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Appellate Case No. 59211-4

8/873-8

COURT OF APPEALS,  
DIVISION I OF THE STATE OF WASHINGTON

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SANDRA LAKE,

Appellant

v.

WOODCREEK HOMEOWNERS ASSOCIATION,  
a Washington homeowners association;  
and GLEN R. CLAUSING, a single man,

Respondent.

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COURT OF APPEALS DIV #1  
STATE OF WASHINGTON  
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APPELLANT'S REPLY BRIEF

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A. **Woodcreek and Mr. Clausing misunderstand the applicability of *Bogomolov* and *Keller*.**

Respondents attempt to distinguish *Bogomolov v. Lake Villas Condominium Association*, 131 Wn. App. 353, 127 P.3d 762 (2006) misunderstands Ms. Lake's argument. The *Bogomolov* decision is not so narrow that it turns on the precise language of the condominium declaration, and the differences between the Woodcreek and the Lake Villa declarations are not relevant and do not render the *Bogomolov* decision inapplicable to this case. The *Bogomolov* court concluded that construction on common area that limits the use of that common area and reserves exclusive rights to the common area to specific owners converts the common area to limited common area. *Bogomolov*, 131 Wn. App. at 370. When Mr. Clausing constructed his Bonus Room he appropriated the common area above the elevation level of the ceiling height stated in the Declaration and enclosed that space, thereby converting common area into an area for Clausing's exclusive use. Arguing the specifics contained in the Lake Villa declarations regarding combining and subdividing is merely an attempt at classifying Mr. Clausing's act as "combining" rather than the conversion of common area. The *Bogomolov* court did not address Section 27 of the Lake Villa Declaration regarding subdividing and combining. The use of the Lake Villa Declaration and the argument

regarding Section 27 are red herrings. Likewise, the subdividing and combining language of the Woodcreek Declaration is not relevant.

Woodcreek agrees that the Board's special allocation to Mr. Clausing for his Bonus Room is ineffective and would require an amendment to the Declarations rather than ratification. However, Woodcreek misunderstands the principle set forth in *Keller v. Sixty-01 Associates of Apartment Owners*, 127 Wn. App. 614, 112 P.3d 544 (2005), while Mr. Clausing does not address *Keller* in his response at all. The court in *Keller* stated explicitly that common area and common expenses are **necessarily linked** to the undivided percentage interest each owner has in the property for condominiums governed by RCW 64.32.080 of the Horizontal Property Regimes Act ("HPRA"). *Keller*, 127 Wn. App. at 623-24. RCW 64.32.080 states, "[T]he common expenses [of the property] shall be charged to, the apartment owners according to the percentage of undivided interest in the common areas and facilities." As stated by the *Keller* court, under RCW 64.32.080 "the percentage of undivided interest and common expenses [are] linked – one [can] not be changed without the other being changed as well." *Keller*, 127 Wn. App. at 623.

Mr. Clausing's Bonus Room created new common area (e.g. walls, wiring, siding, and exterior) and new common expenses (e.g. maintenance

and replacement of siding and painting of exterior) at Woodcreek. The increase in common expenses caused by the increase in common area necessarily obligates Mr. Clausing to pay a higher percentage of the common area expenses and Woodcreek does not dispute this. However, Woodcreek ignores that the total of all ownership interests sharing the common area expenses must equal 100% and therefore an increase for Mr. Clausing has a corresponding decrease on the percentage of undivided interest each other homeowner has in the property, including Ms. Lake's interest.

Furthermore, the Board acknowledged the creation of additional common area and the burden imposed for additional maintenance when it increased Mr. Clausing's monthly assessment **as a direct result of the addition of his Bonus Room.** (CP 194; *see also* CP 157.) However, instead of following the Declaration mandate that percentage interests be changed to allocate the additional burden, the Board unilaterally decided to charge a surcharge to Mr. Clausing for his Bonus Room. As explained above, RCW 64.32.080 and the relevant provisions of the Woodcreek Declaration and Bylaws require that monthly assessments against owners be directly linked to the percentage of undivided interest.

**B. The Bonus Room created new common area and new limited common area.**

The parties agree, and state law supports the concept, that common area, limited common area and the apartment unit are distinct and exclusive. The purpose of this distinction is to allocate the assessments for the common expenses shared by all owners in accordance with Section 15 of the 1973 amended Declaration and Article IV, Section 2 of the Bylaws. In its entirety, Section 4 of the 1976 amended Declaration states:

The residence apartments are generally divided into four types as follows:

J – Single story, two bedrooms, two baths,  
Square footage – 1886

Unit K – Single story, three bedrooms, two baths,  
Square footage – 2183

Unit L – Two story, three bedrooms, two baths,  
Lower floor plan – 151 square feet  
Upper floor plan – 612 square feet

Unit M – Two story, two bedrooms, two baths,  
Lower floor plan – 1510 square feet  
Upper floor plan – 558 square feet

In addition there is designed in the plans for Type L M [sic] units a room designated as the “bonus room”. At the option of the purchaser the floor plans for Types L and M Units will include an additional area to be situated directly above the car garage area which is incorporated within the basic structure of the apartment unit. The bonus room will consist of one of four alternate floor plans and will increase the square footage of said units by approximately 416 square feet. A more particular description of each

apartment by unit type is shown on Sheet 5 of 5 of the Survey Map and Plans. The boundaries of each apartment are the interior surfaces of the perimeter walls [sic] floors, ceilings, windows and doors thereof.

(CP 385-86.) Common area is defined at Section 5 of the 1973 amended

Declaration, in relevant part, as:

... those areas ... as defined by the Act (RCW, Chapter 64.32) and all areas not expressly described as part of the individual residence apartments or as limited common areas ... and include, but are not limited to the following:  
... B. The roofs, walls, foundations, studding, joists, beams, supports, main walls (excluding only non-bearing interim partitions of apartments, if any), pipes, conduits and wire wherever they may be located whether in partitions or otherwise, and all other structural parts of the buildings to the interior surfaces of the apartments' perimeter walls, floors, ceilings, windows and doors; that is to the boundaries as defined in the Act, in RCW 64.32.010(1).

(CP 282-83.) Section 7(B) of the 1973 amended Declaration also states that common area includes, "the foundations, columns, girders, beams, supports, walls and roofs ... for the purpose of repair or replacement."

(CP 284.)

The definition of apartment extends only to the **interior** of the apartment. To read otherwise would contradict RCW 64.32.010(1) and ignore the Declaration language defining apartment and common area. RCW 64.32.010(1) defines "Apartment", in part: "The boundaries of an apartment located in a building are the **interior surfaces of the perimeter walls, floors, ceilings, windows and doors thereof**, and the apartment

includes both the portions of the building so described **and the air space so encompassed.**” (Emphasis added.) Section 4 of the Declaration limits the boundaries of each apartment to, “the interior surfaces of the perimeter walls [sic] floors, ceilings, windows and doors thereof.” (CP 386.) By definition, the structural elements of Mr. Clausing’s Bonus Room, including new and additional exterior walls, joists, beams, supports, pipes, conduits, and roof, are not part of the apartment.

At least two problems arise by limiting the analytical focus on the sentence in Section 4 of the 1976 amended Declaration that reads, “Units will include an additional area to be situated directly above the car garage area which is incorporated within the basic structure of the apartment unit.” First, such focus ignores the sentence at the end of Section 4 limiting the boundaries of the apartment to the interior. Second, the use of the relative pronoun “which” to introduce the statement, “is incorporated within the basic structure of the apartment unit” should be read to modify the garage, thereby incorporating the garage into the apartment, and not the Bonus Room. *See e.g. State v. J.M.*, 144 Wn.2d 472, 480-81, 28 P.3d 720 (2001) (grammatical rules and function may demonstrate meaning of a statute); *Caughey v. Employment Sec. Dep’t*, 81 Wn.2d 597, 602, 503 P.2d 460 (1972) (where no contrary intent appears, the ordinary rules of grammar and statutory interpretation require that relative and qualifying

words and phrases refer to the last antecedent); *Martin v. Aleinikoff*, 63 Wn.2d 842, 846, 389 P.2d 422 (1964) (holding that where no contrary intention appears in a statute, qualifying words and phrases refer both grammatically and legally to the last antecedent). The Chicago Manual of Style states that “a relative pronoun’s antecedent is a noun ... [that] should immediately precede the pronoun.” *The Chicago Manual of Style* § 5.59 (The University of Chicago Press 15<sup>th</sup> ed. 2003). In this case, the antecedent noun is “the car garage area” and not the further removed “additional area”.

In his response, Mr. Clausing also argues that because the definition of limited common area in Section 7 of the 1973 amended Declaration does not specifically include the word Bonus Room his Bonus Room is not limited common area. It is agreed that limited common area should not include a Bonus Room. However, the construction of the Bonus Room reserved previously defined common area for the exclusive use of Mr. Clausing, and therefore **unauthorized** limited common area was created. See *Bogomolov*, 131 Wn. App. at 370 (construction on common area that limits the use of common area and reserves exclusive rights to the common area to specific owners converts the common area to limited common area). And, the Board does not have authority to create

or authorize new limited common area; particularly for the exclusive use of a resident.

C. **The Declaration uses the terms “Purchaser” and “Owner” in specific and distinct instances.**

Mr. Clausen cites the language of Section 4 of the 1976 amended Declaration in arguing that he is a Purchaser under the intended language of the Declaration. The Declaration context is clearly relating to the development stages both current and future of the Woodcreek phases 1 through 3. It is in this context that throughout the Declaration the use of the word Purchaser is referring to a point in time that the apartment unit has not been fully built. That is the time in which the purchaser is to decide whether to add a bonus room; not over 20 years after the developer completed the projects. A simple reading of the context as used in the Declaration shows that “Purchaser” is that person who is purchasing a unit at the time of development. In contrast, the word “Owner” is used to refer to situations that continue *ad infinitum*. Section 4 is the only portion of the amended Declaration that refers to the developmental stages; it is also the only section that utilizes the word “Purchaser” rather than “Owner.” There is no doubt that deciding whether a Bonus Room should be added is a decision that needed to be made by the Purchaser at the time of development.

D. The record does not prove the basis the developer used to assign value or undivided percentage interests to each unit.

Woodcreek misstates Ms. Lake's issue regarding the change in percentage interest. Mr. Clausing's argument mischaracterizes Ms. Lake's fundamental premise. Both Woodcreek and Clausing state that Ms. Lake's case turns on the addition of the bonus room, **with the associated square footage**, alters the value and percentage interests. (Woodcreek's Brief at 7.) This is not a fundamental point. Woodcreek ignores the fact that the Bonus Room took away from the common area that Ms. Lake previously enjoyed, it added height and a second level that was not in the Declaration, and it added new common area.

Instead, Woodcreek and Mr. Clausing focus on an argument that the square footage added does not affect the value because the original developer did not only use square footage to assigning values and percentage interests. However, all that is shown by comparing the Bonus Rooms and undivided percentage interests is that the developer used other and/or additional means to determine value. None of the other factors are known; nor was a complete analysis done to compare the units on all other possible differences. The developer could have also considered view, positioning on the lot, privacy, etc, Ms. Lake's unit and undivided percentage interest is an example. Her undivided percentage interest is

substantially higher than other “L” style units with Bonus Rooms, (CP 391-93), and up until Mr. Clausing’s Bonus Room was built she had a beautiful mountain view. It is not known how the developer actually determined the values or the percentage interests and the record before this court is completely void of evidence supporting a list of factors or more specifically whether the bonus rooms were a sole factor. Thus, comparing the units only on one or two factors without determining all of the other factors that may have contributed makes the whole analysis pointless.

Woodcreek argues that there is no correlation between value and square footage; however the table that Woodcreek provides shows just the opposite. Where square footage increases, value increases. Where square footage of the lot size increases, value increases even if interior square footage decreases slightly. Square footage was likely a factor, but as discussed above it is not known to what extent. Woodcreek’s argument is not proven by their example, and even if it was, the example is lacking because it does not show all the possible or even probable factors used when determining value and undivided percentage interest.

Regardless, after the developer completed the final phase and recorded the final amended Declaration the rationale of the developer is no longer relevant. Once the Association took over the developer’s actions were recorded and completed. RCW 64.32.050 requires the developer to

provide each apartment owner with an undivided interest in common areas and facilities in the percentage expressed in the declaration and to compute the percentage by taking as a basis the value of the apartment in relation to the value of the property. The statute states what the developer should have done and the Declaration proves that the developer determined values and undivided percentage interests. Whether the developer was precise, used exact criteria or used a different rationale has no relevance now. The question is whether the addition of a Bonus Room results in a change in undivided percentage interests under the Declaration that the developer recorded and that the Association is bound by today.

The essence of Woodcreek's and Mr. Clausing's argument is that there is no difference in constructing a Bonus Room in 1977 during development from constructing one after the Declaration is recorded and as late as 2004. The difference between the development phase of the 1970's and 2004 is that during the development phase the Declaration provided that changes to the undivided percentage interests would be made as each phase was constructed and reserved that right to the Declarant. (CP 280-81.) In fact, Section 4 allowed purchasers during the phases of construction to add a Bonus Room. However, once the Declarant recorded their final amended Declaration the homeowners, including Ms. Lake, have the right to rely, without change, on the

undivided percentage interests, as well as everything else, that is set forth in the Declaration except as authorized by the Declaration. Mr. Clausing's Bonus Room creates new common area, new limited common area, changes the square footage of the complex, increases square footage for the tax assessment, adds height to the elevation tables, changes his unit from a single story to a two story and takes the view away from his neighbor. Such a change is unauthorized and contradicts that which is expressly stated in the Declaration. No reservation to change the Declaration in this regard exists any longer.

E. **Mr. Clausing's argument about the Board's authority under the Bylaws is faulty.**

First, Mr. Clausing errs in arguing that the Bylaws are the primary governing document in this case. The Bylaws are supplemental to and may not be inconsistent with the Declaration. If there is any inconsistency between the two documents, the Declaration controls. (CP 293.)

Second, Mr. Clausing's reliance on the Bylaws regarding the Board's authority to approve structural alterations without unanimous consent of homeowners is misplaced. He argues that an owner's obligation to seek the permission of the Board to alter a unit is the same as an owner **only** needing Board approval to structurally modify a unit. Mr. Clausing's conclusion is illogical and a convenient juxtaposition to

support his position. Requiring an owner to seek Board approval does not mean that approval by all homeowners is not required. The Declaration requires it in this case.

**F. The covenant language is restrictive.**

Mr. Clausing solely relies upon the argument that the Declaration, which he admits is a covenant that runs with the land, does not say that it is a restriction. However, as discussed in Ms. Lake's opening brief, Section 7 of the 1976 amended Declaration provides:

[T]his Certificate of Amendment together with the Survey Maps and Plans referred to herein, ... state the covenants, conditions, **and restrictions** effecting a common plan for the condominium development mutually beneficial to all of the described apartments, and that the covenants, conditions and restrictions and plan as now existing or hereafter amended, are binding upon each such apartment as a parcel of realty, and upon its owners or possessors and their heirs ... without requirement of further specific interest or inclusion in deeds, contracts, or security instruments....

(CP 388 [emphasis added].)

There is no doubt that the elevation listed for Mr. Clausing's second level is "N/A" because the Survey Maps and Plans do not show unit 109 as having a bonus room on the second level. The Certificate itself uses mandatory language, "This Certificate of Amendment to Declaration shall take effect upon recording." (CP 395.) The Declaration in Section 5 defines in similar mandatory language "common area": "The

common areas and facilities **shall be** those areas and facilities as defined in the Act (RCW, Chapter 64.32) and **all areas** not expressly described as part of the individual residence apartments or as limited common areas or the property of the Association of Apartment Owners ....” (CP 225 [emphasis added].) This is restrictive mandatory language. Ms. Lake ought to be able to rely upon the Certificate of Amendment to Declaration, its contents and the effect of its contents becoming effective upon recording. The Certificate of Amendment lists the units with bonus rooms and the Woodcreek owners should be able to rely upon the fact that no other units shall have bonus rooms unless the Declaration is amended in accordance with the Declaration.

**G. Neither Section 12 nor McLendon are applicable.**

Section 12 of the 1973 amended Declaration, (CP 289), specifies how undivided percentage interests change when combining or subdividing. Woodcreek argues that Section 12’s silence on the issue of whether percentage interest changes when combining an apartment with common area indicates that changing the percentage interest is not dictated. However, this argument is contrary to Woodcreek’s action of increasing Mr. Clausing’s assessment for common area expenses. The construction of Section 12 demonstrates that combining an apartment unit with common area was never intended and such an act would be covered

under another section of the Declaration. The specific combination and subdivision scenarios set forth prove that those were the scenarios contemplated by Section 12. It contemplates specific combination and subdivision scenarios and its silence regarding other scenarios demonstrates that the section does not authorize combining an apartment with common area or creating new common area.

In this case, ratification of the Board's actions by a vote of a 51% majority vote is insufficient because Section 12 neither authorizes the creation of new common area nor permissively allows the combination of any apartment unit with common area for the exclusive use of an owner. Instead, Section 19 of the 1973 amended Declaration applies and requires unanimous written consent of the homeowners.

In *McLendon v. Snowblaze Recreational Club Owners Association*, 84 Wn. App. 629, 929 P.2d 1140 (1997), the court rejected an argument that a provision requiring unanimous consent applied and noted that the unanimity provision before it applied to amendment of the entire Declaration, and not to the question before it, which was the voting requirements for combining common area with an apartment. The court did not set out the unanimity provision. In our case, it is not a lease situation; rather, Mr. Clausing enclosed common area making it limited common area, used exclusively for his apartment, and created more

common area burdening the homeowners. Title to the property is not affected in *McLendon* and the court determined that the Declarations did not need to be amended. Here, the Declaration provides that Mr. Clausing's unit is a single story and this is what is recorded on title. In order for that to change, the Declaration must necessarily be amended. Section 19 is the only way to amend the Declarations. *McLendon* does not apply to the greater and broader issues of this case rather than the specific and limited issues raised in *McLendon*.

H. **Ms. Lake has been prejudiced by the trial court's order granting Woodcreek leave to file an Amended Answer.**

Ms. Lake is not required to identify the Order on Woodcreek's motion to amend its Answer in her Amended Notice of Appeal and review of the order by this court is proper. "The appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice ....." RAP 2.4(b). The order granting Woodcreek's motion to amend prejudicially affected the trial court's decision to deny Ms. Lake's motion for summary judgment and grant Mr. Clausing's motion for summary judgment.

Mr. Clausing takes the position that the summary judgment he filed against Ms. Lake was not based upon Woodcreek's original Answer

or its Amended Answer. (Clausing Brief at 45.) The supposition here is that whether or not the answer was amended is irrelevant to the trial court's decision related to Mr. Clausing's motion for summary judgment. However, the trial court considered Woodcreek's Amended Answer in its Order on the summary judgment motions. (CP 779, ¶ 27.) Whether or not **Mr. Clausing** relied on Woodcreek's Answer or Amended Answer is irrelevant; the **trial court** considered it.

Ms. Lake did not have an opportunity to prepare her case for summary judgment based upon Woodcreek's Amended Answer, yet the trial court considered it when ruling just six days after the amendment of Woodcreek's Answer was granted. The Order granting Woodcreek's motion to amend prejudiced Ms. Lake. Under the CR 56(c), Ms. Lake was required to file her response to Mr. Clausing's and Woodcreek's motions for summary judgment motions 11 days prior to the hearing, which was scheduled for November 22, 2006. Plaintiff filed her response on November 13, 2006. The Order granting the Motion to Amend was not entered until November 16, 2006.<sup>1</sup>

Woodcreek argues that Ms. Jones did not indicate at the summary judgment hearing that she needed additional time, information or discovery in order to respond to the Defendants' motions for summary

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<sup>1</sup> Plaintiff's counsel received a copy of the entered Order granting Woodcreek's Motion to Amend on November 20, 2006, two days prior to the summary judgment hearing.

judgment. Woodcreek misinterprets the exchange between Ms. Jones and the trial court. The court offered Ms. Jones the opportunity to re-file and she accepted that offer, but then the trial court instructed Ms. Jones to “go ahead and go first . . .” thereby cutting off the discussion of re-filing documents. (CP 794-95.) Ms. Jones proceeded as instructed by the trial court fully believing that she represented the prevailing party on summary judgment because the trial court ignored her acceptance of the opportunity to re-file. (Id.) When Ms. Jones asked for leave to re-file it was intended that **all** Ms. Lake’s documents be re-filed, including the motion and the responsive pleadings to Mr. Clausing’s and Woodcreek’s motions for summary judgment. Both Ms. Lake’s Motion for Summary Judgment on the issue of liability and her response to both Mr. Clausing’s and Woodcreek’s motions were affected by the change of position of Woodcreek. Up until the Motion to Amend was granted by the trial court, Ms. Lake relied on Woodcreek’s initial Answer, under which Woodcreek supported Ms. Lake’s position, and the trial court considered Woodcreek’s Amended Answer in reaching its judgment. (CP 779, ¶ 27.)

Ms. Lake had also previously argued that additional time was needed for discovery. In her response to Woodcreek’s motion to amend, Ms. Lake argued that additional time was needed for discovery, not just in relation to the impending summary judgment, but the case overall. As

pointed out by Ms. Lake in her response, a continuance of the summary judgment motions even at that point would not have helped to reduce the prejudice to her. (CP 648.) When Ms. Lake filed her response to Woodcreek's Motion to Amend on November 7, 2006, only two months remained until the first major discovery deadline on January 2, 2007, which was the deadline for disclosing possible primary witnesses. Ms. Lake argued to the trial court that she required additional discovery, explained to the trial court the extreme cost that would be involved, and argued the prejudice to her if the amendment was granted. (CP 648.) The trial court ignored these discovery deadlines and focused only on the June 4, 2007 trial, rather than impending short-term discovery deadlines. (CP 721.)

I. **Mr. Clausing fails to establish that he is entitled to an award of attorney's fees under *Coy* or *One Pacific Towers*.**

Mr. Clausing claims that *Eagle Point Condominium Owners Association v. Coy*, 102 Wn. App. 697, 715, 9 P.3d 898 (2000) stands for the proposition that even when a non-prevailing party's arguments in support of their substantive claims are "not without some merit" attorney fees are appropriate under RCW 64.34.455. (Clausing Brief at 51.) A closer reading of *Coy* demonstrates that the court's reference to the non-prevailing party's arguments as "not without some merit" describes that

party's arguments in favor of denying attorney fees or granting reduced attorney fees under the statute. *Coy*, 102 Wn. App. at 715. It does not refer to the merits of the non-prevailing party's substantive claims. *Coy* states that the purpose of RCW 64.34.455 "is to punish frivolous litigation and to encourage meritorious litigation." *Id.* at 713. The Findings and Conclusions do not satisfy the requirements under *Coy* because there is no finding of fact or conclusion of law that Lake's claims were without merit or frivolous. Thus, there is no support that attorney fees should be granted under RCW 64.34.455 despite a non-prevailing party asserting non-frivolous claims.

Nor is this case analogous to *One Pacific Towers Homeowners' Association v. HAL Real Estate Investments, Inc.*, 108 Wn. App. 330, 30 P.3d 504 (2001) *upheld in part and reversed in part* 148 Wn.2d 319, 61 P.3d 1094 (2002) (reversal in part does not effect lower court's analysis of attorney fees). The *One Pacific Towers* court upheld a grant of attorney fees to the prevailing owner plaintiffs as appropriate because it furthered the purpose of encouraging meritorious private enforcement actions. *Id.* at 354. This holding is simply not applicable to the case before this court, because this action involves a claim for attorney's fees based upon a statute, not a provision contained in a private contract.

Mr. Clausing also asserts the trial court properly exercised its discretion in awarding Mr. Clausing attorney fees under RCW 64.34.455, citing “tenable grounds” that include “erroneous or unsupported interpretations” of case law and the condominium declarations. (Clausing Brief at 50.) In granting summary judgment in favor of Mr. Clausing and Woodcreek, the Trial court made no findings and did not state legal basis for its decision. (CP 962; CP 792-802.) As previously pointed out by Lake, the trial court’s basis can not be presumed and relied upon by Mr. Clausing. For example, if the defense of estoppel was the basis of the trial court’s decision, whether Ms. Lake’s interpretation of case law and the declarations was correct or not would be irrelevant. As a result, attorney fees can not be granted on this basis.

Mr. Clausing has attempted to remedy this deficit by obtaining post-appeal Findings of Fact and Conclusions of Law regarding the award of attorney’s fees.<sup>2</sup> (Clausing Appendix F.) However, these Findings of Fact and Conclusions of Law provide no insight into the basis of the court’s ruling on the summary judgment motions, i.e. the merits of the

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<sup>2</sup> Ms. Lake assigns error to the following Findings of Fact and Conclusions of Law Regarding Award of Attorney’s Fees (*see* Clausing Appendix F1-F5): Findings of fact numbers three, four, six, seven, eight, nine, and conclusions of law numbers two, three, four, and five. Ms. Lake intends to file with the Court of Appeals a motion requesting permission to elaborate on her assignments of error and issues pertaining to assignments of error and briefing thereon related to these Findings of Fact and Conclusions of Law because they were entered by the trial court on May 17, 2007, after Ms. Lake’s opening brief was filed with the Court of Appeals.

individual claims asserted by each of the parties, and the appellate court should reject Mr. Clausing's position that the award of attorney's fees in his favor was proper.

**J. The equitable defense of laches does not apply in this case.**

Almost as a counter-appeal, Mr. Clausing raises the issues of laches, waiver, and estoppel yet he only argues laches. Laches is an equitable principle that relates to neglect for an unreasonable length of time, under circumstances permitting diligence, to do what in law should have been done. *Retail Clerks v. Shopland*, 96 Wn.2d 939, 948, 640 P.2d 1051 (1982); *see also Arnold v. Melani*, 75 Wn.2d 143, 147, 437 P.2d 908 (1968). Laches also requires an intervening change of condition, making it inequitable to enforce the claim. *Arnold* 75 Wn.2d at 147-48. Delay and the lapse of time alone do not constitute laches. *LaVergne v. Boysen*, 82 Wn.2d 718, 721, 513 P.2d 547 (1973). Its application depends upon the equities of a particular case which would render the maintenance of the action inequitable. *Id.* Some injury, prejudice or disadvantage to the defendant or an innocent third party must result from allowing the relief sought. *Id.* Laches, when asserted in opposition to the interest of a landowner, must be proved by clear and convincing evidence. *Arnold*, 75 Wn.2d at 148. Strict application of such a doctrine is required when the effect is to divest men of their estate and land. *Id.*

Ms. Lake protested the Board's approval of the bonus room upon learning of Mr. Clausing's construction. She protested immediately to the President and to two other Board members. (CP 77.) Then she raised it as an issue at the homeowner's meeting on July 15, 2004 just as construction was beginning, complaining of "loss of view, loss of light, loss of value". (CP 59-60.) She warned the Board and other homeowners in essence that the process of approval can not occur in the laissez-faire manner employed by the Board, rather "Article 5 of the By Laws [sic] require [sic] 'care' in making changes to their units." (Id.) Her statement put the Board on notice that she contested the Bonus Room construction. When her verbal protests became written, and as construction continued, Ms. Lake faced continued rebuking from the Board. During construction, Ms. Lake attempted to get the Board to listen, but they would not.

Mr. Clausing also claims laches apply because there were no protests to other post-developer Bonus Rooms. Under this theory, Ms. Lake becomes permanently divested of Declaration statements afforded by title to her property simply because the Board, without authority, violated the Declaration previously. Meanwhile, Mr. Clausing and any other similarly situated units from now on should be able to get approval and build. This is not a proper application of the doctrine of laches.

**K. Clarification of factual statements.**

Woodcreek's Counterstatement of Procedural Facts ignores certain facts stated by Ms. Lake and contains inconsistencies. Those procedural facts stated by Lake that are not refuted by Woodcreek should be considered verities on appeal. Woodcreek ignores the initial admissions and lack of affirmative defenses in its Answer, Mr. Clausing's Cross Complaint (general denial and affirmative defenses), and that a Confirmation of Joinder was done based upon these initial pleadings. The Confirmation of Joinder is a representation by all parties to the trial court that all parties, claims, and defenses have been made, and the parties are ready to present their respective cases to the court based on the pleadings that have been filed. (CP 40-41.) Woodcreek ignores that Ms. Lake filed her motion for summary judgment on the basis that the parties had filed the Confirmation of Joinder and that Ms. Lake's motion was solely on the issue of liability. (See CP 643-44.)

Following are details that Ms. Lake points out to clarify the facts:

Woodcreek states that Kris Sundberg appeared for Woodcreek on December 23, 2006; Mr. Sundberg appeared in 2005. (CP 11-12.)

Ms. Lake states in her brief that the Sundberg/Morgenstern withdrawal and substitution was done on May 24, 2006; Woodcreek states May 31, 2006. The document was signed by Sundberg and Morgenstern

on May 24, 2006, mailed to the parties on May 30, 2006, and filed with the Court on June 22, 2006.<sup>3</sup> (CP 32-33.)

Ms. Lake states that that date of Mr. Clausing's Answer, Affirmative Defenses and Counterclaim is June 15, 2006; Woodcreek states it is June 21, 2006. The document was signed by Ted Watts on June 15, 2006, but filed with the Court on June 21, 2006.<sup>4</sup> (CP 24-31.)

Woodcreek's Joinder with Mr. Clausing's motion for summary judgment was filed November 8, 2006. (CP 664-5.)

RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of July, 2007.

JONES LAW GROUP, PLLC

A handwritten signature in black ink, appearing to read "Marianne K. Jones", is written over a horizontal line. The signature is stylized and somewhat cursive.

MARIANNE K. JONES, WSBA #21034

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and

TOUSLEY BRAIN STEPHENS PLLC

CHRISTOPHER BRAIN, WSBA #5054

Counsel for Appellant Sandra Lake

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<sup>3</sup> The certificate of mailing is not part of the record on appeal, but the date is provided for clarification.

<sup>4</sup> There is no certificate of service, but for clarification Mr. Clausing's Answer was received by Ms. Lake's counsel on June 16, 2006.

Appellate Case No. 59211-4

COURT OF APPEALS,  
DIVISION I OF THE STATE OF WASHINGTON

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SANDRA LAKE,

Appellant

v.

WOODCREEK HOMEOWNERS ASSOCIATION,  
a Washington homeowners association;  
and GLEN R. CLAUSING, a single man,

Respondent.

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PROOF OF SERVICE OF APPELLANT'S REPLY BRIEF

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I hereby certify that I served copies of the foregoing Appellant's Reply Brief on the attorneys for the respondents:

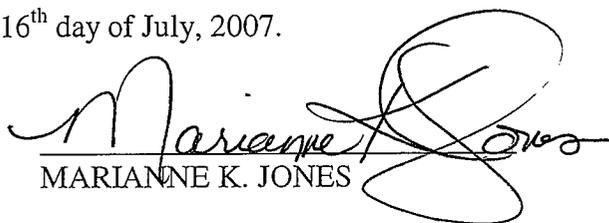
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I further certify that copies were placed in sealed envelopes addressed to the above individuals and mailed this 16<sup>th</sup> day of July, 2007.

  
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