

ENDORSED FILED  
SUPERIOR COURT

AUG 30 2011

COWLITZ COUNTY  
BEVERLY R. LITTLE, Clerk

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**SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY**

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ANDY & SUE WHITWORTH, Husband  
and Wife; DOUG & STACY YEAMAN,  
Husband and Wife; ROBERT & PHYLLIS  
NELSON, Husband and Wife; BRENT &  
CONNIE DAVIS, Husband and Wife;  
NICK & JOANN SPRINGER, Husband  
and Wife; KARL & MARSHA MICHELS,  
Husband and Wife; DOUG & YOLANDA  
RAUCH, Husband and Wife; HOWARD  
& STACEY ALLINGTON, Husband and  
Wife; MARVIN & HELEN TAYLOR,  
Husband and Wife; RANDY & JODI  
SPARKS, Husband and Wife; MORALL  
& WENDI OLSON, Husband and Wife;  
DAVE & CRISTA NEAL Husband and  
Wife; and FELIX & JOLENE HARO,  
Husband and Wife, JEFF & AMY HULSE,  
Husband and Wife, BRENDAN & ANGIE  
HEATH, Husband and Wife, GILBERT  
ORNELAS and CAROLEE ORNELAS,  
Husband and Wife, and CAROLEE  
ORNELAS as Trustee of the CINDY  
MORSE LIVING TRUST,

Plaintiffs,

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v.

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No. 08-2-01650-2

**FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND ORDER PURSUANT  
TO CR 54(b)**

**Law Office of Vincent L. Penta, P.S.**  
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DAVE'S VIEW, LLC, a Washington limited liability company; DAVE'S VIEW AT MARTIN'S BLUFF HOMEOWNERS' ASSOCIATION, a Washington non-profit corporation, LYNDA S. WILSON, an individual; and CHAD WILSON, a married man,

Defendants.

THIS MATTER was tried in a bifurcated bench trial before the above-entitled Court, the Hon. James E. Warne, on June 7, 8, 9, 16 & 17, 2011. The Plaintiffs were represented by Vincent L. Penta, P.S. of the Law Office of Vincent L. Penta, P.S. and Daniel E. Zimberoff, Esq. of the Barker Martin law firm. The Defendants were represented by Cassie N. Crawford, Esq. of Vancouver Land Law.

**A. Plaintiffs' Witnesses.** Testifying at trial were Andrew Whitworth, Stacey Allington, Jeff Hulse, Morall Olson, Jolene Haro, Bob Nelson, Karl Michels, Carolee Ornelas, Marv Taylor and Joann Springer, all of whom were Plaintiffs. Testifying on behalf of Plaintiffs were Carl McCrary, in his capacity as Director of the City of Kalama Department of Public Works, and Terry Woodruff, an expert, in his capacity as Assistant Manager and Chief Title Officer for Cowlitz Title Company.

**B. Defendants' Witnesses.** Testifying at trial were Chad Wilson, Defendant and Managing Member of Dave's View, LLC; Karl Hintz, a former employee of Dave's View, LLC; Paul King, formerly of King's Landscaping; Diana Downing, a home owner and real estate agent in Phase 1; Don Vossler, a lot owner in Phase 1 of Dave's View at Martin's Bluff; Chuck Whitten, retired, regarding his prior service as the engineer for Hagedorn Inc.; and Mike Wojtowicz, in his capacity as Director of the Cowlitz County Department of Building and Planning.

**C. Evidence Presented and Entered.** Voluminous evidence was presented

by Plaintiffs and Defendants at trial which included, but was not limited to: the governing documents of Dave's View at Martin's Bluff Homeowners' Association (hereinafter the "Association") including Articles of Incorporation, Bylaws, Meeting Minutes, Declaration of Covenants, Conditions & Restrictions File No. 3221251, Restated/Amended Declaration File No. 3238049 and Restated/Amended Declaration File No. 3283826; incomplete banking records for the Association including bank signature cards, some monthly statements for the Association bank account from 2005 through 2009 with some microfiche copies of some negotiated checks drawn thereon and reconciliation reports; incomplete accounting records for the Association including partial Profit & Loss statements for years 2005 and 2006, budget forecasts for 2008, 2009, 2010 and 2010; an excerpt of a video recording of a pre-litigation meeting between Plaintiffs and Developer; Association dues and billing statements as issued to Plaintiffs by Defendants; email and written correspondence between the Developer and Phase 1 Lot Owners; original development and planning documents for the Dave's View at Martin's Bluff property including the original proposed development plan, individual plat maps for the two plats of record under File Nos. 3221250 and 3283826, the Washington State Environmental Policy Act Application (SEPA), Department of Ecology Permit and Notice of Violations thereof, Warranty Deeds for sold lots in Phase 1, Title Policies and Loan Documents for lots purchased in Phase 1, Notices of alleged violations to lot owners, and some Architectural Review records for Phase 1 lot owners.

## I

### **FINDINGS OF FACT**

The Court, having heard the testimony as presented, having reviewed the pleadings and the evidence as set forth in pertinent part above, and having interrogated

the witnesses, and having heard the arguments of Counsel and being otherwise fully advised,

**NOW, THEREFORE, THE COURT FINDS:**

**A. The Homeowners' Association.**

1) The Declaration of Covenants, Conditions and Restrictions was drafted by ~~Mr. Wilson~~ the Defendants.

2) The original and applicable Declaration (AFN 3221251) states that the subject Property is defined as Phase 1 according to the Plat filed and the recitals therein.

3) The Development Period ended twenty-four months from the date the Plat for Phase 1 was recorded or upon the sale of thirty-three of the thirty-five lots in Phase 1 which was January 31, 2006.

4) The Developer reserved the right to add property to the Association but has not done so.

5) The Declaration does not provide for any extension of the Development Period for Phase 1.

6) The Homeowners' Association exists to collect assessments and maintain the common areas of the Property which currently encompasses the common areas of Phase 1 as delineated on the Plat, and any other property which is later added by the Developer.

7) The Association owes a duty to the Developer and Lot Owners to maintain the common areas, which common areas include all of the common areas delineated on the plat of Phase 1 and the main private road known as Dave's View Drive which is shared with Phases 2 and 3.

8) The Association should have been turned over to the Phase 1 lot owners as of January 31, 2006.

- 9) The Association is governed by RCW 64.38.
- 10) The Association has duties and responsibilities, all of which have to do with maintaining the common areas within the development.
- 11) The Association must carry out its duties in good faith.
- 12) The Association is obligated to keep financial and sufficient records to enable it to declare to each owner/member the true statement of its financial status.
- 13) All records, including, but not limited to bank records, checks and invoices, in whatever form they are, are the property of the Association and its Members.
- 14) Each Association manager has an obligation to turn over all the original books and records to the new Association immediately upon termination of the management relationship with the old Association.

a) Development of water feature was a capital expense of the Developer.

**B. Architectural Review Board.**

- 15) Each lot owner purchased with knowledge of the architectural design standards as set forth in the original Declaration and all material disputes related to such standards have been resolved by the Owners in agreement with the Developer, or otherwise, leaving no issues remaining for the trial Court to adjudicate.
- 16) There are no rules or design guidelines adopted other than those set forth in the original Declaration.
- 17) The Association cannot change the design standards, and the Developer cannot change the design standards after the sale of the lots.
- 18) The architectural rules are designed to protect the Developer's investment and the Homeowners' investments.
- 19) The enforcement of architectural rules is not a function of the Association.
- 20) The undeveloped lots remaining in Phase 1 are obligated to build in

accordance with the design standards and guidelines under which they purchased.

21) No rules were adopted regarding enforcement of the architectural rules or design guidelines.

22) There can be no recordings against Lot Owner titles without proper rules for enforcement and appeal.

**C. Association Records and Accounting.**

23) Defendants did not comply with RCW 64.38.

24) Wilson testified that he was the Association and that he, his mother and wife would make all the decisions and would give the lot owners such financial information as they saw fit, ~~and then decided that they did not need any information.~~

25) The Wilsons had the highest duties of loyalty to the Association as would the directors of any non-profit corporation.

26) Wilson, as and for himself and in his capacity as the Managing Member of the Dave's View, LLC, testified that he performed work for the Association in lieu of paying dues on his lots, and also that he paid himself for work done out of Association funds.

27) Defendant Wilson and Dave's View, LLC failed to account for any of the work he claimed to have done.

28) Defendants did not provide the full records to any lot owner upon request and did not provide the Plaintiffs nor the trial Court with the full records for the Association.

29) Defendants invaded Association funds to pay their own costs, specifically, but not limited to, the payment of three checks from Association funds to an employee of Dave's View LLC, the payment of capital expenses for the installation of a water meter and original landscaping at the front entrance of the Development, and paying Wilson

and/or his companies for work that is unsubstantiated documented by the records provided.

30) Defendants failed to maintain a clear line between Association funds and their own funds.

31) ~~Defendants did not have~~ Neither the Declaration nor the law gave authority to record Notices of past due assessments which were treated like liens against real property.

## II

### CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Court hereby sets forth Its **CONCLUSIONS OF LAW** as follows:

1) The Defendants violated the Homeowners' Association Act (RCW 64.38) by failing to maintain sufficient records, failing to provide an account to each owner, failing to call annual meetings of the owners and by improperly imposing assessments upon lot owners.

2) The Defendants did not act in accordance with their fiduciary obligations as set forth in RCW 24.03 *et.seq.* and RCW 64.38.025.

3) The Developer and/or any Manager of the Association shall call for the organizational meeting for the purpose of democratically electing the Board of Directors, and the Dave's View at Martin's Bluff Homeowners' Association shall bear the costs of serving the notices upon all the Phase 1 lot owners.

4) All financial records from the very first assessment to the present time shall be turned over to the new Association's democratically elected Board of Directors.

5) The Association shall, if desired, have an audit conducted of the records and this Court shall retain jurisdiction for the purpose of making the determination as to

the extent of any conversion of Association funds by the Defendants based upon such an audit.

6) The Association shall be responsible to maintain all the common areas of Phase 1, and in addition thereto, shall be responsible for forty percent (40%) of the maintenance and repair costs associated with the front entry of the development and the common road known as Dave's View Drive.

7) All assessments imposed by the Defendants after January 31, 2006 were improper and unenforceable.

8) The Notices of Past Due Assessments as recorded by the Defendants against the real property titles of the Plaintiffs are slanderous to the titles of the Plaintiffs ~~and Plaintiffs have been damaged thereby.~~

9) Plaintiffs Haro and Hulse shall be awarded their damages as a result of the offense to their respective titles.

### III

#### **ORDER**

In consideration of the foregoing Findings of Fact and Conclusions of Law, the Court **ORDERS** the following relief to be granted to the Plaintiffs:

1) Judgment for the damages incurred by Defendants' slander of title against Plaintiffs HARO is hereby awarded in the sum of Nine Hundred Ninety Seven Dollars and Fifty Cents (\$997.50) with interest thereon at the statutory rate of twelve percent per annum (12%);

2) Judgment for the damages incurred by Defendants' slander of title against Plaintiffs HULSE is awarded, and it is hereby ordered that the Four Thousand Five Hundred Dollars (\$4,500.00) which had been improperly withheld from the sale proceeds

of Plaintiffs HULSE shall be released and judgment is awarded in the sum total of the interest thereon at the statutory rate of twelve percent per annum (12%) from the date the funds were withheld until the date they are released to Plaintiffs HULSE.

3) Defendants or their Property Manager shall call the organizational meeting of the Association at a reasonable time and place within 30 days of the entry of this Order in accordance with the foregoing Findings and Conclusions of Law.

4) Defendants and their agents shall turn over to the democratically elected Board of Directors of the new Association:

- a) All records from the date of the first assessments;
- b) All accounts held by the Association and in the name of the Association; and
- c) All funds collected, by assessment or special assessment, or held by the Developer or Association in the trust accounts or other accounts of any title company or property management company, in excess of \$150 per lot for all Phase 1 lots from January 31, 2006 to the present date.

5) The Court shall retain jurisdiction for the purpose of entering judgment against the Defendants for all invasions of Association funds, or funds which are determined to have been improperly taken or paid from the Association upon completion of an audit of the records for up to one year from the date of entry hereof.

6) Those certain Notices of Past Due Assessments which have operated to slander the title of the real properties of the Plaintiffs are hereby invalidated and a separate release shall be signed contemporaneously herewith to clear Plaintiffs' title of the encumbrance created thereby (AFN 3388973, 3388974) .

7) The Court reconsidered its Declaratory Judgment granted in this action on December 27, 2010, and affirms its decision therein as being a final judgment in this

action, except for that portion which assigns the obligations for maintenance within the development that this Court has addressed with specificity herein at §2, ¶6 above.

8) That Defendants and/or their agent, RPM Services as Property Manager, shall tender all funds held for and on behalf of the Association, to the Clerk of the above-entitled Court no later than 30 days from the entry of this Order.

9) Plaintiffs, as the substantially prevailing party, are hereby awarded their Court costs and Attorneys' fees upon submission of an appropriate Cost Bill.

10) The Clerk of the above-entitled Court shall, upon entry of this Order, remit all funds deposited by Plaintiffs currently held in the Clerk's Registry in the amount of Four Thousand, Two Hundred Ninety-Eight Dollars and Five Cents (\$4,298.05) to the Law Office of Vincent L. Penta, P.S., In Trust, for and on behalf of Plaintiffs.

**SO ORDERED** this 30<sup>th</sup> day of August, 2011.

**JAMES E. WARME**  
HON. JAMES E. WARME

Presented by:

/s/ Vincent L. Penta, P.S.  
VINCENT L. PENTA, P.S., WSBA 17827  
Of Attorneys for Plaintiffs

Approved as to form;

\_\_\_\_\_  
CASSIE N. CRAWFORD, WSBA \_\_\_\_\_  
Attorney for Defendants