IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR WHATCOM COUNTY

SCOTT HILLIUS, et al., Plaintiffs, v. 18 PARADISE, LLP, et al., Defendants.	No. 20-2-00701-37 MOTION FOR RECONSIDERATION Judge David Freeman

I. INTRODUCTION

The civil rules establish a clear and unambiguous procedure for the decision of cases after a bench trial. Pursuant to CR 52(a)(1), "the court shall find the facts specially and state separately its conclusions of law." Findings of Fact must state all material and ultimate facts necessary to support the trial court's decision and are reviewed based on the evidence presented at trial. *Columbia State Bank v. Invicta Law Grp. PLLC*, 199 Wn.App. 306, 323, 402 P.3d 330 (2017); *Wold v. Wold*, 7 Wn.App. 872 , 875, 503 P.2d 118 (1972).

In other words, findings of fact concern the ultimate issues presented in the case and must "give a clear indication that there has been a resolution of the material issues of fact." *Groff v. Department of Labor and Industries*, 65 Wn.2d 35, 395 P.2d 633 (1964).

> Ultimate facts are the essential and determining facts upon which the conclusion rests and without which the judgment would lack support in an essential particular. They are the necessary and controlling facts which must be found in order for the court to apply the law to reach a decision.

Marriage of Lutz, 74 Wn.App. 356, 371, 873 P.2d 566 (1994). A mere recitation of a witness' testimony or the procedural history of the case is inadequate and inappropriate. *Weems v. State, Board of Industrial Insurance Appeals*, 44713-4-II (2014); *Marriage of Lutz*, 74 Wn.App. 356, 370, 873 P.2d 566 (1994).

MATTHEW F. DAVIS, PLLC
1155 N. State Street, Suite 619
Bellingham, WA 98225
(360)564-6400

This Court's Findings of Fact, however, sets forth seven pages of procedural history and appears to be based largely on that history, not on evidence presented at trial.

The Court also made extensive findings about the factual background of the case. However, many, if not most of those findings, lack any evidentiary basis from trial or are simply wrong. For example, Findings of Fact 2.41 states that "The City of Lynden approved the Homestead PRD Master Declaration, including the structure of the Homeowners Association as indicated by the Homestead PRD Agreement between the City and Homestead Northwest LLC," but no evidence was presented that the City approved the structure of the association. Findings of Fact 2.64 states that "The Court finds that the Intervenors contention that the HOA incorporated and filed with Washington Secretary of State by Plaintiff's lawyer, K. David Andersson, and currently governed by Tom Staehr is invalid and defunct," but no testimony was presented that it ever purported to be a homeowners association. It was incorporated as a corporate placeholder pending resolution of plaintiffs' dispute with the Declarant. While the *pro se* intervenors misunderstand legal concepts of corporate capacity, the Court should not subscribe to those misunderstandings.

The Court stated at the July 3 hearing that its decision was based on the fact that MJ Management did not obtain 18 Paradise's consent to sign and record the Sixth and Seventh Amendments. However, the Court's Findings of Fact make no such finding. In fact, the Court's Findings of Fact do not include a single reason why the Sixth and Seventh Amendments are invalid.

II. FINDINGS OF FACT

A. Procedural Findings.

As a threshold matter, the entire procedural background section is unnecessary and inappropriate. There is no basis or reason for the Court to make findings of fact about the record in this case. Findings of Fact must be supported by substantial evidence, which is "defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *McCleary v. State*, 173 Wash.2d 477, 269 P.3d 227 (2012). Substantial evidence is based on the evidence presented at trial, not on the pleadings on file. *State v. H.O.*, 186 Wn.2d 292, 376 P.3d 350 (2016).

MATTHEW F. DAVIS, PLLC
1155 N. State Street, Suite 619
Bellingham, WA 98225
(360)564-6400

The Court may, of course, refer to the record in any part of its decision, and for whatever purpose the Court deems appropriate. However, the Court should not characterize or comment on pleadings and then rely on its characterization instead of the record itself. In numerous instances, the Court's findings about the record are erroneous, inaccurate, or misleading.

As the Court has pointed out many times, the Complaint in this case was amended five times. The earlier versions of the Complaint were superseded and no longer have any relevance to or bearing on this action.

> An amendment which is complete in itself and does not refer to, or adopt, the prior pleading, supersedes it and the original pleading ceases to be a part of the record, being in effect abandoned, or withdrawn, and becoming functus officio, with the result that the subsequent proceedings in the case are to be regarded as based upon the amended pleading, which will not be aided by anything in the prior pleading, and any ruling of the court with relation to the sufficiency of the original pleading is not properly in the record. 49 C.J. 558, Pleading, § 773.

Herr v. Herr, 35 Wn.2d 164, 211 P.2d 710 (1949); *High v. High*, 41 Wn.2d 811, 252 P.2d 272 (1953) ("One can abandon his initial theory or cause of action by filing amendatory pleadings, in which case there is a supersedure of the former pleadings."). What plaintiffs said in the earlier Complaints may be relevant to issues such as sanctions or attorney fees, but earlier complaints cannot be part of the basis for the decision on the merits of this case. Similarly, the fact that parties filed answers to earlier complaints cannot be the basis for the decision on the merits. For the same reason, whether parties filed motions for summary judgment and the Court's ruling on such motions are not the kind of facts that will support a decision on the case.

If the Court could or should include the procedural history in the findings of fact, then it should include all of them. However, the findings adopted by the Court list only a tiny fraction of the pleadings, and the ones listed are limited to those selected by MJ Management. As a whole, the findings presented an incomplete and inaccurate recitation of the history of the case.

Making matters even more troubling, many of the procedural findings are flatly wrong. For example, Finding of Fact 2.9 states that

> On September 29, 2021, MJ Management, Josh Williams, and William O'Bryan filed their Answer, Affirmative Defenses and Counterclaim to Plaintiffs' Second Amended Complaint. Their counterclaim sought declaratory relief on the applicability of the Joint Maintenance Fee.

MATTHEW F. DAVIS, PLLC
1155 N. State Street, Suite 619
Bellingham, WA 98225
(360)564-6400

However, MJ Management's Answer asserted only a counterclaim for past due joint maintenance fees. MJ Answer to Second Amended Complaint at 12. The counterclaims make no mention of a declaratory judgment claim. Similarly, Finding of Fact 2.34.1 states that "The Court granted in Part Plaintiffs Motion to exclude evidence MJ Management's counterclaims to the extent it related to monetary claims. The Court ruled that MJ Management's declaratory claims remained in the case;" The Court did not rule that MJ Management's declaratory claims remained in the case, which is why MJ Management subsequently filed a Second Amended Answer asserting such a claim. Numerous other characterizations of the record in the findings are equally inaccurate.

The Court should strike all of the references to the procedural history. The history of this case is what it is, and purported findings about it would add nothing to the case.

B. Factual Findings.

On July 3, the Court stated that it was using plaintiffs' proposed findings and conclusions because they accurately identified the issues. The proposed findings filed by MJ Management on July 23, and that form the basis of the Court's written findings, are completely different and wildly inaccurate. The findings signed by the Court contradict the decision announced by the Court on July 3.

The findings include numerous matters for which **no evidence** was admitted at trial. Examples include:

- "The Planned Residential Development Ordinance laid out the steps to initiate and complete a Planned Residential Development." (2.38)
- "The City of Lynden approved the Homestead PRD Master Declaration, including the structure of the Homeowners Association as indicated by the Homestead PRD Agreement between the City and Homestead Northwest LLC." (2.41)
- "Part of the plan for the PRD included Common Open Space, defined above in Paragraph 2.13, which was scattered throughout the property to provide parks and other recreational areas around Homestead." (2.42)
- "The Court finds that the Intervenors contention that the HOA incorporated and filed with Washington Secretary of State by Plaintiff's lawyer, K. David Andersson, and currently governed by Tom Staehr is invalid and defunct." (2.64)
- "The Court finds that the Master Declaration is clear on the requirement for an HOA, but that it would remain an "advisory committee" only until such time that there was property for the HOA to manage. (2.65)

MATTHEW F. DAVIS, PLLC
1155 N. State Street, Suite 619
Bellingham, WA 98225
(360)564-6400

The nonprofit corporation formed by Andersson has never been or purported to be the homeowners association. MJ Management's proposed findings would result in validation of the current arrangement that the Court said improperly prevented the formation of a homeowners association. These findings bear no relationship whatsoever to the decision announced by the Court on July 3.

Even more concerning, the Court's Findings of Fact say nothing about the primary basis of the Court's decision. The July 3 Court stated that it was ruling that while amendment of the Declaration was within the general scope of MJ Management's authority, doing so required the express consent of 18 Paradise, which was not obtained. The Court further stated that it relied on the deposition testimony of 18 Paradise. The Court's written findings, however, say no such thing. They completely leave out the most important facts.

The Court ruled that the PRD ordinance requires every PRD to have a homeowners association. Its findings, however, state that "the Master Declaration is clear on the requirement for an HOA, but that it would remain an 'advisory committee' only until such time that there was property for the HOA to manage." In other words, the Court's findings validate the refusal of the Homestead declarant to permit the homeowners to have a homeowners association for 32 years.

The Court announced its decision on July 3 based on the proposed findings submitted by plaintiffs. It based its written findings on proposed findings submitted by MJ Management 20 days later. Once again, the Court's written decision completely contradicts what it said it had decided when it announced its decision. If the Court is going to completely change its mind, plaintiffs are entitled to an explanation and an opportunity to respond.

The Court should adopt the proposed findings that were submitted by plaintiffs, which the Court used to announce its decision in the case on July 3. Plaintiffs prevailed in this action, and the Court should be inclined to adopt their proposed findings unless they are inaccurate. The fact that the July 3 Court chose to use plaintiffs' proposed findings as the basis for its oral decision removes any possibility of that.

MATTHEW F. DAVIS, PLLC
1155 N. State Street, Suite 619
Bellingham, WA 98225
(360)564-6400

III. CONCLUSIONS OF LAW

The Court's conclusions of law were written by MJ Management and bear no relation to the decision announced by the Court on July 3. They include many aspects that were not mentioned by the Court on July 3 and omit critical parts of the decision that were announced. Unless the Court has completely changed its mind, it should amend the conclusions to comport with its announced decision.

Paragraph 3.3 of the Conclusions of Law states that "The Declarant's ownership of the Common Open Space is not impaired or affected in any manner by this ruling or the prior rulings in this case, other than to confirm that all claims by Plaintiffs to dispossess 18 Paradise's of its ownership failed and have been dismissed with prejudice." On the first day of trial, the Court dismissed plaintiffs' claim that the private ownership of the Common Open Space was barred by the PRD Ordinance. It ruled that its decision on 18 Paradise's Motion for Summary Judgment on Quiet Title Claims barred the claim. However, a quiet title claim must assert that the plaintiff has an ownership interest in the property, and plaintiffs have never asserted that they had or were entitled to an ownership interest in the Common Open Space.

Instead, plaintiffs have asserted in every Complaint filed in this action that the PRD Ordinance bars the private ownership of the Common Open Space and that 18 Paradise's ownership violates the ordinance. *See* May 29, 2020 Complaint at ¶¶ 25, 155-156, 184-186. Plaintiffs have consistently sought a declaratory judgment to that effect. The Court has not addressed that claim. It did not dismiss the claim with prejudice because it never took the claim up. The Court should address that claim instead of ignoring it, but at a minimum it should remove the statement that the claim was dismissed with prejudice.

Paragraph 3.8 of the Conclusions of Law states that "Based on the issues before the Court and the evidence presented at trial the Court's ruling on the agency relationship between the MJ Management and 18 Paradise is strictly limited to MJ Management's authority to execute and record the Sixth and Seventh Amendments." The Court has never before been asked to make such a ruling, and it has never said any such thing. Instead, the Court ruled as a matter of law on summary judgment that "MJ

MATTHEW F. DAVIS, PLLC
1155 N. State Street, Suite 619
Bellingham, WA 98225
(360)564-6400

Management acted as the agent of 18 Paradise under the 2017 Management and Lease Agreement between them." 9/22/2022 Order at ¶ 1. The Court should not rewrite its legal conclusions after trial.

Paragraph 3.9 of the Conclusions of Law states that "The Parties stipulated to the validity of and have not challenged in this lawsuit any increase of the Joint Maintenance Fee prior to the Sixth and Seventh Amendments." A stipulation by plaintiffs would be in writing, but the Conclusion makes no reference to a written document because plaintiffs never stipulated to that statement. To the contrary, plaintiffs told the Court that they reserved the right to bring that issue up at a later time.

Paragraph 3.10 of the Conclusions of Law states that "It is clear both from the plain language and from parol evidence of the intent of the drafter that the Master Declaration anticipates the collection of Joint Maintenance Fee from the parcel owners by the Declarant but that this fee is not tied to the Declarant's obligation to maintain the Common Open Space." Among other things, every reference to the maintenance fee in the Declaration is in Article III, which is entitled "Open Space." Maintenance fees are imposed by paragraph 3.3, which contains 3 references to the "Common Open Space." The Common Open Space is the only part of the PRD that the Declaration requires the Declarant to maintain. The statement that the fee "is not tied to the Declarant's obligation to maintain the Common Open Space" is incorrect.

Paragraph 3.11 of the Conclusions of Law states, "nowhere in the CCRs is it stated that the maintenance fees must be used exclusively to maintain the Common Open Space as the Plaintiffs argue here," which would actually be a finding of fact. 18 Paradise is the Declarant, and the Court stated that it found the deposition testimony of 18 Paradise to be highly persuasive. That testimony included the following:

> Q. Do you understand – or does 18 Paradise understand that the intention of the declaration was that the maintenance fee would be used for the purpose of paying the expenses of maintaining the common open space?
>
> A. Yes.
>
> * * * *
>
> Q. I'm asking a slightly different question here, Mr. Chou, because what I'm trying to do is, I'm trying to – I'm asking whether or not that seems to you a natural interpretation of the language that the cost of the maintenance shall be funded by the maintenance fee, whether that's a natural understanding of that statement that the purpose of the maintenance fee is, in fact, to fund the cost of maintenance?

MATTHEW F. DAVIS, PLLC
1155 N. State Street, Suite 619
Bellingham, WA 98225
(360)564-6400

A. Yes.

* * * *

Q. It says: So long as the Declarant or its heirs, successors, or assigns continues to own and hold title to the common open space, payments for cost and expenses shall be provided under maintenance fee. It say: The Declarant shall manage and maintain the common open space. It says: All costs and expenses of maintenance and of improvements to the common open space shall be paid by the Declarant. Now, does that suggest to 18 Paradise that maintenance means maintenance of the common open space?

A. Yes.

18 Paradise Deposition at 13-14, 61. When the Declarant repeatedly testifies that the maintenance fee can only be used for Common Open Space maintenance, the Court should not adopt facts to the contrary.

Paragraph 3.11 of the Conclusions of Law states, " . . the Declarant is also charged with maintaining other common benefits, like the stormwater system that while not included in the definition of Common Open Space, benefiting the whole of Homestead". The "common benefit" theory is without any legal precent or authority. The Homestead stormwater system also benefits the golf course and other developments outside of Homestead, yet the Court is ruling that its maintenance be funded solely by Homestead Parcel owners. The stormwater is not mentioned at all in the Master Declaration yet somehow the Court is adopting this a Conclusion of Law. Moreover, the City of Lynden has the overall responsibility for stormwater throughout the City.

Paragraph 3.13 of the Conclusions of Law states that "The city of Lynden Ordinance establishing a planned residential development zone ("PRD") and RCW 90.40 require that a homeowner association be established. There is no justiciable controversy before the Court in this matter aside from confirming this fact. The Court expressly reiterates its prior rulings and confirms that this judgment does not divest any property ownership from 18 Paradise. The Court further concludes that the required homeowner association in this case would by definition need to be some manner of an advisory association, as it would not own the Common Open Space or other property." On the one hand, the Court effectively is stating that the PRD Ordinance requires a homeowners association while on the other hand, is saying that it is not serious and that 18 Paradise can continue to control the association. At the July 3 hearing, the Court stated that an advisory association was not a homeowners association and **would not suffice**. If the Court has changed its mind, it should say so and explain why.

MATTHEW F. DAVIS, PLLC
1155 N. State Street, Suite 619
Bellingham, WA 98225
(360)564-6400

Paragraph 3.14 of the Conclusions of Law states that "there is not an active homeowner association and the relevant sections in the Master Declaration will only apply if the Declarant conveys its ownership to the homeowner association, which has not occurred." After saying that the PRD Ordinance requires a homeowners association, the Court is saying that 18 Paradise can continue without one. Both cannot be true. If the Court is ruling that 18 Paradise is not required to obey and follow the law, it should say so and explain why.

IV. ORDER

Paragraph 4.1 of the Order states that the Sixth and Seventh Amendments to the Declaration are void *ab initio*. To take effect, that order will have to be recorded. To record the order, a legal description and recording numbers will be required. For clarity of title, the Court should sign separate orders for the Sixth and Seventh Amendments with the pertinent information for recording.

Paragraph 4.2 of the Order states that "18 Paradise's claim for Declaratory Relief is granted as follows: The Joint Maintenance Fee is restricted only by the timing and increase restrictions set forth in Section 3.5(e) and (f), and the use of the Joint Maintenance Fee is not restricted to only Maintenance of the Common Open Space or any in any other manner." Paragraph 16 of 18 Paradise's counterclaim in its Amended Answer contains its only reference to a declaratory judgment: "Under Chapter 7.24 RCW, 18 Paradise is entitled to declaratory judgment establishing the amount of each of the class member's unpaid assessment and ordering each class members to pay their required joint maintenance fees." 18 Paradise never requested a declaratory judgment about the use of the maintenance fee, and no such claim was presented at trial. The Court should not make rulings on claims that were never pled.

Paragraph 4.4 of the Order states that "Lynden's PRD and RCW 64.90 require a homeowner association to be established in all common ownership communities, which includes Homestead. It is not before the Court to opine further on how to establish a homeowner association here." RCW 7.24.080 provides that "Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefore shall be by petition to a court having jurisdiction to grant the relief. When the application is deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or

MATTHEW F. DAVIS, PLLC
1155 N. State Street, Suite 619
Bellingham, WA 98225
(360)564-6400

decree, to show cause why further relief should not be granted forthwith." Plaintiffs respectfully presented legal authority that it is improper for Courts to decide declaratory judgment cases by rendering a theoretical decision and then wash their hands of the matter. It is the solemn duty of this Court not only to make the declaration but also to implement it. Plaintiffs are entitled to meaningful relief, and the Court's existing order would leave them no better off than they were when this action was filed four years ago. Plaintiffs acknowledge that the judge may not have personal availability, but if necessary, this matter should be transferred to another judge for completion.

Paragraph 4.7 of the Order states that "Plaintiffs' Declaratory Claim to determine which parcels may and may not be subject to the Master Declaration, is dismissed without prejudice." Plaintiffs' Second Amended Complaint was filed three years before trial on May 25, 2021. It expressly asserted a claim for declaratory relief that "Identifies the properties that are subject to the Declaration." Second Amended Complaint at ¶ 213(f). That claim has been asserted at all times since. A Declaratory Judgment Act claim requires only notice pleading, and this claim was more than adequately pled. The Court refused to consider or decide it because 18 Paradise claimed unfair surprise. Plaintiffs did all they were required to by pleading the claim. No civil rule permits a trial court to dismiss a claim that was properly pled at trial without prejudice. Courts have a duty to decide the claims that were pled. The Court should decide this claim on the record or establish a procedure for a prompt determination.

Paragraph 4.8 states that "With the entry of these Findings, Conclusions, and Order the representation of Plaintiff's Counsel, Matthew Davis and K. David Andersson terminates with respect to the class members, except as such representation limited to post-trial motions and appeal. For the purposes of communication, class members may be contacted by counsel for 18 Paradise and/or MJ Management." It is difficult to know what to say about this provision. Class counsel still represents the Class, and much work remains to be completed. The notion that a trial court may dismiss counsel for a party *sua sponte* is unprecedented. Whether an attorney represents a client, and the scope of such representation, is entirely a matter between the client and the attorney. The Court should remove this provision.

MATTHEW F. DAVIS, PLLC
1155 N. State Street, Suite 619
Bellingham, WA 98225
(360)564-6400

V. CONCLUSION

The Court effectively reversed itself with its written findings and conclusions. The Court used plaintiffs' proposed findings and conclusions to announce its decision, and it should use them for its written decision. If the Court has completely changed its mind, it should explain why.

DATED this 20th day of September, 2024.

ANDERSSON CROSS-BORDER LAW

By_____
K. David Andersson, WSBA 24730
Attorneys for plaintiffs

MATTHEW F. DAVIS, PLLC

By_____
Matthew F. Davis, WSBA 20939
Attorneys for plaintiffs

MATTHEW F. DAVIS, PLLC
1155 N. State Street, Suite 619
Bellingham, WA 98225
(360)564-6400

CERTIFICATE OF SERVICE

I certify that on the date shown below a copy of Plaintiffs' MOTION FOR RECONSIDERATION was served on the following persons in the manner set forth below:

MONTGOMERY PURDUE PLLC Benjamin I. VandenBerghe WSBA #35477 Attorney for Defendant 18 Paradise, L.L.P. biv@montgomerypurdue.com afrank@montgomerypurdue.com lhanlon@montgomerypurdue.com	Via Email Per Agreement
INTERVENORS – PRO SE Matt and Kari Skinner mkkmskinners@comcast.net Roger and Maureen Dowling romo@olypen.com	Via Email Per Agreement
POSSINGER LAW GROUP Jeffrey Possinger WSBA #30854 Reid Meyers WSBA #51751 Attorneys for Defendants MJ Management, William O'Bryan and Josh Williams jeffrey.possinger@possingerlaw.com reid@reidmeyers.com jody.riegler@possingerlaw.com david.selka@possingerlaw.com ian.ducey@possingerlaw.com	Via Email Per Agreement

DATED this 20th day of September, 2024.

Krystina Bergman

MATTHEW F. DAVIS, PLLC
1155 N. State Street, Suite 619
Bellingham, WA 98225
(360)564-6400