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No. 66308-9-1

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

GREENBANK BEACH AND BOAT CLUB, INC., and HOLMES
HARBOR WATER COMPANY, INC.,

Respondents,

v.

DALLAS K. BUNNEY and MARYLOU BUNNEY, husband and wife,

Appellants,

RESPONDENTS' BRIEF

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COURT OF APPEALS
DIVISION ONE
STATE OF WASHINGTON
CLINTON, WA 98236

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I. INTRODUCTION

The Greenbank Beach and Boat Club, Inc. and the Holmes Harbor Water Company, Inc. (hereinafter referred to as “Associations”) are homeowner’s associations responsible for enforcement of the restrictive covenants for Holmes Harbor Estates. The restrictive covenants governing the property within the Plat of Holmes Harbor Estates prohibit the construction of a dwelling which exceeds 15 feet in height.

In 2004 Dallas and MaryLou Bunney (hereinafter referred to as “Bunneys”) purchased property in Holmes Harbor Estates. Approximately three years later they submitted plans to the Associations for construction of a dwelling. The plans were reviewed and rejected because the home exceeded the 15 foot height limitation. The Bunneys ignored the rejection and chose not to submit additional plans even though they indicated on several occasions that they would do so. They were fully aware of the height restriction and that the residence that they were proposing exceeded the height restriction by approximately six feet. In a belligerent, threatening, and hostile manner they informed the Associations that they were going to build their house the way they wanted to build it regardless of the restrictions contained in the covenants.

Prior to pouring the foundation for the proposed home the Bunneys received a letter from the Associations’ attorney again warning them that

they should not proceed with construction since the proposed building violated the 15 foot height restriction. The Bunneys ignored the letter from the attorney and proceeded with construction of the residence as originally designed.

In May of 2007 the Associations initiated a lawsuit against the Bunneys for violation of the height restriction. They asked the court to determine that the residence violated the height restriction and determine that the Bunneys be required to modify the structure to bring it into compliance with the height restriction. The lawsuit was initiated six months prior to the completion of the residence.

Upon completion of the residence the structure was determined to exceed the 15 foot height restriction by more than six feet.

The Bunneys totally ignored the height restriction set forth in the covenants and built their residence in flagrant disregard of the height restriction and the concerns expressed by the Associations. At trial Mr. Bunney admitted that he knew that he was building the residence in violation of the restriction and was willing to take that risk. The Bunneys intentional and willful disregard of the height restriction forced the Associations to file legal action against the Bunneys to enforce a clearly valid right that the Associations had to enforce the restrictive covenants. The court ultimately ordered the Bunneys to modify the structure to bring

it into compliance with the height restriction. Additionally, as a result of their misconduct and bad faith the court properly imposed a judgment against the Bunneys for attorney's fees incurred by the Associations.

II. ISSUES

A. Does a lawsuit filed prior to completion of construction of a dwelling which results in a court order commanding a homeowner to modify the dwelling to bring it into compliance with the height restriction contained in the restrictive covenants constitute an action to enjoin construction as that term is used in the covenants?

B. Is it an abuse of discretion for the trial court to award attorney's fees, based on bad faith, against a party who engages in prelitigation misconduct when the misconduct requires a party to initiate litigation to enforce a clearly valid claim or right?

III. COUNTER STATEMENT OF THE CASE

The respondents would like to initially point out that the appellants have cited as support for a substantial portion of their Statement of the Case a declaration that was stricken by the trial court. All of the factual summary beginning on page 6 of the Appellants' Brief with the sentence, "In 2007, the Bunneys developed architectural plans for a rambler house to be built on their Holmes Harbor Estates property" through and including page 10 of the Brief, except for the line on page 9, "The 2003

resolution was not recorded” is based on Sections 4 through 17 of the Declaration of Dallas K. Bunney. (CP 462 – 487) Those sections of the Declaration were stricken by the court. (CP 259 – 260) The order striking those portions of the Declaration has not been challenged by the Bunneys nor have they argued that the court erred when it struck Sections 4 through 17 of the Declaration. As a result, the stricken portions of the Declaration are not part of the official record before this court.

The record from the trial court reveals the following:

Holmes Harbor Estates is a residential plat consisting of more than 200 residential lots, 66 of which contain homes. (CP 51, FF 1) The plat is governed by Restrictive Covenants of Holmes Harbor Estates, Inc. which were recorded on June 18, 1962 and which were amended by document recorded on September 14, 1964 and re-recorded on September 24, 1964. (CP 51, FF 2, 3) The 1962 and 1964 Covenants govern and affect all of the property located within the plat of Holmes Harbor Estates including the property owned by the appellants, Dallas K. Bunney and Mary Lou Bunney (Bunneys).

The Covenants contain a restriction that prohibits constructing a dwelling that exceeds 15 feet in height. (CP 52, FF 6) In 1977 the governing boards of the Greenbank Beach & Boat Club, Inc. and Holmes Harbor Water Co. Inc. (Associations) adopted a rule to promote

uniformity in the measuring of dwelling height when applying the Covenant's 15 foot height restriction. (CP 52, FF 7) This rule was clarified by the Associations in 2003 and a committee was formed to review construction plans to insure that the height restrictions were followed. (CP 53, FF 8) The Associations have regularly and uniformly reviewed construction plans for compliance with the height restriction. If submitted plans showed that a proposed residence would exceed the height restriction the committee requested that the plans be redone to bring the proposed building into compliance. (CP 53, FF 9, 10)

The Covenants also contain a provision that provides in pertinent part

In the event the Committee or its designated representative fails to approve or disapprove within thirty (30) days after plans or specifications have been submitted to it, or in any event if no suit to enjoin the construction has been commenced prior to completion thereof approval will not be required and the related covenants shall be deemed to have been fully complied with.

(CP 52, FF 5)

On August 13, 2004 the Bunneys acquired Lots 8 and 9 within the plat of Holmes Harbor Estates. (CP 53, FF 11) Approximately three years later, in July of 2007, they submitted plans for the construction of a home to the Associations for review. That same month the Bunneys' plans were rejected since it was determined that the dwelling if

constructed according to the plans would exceed the applicable height restrictions by more than six feet. (CP 54, FF 12) On July 25, 2007 a letter was sent to the Bunneys advising them that the plans were unacceptable because they did not comply with the 15 foot height limitation. (CP 54, FF 14)

At a meeting of the Associations on August 1, 2007 the Bunneys provided additional information concerning the construction of their home including an excavation plan and a lot layout plan. (CP 54, FF 15) At the meeting, Mr. Bunney was hostile, threatening, and belligerent and told the Associations that if they did not allow him to build his house at the height he wanted he would sue them. (CP 54, FF 16) On August 8, 2007 the Associations advised the Bunneys by letter that they needed to provide more technical drawings showing the natural grade and appropriate excavation to bring their home within the height requirement. (CP 55, FF 18) The Bunneys submitted no additional drawings to the Associations and did not complete any excavation work that would have resulted in the residence being constructed within the height limitations. The Bunneys were fully aware that they needed to resubmit their plans for approval and they did not. (CP 55, FF 19)

In September of 2007 Mr. Bunney advised the Associations' representative, Ms. Sharon Dunn, that he understood the Covenants and

that he would comply with them. He indicated that he would provide technical drawings from a surveyor that would show the excavation that he was going to have done to meet the 15 foot height limit. (CP 55, FF 20) In October, Mr. Bunney further advised Ms. Dunn that he would redesign the roof of his residence in order to comply with the 15 foot height limitation. (CP 55, FF 21) He never provided the promised drawings. (CP 56, FF 22)

On November 19, 2007 prior to the pouring of the foundation for the residence, Paul Neumiller, the attorney for the Associations, wrote to the Bunneys and advised them not to proceed with construction, warned them that suit would be filed against them if they continued without approval, and advised them that the letter would be submitted to the court to demonstrate their bad faith. The letter did set forth the incorrect standard for measuring the 15 foot height limitation. (CP 56, FF 23) However, the Bunneys were advised of the appropriate standard for measurement prior to beginning construction. They did not rely on the incorrect measurement standards set forth in Mr. Neumiller's correspondence nor did they ever question the different standards. In any event they were aware that their home if built according to the plans would exceed the applicable height restrictions by at least 6 feet. (CP 57,

FF 25) The Bunneys also never requested a variance of the 15 foot height restriction. (CP 57, FF 26)

The Associations initiated a lawsuit for declaratory judgment against the Bunneys on May 14, 2008. (CP 517 – 520) In addition to other relief the complaint requested a declaratory judgment as follows:

2. Determining that the residence constructed by Bunney on the Bunney property violates the height restrictions set forth in the covenant;
3. Determining that the residence so constructed by Bunney should be modified to bring it into compliance with the height restriction described in the covenants.

7. Granting judgment in favor of the plaintiffs and against Bunney for plaintiffs' reasonable attorney's fees incurred herein.

(CP 520-521)

Despite the warning letter from Mr. Neumiller and the lawsuit by the Associations, the Bunneys continued with construction of their home completing it approximately six months later in November of 2008. (CP 56, FF 23) The Bunneys' home in all relevant respects was constructed pursuant to the submitted plans which were never approved resulting in the home exceeding the 15 foot height limitation by at least 6 feet. (CP 57, FF 27)

The trial court found that the Bunneys acted arrogantly and proceeded at their own risk when building the home in accordance with

the original plans which had been rejected by the Associations. (CP 57, FF 28) The Bunneys could have done a number of things including deeper excavation of their lot and/or reducing the pitch of the roof to bring the home into compliance with the height restriction but they did not. (CP 58, FF 31) They made no good faith efforts to resolve the concerns of the Associations over the proposed height of the residence and proceeded with full knowledge that their home exceeded the 15 foot height restriction and that their plans had been rejected. (CP 58, FF 32) Mr. Bunney even admitted at trial that he knew the risk that he was taking when he made his decision not to resubmit his plans and to build the house without complying with the 15 foot height restriction. (CP 59, FF 33) The Bunneys also knew that construction of their home according to the original plans blocked the views of others in the neighborhood. (CP 59, FF 34)

IV. ARGUMENT AND AUTHORITIES

A. A declaratory judgment action filed prior to the completion of construction of a dwelling in which the court issues an order commanding a homeowner to modify the dwelling to bring it into compliance with the height restrictions contained in the restrictive covenants constitutes an action to enjoin construction as that term is used in the covenants.

The Bunneys have assigned error to the trial court's denial of their motion for summary judgment requesting dismissal of the Associations' lawsuit. They argue that the court should have granted their motion for summary judgment and dismissed the action because the Associations filed an action seeking a declaratory judgment and not an action seeking an injunction. This court should not consider this assignment of error since an order denying a motion for summary judgment is not an appealable order. *Gilman v. MacDonald*, 74 Wn. App. 733, 875 P.2d 697 (1994). An order denying a motion for summary judgment is interlocutory and not a final order. *Dunning v. Pacerelli*, 63 Wn. App. 232, 818 P.2d 34 (1991). Only final court orders are appealable. *Supra*. RAP 2.2(a)

Even if there is a procedural way to properly challenge the denial of the summary judgment in this appeal the Bunney's substantive argument on this issue is unpersuasive. The covenant in question reads in part as follows:

In the event the Committee or its designated representative fails to approve or disapprove within thirty (30) days after plans or specifications have been submitted to it, or in any event if no suit to enjoin the construction has been commenced prior to the completion thereof approval will not be required and the related covenants shall be deemed to have been fully complied with.

(CP 423, CP 52, FF 5)

The gravamen of the dispute in the trial court was the enforcement of the 15 foot height restriction set forth in the restrictive covenants. However, the narrow issue on appeal in connection with the covenants is the interpretation of the language “if no suit to enjoin the construction has been commenced prior to the completion thereof approval will not be required and the related covenants shall be deemed to have been fully complied with.” (CP 52, FF 5)

Contrary to the Bunney’s assertion enforcement of restrictive covenants in Washington is favored.

[I]n Washington the intent, or purpose of the covenants, rather than free use of the land, is the paramount consideration in construing restrictive covenants. . . . The time has come to expressly acknowledge that where construction of restrictive covenants is necessitated by a dispute not involving the maker of the covenants, but rather among homeowners in a subdivision governed by the restrictive covenants, rules of strict construction against the grantor or in favor of the free use of land are inapplicable.

Riss v. Angel, 131 Wn.2d 612, 623, 934 P.2d 669 (1997).

Courts are to determine the drafter’s intent by examining the clear and unambiguous language of a covenant. We must consider the instrument in its entirety and, when the meaning is unclear, the surrounding circumstances that tend to reflect the intent of the drafter and the purpose of a covenant that runs with the land.

Bauman v. Turpen, 139 Wn. App. 78, 88-89, 160 P.3d 1050 (2007).

The meaning of the language in the covenant requiring initiation of a lawsuit to enjoin construction is clear. The purpose of the covenant is to notify the homeowner that continued construction of the building without approval will violate the restrictive covenants. This provides the homeowner with an opportunity to correct the violation while the building is still in the construction phase and presumably when correction would be less expensive than after completion of the structure.

The Bunneys argue that the suit filed by the Associations was not a suit to enjoin construction and therefore pursuant to the terms of the covenant the Bunneys are considered to have complied with the restrictive covenants. They have used an overly technical definition of “enjoin” arguing that it required a lawsuit seeking an injunction in order to comply with the covenant. However, *Blacks Law Dictionary*, Revised Fourth Edition, 1968, also defines “enjoin” to mean “to require; command; positively direct.” Additionally when determining the intent of a covenant the court is to give the language used in the covenant its ordinary common meaning. *Lakewood Racquet Club Inc. v Jensen*, 156 Wn. App. 215, 222, 232 P.3d 1147 (2010). The common definitions of “enjoin” are: “1. To direct with authority and emphasis; command. 2. To prohibit or forbid.” *The American Heritage Dictionary*, Second College Edition, 1985.

The Associations lawsuit filed in this matter sought a declaratory judgment,

2. Determining that the residence constructed by Bunney on the Bunney property violates the height restrictions set forth in the covenants;
3. Determining that the residence so-constructed by Bunney should be modified to bring it into compliance with the height restriction prescribed in the covenants.

(CP 520)

At the conclusion of the trial the court entered the following orders:

1. The defendants, Dallas Tex J. Bunney and MaryLou Bunney shall modify their home located on Lots 8 and 9, Block 4, of the Plat of Holmes Harbor Estates No. 1 in Island County, Washington to comply with the 15 foot height restriction set forth in Article V of the Amendments to Restrictive Covenants of Holmes Harbor Estates, Inc. as recorded September 24, 1964.

.....

3. The defendants shall modify their home to comply with the 15-foot height restriction set forth above by July 1, 2011.

(CP 40-41)

Evaluating the relief requested in the complaint and the subsequent court order based on the requested relief the Associations' action clearly sought to prohibit, forbid, or disallow the construction being conducted by the Bunneys in violation of the height restriction. The court found that the construction did in fact violate the height restriction (CP 57, FF 27) and

entered its order commanding that the Bunneys bring the home into compliance with the restrictive covenants.

The lawsuit initiated by the Associations was to “enjoin” construction of the residence in the common and ordinary meaning of the word “enjoin.” Additionally, the lawsuit initiated by the Associations, well before completion of construction, satisfied the purpose of the covenant by officially notifying the Bunneys of the violation of the covenants and that they were proceeding without the required approval.

B. It was not an abuse of discretion for the trial court to award attorney’s fees to the Associations based on “bad faith” by the Bunneys when they engaged in prelitigation misconduct which required the Associations to initiate litigation to enforce the height restriction contained in the covenants.

The Bunneys assert that it was error for the trial court to require them to pay attorney’s fees to the Associations as part of the court’s judgment. The standard for review of an award of attorney’s fees is whether the trial court abused its discretion. “We reverse an award only if the trial court exercised its discretion on untenable grounds or for untenable reasons.” *Collins v. Clark County Fire District No. 5*, 155 Wn. App 48, 98, 231 P.3d 1211 (2010). In Washington the payment of an opposing party’s attorney’s fees in litigation must be based on a

contractual provision, a statute, or a recognized ground in equity. *Bowles v. Department of Retirement Systems*, 121 Wn.2d 52, 70, 847 P.2d 440 (1993). The Bunneys rely on a number of cases to support their position that imposition of attorney's fees was not authorized. However, the cases that they rely on involve awards of attorney's fees as the result of frivolous lawsuits or violations of CR 11.¹

In this case the imposition of attorney's fees was not based on an allegation of violation of CR 11² or that the formal defense put on by the Bunneys was frivolous. The basis for the court's imposition of fees was the prelitigation misconduct of Mr. Bunney which the court concluded constituted bad faith. Bad faith as a basis for imposition of attorney's fees was discussed in *Rogerson Hiller Corporation v. Port of Port Angeles*, 96 Wn. App. 918, 982 P.2d 131 (1999) wherein the court stated,

“In the federal courts, three types of bad faith conduct have warranted attorney's fees: (1) prelitigation misconduct; (2) procedural bad faith; and (3) substantive bad faith.
(Citations omitted) Prelitigation misconduct refers to

¹ The Bunneys cite *Entertainment Industry Coalition v. The Tacoma-Pierce County Health Department*, 153 Wn.2d 657, 105 P.3d 985 (2005), *Curhan v. Chelan County*, 156 Wn. App. 30, 230 P.3d 1083 (2010), and *Eller v. East Sprague Motors and R.V.s Inc.*, 159 Wn. App. 180, 244 P.3d 447 (2010) as support for their objection to the imposition of attorney's fees. Those three cases all involve imposition of attorney's fees in actions involving frivolous lawsuits. Additionally the *Eller* case involves attorney's fees based on a violation of CR 11.

² CR 11 provides that an attorney or party's signature on a pleading constitutes a certification that the pleading is properly supported by the facts and the law and is not interposed for any improper purpose. Violation of the rule subjects the party to sanctions including reasonable expenses incurred because of the filing of the pleading including a reasonable attorney fee. CR 11(a).

“obdurate or obstinate conduct that necessitates legal action” to enforce a clearly valid claim or right.”

Supra at 927.

The award of attorney’s fees for prelitigation misconduct is in many ways similar to the imposition of a remedial fine by the court for civil contempt in that the party’s bad faith is wasting private and judicial resources. *Supra* at 928.

The ability of the court to award attorney’s fees based on a party’s conduct constituting bad faith was recognized in *Hsu Ying Li v. Tang*, 87 Wn.2d 796, 557 P.2d 342 (1976). The court also recognized that the court’s power to award attorney’s fees based on equitable grounds comes from the court’s inherent equitable powers and therefore the court is at liberty to set the boundaries of the exercise of that power. *Supra* at 799.

The trial court made significant findings of fact that support its determination that the Bunneys engaged in prelitigation bad faith conduct. None of these findings have been challenged on appeal and are therefore verities. *Cogdell v. 1999 O’Ravez Family, LLC.*, 153 Wn. App. 384, 220 P.3d 1259 (2009); *Robel v. Roundup Corporation*, 148 Wn.2d 35, 59 P.3d 611 (2004).

The unchallenged findings show that the building plans that were submitted by the Bunneys for review by the Associations did not comply with the height restrictions resulting in a request by the Associations that the plans be redone and resubmitted. (CP 53, FF 10; CP 54, FF 13, 14; CP 55, FF 18, 19) The original plans that were rejected were submitted to the Associations in July of 2007. The plans showed that the height of the building to be constructed would be 21 feet 9 inches. (CP 54, FF 12) The Bunneys were aware that they needed to resubmit their plans for approval and they did not do this. (CP 54, FF 13)

The president of the water company, on behalf of the Associations, sent the Bunneys a letter dated July 25, 2007 advising them that the plans were unacceptable because they did not comply with the 15 foot height limitation. (CP 54, FF 14) Shortly thereafter Mr. Bunney appeared at the August 2007 Associations' Board Meeting and advised the Board that he would sue if he was not allowed to build the house at the height that he wanted. He was hostile, threatening, and belligerent at the meeting. (CP 54, FF 16)

The Bunneys were advised by letter of August 8, 2007 that they needed to provide more technical drawings before the plans could be approved. The Bunneys submitted no additional drawings and did not

conduct any excavation work to bring the building within the height limitation. (CP 55, FF 18, 19)

In November of 2007 the attorney representing the Associations wrote to the Bunneys and advised them that if they proceeded with construction of the house suit would be filed against them and the attorney's letter would be submitted to the court to show bad faith. The Bunneys ignored the letter and continued with the construction of their home completing it in November of 2008. (CP 56, FF 23)

The Bunneys were advised on several occasions before and during construction that they were required to submit revised plans for approval and they did not do so. (CP 57, FF 24)

The Bunneys were also advised of the appropriate measurement standard prior to construction of the house. They were advised of a slightly different measurement standard prior to construction, however, they did not rely on the incorrect standard. They never questioned the different standards and were aware that if their home was built according to the unapproved plans it would exceed the applicable height restriction by at least six feet. (CP 57, FF 25) It turns out that the Bunneys home as constructed is at least six feet over the height restriction. (CP 57, FF 27)

The Bunneys acted arrogantly and proceeded at their own risk when building the home pursuant to the rejected plans. (CP 57, FF 28) They made no good faith efforts to resolve the concerns of the Associations over the proposed height of their residence and proceeded with construction with full knowledge that the home exceeded the 15 foot height restriction and that their plans had been rejected. (CP 58, FF 32) Mr. Bunney even admitted that he knew the risk that he took when he made the decision to not resubmit his plans and to build his house without complying with the 15 foot height restriction. (CP 59, FF 33) The Bunneys also proceeded with construction of the home with full knowledge that the home blocked the views of others in the neighborhood. (CP 59, FF 34) The findings of the court clearly show that the Bunneys were obstinate, intransigent, and willfully violated the height restriction covenant. This prelitigation misconduct necessitated the Associations to take legal action to enforce a clearly valid claim or right. This is bad faith conduct as defined in *Rogerson Hiller Corporation v. Port of Port Angeles*, 96 Wn. App. 918, 982 P.2d 131 (1999).

The Bunneys also argue that imposition of attorney's fees was inappropriate since they had no notice of a claim for attorney's fees. However, the complaint itself requests a judgment against the Bunneys for reasonable attorney's fees. (CP 521) Additionally, the Associations

moved to amend the complaint to conform to the evidence once the extent of the Bunney's prelitigation misconduct became apparent at trial. The Associations orally moved to amend the complaint to conform to the evidence. (CP 48) The court granted the motion and ordered that the complaint be amended to provide that the request for attorney's fees is based on the Bunneys' bad faith. (CP 49) CR 15(b) authorizes the amendment.

The two cases that the Bunneys are relying on to support their position that they were entitled to notice of the specific basis for awarding attorney's fees are *Biggs v. Vail*, 124 Wn.2d 193, 876 P.2d 448 (1994) and *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 829 P.2d 1099 (1992). Both of those cases required notice before imposing attorney's fees so that the offending party would have an opportunity to mitigate the misconduct by correcting it. The *Biggs* case was based on a CR 11 sanction. The theory in both of the cases was that the purpose of the notice was to prevent the misconduct from occurring. The threat of the sanction was to prevent the misconduct. That is not the purpose of the award of attorney's fees in this case. In this matter the misconduct was prelitigation misconduct and had already occurred. The award of attorney's fees in this case is in the nature of "a remedial fine by the court for civil contempt in that the party's bad faith is wasting private and judicial resources." *Rogerson Hiller*

Corporation v. Port of Port Angeles, supra at 298. Additionally, the Bunneys had ample notice from multiple sources of the nature of the complaint against them, including the letter from Mr. Neumiller of November 19, 2007. That letter stated:

It is the Associations' intent to submit this letter to court in the event of a lawsuit. This letter will then constitute part of the record to demonstrate that you were well aware of the consequences of your actions and that you chose to proceed in bad faith anyway.

(CP 56)

Providing specific notice of a request for attorney's fees based on "bad faith" in a pleading prior to the commencement of the trial would have provided no additional useful purpose.

C. RAP 18.1 Request for award of fees and expenses.

The Associations are requesting that this court order the Bunneys to pay the attorney's fees that the Associations have had to incur in responding to this appeal. RAP 18.1.

RAP 18.1(a) provides "if applicable law grants to a party the right to recover reasonable attorney's fees or expenses on review before either the Court of Appeals or the Supreme Court the party must request the fees or expenses as provided in this rule unless the statute specifies at the request is to be directed to the trial court."

As previously pointed out, “a prevailing party may recover attorney’s fees authorized by statute, equitable principals, or agreement between the parties.” *Thompson v. Lennox*, 151 Wn. App. 479, 484, 212 P.3d 597 (2009). If such fees are allowed at trial the prevailing party may recover fees on appeal as well. *Supra*.

The Associations recovered their attorney’s fees in the trial court based on the equitable principal of bad faith. If this court agrees with the Associations argument that imposition of attorney’s fees in the trial court was appropriate then the Associations are entitled to recover their attorney’s fees incurred in connection with this appeal.

V. CONCLUSION

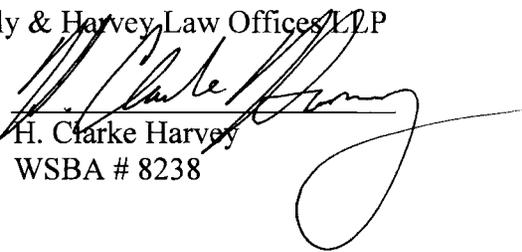
For the reasons set forth above the trial court’s judgment finding that the Bunneys residence violates the height restriction contained in the Restrictive Covenants and requiring the Bunneys to modify the structure to bring it into compliance with the height restriction by July 11, 2011 should be affirmed. Additionally, the trial court’s judgment against the Bunneys for \$75,000 in attorney’s fees in favor of the Associations as a result of the Bunneys bad faith conduct should be affirmed. Finally, this court should order that the Bunneys pay the reasonable attorney’s fees and costs incurred by the Associations in responding to this appeal.

June 3, 2011

Respectively submitted,

Kelly & Harvey Law Offices LLP

By:


H. Clarke Harvey
WSBA # 8238

CERTIFICATE OF SERVICE

I certify that on the 3rd day of June, 2011, I caused a true and correct copy of the Respondents' Brief to be served on the following in the manner indicated below:

Mr. John Widell
Attorney at Law
3937 Agua Fria St.
Santa Fe, NM 87507

FedEx Priority Overnight

DATED this 3rd day of June 2011 at Clinton, Washington.


Elaine Jones

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