IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. 94531-4

(Court of Appeals No. 75001-1-I)

E. DUANE GOLPHENEE, a married individual; and JOHN SOLIN, a married individual,

Petitioners/Plaintiffs

and

WILLIAM and SUSAN GOODMAN, husband and wife; MICHAEL and JOAN LEDRESSAY, husband and wife; MICHAEL SZEMILLER, an individual; and HUNTER and ANGELA NEWTON, husband and wife;

Plaintiffs pursuant to RCW 7.24.110

v.

PONDILLA ESTATES COMMUNITY ASSOCIATION, a Washington non-profit corporation,

Respondent/Defendant

PETITION FOR REVIEW

E. Duane Golphenee
Petitioner *pro se*
583 Seaside Drive
Coupeville WA 98239
(360) 678-6543

John Solin
Petitioner *pro se*
558 Pebble Beach Drive
Coupeville WA 98239
(360) 969-1227

TABLE OF CONTENTS

Page

I. IDENTITY OF PETITIONING PARTY 1

II. COURT OF APPEALS DECISION TO BE REVIEWED 1

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW 1

Issue #1: Did the COA err when it held part performance excuses the omission of the signatures of 24 of the 31 joint owners of the servient estate from the deed, when: a) these 24 joint owners are not parties to the deed; b) this deed does not meet the requirements for part performance specified by this Court in *Granquist v. McKean*; c) the HOA did not plead the defense of part performance in its Answer to the Complaint or in its motion to dismiss; and d) the issue of part performance was not argued to the trial court? Did these omitted 24 joint owners' mistaken belief that they didn't own the servient estate excuse their omission from this deed? 1

Issue #2: Did the COA err when it held the deed does not need to include the legal description of the property where the bulkhead is located that is to be repaired and maintained indefinitely under this deed? 1

Issue #3: Did the COA err when it held the deed is supported by consideration in the form of a mutual forbearance to sue when: a) there is no record of anyone threatening litigation; b) there is no record the parties agreed, or even discussed, any release of claims or forbearance to sue; c) the HOA did not assert the affirmative defense of release in its Answer or motion to dismiss, or argue this defense to the trial court; d) the deed does not contain any release or covenant not to sue; e) 24 of the persons who would be indispensable to any such release or covenant are not parties to the deed; and f) there is no record of any valid claim to release? 1

Issue #4: Did the COA err by failing to reverse the trial court's dismissal of Solin's action as time-barred, when: a) Solin is entitled to seek declaratory judgment under RCW 7.24.020;

Page

b) the Uniform Declaratory Judgment Act (RCW 7.24 *et seq*) has no statute of limitations; c) Washington courts have long reviewed deeds (including easements and real covenants, such as here) for compliance with the statute of frauds many years, even decades, after they were conveyed; and d) the deed is unenforceable as a matter of law because it violates the statute of frauds and lacks consideration, rendering the statute of limitations moot? 2

IV. STATEMENT OF THE CASE 2

A. All 31 Lot Owners in Pondilla Estates Have Jointly Owned the Community Beach and the Private Beach Access Road, Pebble Beach Drive, Since 1985 as a Matter of Law. 2

B. The 1991 Agreement, a Real Estate Deed, Omits 24 of the Joint Owners of the Servient Estate (Pebble Beach Drive). 3

C. The Deed Omits the Legal Description of the Property to be Maintained Under the Covenant Running With the Land. 3

D. The 1991 Agreement Does Not Contain Any Release of Claims 4

E. HOA Failed to Assert the Affirmative Defense of Release or Part Performance, and Did Not Argue Either to the Trial Court . . . 4

V. REASONS WHY REVIEW SHOULD BE GRANTED 5

A. The 1991 Agreement Violates the Statute of Frauds. 5

1. The COA Erred by Applying the Affirmative Defense of Part Performance to Remove the 1991 Agreement From the Statute of Frauds. (Issue #1). 6

Page

2. The COA Erred When it Held There is No Requirement for a Legal Description of the Property Where a Bulkhead is Located That Must be Maintained Indefinitely Under the Covenant Running With the Land (Issue #2). 11

B. The COA Erred By Holding the 1991 Agreement is Supported by Consideration in the Form of Mutual Releases Between the Parties. (Issue #3). 15

C. The COA Erred When it Failed to Reverse the Trial Court's Dismissal of Solin's Action for Declaratory Judgment (Issue #4). 17

D. This Court's Standard of Review is *de novo*. 20

VI. CONCLUSION 20

TABLE OF AUTHORITIES

Cases Page

Barton v. State, Dep't of Transp., 178 Wn.2d 193, 208, 308 P.3d 597, 606 (2013) 15-16, 17

Beebe v. Swerda, 58 Wn. App. 375, 382, 793 P.2d 442, 446 (1990) 6, 7

Ben Holt Indus., Inc. v. Milne, 36 Wn. App. 468, 470, 675 P.2d 1256, 1258 (1984) 10

Bigelow v. Mood, 56 Wash.2d 340, 353 P.2d 429 (1960) 11, 12-13

Dickson v. Kates, 132 Wash. App. 724, 133 P.3d 498 (2006) 11, 13-14, 17, 18-19

Farmers Ins. Co. v. Miller, 87 Wash.2d 70, 76, 549 P.2d 9 (1976) . .15, 16

FDIC v. Uribe, Inc., 171 Wn. App. 683, 688, 287 P.3d 694 (2012). .18, 19

Friedl v. Benson, 25 Wn. App. 381, 390, 609 P.2d 449, 455 (1980) 7, 10

Granquist v. McKean, 29 Wn.2d 440, 445, 187 P.2d 623, 626 (1947) 6, 7-8, 10

Haslund v. City of Seattle, 86 Wash.2d 607, 547 P.2d 1221 (1976) 17, 18

Home Realty Lynnwood, Inc. v. Walsh, 146 Wash. App. 231, 237, 189 P.3d 253, 257 (2008) 14

Howell v. Inland Empire Paper Co., 28 Wn. App. 494, 624 P.2d 739 (1981) 11, 14

Johnson v. S.L. Savidge, Inc., 43 Wn.2d 273, 276, 260 P.2d 1088 (1953) 15, 17

Page

Key Design Inc. v. Vince Moser et al, 138 Wash. 2d 875, 881, 983 P.2d 653 (1999) 11, 16

King v. Riveland, 125 Wn.2d 500, 505, 886 P.2d 160, 164 (1994) 15, 16-17

Kingery v. Dep't of Labor & Indus. of the State of Wash., 132 Wn.2d 162, 175, 937 P.2d 565, 572 (1997) 6, 9

Lake Limerick Country Club v. Hunt Mfg. Homes, Inc., 120 Wn. App. 246, 254-256, 84 P.3d 295, 300 (2004) 12, 19

Losh Family, LLC v. Kertsman, 155 Wn. App. 458, 465, 228 P.3d 793, 797 . . . . . 11, 14

Maier v. Giske, 154 Wn. App. 6, 223 P.3d 1265 . . . . . 18, 19

Martin v. Seigel, 35 Wn.2d 223, 229, 212 P.2d 107, 110 (1949) 11, 13

McConiga v. Riches, 40 Wash. App. 532, 700 P.2d 331 (1985) 2-3

McKay v. Calderwood, 37 Wash. 194, 198, 79 P. 629, 631 (1905) . . . 6, 8

M.K.K.I, Inc. v. Krueger, 135 Wash. App. 647, 653, 145 P.3d 411, 43 (2006) 3

Mountain Park Homeowners Ass'n v. Tydings, 125 Wash.2d 337, 341, 883 P.2d 1383 (1994) 20

Multicare Med. Ctr. v. State, Dep't of Soc. & Health Servs., 114 Wn.2d 572, 584–85, 790 P.2d 124, 131–32 (1990) 17

Parry v. Hewitt, 68 Wash. App. 664, 847 P.2d 483 (1992) 20

Rainier Nat. Bank v. Lewis, 30 Wn. App. 419, 422, 635 P.2d 153, 155 (1981) 6, 11

Riverview Cmty. Grp. v. Spencer & Livingston, 173 Wn. App. 568, 585–86, 295 P.3d 258, 266–67 (2013), rev'd, 181 Wn.2d 888, 337 P.3d 1076 (2014) 11, 12

Page

Saunders v. Meyers, 175 Wn. App. 427, 435-37, 306 P.3d 978, 983 . . . . . 17, 18, 19

Smith v. Twohy, 70 Wn.2d 721, 725, 425 P.2d 12, 15 (1967) . . . 11, 15, 19

Washburn v. Beatt Equip. Co., 120 Wn.2d 246, 289, 840 P.2d 860, 884 (1992) 6, 10, 16

Statutes

RCW 7.24.020 . . . . . 2, 18

RCW 58.17.165 2-3

RCW 64.04.010 6

RCW 64.04.020 6

Regulations and Rules

CR 8(c) 10, 16

CR 56 20

RAP 13.4(b)(1) 6, 11, 15, 17

RAP 13.4(b)(2) 6, 11, 17

RAP 13.4(b)(4) 11, 18

Other Authorities

17 Washington Practice § 3.2 @ p 127 12

Appendices

COA Unpublished Opinion in 75001-1-I dated April 3, 2017. . . . . A

Order Denying Motion to Reconsider dated May 3, 2017 . . . . . B

Statutes Referenced in Petition for Review C

I. IDENTITY OF PETITIONING PARTY

Plaintiffs/Appellants E. Duane Golphenee and John Solin ("Solin") petition for review of the decision terminating review identified below.

II. COURT OF APPEALS DECISION TO BE REVIEWED

The Court of Appeals ("COA") issued its unpublished opinion terminating review ("Opinion") on April 3, 2017 (App. A), and denied Solin's motion to reconsider on May 3, 2017 (App. B).

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Issue #1: Did the COA err when it held part performance excuses the omission of the signatures of 24 of the 31 joint owners of the servient estate from the deed, when: a) these 24 joint owners are not parties to the deed; b) this deed does not meet the requirements for part performance specified by this Court in *Granquist v. McKean*; c) the HOA did not plead the defense of part performance in its Answer to the Complaint or in its motion to dismiss; and d) the issue of part performance was not argued to the trial court? Did these omitted 24 joint owners' mistaken belief that they didn't own the servient estate excuse their omission from this deed?

Issue #2: Did the COA err when it held the deed does not need to include the legal description of the property where the bulkhead is located that is to be repaired and maintained indefinitely under this deed?

Issue #3: Did the COA err when it held the deed is supported by consideration in the form of a mutual forbearance to sue when: a) there is no record of anyone threatening litigation; b) there is no record the parties agreed, or even discussed, any release of claims or forbearance to sue;

c) the HOA did not assert the affirmative defense of release in its Answer or motion to dismiss, or argue this defense to the trial court; d) the deed does not contain any release or covenant not to sue; e) 24 of the persons who would be indispensable to any such release or covenant are not parties to the deed; and f) there is no record of any valid claim to release?

Issue #4: Did the COA err by failing to reverse the trial court's dismissal of Solin's action as time-barred, when: a) Solin is entitled to seek declaratory judgment under RCW 7.24.020; b) the Uniform Declaratory Judgment Act (RCW 7.24 *et seq*) has no statute of limitations; c) Washington courts have long reviewed deeds (including easements and real covenants, such as here) for compliance with the statute of frauds many years, even decades, after they were conveyed; and d) the deed is unenforceable as a matter of law because it violates the statute of frauds and lacks consideration, rendering the statute of limitations moot?

IV. STATEMENT OF THE CASE

A. All 31 Lot Owners in Pondilla Estates Have Jointly Owned the Community Beach and the Private Beach Access Road, Pebble Beach Drive, Since 1985 As a Matter of Law.

The trial court held that all 31 lot owners in Pondilla Estates own Tract A and the private road (now known as "Pebble Beach Drive") as a matter of law under RCW 58.17.165 (rev. 1981) and *McConiga v. Riches*.

> "The face of the recorded plat map has the following Dedication:
>
> 'Tract A is hereby dedicated to the use of all owners of this plat and any future additions thereto for recreational purposes and community activities.'

As a matter of law, this dedication serves as a quitclaim deed to all owners with the plat. *M.K.K.I, Inc. v. Krueger*, 135 Wash. App. 647, 653, 145 P.3d 411, 43 (2006); RCW 58.17.165.

As joint and equal owners of Tract A, all of the Pondilla Estates lot owners have ownership of the Private Road to the center of the road. *McConiga v. Riches*, 40 Wash. App. 532, 700 P.2d 331 (1985)."

COL 1B (CP 7, line 21 - CP 8, line 6)

This ruling was not challenged on appeal. It has gone undisputed that all 31 lot owners in Pondilla Estates have jointly owned both Tract A and the private beach access road (Pebble Beach Drive) since 1985.

B. The 1991 Agreement, a Real Estate Deed, Omits 24 of the Joint Owners of the Servient Estate (Pebble Beach Drive).

In August, 1991 the parties executed the subject real estate deed ("1991 Agreement") that contains the grant of an easement over Pebble Beach Drive to certain Gov't Lot 3 lot owners, and conveyance of a covenant running with the land to repair and maintain a bulkhead. CP 143, ¶ 4) - CP 144, ¶ 5).

The Pondilla Estates Homeowners Association ("HOA") and the owners of the seven lots that abut to Pebble Beach Drive ("Pebble Beach Drive lot owners") are the only parties to the 1991 Agreement. CP 143-44; CP 183, line 4-5.

C. The Deed Omits the Legal Description of the Property to be Maintained Under the Covenant Running With the Land.

The 1991 Agreement contains no legal description of either the larger property upon which the bulkhead that is to be maintained under the covenant running with the land is located, or the portion of this property

where such a bulkhead was constructed. The deed only describes the bulkhead by its intended purpose, *not* its location. CP 144, ¶ 5).

This "bulkhead" is actually only an unspecified section of a much larger, continuous bulkhead that is some 565' long without any gaps. CP 129, ¶ 3-4. As the recorded plat map shows, Pebble Beach Drive does not parallel the shoreline very far before it angles up the hill away from the water, and at some undesignated point the road becomes beyond any possible protection by the bulkhead. CP 119. The bulkhead continues on to the north for another several hundred feet. CP 129, ¶ 4. So only a small section of it even arguably provides any protection to Pebble Beach Drive. But the deed does not specify where any such section of bulkhead is located, or where it begins and ends.

D. The 1991 Agreement Does Not Contain Any Release of Claims.

The only consideration specified in the 1991 Agreement is that the HOA will pay one-half of the cost ($15,500) to construct a bulkhead; and the Pebble Beach Drive lot owners will pay the other half, grant an easement over Pebble Beach Drive to certain lot owners in Gov't Lot 3, and repair and maintain a bulkhead and Pebble Beach Drive into the future indefinitely. It does not contain any release of claims. CP 143-44.

E. HOA Failed to Assert the Affirmative Defense of Release or Part Performance, and Did Not Argue Either to the Trial Court.

Solin alleged in his Complaint that the 1991 Agreement lacks consideration and violates the statute of frauds. CP 292. The HOA failed

to assert the defense of part performance or release in its Answer. CP 280. On August 27, 2015 the HOA filed a motion to dismiss, but again failed to raise either part performance or release as a defense to Solin's claims. CP 175-276. Solin repeated his claims in his response. CP 109. The trial court granted the motion to dismiss on December 23, 2015. CP 69-75.

On December 31, 2015 Solin filed a motion for reconsideration in which he restated his claims the 1991 Agreement violates Washington's statute of frauds and lacks consideration. CP 56, ¶ 2-4. On January 21, 2016 Solin filed a supplemental brief arguing to the trial court for the *fourth time* that the 1991 Agreement violates the statute of frauds and lacks consideration. CP 31-3; CP 36-7.

On February 24, 2015 the HOA filed "Defendant's Response to Plaintiffs Motion For Reconsideration and Supplemental Brief". CP 24-27. It contains no reference to either the affirmative defense of release *or* the defense of part performance.

In fact, the HOA did not argue the defense of either part performance or release to the trial court, raising part performance for the first time to the COA, and failing to raise the affirmative defense of release at all.

V. REASONS WHY REVIEW SHOULD BE GRANTED

A. The 1991 Agreement Violates the Statute of Frauds.

1. The COA Erred by Applying Part Performance to Remove the 1991 Agreement From the Statute of Frauds. (Issue #1)

This issue warrants review under RAP 13.4(b)(1) because the COA Opinion conflicts with this Court's decisions in *Granquist v. McKean*, 29 Wn.2d 440, 445, 187 P.2d 623, 626; *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 289, 840 P.2d 860, 884 (1992); *McKay v. Calderwood*, 37 Wash. 194, 198, 79 P. 629, 631 (1905); and *Kingery v. Dep't of Labor & Indus. of the State of Wash.*, 132 Wn.2d 162, 175, 937 P.2d 565, 572 (1997); and under RAP 13.4(b)(2) because it conflicts with the published COA decisions in *Beebe v. Swerda*, 58 Wn. App. 375, 382, 793 P.2d 442, 446 (1990); and *Rainier Nat. Bank v. Lewis*, 30 Wn. App. 419, 422, 635 P.2d 153, 155 (1981).

Washington's statute of frauds requires every conveyance of any interest in land to be by deed, signed by the parties bound thereby, and acknowledged.

> "Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed." RCW 64.04.010.
>
> "Every deed shall be in writing, signed by the party bound thereby, and acknowledged by the party before some person authorized by this Act to take acknowledgments of deeds." RCW 64.04.020.

In violation of the statute, 24 of the joint owners of the servient estate (Pebble Beach Drive) were entirely omitted from this deed that grants an easement over their private road to certain Gov't Lot 3 lot owners. These omitted joint owners are indispensable to any deed granting an easement over their private road. In *Beebe v. Swerda*, 58 Wn.

App. 375, 382, 793 P.2d 442, 446 (1990) the court held:

> "Agreement to the easement by the owner of the servient estate is an indispensable element of the creation of an easement."

The COA acknowledged that Washington's statute of frauds requires all bound parties to sign the agreement, and that the 1991 Agreement violates the statute because the signatures of 24 of the 31 joint owners of the servient estate were omitted from this deed. But the COA excused this violation because it found part performance of the agreement. Opinion, p 9, ¶ 2; p 10, ¶ 1.

However, the 1991 Agreement fails in every respect to satisfy the requirements for applying part performance to remove this deed from the statute of frauds, as established by this Court in *Granquist v. McKean*, 29 Wn.2d 440, 445, 187 P.2d 623, 626:

> "The first requirement of the doctrine that part performance of an oral contract exempts it from the provisions of the statute of frauds is that the contract be proven by evidence that is clear and unequivocal and which leaves no doubt as to the terms, character, and existence of the contract. Thompson v. Weimer, 1 Wash.2d 145, 95 P.2d 772; Payn v. Hoge, 21 Wash.2d 32, 149 P.2d 939; Jennings v. D'Hooghe, 25 Wash.2d 702, 172 P.2d 189... A mere preponderance of the evidence is not sufficient. If the evidence leaves it at all doubtful as to whether or not a contract was entered into, the court will not decree specific performance... Another requirement of the doctrine that part performance may take an oral contract out of the statute of frauds is that the acts relied upon as constituting part performance must unmistakably point to the existence of the claimed agreement. If they point to some other relationship, such as that of landlord and tenant, or may be accounted for on some other hypothesis, they are not sufficient. Broadway Hospital & Sanitarium v. Decker, 47 Wash. 586, 92 P. 445; Blakely v. Sumner, 62 Wash. 206, 113 P. 257; Burns v. McCormick, 233 N.Y. 230, 135 N.E. 273; Woolley v.

> Stewart, 222 N.Y. 347, 118 N.E. 847; Walker v. Bohannan, 243 Mo. 119, 147 S.W. 1024." (emphasis added)

Here, the COA identified "the acts relied upon as constituting part performance" as the HOA's construction of a bulkhead and payment of half the cost. Opinion, p 10, ¶ 1. So to satisfy *Granquist*, these acts must provide "clear and unequivocal" evidence that "leaves no doubt as to the terms, character, and existence of the contract" that the 24 joint owners of Pebble Beach Drive who didn't sign the deed nevertheless agreed to grant an easement over their private road to certain Gov't Lot 3 lot owners. To be clear, it is not just the *signatures* of these 24 joint owners of the servient estate that are missing from this deed -- they were never parties to the 1991 Agreement at all. They have not agreed to be bound by its terms, which is a specific requirement of the statute of frauds, as the COA acknowledged in its Opinion @ p 9, ¶2. So in effect, the COA's Opinion adds 24 new parties to the deed who were never parties to it before. No court has ever applied part performance in this way.

An additional requirement under *Granquist* is the "acts relied upon as constituting part performance must unmistakably point to the existence of this claimed agreement". The HOA has the burden to show these "acts" prove the "existence of this claimed agreement", which it has failed to do.

> "...the burden is imposed upon the party pleading the part performance to show acts unequivocally referring to and resulting from that agreement - acts such as would not have been done unless with a direct view to the performance of that very agreement."
>
> *McKay v. Calderwood*, 37 Wash. 194, 198, 79 P. 629, 631 (1905)

There is absolutely nothing about the HOA paying half of the cost to construct a bulkhead that proves by "clear and unequivocal" evidence that "leaves no doubt as to the terms, character, and existence of a contract" that these 24 joint owners of Pebble Beach Drive omitted from the deed ever agreed to grant an easement over their private road to any Gov't Lot 3 lot owner (or anyone else). This is a *non sequitur*.

Moreover, it would be impossible for these 24 joint owners to have intended to grant such an easement. As the COA stated in its footnote to page 9 of its Opinion, in 1991 these 24 joint owners did not believe they owned Pebble Beach Drive. This mistaken belief was confirmed by the HOA at CP 182. How could these 24 joint owners have possibly intended to execute a deed granting an easement over a private road they believed was owned by someone else?

The COA erroneously states in its footnote to page 9 that because the lot owners in Pondilla Estates wrongly believed Pebble Beach Drive was owned by someone else in 1991, the deed was in compliance with the statute of frauds at that time. But who they believed owned this private road is irrelevant in determining whether the deed violates the statute of frauds. This Court has often cited "the universal maxim that ignorance of the law excuses no one". *Kingery v. Dep't of Labor & Indus. of the State of Wash.*, 132 Wn.2d 162, 175, 937 P.2d 565, 572 (1997).

Moreover, the doctrine of part performance was not properly before the COA. Solin repeatedly raised his claim that the 1991

Agreement violates the statute of frauds, but the HOA did not assert part performance as a defense to these claims to the trial court. The doctrine of part performance was therefore not properly before the COA. This Court stated in *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 289, 840 P.2d 860, 884 (1992):

> "Defendant did not bring this issue to the attention of the trial court, and it is not properly before this court. *Hansen v. Friend,* 118 Wash.2d 476, 485, 824 P.2d 483 (1992)."

Furthermore, part performance is a matter constituting an avoidance or affirmative defense. *Granquist v. McKean*, 29 Wn.2d 440, 445, 187 P.2d 623, 626 (1947); *Ben Holt Indus., Inc. v. Milne*, 36 Wn. App. 468, 470, 675 P.2d 1256, 1258 (1984). It must be pled in the defendant's answer to the complaint. CR 8(c) states:

> "**Affirmative Defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fault of a nonparty, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitation, waiver, and any other matter constituting an avoidance or affirmative defense." emphasis added

The HOA failed to raise part performance as an "avoidance or affirmative defense" to Solin's claims under the statute of frauds in the HOA's Amended Answer to the Complaint. CP 277-281. In fact, the HOA failed to argue part performance to the trial court at all, having raised it for the first time on appeal. Therefore, it is deemed waived.

> "Here, after Rainier filed its motion and affidavit for summary judgment, Mr. Lewis filed a counter motion for summary judgment and for the first time, raised this defense, having failed to raise it in his answer. In general, if such defenses are not affirmatively pled, asserted with a motion under CR 12(b), or tried by the express or implied consent of the parties, such defenses are deemed to have been waived and may not thereafter be considered as triable issues in the case. *Farmers Ins. Co. v. Miller*, 87 Wash.2d 70, 76, 549 P.2d 9 (1976)."
>
> *Rainier Nat. Bank v. Lewis*, *Supra*, 30 Wn. App. @ 422

2. <u>The COA Erred When it Held There is No Requirement for a Legal Description of the Property Where a Bulkhead is Located That Must be Maintained Indefinitely Under the Covenant Running With the Land. (Issue #2)</u>

This issue warrants review under RAP 13.4(b)(1) because the COA Opinion conflicts with this Court's decisions in *Bigelow v. Mood,* 56 Wn.2d 340, 341, 353 P.2d 429, 430 (1960); *Key Design Inc. v. Vince Moser et al*, 138 Wash. 2d 875, 881, 983 P.2d 653 (1999); *Martin v. Seigel*, 35 Wn.2d 223, 229, 212 P.2d 107, 110 (1949); and *Smith v. Twohy*, 70 Wn.2d 721, 725, 425 P.2d 12, 15 (1967); under RAP 13.4(b)(2) because it conflicts with COA published opinions in *Riverview Cmty. Grp. v. Spencer & Livingston*, 173 Wn. App. 568, 585–86, 295 P.3d 258, 266–67 (2013), <u>rev'd,</u> 181 Wn.2d 888, 337 P.3d 1076 (2014); *Losh Family, LLC v. Kertsman*, 155 Wn. App. 458, 465, 228 P.3d 793, 797 (citing this Court's decision in *Key Design*); *Howell v. Inland Empire Paper Co.*, 28 Wn. App. 494, 495–96, 624 P.2d 739, 740 (1981); and *Dickson v. Kates*, 132 Wn. App. 724, 133 P.3d 498 (2006); and under RAP 13.4(b)(4) because it involves a matter of substantial public interest regarding enforceability of real covenants.

The COA erroneously held that it is not necessary for the covenant running with the land to contain a legal description of the property where a bulkhead is located that must be maintained indefinitely under this real covenant, because it was not a conveyance. Opinion, p 8, ¶ 1. The COA appears to be confusing a "sale" with a "conveyance". Conveyances of an interest in property are much broader than just sales, and include many lesser interests. For example, easements and covenants running with the land are indeed conveyances of a property interest, and subject to the statute of frauds. *Lake Limerick Country Club v. Hunt Mfg. Homes, Inc.*, 120 Wn. App. 246, 254-256, 84 P.3d 295, 300 (2004). This is settled law.

> "Most writers on the subject of running covenants and also the Restatement of Property agree that [covenants] are interests in land." 17 WASH. PRAC. § 3.2 @ p 127.
>
> "RCW 64.04.010, which states in relevant part: 'Every conveyance of real estate, *or any interest therein,* and every contract creating or evidencing any encumbrance upon real estate, shall be by deed.' The broad language of the statute, reaching *any* encumbrance, also applies to easements and other lesser interests in realty."
>
> *Riverview Cmty. Grp. v. Spencer & Livingston*, 173 Wn. App. 568, 585–86, 295 P.3d 258, 266–67 (2013). underscore added.

This Court has long held that legal descriptions are required for every conveyance of a property interest.

> "We have held consistently that, in order to comply with the statute of frauds, a contract or deed for the conveyance of land must contain a description of the land sufficiently definite to locate it without recourse to oral testimony, or else it must contain a reference to another instrument which does contain a sufficient description."

Bigelow v. Mood, 56 Wn.2d 340, 341, 353 P.2d 429, 430 (1960)

> "In the interests of continuity and clarity of the law of this state with respect to legal descriptions, we hereby hold that every contract or agreement involving a sale or conveyance of platted real property must contain, in addition to the other requirements of the statute of frauds, the description of such property by the correct lot number(s), block number, addition, city, county and state."

Martin v. Seigel, Supra, 35 Wn.2d @ 229

> "We feel that it is fair and just to require people dealing with real estate to properly and adequately describe it, so that courts may not be compelled to resort to extrinsic evidence in order to find out what was in the minds of the contracting parties."

Martin v. Seigel, Supra, 35 Wn.2d @ 228

In a case that is similar in many ways to the one at bar, *Dickson v. Kates*, 132 Wn. App. 724, 133 P.3d 498 (2006), as amended (Dec. 12, 2006), the court reviewed a covenant running with the land 22 years after it had been recorded to determine whether or not it contained an adequate legal description to satisfy the statute of frauds. Like here, this real covenant only applied to a portion of a larger piece of property, and while it did contain a legal description of the larger property, it did not legally describe the specific portion of it that was subject to the covenant. It simply referred to it as "the land immediately to the west". The *Dickson* court held this was not an adequate legal description under the statute, and that the covenant was therefore void and unenforceable.

> "Here, the phrase "the land immediately to the west" is not sufficient to identify the burdened property without looking to other sources. *See, e.g., Howell,* 28 Wash.App. at 495, 624 P.2d

> 739... In order to determine exactly what was encumbered, the court would have had to erroneously rely on oral testimony... The statute of frauds was not met in the 1984 Kellogg–Andrews deed, thereby rendering the restriction void. *See, e.g., Howell,* 28 Wash.App. at 495, 624 P.2d 739."
>
> *Dickson, Supra*, 132 Wn. App. @ 734
>
> "It is also well settled that a description which designates the land conveyed as a portion of a larger tract without identifying the particular part conveyed does not meet the requirements of this rule... An agreement containing an inadequate legal description of the property to be conveyed is void..."
>
> *Howell v. Inland Empire Paper Co.*, 28 Wn. App. 494, 495–96, 624 P.2d 739, 740 (1981)

In the instant case, the covenant running with the land does not provide a legal description of *either* the larger property on which the bulkhead is located *or* the portion of the property where the bulkhead was actually constructed. The deed only refers to the bulkhead as "any log pile bulkhead, or other protective structure, which is or may be constructed to prevent damage to the Private Road". CP 144, ¶ 5. There is simply no way to determine from the deed where any such "bulkhead or other protective structure" is located, or where it begins and ends. This violates the statute of frauds. The COA held in *Losh Family, LLC v. Kertsman*, 155 Wn. App. 458, 465, 228 P.3d 793, 797 (citing this Court's decision in *Key Design Inc. v. Moser*, 138 Wn.2d 875, 882, 983 P.2d 653, 658 (1999):

> "A legal description is insufficient if the court needs to resort to extrinsic evidence to definitively locate the property."

The covenant running with the land to repair and maintain a bulkhead into the future indefinitely is a continuous, ongoing contract meant to run forever. To satisfy the statute of frauds, it must be complete in and of itself, containing all essential terms without resort to parol. This Court held in *Smith v. Twohy*, 70 Wn.2d 721, 725, 425 P.2d 12, 15 (1967):

> "The statute of frauds is not a doctrine in equity, it is a positive statutory mandate which renders void and unenforceable those undertakings which offend it. Forland v. Boyum, 53 Wash. 421, 102 P. 34 (1909); Farrell v. Mentzer, 102 Wash. 629, 174 P. 482 (1918); Sposari v. Matt Malaspina & Co., 63 Wash.2d 679, 388 P.2d 970 (1964). The memorandum or memoranda in writing, to satisfy the requirements of the statute must not only be signed by the party to be charged but it must also be so complete in itself as to make recourse to parol evidence unnecessary to establish any material element of the undertaking. Liability cannot be imposed if it is necessary to look for elements of the agreement outside the writing." (emphasis added)

What "material element of the undertaking" of a covenant running with the land to repair and maintain a bulkhead indefinitely could possibly be more essential than where that bulkhead is located?

B. The COA Erred By Holding the 1991 Agreement is Supported by Consideration in the Form of Mutual Releases Between the Parties. (Issue #3)

This issue warrants review under RAP 13.4(b)(1) because the COA Opinion conflicts with this Court's decisions in *King v. Riveland*, 125 Wn.2d 500, 505, 886 P.2d 160, 164 (1994); *Johnson v. S.L. Savidge, Inc.*, 43 Wn.2d 273, 276, 260 P.2d 1088 (1953); *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 289, 840 P.2d 860, 884 (1992); *Farmers Ins. Co. v. Miller*, 87 Wash.2d 70, 76, 549 P.2d 9 (1976); and *Barton v. State, Dep't*

of Transp., 178 Wn.2d 193, 208, 308 P.3d 597, 606 (2013).

The COA correctly held that all 31 lot owners in Pondilla Estates already had a pre-existing obligation to share in the cost to maintain their jointly owned road, Pebble Beach Drive, so payment of half the cost to build a bulkhead to protect their private road cannot be consideration to support the 1991 Agreement. Opinion, p 5, ¶ 2.

Nevertheless, the COA held that the 1991 Agreement *is* supported by consideration because the parties agreed to forbear prosecution of legal claims against each other. Opinion, p 6, ¶ 1. But the HOA failed to assert the affirmative defense of release in its Answer or motion to dismiss, so it is deemed waived. CR 8(c); *Farmers Ins. Co. v. Miller*, 87 Wash.2d @ 76:

> "In general, if such defenses are not affirmatively pleaded, asserted with a motion under CR 12(b), or tried by the express or implied consent of the parties, such defenses are deemed to have been waived and may not thereafter be considered as triable issues in the case."

Nor did the HOA raise this issue to the trial court, so it was not properly before the COA. *Washburn v. Beatt Equip. Co.*, *Supra*, 120 Wn.2d @ p 289 citing *Hansen v. Friend, Supra*,118 Wash.2d @ p 485.

This deed does not contain any release or exchange of releases, any covenant not to sue, or any similar provision. While some of the 31 joint owners of Pebble Beach Drive may have questioned their obligation to share in the cost of maintaining it because they mistakenly believed it was owned by someone else, there is no evidence that anyone ever threatened

litigation, or that the parties even discussed, much less agreed to, any release of claims or forbearance to sue. This Court stated in *King v. Riveland, Supra*, 125 Wn.2d @ p. 505: "Before an act or promise can constitute consideration, it must be bargained for and given in exchange for the promise." In *Barton v. State, Dep't of Transp., Supra,* 178 Wn.2d @ p 208, this Court said "A release is a contract and its construction is governed by contract principles subject to judicial interpretation in light of the language used." Since the 24 joint owners of Pebble Beach Drive who questioned their financial responsibility to maintain it are not even parties to the 1991 Agreement, how could this deed possibly be construed under *Barton* and *King* as a contract to release their claims or forbear to sue?

Moreover, there is also no evidence these joint owners had any valid claim to release, as required by this Court in *Johnson v. S.L. Savidge, Inc., Supra,* 43 Wn.2d @ 276. What valid claim could these joint owners of Pebble Beach Drive possibly have had that exempted them from any responsibility to share in the cost of maintaining their own property? The HOA has the burden of proving its affirmative defense of release. *Haslund v. City of Seattle,* 86 Wash.2d 607, 620–21, 547 P.2d 1221 (1976)

C. The COA Erred When it Failed to Reverse the Trial Court's Dismissal of Solin's Action for Declaratory Judgment (Issue #4).

This issue warrants review under RAP 13.4(b)(1) because the COA Opinion conflicts with this Court's decision in *Haslund v. City of Seattle, Supra*, 86 Wash.2d @ pp 620–21; under RAP 13.4(b)(2) because

it conflicts with COA published opinions in *Dickson v. Kates*, 132 Wash. App. 724, 734, 133 P.3d 498, 503-04), *Saunders v. Meyers*, 175 Wn. App. 427, 435-37, 306 P.3d 978, 983, *Maier v. Giske*, 154 Wn. App. 6, 223 P.3d 1265; and *FDIC v. Uribe, Inc.*, 171 Wn. App. 683, 688, 287 P.3d 694 (2012); and under RAP 13.4(b)(4) because the right of access to the court's declaratory guidance involves a matter of substantial public interest.

Appellants Golphenee and Solin are both current parties to the 1991 Agreement, and adversely affected by it. They are entitled to seek declaratory judgment regarding its validity under RCW 7.24.020:

> "A person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder." (emphasis added)

The COA found that Solin did not cite any authority proving the statute of limitations does not apply to judicial review of deeds and real covenants. Opinion, p 10, ¶ 3. But Solin does not have the burden of proving this affirmative defense does *not* apply to deeds and real covenants; the HOA has the burden to prove that it *does*, as this Court stated in *Haslund v. City of Seattle, Supra,* 86 Wash.2d @ pp 620–21:

> "Since the statute of limitations is an affirmative defense, CR 8(c), the burden was on appellant to prove those facts which established the defense."

The HOA has failed to carry this burden of proof.

Moreover, Solin cited several cases in which Washington courts

reviewed deeds containing easements and covenants running with the land many years, even decades, after they were conveyed, as explained in Section V(A)(2) above. These include *Dickson v. Kates* (real covenant reviewed after 22 years); *Saunders v. Meyers* (real covenant reviewed after 40 years); and *Maier v. Giske*, (easement reviewed after 30 years). It is implicit in these decisions that courts are not time-barred by the statute of limitations from reviewing deeds (including those containing easements and covenants running with the land, such as here) for compliance with the statute of frauds more than six years after they were conveyed.

To be enforceable against successors, the 1991 Agreement must have been enforceable against the original contracting parties. *Lake Limerick Country Club v. Hunt Mfg. Homes, Inc., Supra*, 120 Wash. App. @ p 254. But in order to be enforceable between the original parties, a covenant must satisfy the statute of frauds. *Dickson v. Kates, Supra*, 132 Wn. App. at 733, quoting *Lake Limerick* at 254-55. The 1991 Agreement was fatally flawed when it was signed in August, 1991 because it violated the statute of frauds and lacked consideration. A contract lacking consideration is unenforceable. *FDIC v. Uribe, Inc.,* 171 Wn. App. 683, 688, 287 P.3d 694 (2012 as Amended Jan, 2013). The statute of frauds renders any agreement that offends it void and unenforceable by operation of law. *Smith v. Twohy, Supra*, 70 Wn.2d @ p 725; *Dickson v. Kates, Supra*, 132 Wn. App. @ 733-4. Therefore, the 1991 Agreement was not enforceable against the original parties, so it is not enforceable against

their successors, either. The passage of time since 1991 could do nothing to resuscitate this defective deed, so the statute of limitations is moot. The COA should have reversed the trial court's dismissal of Solin's action and declared the 1991 Agreement void and unenforceable as a matter of law.

D. <u>This Court's Standard of Review is *de novo*</u>.

The COA reviewed the trial court's grant of the HOA's motion to dismiss as a motion for summary judgment, and decided the appeal under CR 56. Opinion, p 4, ¶ 2 and footnote 1. Summary judgment is appropriate when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. CR 56(c); *Parry v. Hewitt,* 68 Wash. App. 664, 667–68, 847 P.2d 483 (1992). All facts and inferences therefrom must be construed in the light most favorable to the non-moving party (in this case, Solin). The standard for this Court's review of a summary judgment is *de novo*. *Mountain Park Homeowners Ass'n v. Tydings,* 125 Wash.2d 337, 341, 883 P.2d 1383 (1994).

VI. CONCLUSION

Solin respectfully asks this Court to accept review, reverse the COA, and declare the 1991 Agreement void and unenforceable as a matter of law because it violates the statute of frauds and lacks consideration.

Respectfully submitted this 16TH day of May, 2017.

E. Duane Golphenee, Petitioner *pro se*
583 Seaside Drive
Coupeville WA 98239
(360) 678-6543

John Solin, Petitioner *pro se*
558 Pebble Beach Drive
Coupeville WA 98239
(360) 969-1227

APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

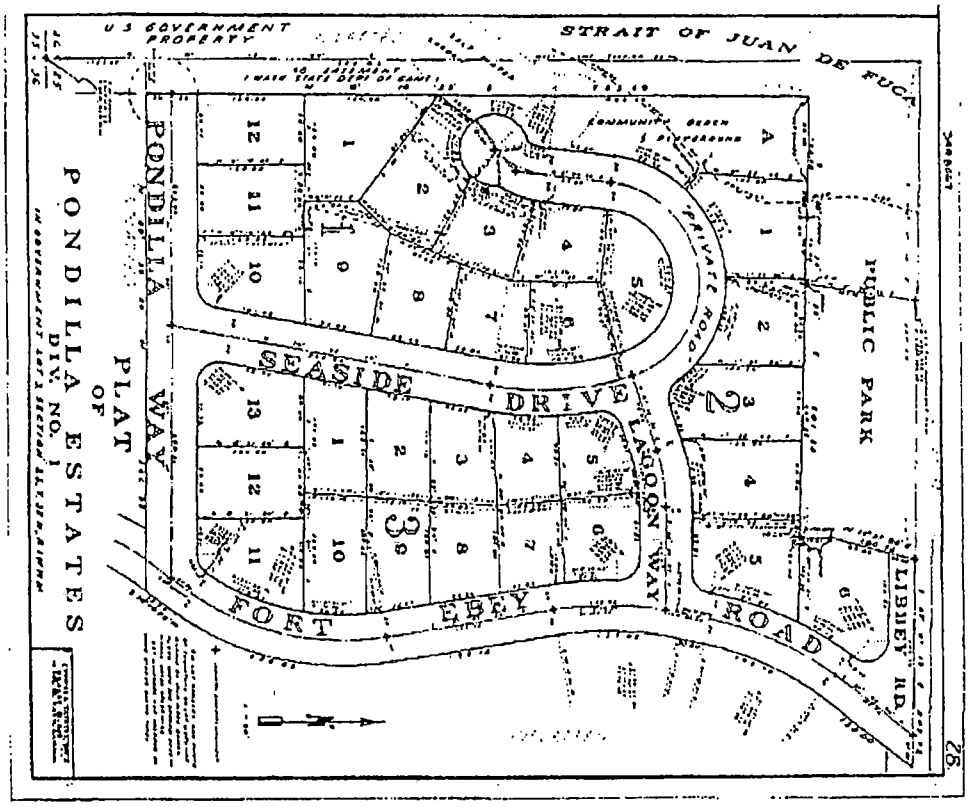
E. DUANE GOLPHENEE, a married individual and JOHN SOLIN, a married individual, Appellants, WILLIAM and SUSAN GOODMAN, husband and wife; MICHAEL and JOAN LEDRESSAY, husband and wife, MICHAEL SZEMILLER, an individual and HUNTER and ANGELA NEWTON, husband and wife: Plaintiffs pursuant to RCW 7.24.110 v. PONDILLA ESTATES COMMUNITY ASSOCIATION, a Washington nonprofit corporation, Respondent.	No. 75001-1-I DIVISION ONE UNPUBLISHED OPINION FILED: April 3, 2017

SPEARMAN, J. — Certain homeowners in the Pondilla Estates Homeowners Association (Association) were serviced by a private road (Private Road Owners). In 1991, the Private Road Owners entered into an agreement with the Association to resolve a dispute over maintenance of the private road. Under the agreement, the Association members who were not serviced by the private road agreed to pay half the cost for a bulkhead and the Private Road Owners assumed responsibility for future maintenance of the road. In May 2015,

two Private Road Owners brought an action under the Declaratory Judgement Act to challenge the enforceability of this agreement. The trial court applied a six year statute of limitations and dismissed the suit as untimely. On appeal, the Private Road Owners challenge the trial court's determination that a six year statute of limitations applied. Finding no error, we affirm.

FACTS

Pondilla Estates is a residential waterfront community on Whidbey Island. Of its 31 lots, seven are waterfront lots that may be accessed only by a private road.



In 1989, the Private Road Owners became concerned the private road would collapse due to erosion on the beach. They feared they would lose access to

their properties unless a bulkhead was built to prevent further erosion. The Private Road Owners approached Pondilla Estates Community Association (Association) with their concerns. The Association owns and operates a water system for the community. It also owns and maintains the community beach, which may be used by Association members, and is accessible only by the private road. The Association includes all parcel owners in the Pondilla Estates plat as well as several adjacent parcel owners who are not in the plat.

The Private Road Owners wanted the Association as a whole to pay for the bulkhead. The rest of the Association owners wanted the Private Road Owners to pay for the bulkhead. The Association sought legal opinions and received the advice that the Association was "'most likely'" responsible for maintenance, but that it would be "difficult to predict what the outcome would be in Court." Clerk's Papers (CP) at 217. In order to resolve the dispute, the Association entered into an agreement with the Private Road Owners in 1991. The Association agreed to pay half of the costs and expenses to build the bulkhead and the Private Road Owners agreed to maintain and repair the private road in the future. In addition, the Private Road Owners granted Association members an easement over the private road in order to access the community beach. The agreement specified that it was binding on the parties, heirs, successors and assigns, and as such was considered as running with the land. The Association paid $15,500 for half of costs.

The agreement was recorded with the Island County Auditor on September 18, 1991. It was re-recorded on March 23, 1992 to include two legal

descriptions of parcels that were named in the agreement, but inadvertently omitted in the attachment containing the legal descriptions.

The appellants, E. Duane Golphenee and John Solin (Solin), are Private Road Owners. On May 2015, they filed this suit seeking a declaration that the agreement is void or unenforceable. The Association moved to dismiss, arguing that the suit was untimely and that plaintiffs failed to join necessary parties. The Association submitted a number of exhibits and affidavits in support of its motion. The trial court granted the motion to dismiss, finding that the action was barred by a six year statute of limitations.

DISCUSSION

We review the trial court's summary judgment decision de novo.[1] Michael v. Mosquera-Lacy, 165 Wn.2d 595, 601, 200 P.3d 695 (2009). Summary judgment is appropriate only when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. CR 56(c).

Consideration

Solin first contends that the agreement fails for lack of consideration. He argues that the Association had a preexisting legal duty to maintain the private road. As a result, according to Solin, the money the Association paid toward the bulkhead in 1991 was not new consideration and thus, cannot support the agreement. The Association argues that there is consideration because the Private Road Owners received immediate funding for the bulkhead in exchange

[1] The parties agree that because the court considered evidence outside of the complaint, the panel should treat the motion to dismiss as one for summary judgment.

for the promise that the Association as a whole would have no future financial responsibility for maintaining the private road. The Association is correct.

A contract must be supported by consideration. Consideration is "'any act, forbearance, creation, modification or destruction of a legal relationship, or return promise given in exchange.'" Labriola v. Pollard Grp., Inc., 152 Wn.2d 828, 833, 100 P.3d 791 (2004) (quoting King v. Riveland, 125 Wn.2d 500, 505, 886 P.2d 160 (1994)). Consideration is a bargained-for exchange of promises. Id. at 833 (citing Williams v. Fruit Co. v. Hanover Ins. Co., 3 Wn. App. 276, 281, 474 P.2d 577 (1970)). A performance of or a promise to perform a preexisting duty does not constitute consideration. Multicare Med. Ctr. v. State, Dep't of Soc. & Health Servs., 114 Wn.2d 572, 584-585, 790 P.2d 124 (1990) superseded by statute on other grounds by Neah Bay Chamber of Commerce v. Dep't of Fisheries, 119 Wn.2d 464, 832 P.2d 1310 (1992). But "'[t]he promise of one party to forgo his rights under the contract is sufficient consideration for the promise of the other party to forgo his rights.'" Rosellini v. Banchero, 83 Wn.2d 268, 273, 517 P.2d 955 (1974) (quoting 15 W. Jaeger, Williston on Contracts § 1826 at 487 (3d ed. 1972)). "Forbearance to prosecute a valid claim or assert a legal right constitutes sufficient consideration for a contract. . . . It is not essential ... that the claim be indisputable or legally certain; where the validity of the claim is doubtful, the existence of a possibility of recovery is sufficient." Johnson v. S.L. Savidge, Inc., 43 Wn.2d 273, 276, 260 P.2d 1088 (1953).

The Association and Private Road Owners had a bona fide dispute over legal responsibility for the private road. Each could have asserted a legal right

against the other. The Private Drive Owners could have sued the Association members for pro rata contribution toward the road, and the Association could have asserted that it had no obligation to pay for the bulkhead. Instead, they each agreed to forbear prosecution of their legal claims. This constitutes sufficient consideration for the 1991 agreement.

Statute of Frauds

Next, Solin argues that the agreement is void because it does not comply with the statute of frauds due to a number of alleged defects.

The purpose of the statute of frauds is to prevent fraud arising from inherently uncertain oral agreements. Howell v. Inland Empire Paper Co., 28 Wn. App. 494, 498, 624 P.2d 739 (1981). It requires that "[e]very conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed. . . ." RCW 64.04.010. Deeds must "be in writing, signed by the party bound thereby, and acknowledged. . . ." RCW 64.04.020. A deed granting an easement must have a description of the land such that an easement can be located on the servient estate. Maier v. Giske, 154 Wn. App. 6, 16, 223 P.3d 1265 (2010) (citing Sunnyside Valley Irr. Dist. v. Dickie, 149 Wn.2d 873, 73 P.3d 369 (2003)). This requires that servient estate have an adequate legal description. Berg v. Ting, 125 Wn.2d 544, 569, 886 P.2d 564 (1995).

Solin first argues that the agreement is void under the statute of frauds because the originally recorded agreement lacked legal descriptions of two dominant estate parcels. The agreement was re-recorded to include those legal

descriptions. A trial court may reform a deed to reflect the parties' intent where a scrivener's error leads to a deficient legal description of land. Glepco, LLC v. Reinstra, 175 Wn. App. 545, 554, 307 P.3d 744 (2013) (citing Halbert v. Forney, 88 Wn. App. 669, 673, 945 P.2d 1137 (1997)). Here, the trial court referred to the omission as a "scrivener's error," and analyzed the re-recorded agreement for compliance with the statute of frauds. CP at 6, 10. This was an appropriate exercise of the trial court's authority to reform the agreement as it is expressed in the re-recorded agreement. Tenco, Inc. v. Manning, 59 Wn.2d 479, 484, 368 P.2d 372 (1962). We find that the agreement, as reformed by the trial court, complies with the statute of frauds.

Solin next contends the agreement violates the statute of frauds because it does not legally describe all Association parcels. This argument fails because, as discussed above, the legal description in a deed granting an easement is sufficient if it permits location of the easement on the servient estate. See Maier, 154 Wn. App. at 16. Here, the legal descriptions for all Association parcels are not required because they are not necessary to locate the easement.

Solin argues that the Private Road Owners' spouses must sign the agreement. He does not explain or cite to which spouse did not sign the agreement. If such a signature is missing, its omission does not render the agreement void because a unilateral encumbrance by one spouse is merely voidable, and only at the election of the nonjoining spouse or partner. See Sander v. Wells, 71 Wn.2d 25, 28, 426 P.2d 481 (1967) (citing Tombari v. Griepp, 55 Wn.2d 771, 350 P.2d 452 (1960)).

Solin argues that the agreement does not comply with the statute of frauds because it does not describe the bulkhead. The argument is without merit. Because the bulkhead was not conveyed, no legal description of it is necessary.

Solin argues that the terms of the agreement are not sufficiently definite because they lack material terms related to maintenance of the bulkhead as between the Private Drive Owners. An agreement under the statute of frauds "must embody all of the essential and material parts of the contemplated lease with sufficient clarity and certainty to show that the minds of the parties have met on all material terms and with no material matter left for future agreement or negotiation." Friedl v. Benson, 25 Wn. App. 381, 387, 609 P.2d 449 (1980) (citing 72 Am.Jur.2d Statute of Frauds § 285, at 805 (1974). But the agreement here is between the Private Drive Owners and the Association. It settles the dispute over financial responsibility for the private road and includes sufficiently definite terms to bind the Private Drive Owners and the Association. The existence or nonexistence of any terms between the Private Driver Owners regarding maintenance of the bulkhead is irrelevant.

Solin also contends that the agreement must be signed by all Association members in the Pondilla Plat. The agreement only bears the signatures of the Private Road Owners and the President and Secretary of the Association. He argues that each Pondilla Plat owner also owns part of the servient estate because, according to the trial court, they are part owners of the private road.

Thus, according to Solin, each Pondilla Plat owner must sign the agreement to grant an easement to the non-Pondilla Plat Association members.[2]

Solin is correct that the statute of frauds requires bound parties to sign the agreement. But even if the agreement lacks signatures of all Pondilla Plat owners, we decline to invalidate it because there has been part performance of the agreement.

Under the doctrine of part performance, an agreement to convey an interest in real estate that does not comply with the statute of frauds may be proved and specifically enforced if there is sufficient part performance of the agreement. Berg, 125 Wn.2d at 556 (citing Miller v. McCamish, 78 Wn.2d 821, 826, 479 P.2d 919 (1971)). The part performance doctrine empowers Washington Courts to enforce an agreement to convey an interest in real property that does not satisfy the statute of frauds if equity and justice so require. Id. at 571 (citing Miller, 78 Wn.2d at 826). We examine three factors to determine if there has been part performance of the agreement so as to take it out of the statute of frauds: (1) delivery and assumption of actual and exclusive possession; (2) payment or tender of consideration; and (3) the making of permanent, substantial and valuable improvements, referable to the contract. Id. at 556.

[2] In 1991, the understanding of the Association and the private road owners was that the private road was owned by the private road owners or the developers. So at the time of execution, it complied with the statute of frauds requirement that servient estate owners sign the agreement because the private road owners signed it. It was not until the current litigation that Solin argued, and the trial court found, that the private road was partly owned by the Association. This gave rise to Solin's argument that the agreement lacked the signatures of all Pondilla Plat owners and was therefore invalid under the statute of frauds.

Here, the first factor has diminished probative value because possession of an easement will never be exclusive. With respect to the second factor, the Association did make its payment toward construction of a bulkhead. The third factor is also satisfied because a bulkhead was built in reference to the agreement.[3] We conclude that under the doctrine of part performance, the agreement is enforceable even though it is not in strict compliance with the statute of frauds. Accordingly, we hold that the Association members are not obligated to contribute financially to the maintenance of the private road.

Statute of Limitations

Solin argues that the agreement is a continuous contract because it runs with the land and requires ongoing maintenance by the Private Road Owners. He contends that the trial court erred by applying the six year statute of limitations because performance under the agreement is not complete.

Solin does not cite cases to support that a covenant running with the land indefinitely tolls the statute of limitations. The agreement required the Association to contribute half of the costs and expenses for the bulkhead. The Association made its contribution and performance of the contract was complete. The agreement shifted the burden for maintenance onto the Private Drive Owners, but the manner and means by which they accomplished this is irrelevant to the obligations between the parties. The claim that the contract at issue is a

[3] The Association "shall contribute one-half of the costs and expenses incurred with respect to the construction of a log pile bulkhead to deter and prevent erosion and damage to the Private Road...." CP at 143.

continuous one and thereby not subject to a statute of limitations is without merit. The trial court did not err when it found that this action was barred.

Admission of Evidence

Solin argues that the trial court erred by admitting two legal opinions on who owns the private road. He contends that the lawyer's advice in the "position paper" is hearsay. He also contends that an affidavit describing the developers' intent for the private road is irrelevant and hearsay. A trial court's decision to admit evidence is reviewed for abuse of discretion. State v. Young, 160 Wn.2d 799, 805-06, 161 P.3d 967 (2007). Hearsay is a statement offered in evidence to prove the truth of the matter asserted. ER 801(c). But here, the statements were not offered to prove legal responsibility for the road. They were offered to show the ambiguity faced by the Association and private drive owners. As such, neither falls within the ambit of the hearsay rule. The trial court did not err by admitting the legal opinions.

Attorney Fees

The Association requests an award of attorney fees for a frivolous appeal under RAP 18.9(a). An appeal is frivolous "if the appellate court is convinced that the appeal presents no debatable issues upon which reasonable minds could differ and is so lacking in merit that there is no possibility of reversal." In re Marriage of Foley, 84 Wn. App. 839, 847, 930 P.2d 929 (1997) (citing Mahoney v. Shinpoch, 107 Wn.2d 679, 691, 732 P.2d 510 (1987)). Solin's appeal presents debatable arguments so we decline to award attorney fees for a frivolous appeal.

No. 75001-1-I/12

Affirmed.

Spearman, J.

WE CONCUR:

Leach, J.

APPENDIX B

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

E. DUANE GOLPHENEE, a married individual and JOHN SOLIN, a married individual, Appellants, WILLIAM and SUSAN GOODMAN, husband and wife; MICHAEL and JOAN LEDRESSAY, husband and wife, MICHAEL SZEMILLER, an individual and HUNTER and ANGELA NEWTON, husband and wife: Plaintiffs pursuant to RCW 7.24.110 v. PONDILLA ESTATES COMMUNITY ASSOCIATION, a Washington nonprofit corporation, Respondent.	No. 75001-1-I DIVISION ONE ORDER DENYING MOTION TO RECONSIDER

Appellants John Solin and E. Duane Golphenee filed a motion to reconsider the opinion filed in this case on April 3, 2017. A majority of the panel has determined this motion should be denied;

Now therefore, it is hereby

ORDERED that appellants' motion to reconsider is denied.

DATED this 3rd day of May 2017.

FOR THE COURT:

Spearman, J.

Presiding Judge

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2017 MAY -3 PM 4:26

APPENDIX C

RCW 7.24.020. Rights and status under written instruments, statutes, ordinances:

A person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

RCW 58.17.165. Certificate giving description and statement of owner must accompany final plat--Dedication, certificate requirements if plat contains--Waiver:

Every final plat or short plat of a subdivision or short subdivision filed for record must contain a certificate giving a full and correct description of the lands divided as they appear on the plat or short plat, including a statement that the subdivision or short subdivision has been made with the free consent and in accordance with the desires of the owner or owners.

If the plat or short plat is subject to a dedication, the certificate or a separate written instrument shall contain the dedication of all streets and other areas to the public, and individual or individuals, religious society or societies or to any corporation, public or private as shown on the plat or short plat and a waiver of all claims for damages against any governmental authority which may be occasioned to the adjacent land by the established construction, drainage and maintenance of said road. Said certificate or instrument of dedication shall be signed and acknowledged before a notary public by all parties having any ownership interest in the lands subdivided and recorded as part of the final plat.

Every plat and short plat containing a dedication filed for record must be accompanied by a title report confirming that the title of the lands as described and shown on said plat is in the name of the owners signing the certificate or instrument of dedication.

An offer of dedication may include a waiver of right of direct access to any street from any property, and if the dedication is accepted, any such waiver is effective. Such waiver may be required by local authorities as a condition of approval. Roads not dedicated to the public must be clearly marked on the face of the plat. Any dedication, donation or grant as shown

on the face of the plat shall be considered to all intents and purposes, as a quitclaim deed to the said donee or donees, grantee or grantees for his, her or their use for the purpose intended by the donors or grantors as aforesaid.

RCW 64.04.010. Conveyances and encumbrances to be by deed:

Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed: PROVIDED, That when real estate, or any interest therein, is held in trust, the terms and conditions of which trust are of record, and the instrument creating such trust authorizes the issuance of certificates or written evidence of any interest in said real estate under said trust, and authorizes the transfer of such certificates or evidence of interest by assignment by the holder thereof by a simple writing or by endorsement on the back of such certificate or evidence of interest or delivery thereof to the vendee, such transfer shall be valid, and all such assignments or transfers hereby authorized and heretofore made in accordance with the provisions of this section are hereby declared to be legal and valid.

RCW 64.04.020. Requisites of a deed:

Every deed shall be in writing, signed by the party bound thereby, and acknowledged by the party before some person authorized by this act to take acknowledgments of deeds.

SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. _____

(Court of Appeals No. 75001-1-I)

E. DUANE GOLPHENEE, a married individual; and JOHN SOLIN, a married individual,

Appellants

WILLIAM and SUSAN GOODMAN, husband and wife; MICHAEL and JOAN LEDRESSAY, husband and wife; MICHAEL SZEMILLER, an individual; and HUNTER and ANGELA NEWTON, husband and wife;

Plaintiffs pursuant to RCW 7.24.110

v.

PONDILLA ESTATES COMMUNITY ASSOCIATION, a Washington non-profit corporation,

Respondent

DECLARATION
OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on the 16TH day of May, 2017, I caused a true and correct copy of the 1) Petition for Review and 2) Declaration of Service to be served on the following in the manner indicated below:

Mr. Charles Arndt, esq. Kelly, Arndt & Walker Attorneys at Law, PLLP P.O. Box 290 Clinton WA 98236 (Counsel for Respondent)	(X) U.S. Mail ( ) Hand Delivery
William and Susan Goodman 565 Pebble Beach Drive Coupeville WA 98239	(X) U.S. Mail ( ) Hand Delivery
Michael and Joan LeDressay 2792 W. Pondilla Way Coupeville WA 98239	(X) U.S. Mail ( ) Hand Delivery
Michael Szemiller 562 Pebble Beach Drive Coupeville WA 98239	(X) U.S. Mail ( ) Hand Delivery
Hunter and Angela Newton P.O. Box 1077 Coupeville WA 98239	(X) U.S. Mail ( ) Hand Delivery

ORIGINALS AND FILING FEE MAILED TO:

Court Clerk
Washington Court of Appeals, Div. 1
One Union Square
600 University Street
Seattle WA 98101-4170

DATED and signed this 16TH day of May, 2017 in Coupeville, Washington.

John Solin, Petitioner *pro se*
558 Pebble Beach Drive
Coupeville WA 98239
(360) 969-1227