditions, such disapproval or qualified approval shall be accompanied by a statement of the grounds upon which such action was based. In any such case, the Architectural Committee shall, if requested, make reasonable efforts to assist and advise the applicant in order that an acceptable proposal can be prepared and submitted for approval.

(Ex. P-02, Art. 9.2, in part)

**10.1 Enforcement.** The Association, or an Owner, shall have the right to enforce by any proceeding at law or in equity, all restrictions, conditions, covenants, reservations, liens and charges now or hereafter imposed by the provisions of this Declaration, against any person or persons violating or attempting to violate any covenant, either to restrain violation or to recover damages. Failure by the Association or by any Owner to enforce any covenant or restriction herein contained shall in no event be deemed a waiver of the right to do so thereafter.

(Ex. P-02, Art. 10.1)

Between June 2008 and July 31, 2008, the Architectural Committee consisted of Gary Wilson (Chair), Lou Wilmot (Co-Chair), Marie Firestone, Marcia Ethridge, Jolene Baldwin, William Murray,

Sheila Whitener, Karine Poutre, and Lanie Mason. However, Lanie Mason was not an active member of the Committee and did not participate in any meetings or voting. (Finding #22, CP at 822)

**B. The Facts of the Case.**

In June 2007, the Waltzes submitted three separate plans to the Architectural Committee: (a) to modify their existing residence to include a new third-car garage addition; (b) to construct a storage shed on their property; and (c) to construct a shop on their property. (Finding #20, CP at 822; Ex. P-06; Ex. P-23; Ex. P-24) All three plans were approved even though they did not specify heights for the buildings or contain any designation of the roof pitch for the buildings. (RP at p. 68, l. 15-25; p. 69-72; p. 73, l. 1-13)

In May or June 2008, the Waltzes decided to modify the new garage addition to include a bonus room above the third-car garage addition, as well as other architectural changes. (Finding #23, CP at 822) Prior to obtaining a building permit for the garage addition, Mr. Waltz contacted Gary Wilson (the Chair of the Architectural Committee) and discussed the change in plan for the garage addition. Mr. Wilson told Mr. Waltz that as long as the County approved the Waltzes' plan, the Waltzes

could proceed with the addition. (RP at p. 79, l. 1-10; p. 80, l. 18-25; p. 81, l. 1-11)<sup>3</sup>

On June 9, 2008, the Waltzes obtained a permit from Spokane County for the garage addition, including the bonus room. (RP at p. 79, l. 11) Shortly after obtaining the building permit, the Waltzes began demolition of the existing roof on the garage, poured the foundation, and constructed walls for the addition and the bonus room. (RP at p. 79, l. 11-17) Exterior sheathing was installed on the newly constructed walls, and the Waltzes obtained trusses that were specifically manufactured for the new addition. (RP at p. 82, l. 3-18; p. 94, l. 21-25; p. 95, l. 1-7)

On July 1, 2008, Mr. Wilson stopped by the Waltzes' residence and dropped off a copy of the 2007 approved garage plan. (Finding #26, CP at 823) On the copy of the 2007 plan, Mr. Wilson wrote:

over single story County guideline's is 10' from property line  
current structure is not approved by TEHA Arch Committee  
Please call Gary Wilson . . .

(Ex. P-26)

Mr. Waltz and Mr. Wilson later met at the Waltzes' residence to discuss the addition. Mr. Waltz explained that the County setback requirement was only five feet for the height of his addition. (RP at p.

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<sup>3</sup> The trial court found that "Gary Wilson advised [the Waltzes] that the Spokane County approval would likely override the CC&Rs." (Finding #23, CP at 823)

334, l. 12-17) Mr. Wilson asked Mr. Waltz to stop construction until Mr. Wilson could confirm the setback requirement. (RP at p. 87, l. 9-20)

On July 2, 2008, Mr. Waltz and Mr. Wilson each verified with Spokane County that the Waltzes' proposed construction complied with Spokane County setback requirements. (RP at p. 334, l. 18-24; Finding #27, CP at 823) Mr. Waltz and Mr. Wilson spoke again that day, and Mr. Wilson reiterated his statement that since the County approved the plan, the Waltzes could proceed with construction. (RP at p. 335, l. 5-25; p. 336-339; p. 340, l. 1-24) Mr. Wilson's statement was a mistake, but based on his statement, the Waltzes continued with construction. (Finding #27, CP at 824)

On July 6, 2008, Mr. Waltz provided Gary Wilson with a copy of the new plan for the garage addition. (Finding #31, CP at 824)

Between July 1, 2008 and July 13, 2008, neither the Architectural Committee nor the Association took any action to stop the construction of the garage addition, even though they knew that the construction was different than the plan approved in 2007. (RP at 342, l. 11-25; p. 343, l. 1-3)

On July 13, 2008, the President of the Association, Kirk Firestone, delivered a Stop Work Order to the Waltzes, instructing the Waltzes to cease work on the new addition. (Finding #28, CP at 824; Ex. P-09) The

Stop Work Order was prepared by Marie Firestone, a member of the Architectural Committee and Mr. Firestone's wife at the time. (RP at p. 514, l. 7-16) The Stop Work Order states that it was issued by the "Executive Board." However, there was no prior vote or written consent by a majority of the Board or the Committee to issue the Stop Work Order. (Finding #28, CP at 824; RP at p. 285, l. 16-25; p. 286, l. 1-10) Mr. Firestone acted on his own when issuing the Stop Work Order.

When Mr. Firestone delivered the Stop Work Order, he spoke with Mr. Waltz at the Waltzes' residence. (Finding #29, CP at 824) Mr. Waltz explained that he had been told by Gary Wilson that the Waltzes could construct the addition as long as it met County requirements. *Id.* Mr. Firestone told Mr. Waltz that Gary Wilson made a mistake. *Id.*

The Waltzes complied with the Stop Work Order. (Finding #30, CP at 824) At the time it was issued, there was no roof on the garage addition and there was no siding on the upper exterior walls. *Id.* The interior of the garage was exposed to the elements while the Stop Work Order was in place. *Id.*

On July 15, 2008, Mr. Wilson issued a written notice of "Project Denied" to the Waltzes for their July 6<sup>th</sup> plan. (Ex. P-10)

On July 17, 2008, the Waltzes submitted a second plan for the garage addition to Mr. Wilson for action by the Committee. (Finding #33,

CP at 824) On either July 24<sup>th</sup> or July 26<sup>th</sup>, Mr. Wilson gave the Waltzes a second written notice of “Project Denied” for their July 17<sup>th</sup> plan. (Finding #35, CP at 825)

Following disapproval of the July 17<sup>th</sup> plan, Mr. Wilson prepared a few options for plans that he thought might be approved by the Committee. (RP at p. 358, l. 3-25; Finding #35, CP at 825) Mr. Wilson presented these alternative plans to Mr. Waltz to have Mr. Waltz identify which alternative plan would be acceptable to the Waltzes. (RP at p. 359, l. 1-21) Jim Waltz identified his preferred plan by circling the plan with a pen. (Finding #35, CP at 825; Ex. P-20)

Following his meeting with Mr. Waltz, Gary Wilson prepared a plan for consideration by the Committee and transmitted the plan to the Committee on July 28, 2008. (Finding #36, CP at 825; Ex. P-12) Mr. Wilson requested that the Committee meet at his residence on July 28, 2008 to discuss this third plan. (RP at p. 361, l. 11-24) Mr. Wilson also requested that the Waltzes be present at the meeting to explain their desired plan. (RP at p. 116, l. 22-25; p. 117, l. 1-3)

During the meeting, the Waltzes explained the purpose of the bonus room above the garage. (RP at p. 522, l. 18-25; p. 523, l. 1-5) The Waltzes explained that they intended to use the room as a recreational room for their adolescent son. *Id.* They also explained that, in order to

access the bonus room from the existing house, they needed to install a door between the bonus room and an existing room on the second floor of the home. *Id.* In order for the access door to be a full size door, the walls of the bonus room needed to be a minimum height. *Id.*

Marie Firestone showed up at the Committee meeting and stated that she planned to disapprove the Waltzes' plan and that she recommended that the rest of the Committee do so as well. (RP at p. 117, l. 9-14)

During the meeting, the Committee decided to go to the Waltzes' residence to take measurements of the existing house and the planned bonus room. (RP at p. 362, l. 16-24) While at the Waltzes' residence, Gary Wilson, William Murray, and Jim Waltz went to the second floor of the garage addition to take measurements. (RP at p. 290, l. 13-18; p. 656, l. 17-25; p. 657, l. 1-3) As a result of this process, Mr. Wilson and Mr. Murray confirmed that the Waltzes would be able to achieve their desired goal of making the bonus room accessible from the existing house based on the proposed plan. (RP at 118, l. 17-20)

While at the Waltzes' residence, Marie Firestone, Marcia Ethridge, Lou Wilmot, and Marilyn Miller waited in the driveway. (RP at p. 290, l. 16-20) Marie Firestone expressed vocal opposition to the Waltzes' plan at this time. (RP at p. 290, l. 21-25; p. 291, l. 1-5; p. 362, l. 25; p. 363, l. 1-

9) Marie Firestone's vocal opposition was severe enough that she later wrote a letter of apology to the Waltzes. (Ex. P-39) Other members of the Committee corroborated the fact that Marie Firestone and Marcia Ethridge were very vocal opponents to the Waltzes' project throughout the process. (RP at p. 287, l. 24-25; p. 288, l. 1-4; p. 353, l. 12-16)

After the meeting of July 28<sup>th</sup>, Gary Wilson contacted Mr. Waltz and told him that Mr. Wilson believed there would be a sufficient number of votes to approve the latest plan. (RP at p. 119, l. 25; p. 120, l. 1-3)

On July 29, 2008, Mr. Wilson submitted the Waltzes' third plan to the Committee for approval or disapproval. (Finding #37, CP at 825; Ex. P-13) On July 30, 2008, Marcia Ethridge submitted a lengthy letter to the Committee about the process being followed by the Committee for the Waltzes' residence. (Ex. D-68) Ms. Ethridge testified that her frustrations and concerns about the process were focused on how Mr. Wilson was handling the process, not with the Waltzes. (RP at p. 643, l. 2-8) Ms. Ethridge asked that a more defined process be followed before a vote was taken on the July 29<sup>th</sup> plan. (Ex. D-68) That same day, Marie Firestone also submitted an e-mail to the Committee requesting that another meeting be held before a vote was taken on the Waltzes' July 29<sup>th</sup> plan. (Ex. D-68) No other members of the Committee asked for the vote to be delayed. (RP at 660, l. 22-25; p. 661, l. 20-22) There is no evidence that any other

members of the Committee asked for clarification or for additional information regarding the July 29<sup>th</sup> plan prior to voting.

On July 30, 2008, Gary Wilson responded to Ms. Ethridge and Ms. Firestone, questioning whether their requests to delay the vote were motivated by the fact that they were vocally opposed to the project and by the fact that it appeared the July 29<sup>th</sup> plan might pass by a majority vote. (Ex. P-33) Mr. Wilson notified the Committee that the vote would proceed. *Id.* He also notified the Committee that they could vote to deny the July 29<sup>th</sup> plan if they felt there was insufficient information. *Id.*<sup>4</sup>

On July 31, 2008, the President of the Association, Kirk Firestone, sent an e-mail to Gary Wilson stating:

All current votes are null and void as the AC has not been provided a complete set of plans to evaluate. An AC member has requested a meeting. As you are not willing to schedule one, I will. You will not send out a denial or approval of this plan. I will be contacting the AC and Mr. Waltz.

(Finding #41, CP at 827; Ex. P-33) When Mr. Firestone took the action to declare the votes “null and void,” he was not acting at the request of the Committee or the Board. Prior to his action, there was no meeting of the Board where a majority of the Board voted to declare the votes null and void. (RP at p. 372, l. 1-25; p. 373, l. 1-4; p. 438, l. 13-23) Prior to his

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<sup>4</sup> The Co-Chair of the Committee, Lou Wilmot, agreed that Mr. Wilson’s approach was the appropriate process under the CC&Rs. (RP at p. 292, l. 15-25; p. 293, l. 1-2)

action, there was no written consent by a two-thirds majority of the Board authorizing Mr. Firestone to declare the votes null and void. *Id.* Prior to his action, there was no vote or written consent by a majority of the Architectural Committee asking either Mr. Firestone or the Board to take over the Committee's duties under Article 9 of the CC&Rs. *Id.*; (RP at p. 438, l. 24-25; p. 439, l. 1-2)

In response to Mr. Firestone's unilateral action declaring all Committee votes null and void, in an e-mail dated July 31, 2008, Gary Wilson resigned his positions as Vice President of the Board and Chair of the Architectural Committee. (Finding #42, CP at 827; Ex. P-33) In his e-mail, Mr. Wilson stated, "The project at 3906 E. Siskin would have been approved if the president had not deemed our votes 'null and void.'" (Ex. P-33) Mr. Wilson maintained at trial that there would have been five approving and three disapproving the July 29<sup>th</sup> plan before Mr. Firestone declared the votes null and void. (Finding #43, CP at 827)

Mr. Firestone subsequently performed an investigation to determine the validity of Mr. Wilson's statement about the July 29<sup>th</sup> plan being approved. (Ex. P-53) As a result of his investigation, Mr. Firestone concluded that the July 29<sup>th</sup> plan would have been approved by a majority vote of five in favor of approval. (RP at p. 445, l. 22-25; p. 446, l. 1-16)

As a result of Mr. Firestone's interference, the Architectural Committee never took any action to approve or disapprove the Waltzes' July 29<sup>th</sup> plan. (RP at p. 376, l. 10-13; CP at 424 (Murray Dep., p. 121, l. 23-25; p. 122, l. 1-3)) The Architectural Committee also never voted in any meeting in July 2008 to turn the Waltz matter over to the Board. (RP at p. 296, l. 24-25; p. 297, l. 1-5; CP at 424 (Murray Dep., p. 102, l. 11-17))

After Mr. Wilson's resignation, Mr. Firestone contacted Jim Waltz to meet with him about the status of his submitted plan. Mr. Firestone and Mr. Waltz met at the Waltzes' residence on the evening of July 31, 2008. (Finding #44, CP at 827) Mr. Firestone told Mr. Waltz that Mr. Wilson had resigned, and Mr. Firestone told Mr. Waltz to submit a new plan. *Id.* Mr. Firestone instructed Mr. Waltz to submit a plan with a front view, a rear view, and side views, with measurements shown on each view. *Id.*

On August 1, 2008, Mr. Firestone asked William Murray to fill the position of Vice President in light of Mr. Wilson's resignation. (Finding #45, CP at 827) However, there was no meeting of the Board where a majority of the Board voted to select William Murray to fill the position. (Finding #45, CP at 827).

Based on the instructions from Kirk Firestone, Mr. Waltz prepared a new plan which included a front view, a rear view, and side views, with

measurements of the dimensions of the proposed garage addition. (Ex. P-14) Mr. Firestone told Mr. Waltz that the August 2<sup>nd</sup> plan would be presented to the Architectural Committee for approval or disapproval at a Committee meeting scheduled for August 3, 2008. (RP at p. 446, l. 22-25; p. 447, l. 1-11; Ex. P-41)

The Architectural Committee held a meeting on August 3, 2008. There were no minutes of the meeting and there was conflicting testimony about what actions, if any, the Committee took relative to the Waltz issue. (Finding #47, CP at 828) In the end, the Architectural Committee never took any action to approve or disapprove the Waltzes' August 2<sup>nd</sup> plan. (Finding #48, CP at 828) The Architectural Committee never voted to turn the matter over to the Board either. (RP at p. 297, l. 13-17)

Mr. Firestone subsequently told Mr. Waltz that the August 2<sup>nd</sup> plan had been rejected. (Finding #49, CP at 828) Mr. Firestone then instructed Mr. Waltz to submit a new plan. Mr. Firestone instructed Mr. Waltz to lower the side exterior walls of the bonus room to five feet and to change the roof pitch from a 6/12 pitch to a 4/12 pitch. (RP at p. 130, l. 22-25; p. 131, l. 1-23; p. 132, l. 10-12) The intent of lowering the walls and flattening the roof pitch was to make the peak height of the garage addition at least a foot and a half lower than the peak of the existing home. *Id.* Mr. Firestone told Mr. Waltz that the Waltzes would have to accept

the plan dictated by Mr. Firestone or he would force the Waltzes to tear down the garage addition. *Id.*

The Waltzes did not agree with lowering the walls and reducing the roof pitch of the garage. (RP at p. 132, l. 19-25; p. 133, l. 1-8) By doing so, the Waltzes could no longer install an access door between the existing home and the bonus room. (RP at p. 141, l. 9-25; p. 142, l. 1-25; p. 143, l. 1-20) Furthermore, the Waltzes could no longer tie the HVAC system of the existing home into the bonus room. *Id.* Finally, with the side walls lowered to five feet, the ceiling height of the bonus room was too low at the side walls for an average person to stand fully upright. (RP at p. 253, l. 6-11)

Despite strong disagreement, the Waltzes submitted a new plan on August 4, 2008 which was consistent with the directions of Mr. Firestone. (Finding #50, CP at 828; Ex. P-15) The reasons the Waltzes submitted the August 4<sup>th</sup> plan were: (a) the threat from Mr. Firestone that the addition would be torn down if the Waltzes did not concede; (b) the addition needed to be closed in before the end of the construction season and the Stop Work Order had not been lifted; and (c) Mr. Firestone told the Waltzes that both their July 29<sup>th</sup> plan and their August 2<sup>nd</sup> plan had been rejected by the Architectural Committee (facts which were not true). (RP

at p. 132, l. 19-25; p. 133, l. 1-8; p. 678, l. 14-25; p. 679, l. 16-25; p. 680, l. 1-18)

On August 5, 2008, the Board held an emergency meeting to address the Waltz situation. (Finding #51, CP at 828) There was no advance notice of the meeting to any members of the Association. (RP at p. 264, l. 1-17; RP at p. 265, l. 4-12) The Board meeting of August 5, 2008 was attended by all of the individually named defendants—Kirk Firestone, Jeanette Engle, Ann Marie Perry, William Murray, and Lou Wilmot. (Ex. P-34; Ex. P-35)

There were two sets of meeting minutes prepared following the August 5<sup>th</sup> meeting, with slightly different language. (Finding #51, CP at 828) One set of minutes stated, “The Architectural Committee voted at their last meeting in July to turn the final decision over to the Board regarding the addition to the Waltz home and if all requirements had been met.” (Ex. P-34) The other set of minutes stated, “The Architectural Committee had multiple meetings and made recommendations and handed the final decision over to the Board regarding whether the plans would be accepted for commencement on Jim Waltz’ construction plans.” (Ex. P-35)

According to the testimony of the Secretary (Lou Wilmot), Kirk Firestone instructed her to change the meeting minutes to reflect that the

Architectural Committee “voted at their last meeting in July to turn the final decision over to the Board.” (RP at p. 299, l. 12-21) Ms. Wilmot made this change in the minutes even though she knew that no such action had been taken by the Architectural Committee in July. (RP at p. 294, l. 11-18; p. 296, l. 24-25; p. 297, l. 1-16) William Murray, who was also on the Architectural Committee, approved the August 5<sup>th</sup> meeting minutes even though he knew that there was no such action by the Architectural Committee in July. (CP at 424 (Murray Dep., p. 102, l. 11-17)) Both William Murray and Lou Wilmot knew that Mr. Firestone had unilaterally declared votes on the July 29<sup>th</sup> plan null and void by virtue of the e-mail from Mr. Firestone on July 31, 2008. (Ex. P-33)

The Board voted on the August 4<sup>th</sup> plans dictated by Mr. Firestone, even though no action had been taken by the Committee or the Board on the Waltzes’ previously submitted plans of July 29<sup>th</sup> and August 2<sup>nd</sup>. The Board voted on the August 4<sup>th</sup> plans dictated by Mr. Firestone, even though there was no evidence that the Architectural Committee voted to divest itself of its authority under the CC&Rs or voted to turn the matter over to the Board. The individual Board members did not take any action to correct any of Mr. Firestone’s prior actions in dealing with the Waltzes’ residence.

Furthermore, when voting to approve the August 4<sup>th</sup> plan, the Board failed to explain how a difference of 1' 7" on the peak elevation changed the garage addition from being "unharmonious" to "harmonious." (CP at 424 (Murray Dep., p. 69, l. 25; p. 70, l. 1-25; p. 72, l. 1-9); Ex. P-34; Ex. P-35)<sup>5</sup> The Board did not present any evidence that the 1' 7" difference would have any detrimental impact on the neighborhood or on property values.

On August 11, 2008, Mr. Firestone came to Mr. Waltz's place of employment and presented plans to Mr. Waltz to sign. (RP at p. 468, l. 16-20; Ex. P-16) Mr. Waltz told Mr. Firestone that he objected to the plans and that he was signing them under protest. (Finding #52; CP at 828)

Mr. Firestone did not tell Mr. Waltz that he would be releasing any rights if he signed off on the plans. (RP at 469, l. 17-25; p. 470, l. 1-12; p. 471, l. 15-18) Mr. Firestone did not tell Mr. Waltz that he would be waiving any rights if he signed off on the plans. *Id.* Mr. Firestone did not tell Mr. Waltz that the Board expected his signature to represent a final compromise of all claims or rights the Waltzes may have. *Id.* In fact, Mr. Firestone did not intend that the Waltzes would be waiving or compromising their rights by signing off on the plans. *Id.*

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<sup>5</sup> Gary Wilson admitted that residences in the development are not harmonious with each other. (RP at p. 396, l. 19-25; p. 397, l. 1-19)

When Mr. Waltz signed off on the plans, he did not intend to waive, compromise, or release any rights he had to enforce the CC&R's or the Bylaws. (RP at p. 137, l. 8-32)

In August and September 2008, the Waltzes proceeded to complete the exterior of the garage addition in a manner consistent with the plans dictated by Mr. Firestone. (Finding #52, CP at 828) As a result, the Waltzes currently cannot access the bonus room through the existing house. (RP at p. 142, l. 6-19) Also, the space cannot be heated or conditioned using the existing HVAC system. (RP at p. 143, l. 10-20) The ceiling height at the side exterior walls is too low for an average person to stand fully upright. (RP at p. 255, l. 15-17)

In order for the Waltzes to modify the existing garage addition to conform to the August 2<sup>nd</sup> plans—which were never acted upon by the Board or the Committee—the Waltzes would need to: (a) remove the existing roof and soffits; (b) take down the existing trusses; (c) strip down a few feet of the exterior siding and sheathing; (d) extend the sidewalls by 1' 6"; (e) install new siding and sheathing; (f) reset the trusses; and (h) install new roofing and soffits. (RP at p. 160, l. 3-25; p. 161, l. 1-25; p. 162, l. 1-16) The estimated cost for this work is \$16,215.00.<sup>6</sup> (Ex. P-80)

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<sup>6</sup> The scope of work to raise the walls and the associated cost estimate were not contested at trial.

In addition, when the Waltzes were required to modify the roof pitch from a 6/12 to a 4/12, they were unable to use the trusses which had been purchased and delivered to the site. (RP at p. 144, l. 9-18) Also, because of the Stop Work Order, the garage addition was left exposed without a roof for approximately two and a half months. During this time, damage occurred to the garage which required repairs. (RP at p. 132, l. 23-25; p. 133, l. 1) According to Mr. Waltz, the reasonable estimate of the cost of the trusses and the cost to repair damage to the garage was \$4,000.<sup>7</sup> (RP at 148, l. 7-25)

**C. The Procedural History.**

On May 24, 2011, the Waltzes filed their Complaint for Declaratory Judgment and Damages. The Complaint sought a declaration from the Court that: (a) the Waltzes were entitled to construct their addition according to the plans that would have been approved by a majority of the Architectural Committee or that were approved by the Committee's failure to act upon the plans; (b) the Committee's failure to act on the Waltzes' plans constituted approval; and (c) the actions of the Board and the Association were invalid. (CP at 17-19) The Complaint also sought damages against the Association and the individual Board

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<sup>7</sup> The fact of damage and the cost of repairs were not contested at trial.

members for breach of fiduciary duty. (CP at 18-19) Finally, the Waltzes requested an award of their costs and attorney's fees. (CP at 19)

On September 27, 2012, the Waltzes filed a Jury Demand. (CP at 23-25) The defendants then filed a motion to strike the jury demand, arguing that the Waltzes were seeking relief that was primarily injunctive (equitable) in nature and not subject to trial by jury. (CP at 30-37) The Waltzes opposed the motion, arguing that their relief was largely legal in nature and that factual issues were subject to trial by jury in any event. (CP at 38-45) Ultimately, the trial court struck the jury demand, and a bench trial was held. (CP at 51-52)

Following trial, the trial court invited the parties to submit proposed findings of fact and conclusions of law, as well as written closing arguments. (CP at 715-815) After considering the parties' submissions, the trial court issued its own Findings of Fact, Conclusions of Law, and Judgment on March 15, 2013. (CP at 816-830) The trial court denied all relief sought by the Waltzes. (CP at 830) During the hearing when the Judgment was presented to the parties, the trial court explained its decision:

. . . the Court has considered the evidence and is ruling that there is insufficient evidence to enter a declaratory determination as a matter of law based on the underlying facts and concluding that there is not a violation of the governing documents, the statutes, CC&Rs, bylaws, articles

of incorporation and, therefore, no attorney fees or money judgment.

(RP at p. 710-11) The trial court further explained that “irregularities” in the process by the Association and its Board did not violate the governing documents. (RP at p. 711) Finally, the trial court also suggested that the Association is not to be expected to accurately administer the governing documents because the Association lacks a “legal understanding” of the documents. (RP at p. 712)

#### **IV. SUMMARY OF ARGUMENT**

The Chair of the Association’s Architectural Committee made a significant mistake that precipitated this litigation. He told the Waltzes that they could proceed with constructing their garage addition in the manner they proposed, as long as the addition met County code requirements. After he confirmed that the proposed addition would meet those requirements, he told the Waltzes they could continue with construction.

When Mr. Wilson’s mistake was discovered, the Waltzes stopped work as directed by the Association. The Waltzes then did everything that the Association asked of them in order to reach a resolution of the problems generated by Mr. Wilson’s mistake. Just when it seemed that the issue would be resolved and a majority of the Committee would

approve the Waltzes' addition, two vocal members of the minority enlisted the help of the Association's President to derail the voting process.

From the point when Kirk Firestone unilaterally commandeered the architectural review process, he acted outside the confines of the governing documents of the Association. He then manipulated the process going forward to drive it to the conclusion that he and his wife wanted, rather than what would have been approved. This manipulation was done all for the sake of saving 1' 7" on the height of the structure.

Despite Mr. Firestone's improper conduct, the Waltzes continued to cooperate to mitigate the damages caused by Mr. Wilson's mistake. Unfortunately, the consequence to the Waltzes was to lose the bonus room as livable, usable space.

The Waltzes came to the trial court to enforce their rights under the governing documents of the Association and under statute, only to be turned away because they did not stand their ground earlier. The trial court penalized the Waltzes for doing everything that was asked of them and did not hold the Association and its Board responsible for their neglect of duties owed to the Waltzes.

V. ARGUMENT

A. Standard of review.

The standard of review for a trial court's findings of fact and conclusions of law is generally a two-step process:

First, we must determine if the trial court's findings of fact were supported by substantial evidence in the record. If so, we must next decide whether those findings of fact support the trial court's conclusions of law.

*Landmark Development, Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). Any conclusions of law are reviewed *de novo*, whether designated as a conclusion of law or a finding of fact. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003); *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986). Where there are mixed questions of fact and law, the review is under an error of law standard, giving deference only to the findings of fact. *State ex rel. Evergreen Freedom Foundation v. Washington Education Association*, 111 Wn. App. 586, 596, 49 P.3d 894 (2002). Furthermore, "if a determination is made by a process of legal reasoning from, or of interpretation of the legal significance of, the evidentiary facts, it is a conclusion of law." *Moulden & Sons, Inc. v. Osaka Landscaping & Nursery, Inc.*, 21 Wn. App. 194, 197 n.5, 584 P.2d 968 (1978).

In matters of discretion, the standard of review is the abuse of discretion, which is “whether discretion is exercised on untenable grounds or for untenable reasons, considering the purposes of the trial court’s discretion.” *Coggle v. Snow*, 56 Wn. App. 499, 507, 784 P.2d 554 (1990).

Finally, when the burden of proof rises to clear, cogent and convincing evidence (such as for equitable estoppel), the standard of review shifts from “substantial evidence” to whether when the ultimate fact at issue is “highly probable.” *In re Welfare of L.N.B.-L.*, 157 Wn. App. 215, 243, 237 P.2d 944 (2010).

**B. The trial court erred by failing to enforce the governing documents of the Association.**

There are two fundamental legal principles governing the relationship between homeowner’s associations and their members:

(1) An association is bound to follow the express terms of its CC&Rs, and the failure to do so precludes enforcement of the CC&Rs (*Mariners Cove Beach Club, Inc. v. Kairez*, 93 Wn. App. 886, 890-91, 970 P.2d 825 (1999)); and

(2) An association is bound to comply with its governing documents (such as bylaws and CC&Rs) and state law, and the failure to do so renders any action by the association or its committees invalid

(*Hartstene Pointe Maintenance Ass'n v. Diehl*, 95 Wn. App. 339, 345, 979 P.2d 854 (1999)).

Instead of following these governing principles, the trial court appeared to give deference to the actions of Mr. Firestone and the Board because they may not have fully understood the legal obligations imposed upon them by the Association's Bylaws and CC&Rs. This deference resulted in the trial court failing to enforce the terms of the Bylaws and CC&Rs.

1. The Committee's failure to act on the Waltzes' plans of July 29<sup>th</sup> and August 2<sup>nd</sup> allows the Waltzes to build the garage according to those plans.

In *Mariners Cove Beach Club, Inc. v. Kairez, supra*, property owners of waterfront property subject to restrictive covenants built a dock without written approval by the architectural control committee of Mariners Cove Beach Club, Inc. ("Club"). *Mariners Cove*, 93 Wn. App. at 888. Covenant 8 required the committee to approve or disapprove plans within ten days, but in any event, the committee had to file suit to enjoin the construction before its completion. *Id.* at 891. The Club did not bring suit to enjoin the construction until three months after the owners completed the dock. *Id.* The Court of Appeal held, "Because the time limitation on the Club's right to sue is unambiguous, there is no need to look further to discern the intent of the drafters. . . . Covenant 8 precludes

the Club from bringing action based on the architectural control committee's disapproval of the dock." *Id.*

In this case, Article 9.1 of the CC&Rs expressly states that the Architectural Committee must take action to approve or disapprove a plan submitted by a resident within thirty days. If the Committee fails to take action, "approval will not be required and this Article will be deemed to have been fully complied with." (Ex. P-02)

The undisputed evidence at trial was that the Committee did not take any action to approve or disapprove the Waltzes' plans of July 29<sup>th</sup> or the plans of August 2<sup>nd</sup>. Therefore, under the express terms of the CC&Rs, the July 29<sup>th</sup> plans and the August 2<sup>nd</sup> plans did not require approval and the Waltzes should have been deemed to have complied with Article 9.1 of the CC&Rs. Consequently, the Waltzes should have been allowed to construct their garage addition according to those plans. The trial court erred when it refused to declare that the Waltzes were deemed to have complied with Article 9.1 of the CC&Rs.<sup>8</sup>

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<sup>8</sup> The trial court dismissed the July 29<sup>th</sup> and August 2<sup>nd</sup> plans because the Waltzes unwillingly submitted another set of plans on August 4<sup>th</sup>. However, the August 4<sup>th</sup> plans were submitted under duress and under protest, and were only submitted because the Waltzes had been told, incorrectly, that the Committee had voted to disapprove the earlier plans. Therefore, the Waltzes could not have knowingly and intentionally waived their rights as to the July 29<sup>th</sup> and August 2<sup>nd</sup> plans. *Fulle v. Boulevard Excavating, Inc.*, 20 Wn. App. 741, 744, 582 P.2d 566 (1978) ("Waiver requires an element of knowledge and intent."). Furthermore, because Mr. Firestone's invalid actions preceded the submission of the August 4<sup>th</sup> plans, any action relative to those plans was also invalid. *Hartstene*, 95 Wn. App. at 345.

2. The actions of Kirk Firestone and the Board in violation of the Bylaws, the CC&Rs, and applicable law rendered all Association actions relating to the Waltz garage addition invalid.

In *Hartstene Pointe Maintenance Ass'n v. Diehl, supra*, a homeowner's association sued a homeowner who cut down trees, alleging that the homeowner acted without approval of the association's architectural committee. *Hartstene*, 95 Wn. App. at 341. In that case, the enforcement of the CC&Rs was given to an architectural control committee appointed by the association's board of directors. *Id.* The homeowner submitted an application to the committee to remove trees from his property. *Id.* The committee gave conditional approval to cut trees, limiting the homeowner's ability to remove a particular tree of a certain size. *Id.* The homeowner removed the tree anyway, and the association subsequently issued fines against the homeowner and sued to enforce the fines and other penalties. *Id.* at 341-42.

On appeal, the homeowner argued that the committee's actions were invalid because the committee was not properly constituted under the governing documents of the association. *Id.* at 342. The express language of the CC&Rs limited the architectural committee to three members, but the association decided to appoint five members to the committee. *Id.* at 343. The Court of Appeals held that allowing the association to deviate

from the CC&Rs by appointing five members would render the CC&Rs meaningless. *Id.* The Court of Appeals also explained the consequence of the association's failure to comply with its governing documents:

. . . Diehl does not challenge the corporate authority to regulate lot development in Hartstene, but only the manner of executing such authority, i.e., by an irregularly constituted committee. Thus, the doctrine of ultra vires does not apply to Diehl's claim. *And because the ACC was improperly composed under both the Washington statute and the HPMA's charter, the ACC's conditional denial of Diehl's application was invalid.*

*Id.* at 345 (emphasis added).

In this case, the Association and the Board were constrained to act in accordance with the Bylaws and the CC&Rs. In addition to those governing documents, the Association and the Board have certain statutory obligations to the members of the Association. Directors must exercise the degree of care and loyalty required of an officer or director of any non-profit corporation. RCW 64.38.025(1). This includes a fiduciary duty to act in compliance with the law and the governing documents of the association and to deal fairly with the association members. *Restatement (Third) of Property (Servitudes)* § 6.14 (2000); *Leppaluoto v. Eggleston*, 57 Wn.2d 393, 402, 357 P.2d 725 (1960). Furthermore, all board meetings must be open for observation and minutes must be kept of all actions taken. RCW 64.38.035(4).

In this case, the evidence demonstrated numerous instances where Mr. Firestone and/or the Board failed to comply with the requirements of the governing documents of the Association and with applicable law. The evidence established the following violations:

1. The Board failed to hold an open meeting on August 5, 2008. There was no evidence of any notice of the meeting to Association members. Furthermore, while minutes were produced, the minutes contain false information about actions of the Architectural Committee that did not occur. Therefore, the actions of the Board at the August 5, 2008 meeting, and the reporting of the actions at the meeting, violated the Bylaws (Section IV) and RCW 64.38.035(4) and were invalid.

2. Mr. Firestone took the following actions without obtaining approval from the Board at a meeting or without obtaining written consent of two-thirds of the majority of the Board: (a) issuance of the Stop Work Order; (b) taking over the approval/disapproval process from the Architectural Committee in July 2008; and (c) rejecting the August 2, 2008 plans. Absent evidence of Board approval of such actions, these actions violated the Bylaws (Sections VI and VII) and are invalid.

3. Mr. Firestone appointed William Murray to the position of Vice President without any action by the other members of the Board. Mr.

Firestone's unilateral selection of William Murray to serve as Vice President violated the Bylaws (Section VIII) and is invalid.

4. The Board did not maintain a record of the various acts attributed to the Board in this lawsuit.<sup>9</sup> As a result, any actions not recorded violated the Bylaws (Section X) and are invalid.

5. Mr. Firestone prevented the Committee from performing the functions of Article 9 by declaring votes null and void for the July 29<sup>th</sup> plan and by refusing to submit the August 2<sup>nd</sup> plan to the Committee. The Board acquiesced in this wrongful conduct by acting on the August 4<sup>th</sup> plans dictated by Mr. Firestone, to the exclusion of the July 29<sup>th</sup> and August 2<sup>nd</sup> plans. These actions violated the Bylaws (Section XVII) and are invalid.

In excusing these "irregularities" committed by Mr. Firestone and the Board, the trial court imposed a lesser duty on the defendants, relying on RCW 4.24.264 and RCW 24.06.035(2).<sup>10</sup> However, RCW 4.24.264(1) does not apply because the Waltzes are not third-parties seeking to impose tort liability against the directors for discretionary acts. The Waltzes are members of a corporation who are seeking to enforce: (a) the directors'

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<sup>9</sup> The only written records of any Board action were the minutes of the August 5, 2008 meeting. (Ex. P-34; Ex. P-35)

<sup>10</sup> The trial court described these lesser standards of conduct as: (a) "knowing bad faith;" (b) "intentional misconduct;" (c) "knowing violation of the law;" (d) "receipt of an improper benefit;" and (e) "grossly negligent decision making." (Conclusion #5, CP at 849)

duties to comply with the corporation's governing documents; and (b) the directors' fiduciary duties to the members of the corporation. Under this same statutory section, the directors are not absolved from liability for these express duties to the corporation and its members:

(2) Nothing in this section shall limit or modify in any manner the duties or liabilities of a director or officer of a corporation to the corporation or to the corporation's members.

RCW 4.24.264(2).

Similarly, RCW 24.06.035(2) does not apply to this case because it relates to specialized types of non-profit corporations known as either a "mutual corporation" or a "miscellaneous corporation" organized under RCW Chapter 24.06. *See* RCW 24.06.010(1) (limiting application to corporations organized under RCW Chapter 24.06); RCW 24.06.005(1) (defining "corporation" as mutual corporation or miscellaneous corporation). In this case, the Association is organized under a separate chapter, RCW Chapter 24.03. (Ex. P-01, p. 1, opening paragraph)

More importantly, there is a more specific statute which identifies the duties of directors for homeowners' associations. RCW 64.38.025 specifically relates to officers and directors of homeowners' associations and requires that officers and directors "shall exercise the degree of care and loyalty required of an officer or director of a corporation organized

under chapter 24.03.” RCW 64.38.025(1). The degree of care for a director is an “ordinarily prudent person” standard, not a standard of gross negligence or willful misconduct. RCW 24.03.127. In addition, each director of a corporation has duties to comply with the governing documents and to act within the limitations of the governing documents. *Leppaluoto*, 57 Wn.2d at 402 (stating that a corporate officer is liable for any act “which he knows, or ought to know, is unauthorized”). Any actions by directors which fail to comply with the governing documents are invalid. *Hartstene*, 95 Wn. App. at 345. Furthermore, individual directors who violate their duties are liable to homeowners for their unreasonable conduct. *Riss v. Angel*, 131 Wn.2d 612, 629-30, 934 P.2d 669 (1997).

In the end, the trial court held Mr. Firestone and the rest of the Board to low standards of gross negligence and knowing bad faith. This was error. Mr. Firestone and the Board were obligated to comply with the governing documents and applicable laws and to act reasonably and in good faith, and their failure to do so rendered all their actions beginning July 31, 2008 invalid. The Waltzes were entitled to judgment declaring as much.

C. The trial court's finding that the Board acted reasonably and in good faith is not supported by substantial evidence.

In respect to the Board's action in dictating the August 4<sup>th</sup> plans to the exclusion of the preceding plans, the trial court again imposed a lower standard than the law requires. The trial court held that the Waltzes had to show gross negligence or knowing bad faith. However, when exercising architectural control, an association is bound to act in a reasonable and good faith manner. *Riss*, 131 Wn.2d at 629-30.

In *Riss v. Angel, supra*, a lot owner in a development sued members of the unincorporated association who rejected the owner's plans for construction of a building on the owner's lot. *Riss*, 131 Wn.2d at 615. The CC&Rs gave the board of directors of the association the authority to deny construction plans, considering the "harmony with other dwellings." *Id.* at 616. When the board met to consider the plans, the president of the association and his wife presented pictures of other homes in the development to demonstrate the proposed construction's apparent lack of harmony. *Id.* at 617. Similarly, another board member submitted a letter to all owners expressing concerns about the building plan. *Id.* at 618. In both instances, the information "lacked precision, failed to take into account either the height restrictions of the covenants or the City of Clyde Hill's height restrictions . . . , and were inaccurate and misleading as to the

effect of Plaintiffs' proposed residence." *Id.* at 617-18. The association eventually hired an architect, who imposed six guidelines that were not expressly contained in the CC&Rs. *Id.* at 618. The matter was eventually submitted to all homeowners for decision, and the president submitted a written letter to all homeowners urging rejection of the plan. *Id.* at 619. The turnout resulted in a vote against the lot owner. *Id.*

The trial court ruled that the CC&Rs were binding on the lot owner "but found that the association acted unreasonably in rejecting Plaintiffs' plans." *Id.* Furthermore the trial court ruled that the CC&Rs were reasonable as written "but do not permit the homeowners to impose restrictions more burdensome than those expressed in the covenants." *Id.* The trial court entered judgment declaring that the lot owners could build their proposed home and entered judgment against the other homeowners, jointly and severally, for delay damages and for costs and attorney's fees. *Id.* at 620.

In affirming the trial court's decision, the Washington Supreme Court noted that CC&Rs containing "harmony" provisions are enforceable. "However, such a standard will not be enforced where it has been applied so inconsistently as to result in a wide variety of buildings." *Id.* at 625. Furthermore, the Supreme Court held that consent to construction provisions must be "exercised reasonably and in good faith."

*Id.* At the same time, “a consent to construction covenant cannot operate to place restrictions on a lot which are more burdensome than those imposed by the specific covenants.” *Id.*

The Supreme Court noted that a decision rejecting a plan for lack of harmony cannot be based on “merely conclusory statements of the chairman of the architectural control committee that the proposed residence was not harmonious with surrounding structures.” *Id.* at 627. The Supreme Court noted other factors which make a rejection unreasonable, such as: (a) evidence that a development contained both traditional and nontraditional homes; (b) lack of evidence that the proposed construction would have a detrimental effect on the neighborhood; and (c) lack of evidence that the proposed construction would negatively affect property values. *Id.* at 627-28. In the end, the Supreme Court affirmed the decision that the association acted unreasonably and arbitrarily in rejecting the proposed plan. *Id.* at 629-30.

In this case, the main argument advanced by the Association and the Board at trial was that the Waltzes’ plans were unacceptable because the peak height of the garage addition was not lower than the peak height of the existing home. However, there is no specific height restriction in the CC&Rs. As such, the rejection of the Waltzes’ plan on this basis is unreasonable.

To get around this problem, the defendants' second argument was that the Waltzes' plans were unacceptable because the structure was not harmonious with the rest of the neighborhood. As was the case in *Riss*, this argument is purely conclusory. In fact, evidence of the appearance of other homes in the development clearly demonstrated a complete lack of harmony between various homes. (Ex. P-79) Furthermore, there was no evidence presented that the Waltzes' proposed construction would have a detrimental effect on the neighborhood. There was no evidence presented that the proposed construction would drive down property values in the development.

The fact most damaging to the defendants' case is that the August 4<sup>th</sup> plans mandated by Kirk Firestone did not significantly change the outward appearance of the garage addition. The August 4<sup>th</sup> plan lowered the peak of the addition by a mere 1' 7". While this requirement did not change the outward appearance of the structure, it dramatically affected the ability of the Waltzes to use the bonus room as living space. It took away the only point of access between the bonus room and the existing house and it deprived the Waltzes of the ability to condition the bonus room using the existing HVAC system.

In the end, the Board acted unreasonably and arbitrarily by forcing the Waltzes to drop the peak elevation of the garage addition by 1' 7".

The Board failed to present any evidence about why the difference of 1' 7" changed the addition from being "unharmonious" to "harmonious" with the rest of the neighborhood. The Board failed to present any evidence establishing that the difference of 1' 7" would have a detrimental impact on the neighborhood. The Board failed to present any evidence that the difference of 1' 7" would drive down property values in the neighborhood. Consequently, the trial court's finding that the Board acted reasonably and in good faith is not supported by substantial evidence and should be reversed.

**D. The trial court erred when applying equitable estoppel in the face of Article 10.1 of the CC&Rs.**

The plain language of Article 10.1 preserves the right of residents to enforce violations of the CC&Rs, even if the right is not asserted immediately. When the trial court applied the defense of equitable estoppel, it rendered Article 10.1 meaningless. Because courts are to enforce the terms of CC&Rs as written, the trial court erred by invoking the doctrine of equitable estoppel. *See, e.g., Hollis v. Garwall, Inc.*, 86 Wn. App. 10, 13, 945 P.2d 717 (1997) ("Property owners are entitled to enforcement of restrictive covenants.")

E. **The trial court's decision to apply equitable estoppel is not supported by evidence establishing a high probability of detrimental reliance.**

The burden to establish equitable estoppel is clear, cogent, and convincing evidence. *Colonial Imports, Inc. v. Carlton Northwest, Inc.*, 121 Wn.2d 726, 735, 853 P.2d 913 (1993). The Association and the Board had to present this high level of proof as to three necessary elements: (1) an admission, statement, or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement, or act; and (3) injury to such party resulting from allowing the first party to contradict or repudiate such admission, statement, or act. *McDaniels v. Carlson*, 108 Wn.2d at 308.

At the time of trial, there was no evidence presented to support the second element (reasonable reliance) or the third element (injury). In fact, the evidence before the trial court was that Mr. Waltz conceded to Mr. Firestone's August 4<sup>th</sup> plan only after: (a) Mr. Firestone misrepresented that the Committee had disapproved the August 2<sup>nd</sup> plan; and (b) Mr. Firestone threatened to tear down the garage addition. Furthermore, when Mr. Waltz signed off on the plan, he notified Mr. Firestone that he was doing so under protest. Finally, there is no evidence that Mr. Firestone or the Board expected or intended that the Waltzes were waiving, releasing, or compromising their rights in any way when signing off on the plans

dictated by Mr. Firestone. Absent such evidence, trial court's application of equitable estoppel is not supported by evidence of a high probability establishing the necessary elements and should be reversed.

**F. The trial court abused its discretion when declining to award the Waltzes their costs, including attorney's fees.**

A prevailing party is entitled to certain costs as part of any judgment. RCW 4.84.010. This is true even when the claim includes declaratory relief. RCW 7.24.100 ("In any proceeding under this chapter, the court may make such award of costs as may seem equitable and just."). In addition to costs, a court also has the discretion to award attorneys' fees to the prevailing party in a dispute between a homeowner and an association:

*Any violation of the provisions of this chapter entitles an aggrieved party to any remedy provided by law or in equity. The court, in an appropriate case, may award reasonable attorneys' fees to the prevailing party.*

RCW 64.38.050 (emphasis added).

In this case, the Waltzes established violations of RCW 64.38.025(1) (duty of care) and RCW 64.38.035(4) (open Board meetings and keeping of minutes of all actions taken). As a result, the trial court had the discretion to award the Waltzes their costs and fees incurred to enforce their rights. The trial court did not properly exercise that

discretion because it erred when concluding that the Waltzes did not establish their claims for declaratory judgment and damages.

**G. The trial court abused its discretion when striking the Waltzes' jury demand.**

The trial court denied the Waltzes their right to a jury trial on the basis that the claims asserted by the Waltzes were primarily injunctive (i.e., equitable) in nature. The trial court abused its discretion in reaching this conclusion.

The Waltzes' Complaint asked for damages as well as a declaratory judgment. (CP at 19) Where an action cannot be categorized as purely legal or purely equitable in nature, the trial court must determine whether it is primarily legal or equitable in nature. *Auburn Mech., Inc. v. Lydig Const., Inc.*, 89 Wn. App. 893, 898, 951 P.2d 311 (1998). Any doubt should be resolved in favor of a jury trial, in deference to the constitutional nature of the right. *Id.* Moreover, great weight should be given to the constitutional right of trial by jury and if the nature of the action is doubtful, a jury trial should be allowed. *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 368, 617 P.2d 704 (1980).

The trial court improperly characterized the Waltzes' claim as primarily injunctive (equitable) in nature. The Waltzes sought a declaration that: (a) the Waltzes were entitled to construct the new

addition consistent with the revised plan approved by a majority of the Architectural Committee or as approved by lack of action by the Architectural Committee; (b) the Architectural Committee's failure to act on the revised plans as submitted constituted approval of those revised plans under the CC&Rs; and (c) the actions of the Board to impose new architectural guidelines and to override the authority of the Architectural Committee were invalid. (CP at 19) The prayer for relief did not ask the trial court to command or prevent any action. *See* Black's Law Dictionary (9th ed. 2009) (defining "injunction" as "[a] court order commanding or preventing an action"). Furthermore, the Waltzes sought monetary damages in addition to the declaratory judgment. As a result, "The jury is given the constitutional role to determine questions of fact, and the amount of damages is a question of fact." *Bunch v. King Cnty. Dept. of Youth Servs.*, 155 Wn.2d 165, 179, 116 P.3d 381 (2005).

Because the Waltzes' claims are not primarily equitable, they were entitled to a jury with regard to the issues in the case. It was an abuse of discretion to strike the Waltzes' jury demand.

**H. Motion for costs, including attorney's fees.**

Pursuant to RAP 18.1, the Waltzes request that the Court of Appeals award the Waltzes their costs on appeal, including attorney's fees.

The bases for award of costs, including attorney's fees, are the statutory grounds set forth above in Section V, Subsection F.

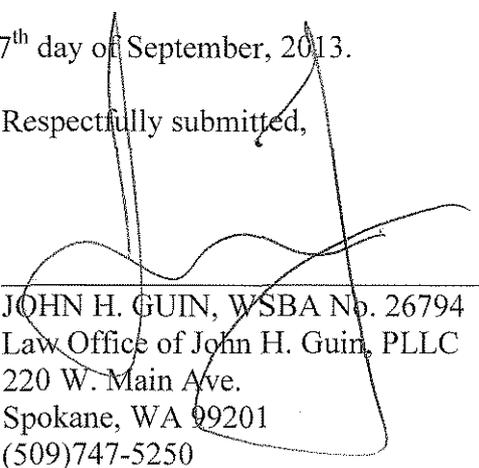
**VI. CONCLUSION**

Based on the foregoing, the Waltzes request that the trial court's decision be reversed and that judgment be entered in favor of the Waltzes on their claims for declaratory judgment and breach of fiduciary duty.<sup>11</sup>

In the alternative, the Waltzes request that the matter be remanded to the trial court for a jury trial, with instructions on the law consistent with the errors of law assigned above.

DATED this 27<sup>th</sup> day of September, 2013.

Respectfully submitted,



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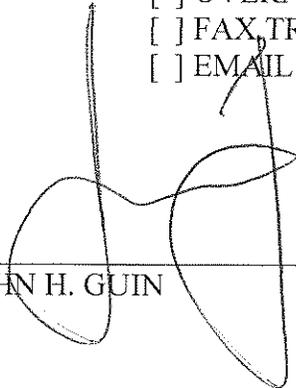
<sup>11</sup> The specific relief sought by the Waltzes was set forth in its written Closing Argument. (CP at 728-29)

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 27th day of September, 2013, I caused to be served a true and correct copy of the forgoing document to the following:

Timothy P. Cronin  
Mullin, Cronin, Casey & Blair, P.S.  
N 115 Washington, Third Floor  
Spokane, WA 99201

- HAND DELIVERY
- U.S. MAIL
- OVERNIGHT MAIL
- FAX TRANSMISSION
- EMAIL



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JOHN H. GUIN