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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

LAKELAND HOMEOWNERS ASSOCIATION, a Washington non-
profit corporation,

Appellant,

v.

ALAN WHITE and ERIKA WHITE, husband and wife,

Respondents/Cross Appellants.

APPELLANT'S REPLY/RESPONSE BRIEF

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APPELLANT'S REPLY BRIEF

I. ARGUMENT

A. Summary of Argument

Respondents Alan and Erika White admit in their response brief that the trial court applied the wrong law when it granted their motion for summary judgment. As pointed out in Appellant Lakeland Homeowners Association's opening brief, and as conceded in the Whites' response, the trial court mistakenly applied *contra proferentem* by construing any perceived ambiguity in the Master Declaration against the Association. Instead, the trial court should have analyzed the Declaration as a whole, and if needed, utilized extrinsic evidence to ascertain the intent of the developer in drafting the one-year leasing restriction. When applying the correct law to the facts of this case, this Court should find that the actual language used in the Master Declaration's defined terms captured condominium units in Section 6.10.3's leasing restriction. Alternatively, extrinsic evidence in the record demonstrates that the developer's intent to include condominium units within Section 6.10.3's leasing restriction would uphold the Lakeland homeowners' collective interests. Accordingly, this Court should reverse the trial court's granting of summary judgment by finding that genuine issues of material fact exist on

whether the developer of the Lakeland HOA intended for the one-year rental restriction to exclude condominium units.

With respect to Respondents' cross-appeal, there is no reasonable evidence that Lakeland was negligent or abandoned its rental restriction. The totality of the evidence in the record demonstrates Carrara at Lakeland Condominium's manager was not an agent of Lakeland HOA. Moreover, all of the evidence in the record shows Lakeland HOA proactively enforced the rental restriction during the entire time the homeowners controlled the master community. Therefore, because no genuine issue of material fact exists relating to either issue, the trial court's ruling of summary judgment in favor of the Association should be affirmed.

The trial court's ruling that the Whites were the prevailing party for purposes of awarding attorney's fees should be reversed because both parties obtained substantive relief on cross-motions for summary judgment. Alternatively, this Court should vacate the Judgment and remand to the trial court to conduct a lodestar analysis of respondents' attorneys' fee request, taking into account evidence of comingled, duplicative and overly broad billing charged against the Association.

B. The Actual Language in the Defined Terms of Section 6.10.3 of the Master Declaration Incorporates Condominium Units.

The Whites conflate several distinct canons of contract interpretation in their response brief to conclude that “the plain and obvious”¹ meaning of “Single-Family Home” excludes condominiums. In reaching their conclusion, the Whites merge, instead of distinguish, defined contract terms from vague and ambiguous terms. In short, “plain and ordinary” contract interpretation should not apply to this case because the terms at issue within Section 6.10.3, *e.g.*, “Owner;” “Single-Family;” and “Home,” are defined under Section 1.5 of the Master Declaration. *See* CP 82-84. “A court may not disregard language the parties employed nor revise the contract’s terms in construing it.” *Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980). The court should interpret clear and unambiguous contract terms *de novo* as a question of law. *Wm. Dickson Co. v. Pierce County*, 128 Wn. App. 488, 493, 116 P.3d 409 (2005). Additionally, a court should favor an interpretation giving effect to all of a contract’s provisions over one that renders some language meaningless or ineffective. *Newsom v. Miller*, 42 Wn.2d 727, 731, 258 P.2d 812 (1953). Instead of following the “plain and ordinary” contract construction analysis, because the dispute at issue involves defined terms, this Court should interpret the Master Declaration according to the actual words

¹ Respondents refer many times in their briefing to “plain and obvious,” which is interchangeable with the more commonly referenced “plain and ordinary” contract interpretation as described by Washington courts.

used. *Hearst Communications, Inc., v. Seattle Times Co.*, 154 Wn.2d 493, 503-04, 115 P.3d 262 (2005); *Wagner*, 95 Wn.2d at 101.

In *Hearst*, the Washington Supreme Court articulated the interplay between determining intent by the actual words utilized in a contract versus subject intent of the drafter or parties:

Washington continues to follow the objective manifestation theory of contracts. Under this approach, we attempt to determine the parties' intent by ***focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties.*** We impute an intention corresponding to the reasonable meaning of the words used. ***Thus, when interpreting contracts, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used.*** We generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent. We do not interpret what was intended to be written but what was written.

Id. at 503-04 (emphasis added) (internal citations omitted). In its ruling, the *Hearst* court disregarded extrinsic evidence as irrelevant, and held that the defined terms of the agreement controlled, even in the face of strong public policy influencing an opposite result. *Id.* at 510-12; *see also Miller v. Kenny*, 180 Wn. App. 772, 792, 325 P.3d 278 (2014) (“[I]f the contract says blue, a person can’t say but what I meant was not blue, I meant red.”).

As with *Hearst*, the trial court in this case should have interpreted the meaning of Section 6.10.3 by “the actual words used.” As demonstrated below, a systematic reading of the Master Declaration’s interlinked definitions provides a conclusive answer that the one-year

leasing limitation applies to all residences within the Lakeland master community, including condominium units.

Under Section 6.10.3 of the Master Declaration, “[a]n Owner may not rent or lease a Single-Family Home in any manner whatsoever for one year after the date of closing of their purchase without the prior written approval of the Board of Directors.” CP 93. The term “Owner” is defined under the Master Declaration as:

1.5.17 “Owner” shall mean and refer to the record owner, whether one or more persons or entities, of a fee simple title to any Lot or Living Unit which is part of the Property...

CP 83-84.

The term “Living Unit” is defined under the Master Declaration as:

1.5.13 “Living Unit” shall mean and refer to a building or structure ...designated and intended for use and occupancy as a residence by a Single-Family, including attached or detached houses, *Condominiums*, and units within Apartment Buildings...

(Emphasis added.) CP 83.

Thus, the Whites are deemed “Owners,” as they are the record owners of a fee simple title to a condominium which is part of the Lakeland Master Community.²

² “Property” is defined under the Declaration as: “the real estate described in Exhibit A and all improvements and structures thereon, including such additions thereto as may hereafter be brought within the jurisdiction of the Association.” CP 84.

Having determined that the Whites are “Owners,” the next step is to define “Single-Family Home,” as that global term is not defined in the Master Declaration. However, the terms “Single-Family” and “Home” are expressly defined as follow:

1.5.22 “Single-Family” shall mean and refer to a single housekeeping unit that does not include more than 4 adults.

* * *

1.5.12 “Home” shall mean and refer to any structure located on a Lot, which structure is designed and intended for use and occupancy as a residence by a single-family or which is intended for use in connection with such residence.

CP 83, 84.

Combining the two defined terms above leads to the determination of “Single-Family Home” as:

“A single housekeeping unit that does not include more than 4 adults . . . [in] any structure located on a Lot . . . designed and intended for use and occupancy as a residence by a single-family or which is intended for use in connection with such residence.”

The Whites’ condominium unit unambiguously meets that definition. By the explicit language of the definitions of “Owner,” “Single-Family,” and “Home,” Section 6.10.3 of the Master Declaration applies to condominium units.

Thus, a methodical review of the definitions of the pertinent terms contained within Section 6.10.3 leads to the conclusion that under “the actual words used” test of *Hearst*, the Whites’ condominium unit is a “Single-Family Home.” This Court, therefore, should reverse the trial court’s granting of summary judgment in favor of the Whites.

C. If the “Actual Words Used” Analysis is Rejected, Then Use of Extrinsic Evidence is Allowed to Show that the Developer Intended for All Residences, Including Condominiums, Be Included Within Section 6.10.3’s One-Year Leasing Limitation.

Under the foregoing analysis, this Court can rule as a matter of law that Section 6.10.3 expressly applies to condominium units. Alternatively, if this Court were to conclude that the actual words used to define “Owner,” “Single-Family” and “Home” were not clear on their face, and that the Master Declaration is vague or ambiguous, then the next step would be to interpret the ambiguity by determining the intent of the parties under *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990). *Berg*’s “intent of the parties” analysis has been transformed in the community association context of interpreting CC&Rs to mean the “developer’s intent,” since HOA CC&Rs, or declarations, are drafted unilaterally by developers. See *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 974 P.2d 836 (1999), and *Riss v. Angel*, 131 Wn.2d 612, 934 P.2d 669 (1997). Under this analysis, both the Whites and Association agree as to the appropriate

law that applies; however, respondents object to the use of extrinsic evidence submitted by the Association to help determine the developer's intent.

In attacking the Association's reliance upon Lakeland HOA's 2009 Rules, the Whites apparently misconstrue the law. The Association is not arguing that its 2009 Rules supplant the Master Declaration or somehow serve to prohibit leasing of residences. Instead, as stated in the Association's opening brief and briefing submitted to the trial court, the Rules serve as extrinsic evidence the court may rely upon in determining the intent of the developer in adopting Section 6.10.3 of the Master Declaration, assuming the Court rejects the actual language used analysis described above.

Next, the Whites rely upon *Wilkinson v. Chiwawa Communities Association*, 180 Wn.2d 241, 327 P.3d 644 (2014), for the proposition that "discerning the drafter's intent can be resolved as a matter of law when reasonable minds cannot differ." Respondents' Brief at p. 23. The Whites also list the rules for interpreting restrictive covenants that the *Wilkinson* court cited from *Berg*. See Respondents' Brief at pp. 21-22. The Association does not disagree with the law cited; however, the Association strongly disagrees that the holding in *Wilkinson* supports the Whites'

argument that the developer of Lakeland did not intend to restrict leasing of condominium units.

The facts of *Wilkinson* are distinguishable from those of the instant action. In *Wilkinson*, the court was interpreting a declaration amendment and conducted extensive analysis on whether the amendment was consistent with the developer's intent not to limit in any manner leasing of homes. The issue before *Wilkinson* was whether a simple majority of homeowners could alter the scheme that the developer of the community had formed when the development was created. Conversely, here, there is no declaration amendment; the issue is contract interpretation of the unaltered Master Declaration. If anything, the holding of *Wilkinson* supports the Association's argument, in that the court reiterated that courts should "place 'special emphasis on arriving at an interpretation that protects the homeowners' collective interests.'" *Wilkinson*, 180 Wn.2d at 250 (quoting *Riss*, 131 Wn.2d at 623-24). In the instant proceeding, as fully described in the Association's opening brief, the Lakeland homeowners' collective interests would be protected by uniform application of Section 6.10.3's one-year leasing limitation, in lieu of omitting over 45 percent of the community from the restriction.

The Association also agrees that summary judgment would be appropriate under the "developer's intent" analysis only if "reasonable

minds can reach but one conclusion.” Here, the Association contends that the only way “but one conclusion” could be reached on the meaning of Section 6.10.3 would be to apply a strict reading of the declaration without attempting to construe the drafter’s intent. Under such an analysis, as described in section I.B. above, the Court should determine as a matter of law that the one-year leasing prohibition applies to condominium units. However, if that argument is rejected, then there can be no reciprocal determination. If a strict and literal reading of Section 6.10.3’s defined terms is rejected, then determining the drafter’s intent in this case cannot be determined as a matter of law—the disputed facts of this case do not allow for “but one conclusion.” Consequently, summary judgment is not appropriate and the trial court’s ruling should be reversed.

The Whites contend that “[m]ost people do not ordinarily regard condominium units as single-family homes, for condominiums are apartment-like living units in multi-dwelling buildings.” Respondents’ Brief at p. 26-27. Yet, there is absolutely no evidence in the record supporting the Whites’ naked allegations.³ To the contrary, allowable extrinsic evidence in the form of the 2009 Rules demonstrates

³ Once again, the “plain and ordinary” analysis relied upon by the Whites should not apply to this case because the terms “Owner,” “Single-Family” and “Home” are defined in the Master Declaration.

convincingly that Section 6.10.3 applies to every residence within Lakeland HOA, including condominiums.

The Whites go on to argue that “Lakeland Homeowners Association must have approved the Carrara Declaration, for Carrara is a sub-association of Lakeland and the Carrara Declaration was drafted and recorded some ten years after the Lakeland Declaration.” Respondents’ Brief at p. 30. This argument is similarly unsupported factually in the record. Lakeland and Carrara are wholly separate legal entities that operate independently. CP 121-27; *see also* testimony of Lakeland HOA’s manager Kimberly Stanphill (CP 286-88) and Carrara Condominium’s manager Ria Blake (CP 126-27).

The trial court’s granting of summary judgment in favor of the Whites should be reversed under either the “actual words used” or “developer’s intent” analysis.

D. The Attorneys’ Fee Award in Favor of Respondents’ Should Be Vacated.

1. This Court Should Conduct a Two-Step Review of the Attorneys’ Fee Award

An appellate court should review the legal basis for an award of attorneys’ fees *de novo* and the reasonableness of the amount of an award for abuse of discretion. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 147, 859 P.2d 1210 (1993); *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120,

126, 857 P.2d 1053 (1993). Hence, the trial court's determination that the Whites were the prevailing party subject to an award of attorneys' fees is reviewed under a *de novo* standard pursuant to the law outlined in the Association's opening brief. Only if this Court were to determine that the Whites were the prevailing party, would the Court need to conduct the next stage of the analysis: whether the amount of the award was reasonable under an abuse of discretion standard.

In addition to the substantive questions described above, there are serious questions as to how the trial court came to the conclusion that \$24,774.98 was awardable. The rule is well settled that the absence of an adequate record upon which to review a fee award will result in a remand of the award to the trial court to develop such a record. *Mahler v. Szucs*, 135 Wn.2d 398, 434, 435, 957 P.2d 632 (1998). The appellate courts exercise a supervisory role to ensure that discretion is exercised on articulable grounds. *Id.* at 434–35. The burden of demonstrating that a fee is reasonable always remains on the fee applicant. *Absher Construction Co. v. Kent School Dist. No. 415*, 79 Wn. App. 841, 847, 917 P.2d 1086 (1995).

2. Respondents' Cannot Shoulder the Burden of Proof That They Were the Prevailing Party

The Whites claim that they were the prevailing party because the trial court ruled their claims for negligence and misrepresentation became moot once the summary judgment ruling was made. Respondents' argument fails for two reasons. First, the trial court's statement that "[a]lternative claims became moot" was written in the Judgment that was not approved as to form by the Association's counsel, nor noted for presentation. Second, the Judgment did not vacate, modify or alter the trial court's Order Granting Defendant Lakeland Homeowners Association's Motion for Summary Judgment in Part. *See* CP 300-02.

The Whites pled in their complaint three separate and cognizable claims: (1) declaratory judgment seeking a determination which set of CC&Rs applied; (2) negligence; and (3) negligent misrepresentation. CP 1-3. Unequivocally, the negligence and negligent misrepresentation claims were wholly separate claims from the declaratory judgment relief requested. Importantly, the Whites also pled damages arising from the tort claims that were separate and distinct from the declaratory judgment relief sought. CP 3. Consequently, the tort claims were not mooted upon the trial court ruling in favor of respondents on the declaratory judgment cause. Had the tort claims survived summary judgment, the Whites could

have continued to pursue monetary damages against the Association, as pled in their Complaint.

Because the Whites' claims for negligence and negligent misrepresentation did not automatically become moot upon entry of the Judgment in this case, as they already had been dismissed under the court's summary judgment order in favor of the Association, and since neither the Whites nor the Association wholly prevailed, an award of attorneys' fees was inappropriate and should be vacated by this Court under a *de novo* standard of review.

3. The Parties, and This Court, Can Only Speculate as to the Basis for the Trial Court's Award of Fees.

The Whites allege that because they deducted a blanket \$7,500 from their total attorneys' fees incurred in the case, "by necessary implication, the Trial Court accepted the White's argument. . . . that the \$7,500 deducted from their overall claim for fees more than offsets Lakelands's claims about unproductive time or time unrelated to the Lakeland case" Respondents' Brief at p. 37. Respondents' allegations are merely speculative and unsupported in the record. In its order awarding fees, the trial court failed to set forth a lodestar calculation, or any "articulable grounds" supporting the award. CP 416-17.

In the Judgment, the trial court stated: “Contribution by co-respondent American Management Services, NW, LLC has been considered in this ruling.” CP 413. However, that document was the Judgment, and not the Order Granting Plaintiff Motion for Attorney Fees; and the Judgment lacked any lodestar or other evaluation or analysis of the attorneys’ fee amount.

Generally, a determination of reasonable attorney’s fees begins with a calculation of the “lodestar,” which is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Weeks*, 122 Wn.2d at 149–50; *Berryman v. Metcalf*, 177 Wn. App. 644, 660, 312 P.3d 745 (2013). Under the lodestar method of determining reasonable fees, the court must first “exclude from the requested hours any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims.” *Mahler*, 135 Wn.2d at 434. Fees should be awarded only for services related to causes of action which allow for fees. *Boeing v. Sierracin Corp.*, 108 Wn.2d 38, 66, 738 P.2d 665 (1987); *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d at 735, 743, 733 P.2d 208 (1987). Here, the trial court did not provide indication that it conducted any type of lodestar analysis, especially in light of the information of comingled and overly broad billing by respondents’ counsel that was submitted by the Association. *See* CP 328-43.

The court may discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 1983). It is appropriate to discount work which could be useful in ancillary or parallel litigation. *Fetzer II*, 122 Wn.2d at 151, n. 6. Other than a blanket statement in the Judgment that “[c]ontribution by co-respondent American Management Services, NW, LLC has been considered in this ruling,” the trial court provided no indication that it reviewed or even considered fees incurred by the Whites’ attorney on duplicated efforts or time spent pursuing the tort and abandonment claims. Consequently, there is strong evidence the trial court abused its discretion in awarding \$24,774.98 in attorneys’ fees and \$347.49 in costs. This Court should therefore vacate the Judgment entered in favor of respondents.

II. CONCLUSION

Under the “actual words used” test of *Hearst Communications*, this Court can determine that condominium units are included within Section 6.10.3’s one-year leasing restriction. Alternatively, if the Court finds ambiguity in the terms and looks to the intent of the developer in drafting Section 6.10.3, extrinsic evidence in the form of the 2009 Rules is admissible and persuasive in showing that the homeowners’ collective interests are best protected by a uniform application of Section 6.10.3

across the entire Lakeland HOA community. Accordingly, this Court should reverse the trial court's granting of summary judgment in favor of respondents and vacate the award of attorneys' fees.

CROSS-RESPONDENT'S RESPONSE BRIEF

I. STATEMENT OF THE CASE

Cross-Respondent Lakeland Homeowners Association relies upon and incorporates by reference herein the Statement of the Case set forth in its Opening Brief in the cross-appeal, supplemented by the following:

At all relevant times, Ms. Blake was manager for Carrara Condominium, and not Lakeland HOA. CP 126-27. Ms. Blake has never managed Lakeland HOA, nor has she stated to anyone that she represented or was in any way was involved with Lakeland HOA. CP 126-27.

Even though the Whites were well aware of the leasing conflict between Carrara's CC&Rs and Lakeland's CC&Rs prior to purchase, there is no evidence in the record that the Whites, or anyone on their behalf, communicated with anyone from Lakeland HOA, or its agents or representatives, prior to closing on their transaction. CP 67.

Evidence before the court demonstrates that Section 6.10.3 of the Master Declaration has been uniformly enforced by the Association, including multiple enforcement actions against condominium unit owners,

since the Association was transitioned from developer to homeowner control, a period dating back to 2007. CP 260-69; *see also* CP 52.

II. ARGUMENT

A. Any Acts or Omissions by Ria Blake Cannot be Imputed to Lakeland HOA.

The entirety of the Whites' tort claims against the Association were grounded in agency, as it is undisputed Ria Blake never acted as Lakeland HOA's manager. Because there are no genuine issues of material fact that Ms. Blake was not acting on behalf of Lakeland HOA relating in any way to the Whites' allegations, the Whites' negligence and negligent misrepresentation claims against Lakeland HOA were properly dismissed on summary judgment.

There is no evidence that Ms. Blake had express or implied authority to act on behalf of Lakeland HOA. An agent's authority to bind her principal may be of two types: actual or apparent. *King v. Riveland*, 125 Wn.2d 500, 507, 886 P.2d 160 (1994). Actual authority may be express or implied. *Id.* Implied authority is actual authority, circumstantially proved, which the principal is deemed to have actually intended the agent to possess. *Deers, Inc. v. DeRuyter*, 9 Wn. App. 240, 242, 511 P.2d 1379 (1973) (citing 3 Am.Jur.2d Agency § 71 (1962)). Both actual and apparent authority depend upon objective manifestations made by the principal. *Smith v. Hansen, Hansen & Johnson, Inc.*, 63 Wn. App. 355, 363, 818 P.2d 1127 (1991), *review denied*, 118 Wn.2d 1023,

827 P.2d 1392 (1992) (citing Restatement (Second) of Agency § 7 comment b, at 29 (1958)). With actual authority, the principal's objective manifestations are made to the agent; with apparent authority, they are made to a third person. *Smith*, 63 Wn. App. at 363. Such manifestations will support a finding of apparent authority only if they have two effects. First, they must cause the one claiming apparent authority to actually, or subjectively, believe that the agent has authority to act for the principal. Second, they must be such that the claimant's actual, subjective belief is objectively reasonable. *Smith*, at 364.

The most usual example of implied actual authority is found in those instances where the agent has consistently exercised some power not expressly given to the agent and the principal, knowing of the same and making no objection, has tacitly sanctioned continuation of the practice. *King* at 507 (citing Harold G. Reuschlein and William A. Gregory, *Agency and Partnership* § 15, at 40–41 (1979)). In addition, the Washington Supreme Court has stated that “[a]uthority to perform particular services for a principal carries with it the implied authority to perform the usual and necessary acts essential to carry out the authorized services.” *King* at 507 (citation omitted). The Restatement provides a closely related explanation of apparent authority:

Likewise, as in the case of [actual] authority, apparent authority can be created by appointing a person to a position, such as that of manager or treasurer, which carries with it generally recognized duties; to those who know of the appointment there is apparent authority to do the things

ordinarily entrusted to one occupying such a position, regardless of unknown limitations which are imposed upon the particular agent.

Smith, 63 Wn. App. at 365 (quoting Restatement (Second) of Agency § 27 comment a, at 104 (1958)).

Here, there is absolutely no evidence that Ms. Blake possessed express or implied authority to bind Lakeland HOA. Applying the above-referenced case law and Restatement (Second) of Agency to the facts of this case, there was no objective manifestation by Lakeland HOA to Ms. Blake that she was its manager or agent; thus, no express authority existed. Similarly, there is no evidence of Lakeland HOA's objective manifestation to a third party (the Whites) that Ms. Blake was its manager or agent; thus, no apparent authority existed. Most compelling is the fact that neither the Whites, nor anyone on their behalf, had any communication with Lakeland HOA, or its agents or representatives, prior to closing of escrow on the Carrara Condominium unit. In short, there is no evidence of any communication or actions by Lakeland HOA to infer or imply that Ms. Blake was in any way related to the master community. Since there was no agency relationship between Ms. Blake and Lakeland HOA, the master community cannot be held liable for Ms. Blake's alleged torts. Consequently, this Court should affirm the trial court's granting of

summary judgment dismissing the Whites' claims of negligence and negligent misrepresentation against Lakeland HOA.

B. There was no Apparent Authority Because There were no Objective Manifestations of Authority.

There is absolutely no evidence in the record that demonstrates Ms. Blake held herself out as an agent for Lakeland HOA, or that the master community permitted Ms. Blake to act on its behalf. To the contrary, the admissible evidence in the record conclusively shows that Ms. Blake was solely the agent for Carrara at Lakeland Condominium Association. To summarize, the pertinent evidence in the record is as follows:

- Sworn declaration from Ms. Blake stating she has never acted in any capacity for Lakeland HOA nor has she ever represented to anyone that she acted in any way on behalf of Lakeland HOA. CP 126-27.
- The Whites readily admitted that Carrara at Lakeland Condominium Association and Lakeland HOA are two separate and distinct legal entities. CP 294.
- In his September 26, 2012 letter to Lakeland HOA, the Whites' attorney admitted Ms. Blake was acting as an agent for Carrara Homeowners Association. CP 235.
- Pinnacle Management manages 38 separate community associations throughout Washington, including three sub-associations within the Lakeland master community. CP 286.

- Lakeland HOA's manager had no involvement whatsoever with sub-association resale certificates (CP 286-87), nor did the manager have any contact with Ms. Blake related in any manner to the White transaction. CP 284.

Since the Whites cannot show any agency relationship between Ms. Blake and Lakeland HOA, they attempt to shoehorn in an agency theory through the management company, Pinnacle Management. The Whites rely upon *Collings v. City First Mortgage Services, LLC*, 177 Wn. App. 908, 317 P.3d 1047, *review denied*, 179 Wn.2d 1028 (2013) for the proposition that “[b]ecause Pinnacle Management was the management company for Lakeland and Carrara, Lakeland is bound by Pinnacles’ misrepresentations and negligence.” Cross-Appellants’ Brief at p. 44. The Whites’ statement is a mischaracterization of how far *Collings* can be stretched.

In *Collings*, a former homeowner brought an action against a lender, lender’s servicing agents and a mortgagee arising out of a transaction in which the homeowner sold his home to the lender and then began leasing the home after one of the mortgage services illegal skimmed profits from the loan. There was substantial evidence that the mortgage servicer’s actions were self-serving, that he personally profited from the loans he made, and that he combined his own business with that of the

lender. *Id.* at 926-277. In affirming the judgment, the court of appeals held that there was sufficient evidence to support a finding that the mortgage servicer acted not only for his own benefit but also within the scope of his authority to act for the lender. Specifically, the court held:

But express authorization is not required for a finding of agency; an employer is liable if the act complained of was incidental to acts expressly or impliedly authorized. Where the servant combines his own business with that of the master, the master will be held responsible unless it clearly appears that the servant could not have been directly or indirectly serving his master.

Unlike *Collings*, here, Ms. Blake was not Lakeland HOA's employee, she was Pinnacle Management's employee. *Collings* would be instructive if the Whites were attempting to impute Ms. Blake's conduct to Pinnacle. But cross-appellants are attempting to use *Collings* to support an agency argument against the Association, who is one-step removed from Pinnacle. This argument fails because there is an additional link in the chain under the facts of this case. Ms. Blake (Actor A) was Carrara's manager and express agent. Under *Collings*, she arguably could have binded Pinnacle (Actor B) under an agency theory. However, her acts or omissions could not extend all the way to Lakeland HOA (Actor C), an entity upon which she had no employee or agency relationship. The only agency relationship Ms. Blake had was with Carrara Condominium, and arguably under *Collings*, her employer Pinnacle Management.

Because Ms. Blake had no express or apparent authority to act on

behalf of Lakeland HOA, and because there is no genuine issue of material fact that the Whites neither sought out nor received any communication from Lakeland HOA relating to the one-year rental limitation prior to close on their purchase, this Court should affirm the trial court's dismissal of the Whites' negligence and negligent misrepresentation claims against the Association.

C. Lakeland Master Community's Rental Restriction Is Regularly Enforced and Has Not Been Abandoned.

Evidence in the record demonstrates that Section 6.10.3 of the Master Declaration was uniformly enforced by the Association throughout the years. CP 260-69. A covenant is abandoned and cannot be enforced if it has been "habitually and substantially violated so as to create an impression that it has been abandoned." *Green v. Normandy Park*, 137 Wn. App. 665, 697, 151 P.3d 1038 (2007). Abandonment is a defense, and "requires evidence that prior violations by other residents have so eroded the general plan as to make enforcement useless and inequitable." *Mountain Park Homeowners Assn'n, Inc. v. Tydings*, 125 Wn.2d 337, 342, 883 P.2d 1383 (1994). Whether the evidence supports a finding of abandonment is a question of fact. *Normandy Park*, at 697 (citing *White v. Wilhelm*, 34 Wn. App. 763, 769-70, 665 P.2d 407 (1983)). A few violations are not enough for a successful abandonment defense. *Wilhelm*,

at 769-70. Compare *Normandy Park*, at 696-97 (a “few” instances of questionable covenant enforcement among 500 lots is not enough to constitute abandonment), and *Sandy Point Improvement Co. v. Huber*, 26 Wn. App. 317, 319, 613 P.2d 160 (1980) (in a 1000-lot development, two violations do not constitute abandonment) with *Wilhelm*, at 770-71, 773 (abandonment was found where there were numerous covenant violations, the association did not have an Architectural Control Committee, and three houses were built without approval).

While abandonment requires evidence of “habitual and substantial” violations, in this action, the Whites have failed to present evidence of a single unenforced violation to the rental restriction. The Whites argue that “[c]ommon sense suggests that in the prior 17 years, there must have been well over a hundred such violations. . . .” Cross-Appellants’ Brief at p. 46. However, abandonment must be proved by admissible evidence, not by “common sense.”

The Association’s rental restriction has been regularly enforced and was not “habitually and substantially violated.” The rental restriction was “enforced prior to the Declarant turning over the Board of Directors to the Homeowners.” CP 265. Between 2007 and 2009, before the Whites purchased their home, the Board of Directors applied the rental restriction “uniformly” to all residences within the master association. CP 268. During the relevant time period of this lawsuit, Lakeland HOA also

consistently and uniformly enforced Section 6.10.3. CP 260-61; CP 52. Enforcement of the rental restriction against residences in Lakeland master community included condominium associations. CP 265; CP 268; CP 261. The Board of Directors enforced all rental restriction violations to which they were aware. CP 266; CP 268; CP 261.

Based on the overwhelming evidence before this Court, there is no basis for an abandonment defense. Consequently, this Court should affirm the trial court's granting of summary judgment in favor of Lakeland HOA.

D. Attorneys' Fees

Pursuant to Section 8.1.2 of the Master Declaration and RAP 18.1, the Association requests its attorney's fees for the time allocated to draft and argue this Response Brief, and for the attorneys' fees incurred in defending against the negligence and negligent misrepresentation claims in the underlying case, as requested in its Cross-Motion for Attorneys' Fees. CP 356-405.

III. OVERALL CONCLUSION

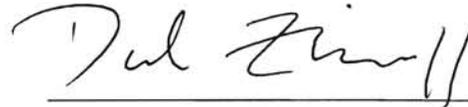
Both parties acknowledge that the trial court misapplied the law when it granted summary judgment in favor of the Whites. If this Court applies the "actual words" analysis under *Hearst*, it can determine as a matter of law that Section 6.10.3 incorporates condominium units. If the *Hearst* analysis is rejected, then under the "developer's intent" analysis,

summary judgment is not appropriate because reasonable minds cannot allow for “but one conclusion.” Under either analysis, this Court should reverse the trial court’s granting of summary judgment in favor of Respondent/Cross-Appellants.

If this Court reverses the trial court’s granting of summary judgment in favor of the Whites, then indisputably, the Judgment awarding attorneys’ fees should be vacated. Even if the Court were to affirm summary judgment, the Judgment should be vacated because both parties prevailed on cross-motions for summary judgment. In the event this Court were to uphold the summary judgment ruling in favor of the Whites and determine that the Whites were the prevailing party, the Judgment should still be vacated and the matter remanded to the trial court to conduct a lodestar calculation of the appropriate amount of fees taking into consideration comingling, duplicity and overly broad billing by respondent/cross-appellant’s counsel.

This Court should affirm the trial court’s granting of summary judgment in favor of the Association because no genuine issues of material fact exist relating to the lack of evidence of negligence or misrepresentation by the Association. Moreover, no genuine issues of material fact exist that the Association did not abandon enforcement of Section 6.10.3 of the Master Declaration.

Respectfully submitted this 25th day of September, 2014.

A handwritten signature in cursive script, appearing to read "Dan Zimmeroff".

Daniel Zimmeroff, WSBA No. 25552
Attorneys for Appellant/Cross-
Respondent Lakeland Homeowners
Association

COURT OF APPEALS DIVISION I OF THE STATE OF WASHINGTON

LAKELAND HOMEOWNERS) Court of Appeals Case No. 71903-3
ASSOCIATION, a Non-Profit Corporation,)
)
Appellant,) CERTIFICATE OF SERVICE
v.)
ALAN WHITE and ERIKA WHITE)
Husband and wife,)
)
Respondents.)

I HEREBY CERTIFY that on September 25, 2014, I caused to be served a true and correct copy of:

1. *Appellant's Reply/Response Brief*

on the party or parties listed below in the manner indicated:

Douglas W. Scott
Law Offices
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11201 SE 8th Street, Suite 152
Bellevue, WA 98004

Via:
 Hand Delivery
 U.S. Mail
 Electronic Mail
 Facsimile Transmission

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Seattle, Washington on this 25th day of September, 2014.



Aleena Hodges