No. 46802-6-II

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

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CHRISTOPHER GUEST AND SUZANNE GUEST,

Appellants,

v.

DAVID LANGE AND KAREN LANGE,

Respondents.

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# RESPONDENTS' BRIEF

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## I. INTRODUCTION

The Langes' wooden deck, having been a part of their home since before the Langes purchased it, was over twenty years old and desperately needed to be replaced. Wanting to be sure that they rebuilt the deck properly, the Langes contacted the City of Gig Harbor to obtain any required permits. The City issued a conditional permit but incorrectly told the Langes that the existing deck exceeded its proper boundaries. So the Langes went to their neighbors, the Guests, to ask if they would object to the Langes rebuilding the deck in the exact same footprint as it had existed long before both the Langes and the Guests had owned their homes. The Guests, however, convinced the Langes that their deck encroached even more than the City had asserted. The Langes believed Ms. Guest because she was an attorney, so the Langes reworked their deck plans to make the deck smaller, believing they were obligated to do so under the law. When Mr. Lange later sought out independent legal advice regarding his right to rebuild the deck, he learned that the Langes were, in fact, legally entitled to rebuild their deck in the exact same footprint as it had existed for decades. Mr. Lange notified the Guests that the deck would be rebuilt in the same footprint. The new deck was completed in the spring of 2011.

Shortly thereafter, the Guests filed this lawsuit. The Guests alleged that both parties were bound by a Patio or Deck Easement and the

Covenants, Conditions, and Restrictions of the Spinnaker Ridge Association ("CC&Rs"). The Langes agreed. The Patio or Deck Easement was created by the developer of Spinnaker Ridge and grants the Langes an easement over a portion of the Guests' property for their deck. The CC&Rs also include an easement for minor encroachments by the Langes' deck beyond the boundaries of the Patio or Deck Easement. The minor encroachment in this case involves a 3' x 5' portion of the Langes' deck.

The Guests claimed the Langes agreed to build a smaller deck and to vacate a portion of the Patio or Deck Easement but breached that agreement when they rebuilt the deck in the same footprint as it had originally existed. The Guests also made a claim for trespass and breach of the encroachment easement in the CC&Rs, claiming the Langes intentionally rebuilt the deck knowing it would encroach beyond the Patio or Deck Easement. The Guests also asserted that an indemnity provision in the Patio or Deck Easement required the Langes to indemnify them for attorney fees and costs incurred in this lawsuit. Under the Guests' interpretation of the indemnity agreement, the Langes must fund the lawsuit the Guests filed *against* them, and they are prohibited from even defending against the lawsuit.

The trial court dismissed the Guests' claim for breach of the CC&Rs on summary judgment, finding that the CC&Rs did not create an

enforceable contract, and dismissed the Guests' indemnity claim because the Guests' interpretation of the indemnity provision was wholly unreasonable. The trial court ruled, as a matter of law, that the Patio or Deck Easement gave the Langes the right to rebuild the deck within the boundaries of that Easement. After the summary judgment motions, the issues that remained for trial were (1) whether the Langes entered into a contract with the Guests to vacate the Patio or Deck Easement; (2) whether the Langes breached a duty of good faith and fair dealing by building the deck; and (3) whether the 3' x 5' area of the deck that went beyond the Patio or Deck Easement constituted an intentional trespass.

Following a six day trial, the jury returned a defense verdict in favor of the Langes, finding that the Langes did not breach any contract with the Guests to vacate the Patio or Deck Easement and did not breach a duty of good faith and fair dealing. The jury also found that the Langes' deck was not trespassing on the Guests' property. The court entered a final judgment dismissing the Guests' claims with prejudice and quieting title in the Langes to exclusively use, maintain, repair and replace the deck as it existed against any claims by the Guests.

It is time this litigation over a 3'x 5' area of deck, that the jury found did not trespass, comes to an end. Notably, the Guests do not argue on appeal that the jury verdict was not supported by the evidence; they do not

argue that the jury's findings (that there was no breach of contract and no trespass) were contrary to the weight of the evidence. Indeed, the jury's finding that the deck does not trespass on the Guests' property renders moot the Guests' appeal of the order dismissing their claim that the Langes breached the CC&Rs by intentionally building the deck to encroach/trespass on the Guests' property. The Guests' claim that the trial court erred in not considering their "new evidence" – evidence they allege shows that the Patio or Deck Easement is invalid – is a non-issue because the Guests failed to even bring that "new evidence" to the trial court's attention. Finally, the Guests' indemnity claim is premised on a wholly unreasonable interpretation of the indemnity provision which produces the absurd result of requiring the Langes to fund the lawsuit filed against them while also prohibiting them from defending against the lawsuit.

In sum, there is no basis in the law or in the extensive record before the Court to support any of the Guests' claims of error by the trial court. The trial court orders, the jury's verdict, and the judgment entered in the Langes' favor should affirmed.

## II. STATEMENT OF ISSUES

A. Did the trial court properly deny the Guests' untimely motion to file a second amended complaint when the proposed amendment

would have dramatically and unnecessarily expanded the scope of the litigation to the Langes' prejudice? (Appellants' Assignment of Error 1)

B. Should the trial court's order dismissing the Guests' breach of contract claim for an alleged breach of the Encroachment Easement in the CC&Rs be affirmed when (1) the issue has been rendered moot by the jury's verdict in favor of the Langes on the trespass claim; and (2) neither the law nor the CC&Rs support a cause of action for breach of contract for an alleged violation of the Encroachment Easement? (Appellants' Assignment of Error 2)

C. Did the trial court properly dismiss the Guests' indemnity claim when the indemnity provision in the Patio or Deck Easement only applies to claims asserted against the Guests by third parties for injuries while using the Patio or Deck Easement – specifically, here, when using the Langes' deck over the Easement? (Appellants' Assignment of Error 9)

D. Is there any basis for finding that the trial court erred in not considering the Guests' "new evidence" and argument that the Patio or Deck Easement was invalid when the Guests never timely presented the "new evidence" or argued that the Easement was invalid? (Appellants' Assignments of Error 3, 4, 5, 6, 9, 10)

E. Did the trial court properly exercise its discretion in giving Jury Instructions No. 17 and 9, when the instructions (1) were supported by

the evidence, (2) allowed the Guests to argue their theory of the case, and (3) informed the jury of the applicable law? (Appellants' Assignment of Error 8)

F. Did the trial court err by inadvertently failing to give the Guests' Jury Instruction No. 9, defining the duty of good faith and fair dealing, when (1) the issue has been rendered moot by the jury's finding that the Langes did not breach a contract with the Guests; and (2) under Washington law, instructions given to the jury, when not objected to, are deemed the law of the case? (Appellants' Assignment of Error 7)

G. Should the Court reject the Guests' claim of cumulative error when they have failed to establish that the trial court committed cumulative errors that were so egregious or unduly prejudicial as to deny the Guests a fair trial? (Appellants' Assignment of Errors 5, 6, 7,and 8)

II. Should the Court reject the Guests' request for attorney fees when there is no contract, statute or recognized ground in equity upon which to base such an award?

## III. STATEMENT OF THE CASE

### A. Facts Leading Up to the Underlying Litigation.

The Guests and the Langes own adjacent parcels of property in the planned unit development neighborhood of Spinnaker Ridge in Gig

Harbor.[1] Spinnaker Ridge was developed by Nu-Dawn Homes in 1986. As part of the original development, Nu-Dawn Homes recorded the CC&Rs and also recorded a series of easement grants and reservations affecting lots in the development.[2]

The Langes purchased their home, located on Spinnaker Ridge Lot 4, in 1993. When they purchased their home, it had a deck located in the space between their Lot 4 home and their neighbor's home on Lot 5.[3] Eleven years later, in 2004, the Guests purchased Lot 5. When the Guests purchased Lot 5, the Lot was subject to the recorded CC&Rs and a "Patio or Deck Easement" which benefitted the Langes' Lot 4 property.[4] The Guests' Lot 5 was similarly benefited by a "Patio or Deck Easement" over the adjoining Lot 6.[5]

The Patio or Deck Easement benefitting the Langes' Lot 4, reserved an easement to a small area of land on Lot 5, where it abutted Lot 4. The easement covered an area 5' x 21' for a patio or deck for Lot 4.[6] The Patio or Deck Easement was recorded in the Pierce County Recorder's Office.[7]

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[1] CP 382.

[2] CP 419-420; 423-436.

[3] CP 383, ¶¶3-4; CP 389-90. Many of the other homes in Spinnaker Ridge have similar deck configurations. CP 383, ¶6; CP 391-393.

[4] CP 419, ¶2; 420, ¶¶3-5; CP 423-431.

[5] CP 420, ¶6; CP 434-436.

[6] CP 420, ¶5; CP 432-433.

[7] Pierce County Auditor No. 8704290509. CP 420; ¶4, CP 430.

In addition, recognizing that there might be unintended encroachments because of the small lot size in the Spinnaker Ridge neighborhood, the developer also included a blanket encroachment provision in Section 16.4 of the original CC&Rs, (referred herein as "Encroachment Easement") allowing for unintentional minor encroachments by a deck or patio over all adjoining lots and common areas beyond the boundaries of the Patio or Deck Easement.[8]

In the winter of 2010-2011, the Langes determined that their deck had suffered extensive deterioration and water damage over the years. As a result, they decided to replace it using composite material to avoid future weather damage to the deck system.[9]

In early 2011, the Langes and the Guests had several conversations about the Langes' intent to replace their deteriorated deck.[10] The Guests told the Langes that (1) the Patio or Deck Easement required that the Langes share their deck with the Guests; and (2) the Langes were required to obtain the Guests' approval on the project before the Langes could begin

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[8] CP 419, ¶2; CP 422-424; The CC&Rs are recorded under Pierce County Auditor's No. 8608080472. *Id.* The Encroachment Easement was likewise included in the amended and restated CC&Rs at paragraph 15.4, recorded under Pierce County Auditor's No. 200705290274. CP 420, ¶3; CP 425-428.

[9] CP 383, ¶7.

[10] CP 384-85, ¶11.

reconstructing their deck.[11] The Guests eventually convinced the Langes that they did not have the right to reconstruct their deck on the original footprint as it existed when the Langes purchased their home, and instead, the Langes would have to reduce the size of their deck.[12] As a result, the Langes began to consider building a smaller deck, because they believed they were legally required to do so.[13] The Langes drew up new deck plans with an area labeled "vacated easement" which reflected the portion of their existing deck that the Langes, at the time, believed was unlawfully encroaching on the Guests' property.[14]

As the Langes' conversations with the Guests became more tense, and the neighbors' relationship deteriorated over the issue of whether the Langes could rebuilt their deck in the same location as it had previously existed, Mr. Lange told the Guests that the Langes intended to repair and rebuild their deck within their legal rights, and if the Langes determined that they had the right to keep the deck as it had been since they purchased their home, that they would rebuild it in that same footprint.[15]

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[11] CP 384-86, ¶¶11-15.
[12] *Id;* CP 385, ¶12; CP 386, ¶¶15, 17.
[13] CP 384-85, ¶¶10-13; CP 386, ¶¶15, 17.
[14] CP 385, ¶13; CP 398-99.
[15] CP 385-86, ¶14.

Subsequently, the Langes learned that the Patio or Deck Easement benefitting their property, in combination with the Spinnaker Ridge CC&Rs, established that they were not required to modify their deck from the footprint in which it was originally constructed.[16] As a result, the Langes told the Guests that they would be replacing their worn deck in the *exact* same footprint as it had originally been built.[17] The deck was rebuilt in April 2011, in the same location and with the same footprint as it had when the Langes' purchased their home.[18]

## B. The Guests Filed Suit And Three Years Of Litigation Ensued.

### 1. The Guests' Original and Amended Complaints.

The Guests, believing the Langes' deck improperly encroached on their property beyond the Patio or Deck Easement, filed this lawsuit on December 6, 2011, alleging claims for breach of contract and trespass.[19] On August 22, 2012, the Guests filed a Confirmation of Joinder, specifically stating that all parties had been served and all mandatory pleadings had been filed.[20] Two months later, in October 2012, after realizing they had filed a different complaint than the complaint originally served on the Langes, the

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[16] CP 386-87, ¶18.
[17] CP 387, ¶19; CP 410.
[18] CP 387, ¶21.
[19] CP 1-4.
[20] CP 30-31.

Guests requested, and Langes' counsel agreed, to allow the Guests to file the correct amended complaint.[21] The Guests filed the Amended Complaint on October 15, 2012, almost a full year after the original complaint had been filed.[22]

The Amended Complaint affirmatively stated that both parties were bound by the Patio or Deck Easement, and then alleged four claims against the Langes: breach of contract, breach of the covenant of good faith and fair dealing, trespass, and indemnity.[23] The Amended Complaint alleged that the Langes entered into a binding contract with the Guests to vacate and relinquish any rights the Langes had to use a "substantial portion" of the "Patio or Deck Easement."[24] It also alleged that the Langes were liable under the Patio or Deck Easement to indemnify the Guests for all costs they incurred with regard to this lawsuit.[25]

### 2. The Guests Moved For Leave To File A Second Amended Complaint A Year After Filing Their Original Complaint.

On January 29, 2013, the Guests moved to file a Second Amended Complaint and for a trial continuance.[26] The proposed Second Amended

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[21] CP 223, fn. 3; CP 282.
[22] CP 32-41.
[23] CP 37, ¶3.17; CP 39-40.
[24] CP 34-35, ¶¶ 3.5, 3.9.
[25] CP 37, ¶3.18; CP 40, ¶¶7.2-7-4.
[26] CP 62-220.

Complaint was a staggering 135 pages long and asserted eleven new causes of action and sought to add a minimum of five new co-defendants.[27] In addition to the breach of contract, trespass, breach of covenant of good faith and fair dealing, and indemnity claims asserted in the Amended Complaint, the proposed Second Amended Complaint also sought to assert claims for negligence, negligence per se, breach of fiduciary duty, violations of RCW 4.24.630, promissory estoppel, equitable estoppel, judicial estoppel, malicious abuse of process, civil conspiracy, the tort of outrage, false light, spoliation and concealment of evidence, insurance bad faith and Washington insurance code and insurance regulations violations and per se liability, "prima face tort," and violations of Allstate Insurance Company's and the Trustees' code of ethics and business practices.[28] Many of the claims in the proposed Second Amended Complaint were based on alleged conduct that occurred well after the deck reconstruction that is at the heart of this litigation.[29] The proposed Second Amended Complaint also asserted

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[27] *See*, CP 76-212.While not entirely clear, the Second Amended Complaint purports to name *all* lot owners in the Spinnaker Ridge development as "John Doe and/or Jane Doe" co-defendants. See CP 77.

[28] CP 159-205.

[29] For example, the Second Amended Complaint alleges "Malicious Abuse of Process" based on the Langes' assertion of a counterclaim, and made allegations of "Civil Conspiracy" citing to emails from the Langes' son in response to the Guests' bizarre behavior after the deck project was completed. CP 174 -181.

claims based on conduct by third-parties not named in the proposed Second Amended Complaint.[30]

The trial court denied the Guests' motion for leave to file the Second Amended Complaint after finding prejudice to the Langes and because the motion was untimely as it was filed eight (8) months after the deadline for joining additional claims and parties had passed.[31]

**3. Order On Motion For Summary Judgment Of Dismissal.**

On March 22, 2013, the Langes filed a motion for summary judgment to dismiss the four claims asserted in the Guests' First Amended Complaint.[32] The Langes' motion argued that the Guests' **trespass claim** should be dismissed because the Langes' use of the property, and replacing the deck in the exact same footprint as the previous deck, was consistent with their legal rights under the Patio and Deck Easement and Section 16.4 of the Spinnaker Ridge CC&Rs – the Encroachment Easement.[33] The Guests' trespass claim involved two separate areas of the deck. The first was a 5 foot wide strip of deck located within the bounds of the Patio or Deck Easement, which the Guests contended the Langes had contracted to

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[30] *See*, CP 188-205.

[31] CP 300-301; RP (February 8, 2013) at p. 7.

[32] CP 448-474. The Guests also filed a motion for summary dismissal of the Langes' counterclaims. CP 302-356.

[33] CP 463-467; 647-651; *see also*, CP 477, lines 10-19; CP 433.

vacate. The second was the minor encroachment past the edge of the Patio or Deck Easement boundary, which measured approximately 3' x 5' in total surface area.[34] The Langes' contended that this minor encroachment was authorized and allowed under the Encroachment Easement – Section 16.4 in the Spinnaker Ridge CC&Rs.[35]

The Langes argued that the **breach of contract claim** should be dismissed because there was no enforceable agreement to "vacate" any portion of the Patio or Deck Easement.[36] They sought dismissal of the claim for **breach of the covenant of good faith and fair dealing** because there was no enforceable contract.[37] Finally, the Langes sought to dismiss the Guests' claim for **breach of duty to indemnify** because the indemnity agreement in the Patio or Deck Easement only applies to claims asserted against the Guests for injuries incurred by others while they are using the Patio or Deck Easement.[38]

The Guests submitted a 50 plus page response, arguing for the first time, that the CC&Rs created a contract between the parties.[39] The Guests

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[34] CP 647, lines 2-12; *see also*, RP (April 19, 2013) at p. 12, lines 22-25, p. 13, lines 1-14.
[35] CP 465-467; 650-51.
[36] CP 458-461; 641-644.
[37] CP 461-463; 644-646.
[38] CP 467 – 469; 651-652.
[39] CP 556-609.

alleged that Mr. Lange knew when he was replacing the deck that it exceeded the boundaries of the Patio or Deck Easement, and therefore, the Langes breached the Encroachment Easement provision in the CC&Rs, giving rise to a breach of contract claim for damages.[40]

On April 19, 2013,[41] after allowing an extensive two and a half hours of oral argument on the motions,[42] the Honorable Ronald Culpepper ruled from the bench. The court dismissed the Guests' **trespass** claim in part, finding that the Patio or Deck Easement created an easement for the 5' x 21' section of the Langes' deck on Lot 5 and that Langes had the right to rebuild and use their deck pursuant to that Easement.[43] However, Judge Culpepper concluded a question of fact existed as to the right to use the 3' x 5' section that exceeded the Patio or Deck Easement and whether Mr. Lange knew that the deck was encroaching beyond the boundaries of the

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[40] CP 576-578.

[41] Two days before oral argument, and long after the deadline for filing their opposition had passed, the Guests filed a "Declaration of Suzanne Guest CR 56(f) Denial of Defendants' Motion for Summary Judgment Dismissal of Claims or Continue." CP 728-796. The sixteen page declaration together with 52 pages of exhibits, claimed postponement was necessary to allow the Guests to explore several new theories, including Mr. Lange's mental capacity, the ownership of the Langes' home, estate planning done by Mr. and Mrs. Lange, and the role played by the Langes' son during the replacement of the deck. *Id.* The Langes filed a written objection arguing that the request for a continuance was untimely, and that the Guests failed to point to any evidence that would create a material issue of fact in the case. CP 798-800. At no time during oral argument on the motions for summary judgment did the Guests ask the Court to rule on their request for continuance. *See* RP (April 19, 2013) at 1-79.

[42] RP (April 19, 2013) at 1-79; RP (May 24, 2013) at p. 3, line 10.

[43] RP (April 19, 2013) at p. 41, lines 16-20; p. 36, lines 8-11.

Easement, so that aspect of the trespass claim was not dismissed.[44] The court dismissed the Guests' **breach of contract** claim based on the Encroachment Easement in the CC&Rs, finding that the CC&Rs did not create a contract between the Langes and the Guests.[45] The court also dismissed the Guests' **breach of good faith and fair dealing** claim insofar as there is no independent duty of good faith and fair dealing.[46] Finally, the court dismissed the Guests' **indemnity** claim, finding that the provision in the Patio or Deck Easement only applied when third parties filed suit against the Guests for injuries incurred when using the easement area.[47]

The presentment hearing for entry of the orders on the motions for summary judgment was noted for May 6, 2013.[48] That morning, Ms. Guest told the Court that she had learned of new information over the weekend and that a CR 56(f) declaration would be filed, seeking to postpone entry of the order on the Langes' motion for summary judgment.[49] The Langes' counsel had not yet received a copy of the CR 56(f) declaration.[50] The only reason given for the requested continuance was that the Guests intended to

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[44] RP (April 19, 2013) at p. 41, lines 21-25; p. 42, lines 1, 14-16.
[45] RP (April 19, 2013) at p. 67, lines 14-25; p. 68, lines 1-3.
[46] RP (April 19, 2013) at p. 77, lines 11-21.
[47] RP (April 19, 2013) at p. 35, lines 4-12; lines 23-24; p. 78, lines 9-14.
[48] CP 936 – 938; RP (May 6, 2013) at pps. 1-42.
[49] CP 937; RP (May 6, 2013) at p. 3, lines 24-25; p. 4, lines 1-8.
[50] CP 937; RP (May 6, 2013) at p. 6.

move to amend the complaint (again), this time to add the prior owners of Lot 5 as a party so that the Guests could seek defense and indemnity from them.[51] The postponement request was denied.[52]

Two orders on summary judgment were entered.[53] Specifically, an Order was entered on the Langes' motion that (1) dismissed the Guests' trespass claim with respect to the area described in the Patio or Deck Easement as a matter of law with prejudice; (2) denied the motion to dismiss the Guests' trespass claim with respect to the 3' x 5' area that exceeded the boundaries of the Patio or Deck Easement (finding there were genuine issues of material facts with regard to the parties' legal rights to occupy or use this area); (3) dismissed the Guests' claim for breach of contract for a violation of the Spinnaker Ridge CC&Rs as a matter of law with prejudice; and (4) dismissed the Guests' claims for breach of indemnity as a matter of law with prejudice.[54] The Guests did not seek reconsideration of the Court's

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[51] RP (May 6, 2013) at p. 4-8.

[52] RP (May 6, 2013) at p. 8, lines 24-25. The Court denied the verbal request, explaining that the trial date was less than a month away, discovery was to close in two weeks, the Langes had an interest in getting the litigation resolved, the potential defense and indemnity claims the Guests wanted to assert against the prior owners would have no bearing on the orders on the parties summary judgment motions. RP (May 6, 2013) at pps. 6-8. The Guests have not argued on appeal that the trial court's denial of their motion for continuance was error, and therefore they have waived any claimed error. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("[a] party that offers no argument in its opening brief on a claimed assignment of error waives the assignment").

[53] CP 939-943; 944-946.

[54] CP 941-942.

Order under Civil Rule 59(a), nor did they seek reconsideration of the Order denying their motion for continuance.[55] Likewise, the Guests did not move to vacate or re-open the Order on Summary Judgment pursuant to Civil Rule 60.[56]

## C. The Jury Trial.

After the various motions, the issues that remained for trial were as follows: (1) whether the Langes entered into a contract with the Guests to vacate the Patio or Deck Easement; (2) whether the Langes breached a duty of good faith and fair dealing by building the deck after allegedly entering into a contract not to; and (3) whether the 3' x 5' portion of the deck that was outside the boundaries of the Patio or Deck Easement was trespassing on the Guests' property.

A six-day jury trial took place from July 8, 2014 to July 16, 2014. Shortly before trial, the Guests filed a motion in limine asking the court to exclude "[a]ny testimony, evidence and/or argument that there is any Lot 4 deck [sic] or any other easement on Lot 5."[57] The trial court denied the

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[55] Contrary to the Guests' assertion at page 13 of Appellants' Brief, the Guests did not move for reconsideration of the dismissal of their indemnity claim; instead, the Guests moved for reconsideration of the ***denial*** of their motion to dismiss the Langes counterclaim regarding paragraph D. CP 1037-1074.

[56] The Guests failed to invoke the possible relief in CR 59(a) or CR 60, despite the fact the trial court specifically stated during the presentation hearing that they had the right to seek relief under those rules. RP (May 6, 2013) at p. 40, lines 23-25; p. 41, lines 19-23.

[57] CP at 4033.

motion, noting that the Order on Summary Judgment entered on May 6, 2013, which was the law of the case, dismissed the Guests' trespass claim as to the area of the deck within the Patio or Deck Easement with prejudice and that it was too late for the court to consider a request for reconsideration of that prior order.[58]

The Guests also objected to the trial court's Jury Instruction No. 17, which told the jury that the court had determined, as a matter of law, that the Langes had the right to rebuild their deck in the area described in the Patio or Deck Easement.[59] The trial court explained that it was not going to change the May 6, 2013 Order on Summary Judgment and that the court had the authority to determine the validity of the Patio or Deck Easement as a matter of law, as reflected in the Order on Summary Judgment.[60] The court further explained that Instruction No. 17 did not prohibit the Guests from arguing their theory of the case, which had always been, that despite the Langes' right to rebuild, the Langes agreed with the Guests to give up that right.[61]

The Guests also objected to Instruction No. 9, which instructed the jury as to the meaning of "consideration" for purposes of proving a valid

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[58] RP (July 8, 2014) at p. 29, lines 15-25, pps. 30-31.
[59] RP (July 15, 2014) at p. 98, lines 15-17.
[60] RP (July 15, 2014) at p. 99, lines 9-14.
[61] RP (July 15, 2014) at p. 99, lines 10-18.

contract. The court rejected the Guests' proposed instruction because it was too difficult to understand, confusing, and not helpful to the jury.[62] The instruction the Court gave stated:

> If you find that plaintiffs justifiably relied on the defendants' promise not to build a new deck in the area identified in the patio or deck easement, then there is consideration.[63]

The Guests' proposed instruction that was rejected by the court stated:

> If you find that the Guests in return for a Lange promise did anything legal which they were not bound to do or refrained from doing anything that they had a right to do, whether there is actual loss or detriment to the Guests or actual benefit to the Langes or not, then there was consideration.[64]

The Guests also proposed a jury instruction concerning the implied duty of good faith and fair dealing which the court agreed to give to the jury.[65] But apparently due to an inadvertent error, that instruction was not included in the court's packet of jury instructions and was not read to the jury. However, before the instructions were read to the jury, the court specifically asked both parties to review the court's jury instruction packet to ensure and confirm that the packet was complete.[66] Both parties did so

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[62] RP (July 15, 2014) at p. 102, lines 6-14.
[63] CP 4747.
[64] RP (July 15, 2014) at p. 102, lines 6-13.
[65] RP (July 15, 2014) at p. 103, lines 18-25; p. 104, line 1.
[66] RP (July 15, 2014) at p. 121, lines 18-25, p. 122, lines 1-2.

and confirmed that the relevant jury instructions were included in the packet.[67] Neither party brought the omission to the court's attention.[68]

After deliberating for approximately six (6) hours, the jury returned a defense verdict in the Langes' favor.[69] The jury specifically found that the Langes did not breach a contract with the Guests to not build their deck in the area where it previously existed, and did not breach a duty of good faith and fair dealing.[70] The jury also found that the Langes' deck did not trespass on the Guests' property.[71] The court thus entered final judgment dismissing the Guests' claims with prejudice and quieting title in the Langes to "exclusively use, maintain, repair and replace the deck . . . as it now exists against any claim of the plaintiffs."[72]

The Guests have now appealed.

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[67] RP (July 15, 2014) at p. 122, lines 1-12.

[68] Later, during deliberations, the jury asked the trial court to define "covenant of good faith and fair dealing." CP at 4761; RP (July 16, 2014) at p. 42, lines 14-15. The Court instructed the jury: "Words are to be given their ordinary meaning." CP 4761; RP (July 16, 2014) at p. 42, lines 16-17. Neither party objected to the court's instruction.

[69] CP 4780; CP 4763-64.

[70] CP 4763.

[71] CP 4764.

[72] CP at 4855-56. On September 30, 2014, after entry of the final Judgment in the Langes' favor, the Guests filed an untimely Motion for Reconsideration (relying on CR 59(a)), asking the trial court to vacate all orders entered in favor of the Langes, as well as the Final Judgment. CP 4910-4937. The trial court denied the motion as untimely under the mandatory timelines set forth in CR 59(a). CP 4948-49. The Guests have not included any argument on the court's order denying their motion of reconsideration, and therefore, they have waived their right to appeal from the same. *Am. Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 7, 802 P.2d 784 (1991)("In the absence of argument and citation to authority, an issue raised on appeal will not be considered.").

## IV. ARGUMENT

### A. The Trial Court Properly Exercised Its Discretion In Denying The Guests' Untimely Motion To Amend The Complaint Because The Amendment Would Have Dramatically and Unnecessarily Expanded The Scope Of The Litigation To The Langes' Prejudice.

An order denying a motion to amend a pleading under CR 15(a) is reviewed for abuse of discretion. "Discretion is abused if it is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Hines v. Todd Pac. Shipyards Corp.*, 127 Wn. App. 356, 374, 112 P.3d 522, 530 (2005). A court's decision is "manifestly unreasonable" if the trial court adopts a view that no reasonable person would take. *Mayer v. Sto Indus., Inc.*, 156 Wn. 2d 677, 684, 132 P.3d 115, 118 (2006). A discretionary decision rests on "untenable grounds" or is based on "untenable reasons" if the trial court relies on unsupported facts or applies the wrong legal standard. *Id.*

While CR 15(a) states that leave to amend pleadings "shall be freely given when justice so requires", the touchstone for denial of a motion to amend a complaint is the prejudice the amendment would cause the nonmoving party. *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316, 319 (1999); *Caruso v. Local Union No. 690*, 100 Wn.2d 343, 351, 670 P.2d 240, 244 (1983). Prejudice results from the introduction of new claims that are significantly different from the original complaint because additional

discovery must be undertaken causing both delay and additional expenses. *Wallace v. Lewis Cnty*, 134 Wn. App. 1, 25, 137 P.3d 101, 113-14 (2006).

Additional factors the court may consider in determining prejudice include unfair surprise, jury confusion, introduction of remote issues, a lengthy trial, or undue delay. *Herron v. Tribune Publ'g Co., Inc.*, 108 Wn.2d 162, 165-66, 736 P.2d 249, 252-53 (1987); *see also*, *Wallace*, 134 Wn. App. at 25, 137 P.3d at 113-14 (undue delay warranted denial of motion to amend when plaintiffs attempted to amend their complaint a year and a half after filing the original complaint, and a month before a scheduled summary judgment hearing). In *Donald B. Murphy Contractors, Inc. v. King County*, 112 Wn. App. 192, 199-200, 49 P.3d 912, 915-16 (2002), a motion to amend was properly denied when (1) the motion was filed more than a year after the lawsuit was initially filed and on the deadline for changing the trial date, (2) a confirmation of joinder had previously been filed confirming joinder of all parties, claims and defenses and plaintiffs had indicated no additional claims would be raised, (3) the discovery cut off was a mere two months away, and (4) the deadline for dispositive pretrial motions was less than three months away.

Notably, appellate decisions that have permitted amendments have done so while emphasizing that the moving parties "were merely seeking to assert a new legal theory based upon the same circumstances set forth in the

original pleading," and therefore, little or no prejudice was shown. *Herron*, 108 Wn.2d at 166, 736 P.2d at 253, citing *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed2d 222 (1962) ("[T]he amendment would have done no more than state an alternative theory for recovery"); *Caruso*, 100 Wn.2d at 350-51, 670 P.2d at 243-44 (allowing amendment to add defamation claim to original complaint that claimed tortuous interference based on defamatory publication).

In this case, the trial court properly exercised its discretion by denying the Guests' motion to amend because the proposed Second Amended Complaint would have dramatically expanded the scope of this litigation, introduced remote issues, resulted in delay and substantial additional discovery and expense. The Guests were not merely seeking to assert a new legal theory based upon the same circumstances set forth in the original pleading, but rather, they sought to add five new defendants, and eleven new causes of action. The new causes of action were significantly different from the original claims; they were premised on sixty-nine (69) pages of "facts", a significant departure from the mere six (6) pages of "facts" in the Amended Complaint.[73] In addition, many of the new claims were based on conduct that occurred well after the deck reconstruction at

[73] Compare CP 33-39 with CP 90-159.

the heart of the litigation, and many of the new claims were premised on allegations of conduct by third-parties who were not even named as defendants.

The trial court also properly denied the Guests' motion to amend because it was clearly untimely. The Guests did not move to amend their complaint until January 29, 2013. But it is clear that the Guests were contemplating claims of wrongdoing against the additional parties they wanted to add as defendants (the Spinnaker Ridge Association Board of Trustees, the Architectural Control Committee, and the individual members of each), as early as December 2011.[74] Further, the motion to amend was not filed until over a year after the original complaint was filed, eight months after the deadline for joining additional claims and parties had passed, a month before discovery was to close, and four months before the trial was scheduled to begin. Allowing the Guests to dramatically change the entire landscape of this litigation at such a late date would have undeniably caused significant delay, additional discovery and expenses, and would have prolonged the litigation that had already been ongoing since December 2011, all to the Langes' significant prejudice. Indeed, in *Donald B. Murphy Contractors, Inc.,* 112 Wn. App. 192, 49 P.3d 912, the court held

[74] CP 223, lines 12-21; CP 224, lines 1-2; CP 233, ¶¶6-7; CP 247-252; 254-259.

a motion to amend was properly denied under very similar circumstances. Thus, the Guests have failed to establish that the trial court abused its discretion in denying the Guests' motion to amend.[75] The trial court's order should be affirmed.

### B. The Trial Court Properly Dismissed The Guests' Claim For Breach of Contract Based On An Alleged Violation Of The CC&Rs Because There Is No Legal Or Factual Basis For Such A Claim.

The Guests argue that the trial court erred when it dismissed their claim that the Langes breached the CC&Rs, specifically Article 16, §16.4, alleging that the Langes rebuilt their deck knowing it would encroach 3' x 5' beyond the area of the Patio or Deck Easement. Under the terms of the Encroachment Easement, §16.4 of the CC&Rs, a deck on Lot 4 may encroach beyond the boundaries of the patio or deck easement so long as the encroachment was not intentional.[76] Here the trial court properly dismissed the Guests' breach of contract claim because the CC&Rs did not create a contract between the Guests and the Langes, and nothing in the CC&Rs gives one homeowner a contract cause of action against another homeowner.

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[75] The fact that the trial date was ultimately postponed for other reasons is not a proper basis to re-visit the denial of the Guests' motion to file a second amended complaint, nor does it provide any basis for finding that the trial court erred when it denied the Guests' motion based upon the facts and prejudice that existed at the time the motion was made.

[76] CP 424.

The Guests' reliance on *Piepkorn v. Adams*, 102 Wn. App. 673, 684, 10 P.3d 428, 434 (2000), is misplaced. While the Court of Appeals in *Piepkorn* held that an adjoining landowner was entitled to *injunctive relief for an alleged breach of the CC&Rs*, the Court rejected the plaintiff's claim that he was also entitled to recover damages. The Court held that an adjoining landowner is not entitled to an award of damages for breach of an alleged covenant when the CC&Rs do not provide for such a recovery. *Id.* at 685-86. *Compare, Day v. Santorsola*, 118 Wn. App. 746, 769, 76 P.3d 1190, 1203 (2003)(the CC&Rs specifically authorized claims for violations of covenants to "recover damages arising from such violation").

Here, there is no provision in the Spinnaker Ridge CC&Rs that gives a homeowner the right to make a claim for damages against another homeowner based on an alleged violation of the Encroachment Easement. Nor does §16.4 of the CC&Rs contain any sort of contractual promise on which the Guests can base a breach of contract claim. Under the terms of §16.4, if the owner of Lot 4 intentionally encroaches on Lot 5, then no encroachment easement exists.[77] Under §16.4, either the Langes have the right to encroach or they do not. There is nothing in §16.4 upon which the

[77] CP 424.

Guests can assert a breach of contract claim for the alleged 3' x 5' encroachment.[78]

Moreover, a claim is moot if a court can no longer provide effective relief. *See, SEIU Healthcare 775NW v. Gregoire*, 168 Wash.2d 593, 602, 229 P.3d 774, 779 (2010); *City of Sequim v. Malkasian*, 157 Wn.2d 251, 259, 138 P.3d 943, 947-48 (2006). The Guests' breach of contract claim based on the CC&Rs was premised on an allegation that the Langes built their deck so as to intentionally encroach beyond the Patio or Deck Easement. But this claim has been rendered moot by the jury's finding that the Langes are not liable for trespass with respect to the 3 x 5 foot encroachment. That finding conclusively establishes that the Guests failed to prove the Langes knowingly built the deck so as to intentionally encroach beyond the area identified in the Patio or Deck Easement.[79] Accordingly, the trial court's order dismissing the Guests' contract claim should be affirmed.

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[78] The Guests' reliance on trial Exhibit 14 for their argument that the CC&Rs create a contract is misplaced because (1) the exhibit was not part of the record before the trial court when it entered the order dismissing the Guests' breach of contract claim; and (2) §14.1 does not confer a right to assert a breach of contract claim for the recovery of damages; instead, it provides a homeowner with the authority to file suit to *enforce* a covenant – the Guests' Amended Complaint did not allege a claim to enforce any covenants within the CC&Rs.

[79] See Instructions No. 11 and 12, CP 4751-4753.

### C. The Trial Court Properly Dismissed The Guests' Indemnity Claim Because The Indemnity Provision In The Patio or Deck Easement Is Triggered Only When A Claim Is Asserted Against The Guests For Injuries Sustained By Others Arising Out Of The Use Of The Patio or Deck Easement.

The trial court properly dismissed the Guests' indemnity claim because the indemnity provision in the Patio or Deck Easement is triggered only when a claim is asserted against the Guests by third parties for injuries sustained while using the Patio or Deck Easement.

Words in a contract are to be given "their ordinary, usual, and popular meaning[.]" *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 713, 334 P.3d 116, 120 (2014), quoting *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 504, 115 P.3d 262, 267 (2005). Contract interpretation is a question of law and is subject to *de novo* review. *Pac. Indem. Co. v. Bloedel Timberlands Dev., Inc.*, 28 Wn. App. 466, 468, 624 P.2d 734, 736 (1981).

"Indemnity agreements are subject to the fundamental rules of contract construction, *i.e.*, the intent of the parties[']controls; this intent must be inferred from the contract as a whole; the meaning afforded the provision and the whole contract must be reasonable and consistent with the purpose of the overall undertaking §16.4" *Knipschield v. C-J Recreation, Inc.*, 74 Wn. App. 212, 215, 872 P.2d 1102, 1104 (1994). The provision must be read as the average person would read it; it should be given a

"practical and reasonable rather than a literal interpretation," and not a "strained or forced construction" leading to absurd results. *Eurick v. Pemco Ins. Co.*, 108 Wn. 2d 338, 341, 738 P.2d 251, 252 (1987), quoting *E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 106 Wn.2d 901, 907, 726 P.2d 439, 443 (1986).

An indemnity clause is "[a] contractual provision in which one party agrees to answer for any specified or unspecified liability or harm that the other party might incur." Black's Law Dictionary, 837-38 (9th ed. 2004). The Indemnity provision in Section D of the Patio or Deck Easement provides as follows:

> Grantee promises, covenants, and agrees that the Grantor shall not be liable for any injuries incurred by the Grantee, the Grantee's guests and/or third parties arising from the utilization of said easement and further Grantee agrees to hold Grantor harmless and defend and fully indemnify Grantor against any and all claims, actions, and suits arising from the utilization of said easement and to satisfy and [sic] all judgments that may result from said claims, actions and/or suits.[80]

The Guests' argument that Section D bars the Langes from defending against the Guests' claims in this lawsuit, bars the Langes from asserting any counterclaims and requires the Langes to defend the Guests with respect

[80] CP 431.

to those counterclaims, is wholly unreasonable and contrary to controlling Washington law.

The Washington Supreme Court decision in *City of Tacoma v. City of Bonney Lake*, 173 Wn.2d 584, 593, 269 P.3d 1017, 1022 (2012) (granting direct review from the trial court) is directly on point. In *City of Tacoma*, Tacoma sued the defendant municipalities under a franchise agreement between the parties that included an indemnity provision. One of the issues before the Court was whether the indemnity provision required Tacoma (indemnitor) to indemnify the Municipalities (indemnitees) with respect to the lawsuit Tacoma filed against the Municipalities, as well as defend the City of Federal Way in the lawsuit. *Id.* at 593. The pertinent provision in the indemnity clause provided:

> [Tacoma] hereby releases, covenants not to bring suit and agrees to indemnify, defend and hold harmless the City . . . from any and all claims, costs, judgments, awards or liability to any person."

*Id.* The Municipalities argued that the indemnity provision precluded Tacoma from filing any action under the contract because any enforcement action to compel performance would be a "claim" arising under the contract subject to the indemnity provision. *Id.* The Supreme Court expressly rejected this argument, holding:

> While this language [in the indemnity provision] is undeniably broad, it does not prevent Tacoma, a party to the

> contract, from suing the Municipalities, another party to the contract. Concluding otherwise *would produce the absurd result of precluding a party to a contract from disputing its obligations under that contract.*"

*Id.* (emphasis added)

The City of Federal Way also argued that the indemnity provision required Tacoma to defend it in the lawsuit. The Court rejected that argument as well, holding that to interpret the indemnity provision so as to force Tacoma to bear all costs of litigation when there was any dispute over contractual performance between parties, likewise "produces an absurd result." *Id.* at 594.[81] This is exactly the same argument and interpretation of the indemnity provision the Guests ask this Court to make in this case; the Guests' interpretation is unreasonable and produces an absurd result, and was properly rejected by the trial court.

Notably, the Guests do not address the Supreme Court's decision in *City of Tacoma*; instead, they rely on an appellate court decision, *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc.*, 168 Wn. App. 86, 285 P.3d 70 (2012), *rev. denied*, 175 Wn.2d 1015, 287 P.3d 10 (2012),

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[81] *See also, Taylor v. Browning*, 129 Idaho 483, 493, 927 P.2d 873, 883 (1996) (holding that indemnity clause did not bar indemnitor's claim against indemnitee because there was no liability to a third party, and it would be unreasonable to interpret it as such as it would allow the indemnitee to breach the contract and then declare himself harmless); *ProtecoTech, Inc. v Unicity Int'l, Inc.*, 547 F. Supp. 2d 1174, 1180 (W.D. Wash. 2008) (finding that the plaintiff's argument would "transform the indemnification clause into a blank check to sue and collect attorney fees" and rejecting such an unreasonable interpretation.)

for the proposition that the indemnity agreement can reasonably be interpreted to bar the Langes' counterclaims and require the Langes to bear all costs for the Guests' lawsuit. That reliance is wholly misplaced. The indemnity provision in *Newport Yacht* was interpreted to bind the indemnitor with respect to claims asserted against the indemnitee *by third parties,* an interpretation entirely consistent with the trial court's ruling in this case.

The Guests' second argument, that "the trial court decided *sua sponte* that the issues in this case did not arise out from the utilization of the easement"[82] so as to preclude the alleged enforcement of the indemnity provision, misstates the trial court's conclusion. The trial court interpreted the indemnity provision to apply in the event the Langes, their guests, or anyone else *sustained injuries arising from their use* of Patio or Deck Easement, but the trial court noted that the present lawsuit was not such a case. Instead, the trial court explained that "this case is about whether [the Langes] have the right to use this property," i.e., the easement.[83]

The trial court's interpretation of the indemnity provision is the only reasonable interpretation and is consistent with the Washington Supreme Court's decision in *City of Tacoma*. Accordingly, there being no claims for

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[82] Appellants' Brief at p. 30.
[83] RP (April 19, 2013) at p. 35, lines 16-19.

injuries asserted against the Guests arising out of the use of the easement; the indemnity provision is not triggered. The trial court's order dismissing the Guests' indemnity claim should be affirmed.

### D. There Is No Basis For Finding That The Trial Court Erred In Not Considering the Guests' Argument and "New Evidence" That The Patio or Deck Easement Was Invalid Because The Guests Never Timely Argued Or Presented Evidence That The Easement Was Invalid.

In their Amended Complaint, the Guests affirmatively alleged that both the Guests and the Langes are bound by the Patio or Deck Easement.[84] The Guests also rely on the validity of the Patio or Deck Easement to support their indemnity claim against the Langes. However, on appeal, the Guests disavow the Easement to defeat the Langes' right to maintain their deck within the Easement. In doing so, the Guests summarily argue that the trial court erred in allegedly "refusing to consider as untimely" their argument that the Patio or Deck Easement was invalid, claiming that "the alleged grantor [of the Patio or Deck Easement] did not own lot 5" and that the signature on the Easement was a forgery.[85] The Guests rely on a declaration authored by Ms. Guest, dated May 6, 2013, for their argument and "evidence" that the Easement is invalid. However, the Guests' appeal

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[84] CP 37, ¶3.17. While the Guests argued in opposition to the Langes' motion for summary judgment that the Patio or Deck Easement was invalid because the signature was not notarized, that argument was rejected and the Guests have not offered any argument on appeal that the trial court erred in doing so.

[85] Appellants' Brief at pps. 24-25.

on this issue fails because the record establishes that the Guests failed to timely present the May 6, 2013 declaration to the trial court prior to the entry of the Order on Summary Judgment and then failed to timely file a motion for reconsideration in an effort to bring the evidence to the trial court's attention. Having failed on both accounts, the trial court did not err in not considering the evidence or argument and in not modifying the Order on Summary Judgment finding that the Langes had the right to rebuild in and occupy the area within the Patio or Deck Easement.

When considering an appeal from an order granting a motion for summary judgment, the appellate court may only consider the evidence and issues called to the attention of the trial court. RAP 9.12. All documents or evidence called to the attention of the trial court on summary judgment must be designated in the order granting summary judgment. *Id.*, *Green v. Normandy Park*, 137 Wn. App. 665, 677-680, 151 P.3d 1038, 1044-45 (2007) (refusing to consider two declarations designated by the appellant in the clerk's papers because the declarations had not been called to the trial court's attention on summary judgment and they were not listed in the summary judgment order).

Here, while the Guests rely on Ms. Guests' May 6, 2013 declaration for their "evidence" that the Patio or Deck Easement is invalid, they failed to provide any citation to the record to show that they brought this

"evidence" to the trial court's attention before entry of the Order finding that the Langes had the right to rebuild in and occupy the area within the Patio or Deck Easement. Indeed, the Order on Summary Judgment does *not* designate Ms. Guests' May 6, 2013 declaration as having been brought to the trial court's attention prior to entry of the Order.[86] Thus, RAP 9.12 instructs that this Court cannot consider Ms. Guests' May 6, 2013 declaration or the purported "evidence" contained therein. Since this is the only "evidence" upon which the Guests' rely to argue that the trial court erred in not considering their evidence or arguments and in not modifying the Order finding that the Langes had the right to rebuild in and occupy the area within the Patio or Deck Easement, the Guests' appeal on this issue fails.

Furthermore, review of the record confirms that the Guests did *not* raise any issue as to the validity of the Patio or Deck Easement at the May 6, 2013 presentment hearing for entry of the orders on the summary judgment motions.[87] The Guests did not advise the trial court that day that they had evidence that they believed would prove that the Patio or Deck

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[86] The only declaration authored by Ms. Guest designated in the Order on Summary Judgment is Ms. Guest's declaration dated April 17, 2014, which was filed two days before oral argument on the motions for summary judgment. CP 728-796. That declaration did not address the validity of the Patio or Deck Easement. Indeed, because the May 6, 2013 CR 56(f) declaration had not been filed as of the time of the presentment hearing, it could not have been designated in the order.

[87] RP (May 6, 2013), pps. 1-42.

Easement was invalid. Having failed to present any such argument or evidence to the trial court for consideration, there is simply no basis upon which the Guests' can argue that the trial court erred in not considering the evidence and not modifying its Order on Summary Judgment.

Even if the Guests filed the May 6, 2013 declaration with the trial court at the time of the presentment hearing, it was, nonetheless, too late. A party opposing a motion for summary judgment is required to file responding documents at least eleven (11) calendar days prior to the hearing on the motion for summary judgment. CR 56(c). Late-filed affidavits are properly excluded where the proponent of the evidence "ha[s] no excuse for failing to address the issues in prior materials submitted to the court." *Brown v. Peoples Mortg. Co.*, 48 Wn. App. 554, 560, 739 P.2d 1188, 1192 (1987). A trial court's decision to accept or reject untimely filed pleadings and declarations is reviewed for abuse of discretion. *Clipse v. Commercial Driver Servs., Inc.*, ___ Wn. App. ___, ___ P.3d ___, No. 45407-6-II, 2015 WL 5023388, at *4 (Wash. Ct. App. Aug. 25, 2015), citing *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 499, 183 P.3d 283, 291 (2008). Here, the Guests offered no excuse, either at the trial court level or on appeal, for their failure to address the alleged invalidity of the Patio or Deck Easement in their summary judgment opposition papers filed three weeks earlier. Thus, even if the Guests had timely presented the declaration, having failed to

offer any excuse for failing to present the evidence in a timely fashion, the trial court would not have abused its discretion by refusing to consider it.[88]

Finally, while the Guests argue on appeal that they "revisited" the validity of the Patio or Deck Easement in connection with their motion in limine and when addressing proposed jury instructions, again, nothing in the record establishes that they presented their evidence or argument to the trial court. Even if they had, any such attempt to revisit the issue came too late. When a party believes it has new evidence that would alter an Order on Summary Judgment, that party must file a motion for reconsideration within 10 days of the entry of the Order and establish that the "new evidence" was not previously available. CR 59(b).[89] If a party fails to timely move for reconsideration under Civil Rule 59, that party is precluded

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[88] Nor have the Guests presented any argument to support a claim of error by the trial court in denying their oral motion for continuance. The Guests, therefore, have waived any such claimed error. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("[a] party that offers no argument in its opening brief on a claimed assignment of error waives the assignment"). Notwithstanding, the Guests failed to meet the requirements for a continuance in the trial court. *See, Dward v. HIMC Corp.*, 151 Wn. App. 818, 828, 214 P.3d 189 (2009).

[89] There are two requirements to moving for reconsideration based on new evidence. First, the motion must be filed within 10 days of the order on summary judgment. CR 59(b); *see also*, 14A Wash. Prac., Civil Procedure § 22:25 (2d ed.). Second, the party must establish, in connection with its motion for reconsideration, that there is newly discovered evidence that could not reasonably have been obtained at the time of summary judgment. CR 59(b). *Barrett v. Freise*, 119 Wn. App. 823, 850-51, 82 P.3d 1179, 1193 (2003), citing CR 59(a)(4). While the Guests' moved for reconsideration after trial and after entry of the verdict in the Langes favor, that was not timely as to the Order on Summary Judgment. In fact, the trial court denied the motion on the basis that the motion was not even timely filed within 10 days following entry of the judgment. CP 4948-4949.

from later attempting to re-litigate the facts and issues decided on summary judgment. *Barrett v. Freise*, 119 Wn. App. 823, 850-51, 82 P.3d 1179, 1193 (2003) (holding that where plaintiff failed to timely move for reconsideration of an Order on Summary Judgment, the trial court did not abuse its discretion when it prohibited the plaintiff from later providing additional evidence and argument on the issues previously decided by that Order).[90] Here, the Guests did not seek reconsideration of the Order on Summary Judgment under Civil Rule 59. Thus, under Washington law, the trial court properly rejected the Guests' untimely attempts to re-litigate the issue of the validity of the Patio or Deck Easement raised shortly before and after trial.

In sum, there is no basis on which to find that the trial court erred in not considering the Guests' "new evidence" and argument as to the alleged invalidity of the Patio or Deck Easement, or in failing to modify the Order on Summary Judgment because (1) under Civil Rule 56, the Guests failed to timely present any such "new evidence" or argument that the Easement was invalid before entry of the Order on Summary Judgment; (2) under

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[90] *See also*, 18B Fed. Prac. & Proc. Juris. § 4478.1 (2d ed.): "A trial court could not operate if it were to yield to every request to reconsider each of the multitude of rulings that may be made between filing and final judgment. All too often, requests would be made for no purpose but delay and harassment. Other requests, made in subjective good faith, would reflect only the loser's misplaced attachment to a properly rejected argument. Even the sincere desire to urge again a strong position that perhaps deserves to prevail could generate more work than our courts can or should handle." *Id.*

Rules of Appellate Procedure 9.12, this Court cannot consider the May 6, 2013 declaration upon which the Guests' rely as their "new evidence" and argument, because it was not timely presented to the trial court and it is not designated in the Order on Summary Judgment; and (3) under Washington law, the Guests' failure to file a timely motion for reconsideration precluded them from later re-litigating the validity of the Patio or Deck Easement. The trial court's Order on Summary Judgment should be affirmed and the Guests' motion for remand should be denied.[91]

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[91] Even if the Guests had timely submitted Ms. Guests' May 6, 2013 declaration for review and it had been considered by the trial court, the trial court would not have abused its discretion by not modifying its Order on Summary Judgment because the declaration and Ms. Guests' testimony was insufficient under CR 56(e) to create a genuine issue of material fact. Under CR 56(e), a declaration must be made on personal knowledge, set forth such facts as would be admissible in evidence, and affirmatively show that the declarant is competent to testify to the matters stated in the declaration. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn. 2d 355, 359, 753 P.2d 517, 518-19 (1988). Unsupported conclusory statements and legal opinions are not to be considered. *Orion Corp. v. State*, 103 Wn.2d 441, 461-62, 693 P.2d 1369, 1380-81 (1985). Ms. Guests' May 6, 2013 declaration fails to satisfy the requirements of CR 56(e) and instead, merely states unsupported conclusory statements and legal opinions. Ms. Guest states in her declaration that she had recently "discovered" that the Patio or Deck Easement was a forgery. CP 879-880, ¶36. She purports to compare the signature on a statutory warranty deed with the signature on the Patio or Deck Easement and summarily concludes that, although the names are the same, the signatures are not. CP. 880, ¶¶37-39. Ms. Guest also states that while she "discovered" that the Patio or Deck Easement identifies Nu-Dawn Homes, Inc., as the owner of Lot 4 and 5, Nu-Dawn Homes, Inc. did not own Lot 4 or 5. CP 880, ¶¶40-41. Nowhere within the declaration did Ms. Guest establish that she has personal knowledge as to any of these facts or conclusions, or that she is competent to testify as to forged signatures or the ownership of Lot 4 at the time the Easement was executed. Thus, even if timely presented to the trial court, the Guests' "new evidence" purporting to show the Easement is invalid, is not competent and was insufficient to create a genuine issue of material fact.

## E. The Trial Court Properly Instructed The Jury.

Contrary to appellants' assertion, whether to give a particular jury instruction is within a trial court's discretion, and therefore, is reviewed for abuse of discretion. *Fergen v. Sestero*, 182 Wn. 2d 794, 802-03, 346 P.3d 708, 712-13 (2015), citing *Christensen v. Munsen, M.D.,* 123 Wn.2d 234, 248, 867 P.2d 626, 643 (1994). "The propriety of a jury instruction is governed by the facts of the particular case." *Fergen,* 182 Wn. 2d at 803. "Jury instructions are generally sufficient if they are supported by the evidence, allow each party to argue its theory of the case, and when read as a whole, properly inform the trier of fact of the applicable law." *Id.* A party challenging an instruction also bears the burden of establishing prejudice as a result of the instruction in order to prevail on appeal. *Griffin v. W. RS, Inc.,* 143 Wn.2d 81, 91, 18 P.3d 558, 563-64 (2001).

### 1. Instruction No. 17 – Patio or Deck Easement.

Instruction No. 17 properly told the jury that the Langes had the right to rebuild in and occupy the area within the Patio or Deck Easement because that is exactly what the court had previously and properly ruled on summary judgment. The trial court explained that it had the authority to determine the validity of the Patio or Deck Easement as a matter of law, as reflected

in the Order on Summary Judgment.[92] The court further explained that Instruction No. 17 did not prohibit the Guests from arguing their theory of the case, which had always been that, despite the Langes' right to rebuild, the Langes agreed with the Guests to give up that right.[93]

While the Guests argue that they were prejudiced by Instruction No. 17, claiming they presented evidence at trial that demonstrated that the Patio or Deck Easement was invalid, they are mistaken: the validity of the Easement was never an issue before the jury, instead, as the court repeatedly explained to the parties, their focus and their proof was to be directed to the 3' x 5' area of the deck that extended beyond the Patio or Deck Easement.[94]

In addition, the Guests fail to explain how the testimony and evidence they presented at trial established or demonstrated that the Patio or Deck Easement was invalid. The Guests merely cite to testimony by Ms. Lange, where she was asked to read the names of two entities identified on the Spinnaker Ridge final plat as owners of the property; one entity was identified as Nu Dawn Homes Limited Partnership. Ms. Lange testified that she did not see an easement outlined on Lot 4 or 5 on the final plat. The Guests also rely on Ms. Guests' own testimony that some of the Spinnaker

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[92] RP (July 15, 2014) at p. 99, lines 9-14.
[93] RP (July 15, 2014) at p. 99, lines 10-18.
[94] RP (July 9, 2014) at p. 114, lines 6-25; p. 115, lines 1-25; p. 116, line 1.

Ridge Association documents that she had seen, listed Nu Dawn Homes, Incorporated as the owner of the real property. There is nothing in this testimony that demonstrates that the Patio or Deck Easement was invalid or that it was issued by the wrong party. Nor have the Guests presented any case law to suggest that this testimony was sufficient to render the Easement invalid.[95]

In short, the trial court did not abuse its discretion when it gave Instruction No. 17. The instruction was governed by the facts of the case that had been in litigation for almost 3 years, it allowed the Guests to argue their contract and trespass theories of the case, and the Guests have failed to establish that they were prejudiced by the instruction. The Guests' request for reversal and remand for trial should be denied.

**2. Instruction No. 9 – Consideration.**

Likewise, the trial court did not err in giving Instruction No. 9 regarding "consideration." Instruction No. 9, which was based on WPI 301.04,[96] provided:

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[95] Nor did the Guests present any expert testimony or citation to legal authority to establish the legal significance of the final plat and information contained therein, or the effect of later created easements. There is also no expert testimony or citation to legal authority to explain the legal significance of the signatures and titles the Guests refer to in the various documents they rely on to argue that the Easement is invalid.

[96] WPI 301.04 provides:

Consideration

If you find (set forth the facts the court has determined would be sufficient to establish consideration), then there was consideration.

> If you find that the plaintiffs justifiabl[y] relied on defendants' promise not to build a new deck in the area identified in the patio or deck easement, then there was consideration.[97]

The trial court refused to give the Guests' proposed version of this instruction after finding it was confusing, difficult to understand, and not helpful to the jury.[98]

The Guests' proposed instruction was:

> If you find that the Guests, in return for a Lange promise did anything legal which they were not bound to do, or refrained from doing anything that they had a right to do, whether there is actual loss or detriment to the Guests or actual benefit to the Langes or not, then there was consideration.[99]

As the trial court stated, the Langes' instruction was proper and would allow the Guests to argue their theory of the case: "'We relied on [the Langes' promise], and we didn't do something we were allowed to do,' then there is consideration."[100] The Court's instruction told the jury what the Guests' confusing instruction sought to do – that giving up a legal right to do something in return for the Langes' promise to build a smaller deck – is consideration, and thus, allowed the Guests to argue their theory of the case. Consistent with the jury instruction given, Ms. Guest, in her closing to the

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[97] CP at 4747.
[98] RP (July 15, 2014) at p. 102, lines 6-24.
[99] CP at 4619.
[100] RP (July 15, 2014), at p. 102, lines 25; p. 103, lines 1-3.

jury, argued that she and her husband reasonably relied on the Langes' promise to vacate a portion of the easement, and in exchange, they gave up their right to use a portion of their property for the Langes' deck.[101] The Court's instruction was an accurate statement of the law, the Guests were able to argue their theory of their case, and no prejudice has been shown. There is, therefore, no basis for this Court to reverse or remand for a new trial based on Instruction No. 9.

### 3. The Failure To Give The Good Faith And Fair Dealing Instruction Became The Law Of The Case When The Guests Failed To Object.

"Under the law of the case doctrine, instructions given to the jury by the trial court, if not objected to, shall be treated as the proper applicable law." *Washburn v. City of Federal Way*, 169 Wn. App. 588, 600, 283 P.3d 567, 573-74 (2012), *aff'd on other grounds*, 178 Wn. 2d 732, 310 P.3d 1275 (2013). "[T]he law of the case doctrine benefits the system by encouraging trial counsel to review all jury instructions to ensure their propriety before the instructions are given to the jury." *State v. Hickman*, 135 Wn. 2d 97, 105, 954 P.2d 900, 904 (1998). The law of the case doctrine applies here; there can be no objection on appeal to the trial court's inadvertent error in

[101] RP (July 16, 2014) at p. 28, lines 7-18; p. 31:18-21.

failing to give a jury the instruction regarding good faith and fair dealing because the Guests never objected to the failure to give the instruction.

Before the jury was instructed, the trial court specifically instructed both parties to review the packet of jury instructions the court intended to give to the jury, to ensure that the packet included all of the instructions the court ruled upon.[102] Both parties confirmed that all relevant instructions were included.[103] When the court provided its verbal instructions to the jury, the Guests did not object that the instruction defining good faith and fair dealing had been omitted. Because the Guests did not object to the absence of the jury instruction, the jury instructions given become the law of the case and no appeal can be had.

Furthermore, the jury's verdict finding that the Langes did not breach a contract with the Guests, renders the Guests' argument that the trial court erred in failing to give the good faith and fair dealing instruction, moot. *See*, *SEIU Healthcare 775NW,* 168 Wn.2d at 602, 229 P.3d at 779. There is no independent duty of good faith and fair dealing in the absence of a contract. *Johnson v. Yousoofian*, 84 Wn. App. 755, 760–62, 930 P.2d 921, 924-25 (1996), citing *Coulos v. Desimone*, 34 Wn.2d 87, 208 P.2d 105 (1949). Where there is no liability for breach of contract, there can be no

[102] RP (July 15, 2014) at p. 121, lines 18-25, p. 122, lines 1-2.
[103] RP (July 15, 2014) at p. 122, lines 1-12.

liability for breach of a duty of good faith and fair dealing. Accordingly, there is no basis for reversal or remand for a new trial based on the trial court's inadvertent error in failing to give the good faith and fair dealing instruction.

### F. The Guests Have Failed To Establish That The Trial Court Committed Cumulative Errors That Were So Egregious Or Unduly Prejudicial As To Deny The Guests A Fair Trial.

The Guests have failed to establish a single error by the trial court much less cumulative errors that were "so egregious or unduly prejudicial that they denied [the Guests'] a fair trial." *State v. Davis*, 175 Wn. 2d 287, 345, 290 P.3d 43, 69 (2012). As aptly stated by the Court in *Davis*, "[a party] is entitled to a fair trial but not a perfect one." *Id.* (internal quotation marks and citation omitted). Contrary to the Guests' assertions, the trial court's decisions did not "undermine the heart of the Guests' claims" to deny them a fair trial. The "heart of the Guests' claims" from the time they filed their original complaint in 2011, has always been based on the allegation that the Langes agreed to vacate a portion of the Patio or Deck Easement and agreed to build a smaller deck and then breached that agreement when they rebuilt the deck in the same footprint as had originally existed. It is from this premise that the Guests argued that the Langes were liable for breach of contract and for trespass. The trial court's Order on Summary Judgment, together with Instruction No. 17 telling the jury that

the Langes' had the legal right to rebuild their deck in the boundaries of the Patio or Deck Easement, and its "consideration" instruction, did not prevent the Guests from arguing their theories of the case and did nothing to undermine the heart of their claims. Further, given the jury's findings that the Guests failed to prove that the Langes intentionally encroached on the Guests' property (which renders the Guests' claims of breach of contract based on the CC&Rs moot), and the jury's finding that the Langes did not breach a contract (which renders any claim of prejudice for the trial court's inadvertent error in failing to give the good faith and fair dealing instruction moot), there is simply no basis to argue, let alone find, that the Guests were denied a fair trial. The Guests' claim of cumulative error should be rejected.

**G. The Guests Are Not Entitled To Attorney Fees.**

Without citation to any legal authority, the Guests claim they are entitled to an award of attorney fees, costs and expenses below, on appeal, and for any further proceedings. Washington courts follow the American rule – each party in a civil action is obligated to pay its own attorney fees and costs, unless an obligation to pay the others' attorney fees and costs is clearly set forth in a contract, statute or a recognized ground in equity. *Cosmopolitan Eng'g Grp., Inc. v. Ondeo Degremont, Inc*, 159 Wn.2d 292, 296-97, 149 P.3d 666, 669 (2006). The Guests' reliance on the indemnity provision of the Patio or Deck Easement (which the Guests' claim is

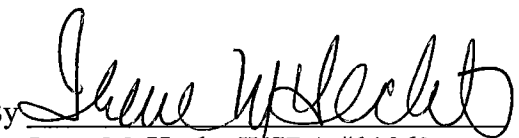
invalid), as the basis on which they are entitled to recover attorney fees in this case is entirely misplaced. As established above, and based upon the Washington Supreme Court decision in *City of Tacoma*, 173 Wn.2d at 593, 269 P.3d at 1021-22, which is directly on point, the indemnity provision in the Patio or Deck Easement only applies if the Guests are sued by third parties for injuries sustained when using the Langes' deck within the area of the Easement. That clearly is not the case here, and therefore, there is no basis upon which to award attorney fees or costs to the Guests, on appeal or for any proceedings below. The Guests' request for attorney fees should be denied.

## V. CONCLUSION

Based on the foregoing, the Langes respectfully request the Court affirm the trial court's Order on Summary Judgment, the jury's verdict, and the judgment entered in the Langes' favor.

RESPECTFULLY SUBMITTED this 5 day of October, 2015.

KELLER ROHRBACK L.L.P.

By 

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## CERTIFICATE OF SERVICE

I, Keeley Engle, declare under penalty of perjury under the laws of the State of Washington that at all times hereinafter mentioned, I am a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date below, I caused a copy of the foregoing document to be served on the individuals identified below via Email and First Class U.S. mail, postage prepaid:

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SIGNED this 5th day of October, 2015, at Seattle, Washington.

Keeley Engle, Legal Assistant

# KELLER ROHRBACK LLP

## October 05, 2015 - 12:02 PM

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