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FROM COURT OF APPEALS, DIVISION II, NO. 53126-7-II

SUPREME COURT
OF THE STATE OF WASHINGTON

WILLIAM G. PARDEE and SHANNON D. PARDEE, husband and wife,
Petitioners,

vs.

EVERGREEN SHORES BEACH CLUB, a Washington nonprofit corporation, NICHOLAS PALMER and JANE DOE PALMER, husband and wife, JOHNNY KRAWCHOOK and JANE DOE KRAWCHOOK, husband and wife, KRIS KINNEAR and JOHN DOE KINNEAR, husband and wife, JON KNUTSON and JANE DOE KNUTSON, husband and wife, BRUCE BAMFORD and JANE DOE BAMFORD, husband and wife, SYLVIA DAVENPORT and JOHN DOE DAVENPORT, husband and wife, PAT ANDERSON and JANE DOE ANDERSON, husband and wife, ASHLEY LIEB and JOHN DOE LIEB, husband and wife, ZENE SNIDER and JOHN DOE SNIDER, husband and wife, AARON MACLEAN and JANE DOE MACLEAN, husband and wife, DAN SOLIE and JANE DOE SOLIE, husband and wife, and VANTAGE COMMUNITY MANAGEMENT, INC., a Washington profit corporation,
Respondents.

PETITION FOR REVIEW

William G. Pardee, Petitioner
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I. IDENTITY OF PETITIONERS

Petitioners William G. Pardee and Shannon D. Pardee (the Pardees) are plaintiffs in the underlying cause of action.

II. CITATION TO COURT OF APPEALS DECISION

The Pardees seek review of Division II of the Court of Appeals' (COA's) Unpublished Opinion in 53167-7-II, dated June 23, 2020 (Decision), and the COA's denial of motion for reconsideration of the same, dated July 20, 2020. Both decisions are attached as Appendix, Exs. A and B, respectively.

III. ISSUES PRESENTED FOR REVIEW

1. Should the Pardees' petition be accepted because the COA's Decision conflicts with the principles of stare decisis and its own decision in *Galbraith*, decisions of other Courts of Appeals, and the Washington Supreme Court, that for there to be retaliation under RCW 49.60.210 does not require that the relationship between Shannon Pardee and the ESBC be either an employee-employer relationship or its functional equivalent.

2. Should the Pardees' petition be accepted because the COA's Decision erroneously concludes that the Regatta does not conflict with ESBC members' (including the Pardees') rights as tenants in common and the CCRs, contrary to extensive precedent in both the Courts of Appeals and the Washington Supreme Court?

3. Should the Pardees' petition be accepted because the COA's Decision erroneously concludes that the ESBC's Covenants, Conditions, and Restrictions (CCRs) mantra that enforcement of the CCRs be by "proceedings at law or in equity" does not just mean civil actions in court, but short of that enforcement by the ESBC Board, contrary to extensive precedent in both the Courts of Appeals and the Washington Supreme Court?

4. Should the Pardees' petition be accepted because the COA's Decision erroneously concludes that statements by Respondents about the Pardees do not constitute defamation and defamation per se, contrary to extensive precedent in both the Courts of Appeals and the Washington Supreme Court?

5. Should the Pardees' petition be accepted because the COA's Decision erroneously concludes that the term "creed" in the WLAD, 49.60 RCW, is limited to religion and religious beliefs, contrary to precedent in the Courts of Appeals, the Washington Supreme Court, and RPC 8.4?

IV. STATEMENT OF THE CASE

On February 20, 2018, the Pardees filed an initial complaint (CP 3-30) alleging various causes of action against the Evergreen Shores Beach Club (ESBC), their homeowner's association, various past and present members of the ESBC Board, and others associated with them, alleging,

among other things, causes of action under RCW 49.60 (the Washington Law Against Discrimination - "WLAD").

On August 7, 2018, the Pardees filed a Second Amended Complaint for Damages, Declaratory Relief, and Injunctive Relief (CP 32-43) alleging various causes of action against the ESBC, various past and present members of the ESBC Board, and others associated with them, for violation of RCW 49.60, including the ESBC and Respondents discriminating against the Pardees in its rental process, by removing Shannon Pardee from the ESBC Facebook site, by removing Shannon Pardee from the ESBC Board in retaliation for filing the lawsuit at issue; for defamation, defamation per se, and false light for statements by Defendants on social media, a notice of special meeting, and in false police reports; for declaratory relief, including damages for Respondents imposing unreasonable charges on the Pardees to obtain ESBC records, and concluding that the Respondents illegally attempted to amend the CCRs), illegally rented the ESBC park and recreation area to persons not members of the ESBC, refused to appoint an architectural planning committee required by the CCRs, and illegally created a CCR enforcement policy that is contrary to the CCRs; and for civil conspiracy.

On February 4, 2019, the trial court issued an ex parte Ruling on Summary Judgment (CP 581), wherein it stated:

> The Court grants Defendants' Motion for Summary Judgment filed December 14, 2018. Each of the separate, independent arguments presented by Defendants are legally correct and Plaintiffs have failed to present evidence warranting a trial on any of their claims under CR 56. While it is clear that Plaintiffs unfortunately have a difficult relationship with their neighbors, Plaintiffs have failed to prove that there is a genuine issue of material fact as to any of their remaining claims. Accordingly, Plaintiffs' claims are DISMISSED WITH PREJUDICE. The prevailing party on this motion shall submit an Order consistent with this Ruling and CR 56(b) for entry by the Court. Trial and Pre-Trial Dates are Stricken.

On February 15, 2019, the trial court issued an Order Denying the Pardees' Motion for Reconsideration (CP 600) of the trial court's February 4, 2019, Ruling on Summary Judgment, and striking the hearing on the same scheduled for February 22, 2019. On February 22, 2019, the trial court entered ad Ex Parte Order Granting Respondents' Summary Judgment Motion (CP 705-707) stating, in relevant part:

> [T]he Court having considered the motion, the argument of counsel, and all relevant records and pleadings on file. . . . Being fully advised of all relevant matters, IT IS HEREBY ORDERED as follows: Defendants' Summary Judgment Motion is hereby GRANTED pursuant to the Court's attached ruling on February 4, 2019, and this case is dismissed in its entirety with prejudice.

On March 22, 2019, the Pardees filed a Notice of Appeal to the COA (CP 709-715) with both the trial court and the COA, appealing the Ex Parte Order Granting Respondents' Motion for Summary Judgment entered by the trial court on February 22, 2019.

On June 23, 2020, the COA issued an unpublished opinion (Decision) upholding the trial court's granting of the Respondents' Motion for Summary Judgment. The Pardees then submitted a timely Motion for Reconsideration of that Decision which the court denied on July 20, 2020, without explanation. Hence this Petition for Review.

V. ARGUMENT

1. *Retaliation under the Washington Law Against Discrimination (WLAD), RCW 49.60, Galbraith, and Stare Decisis Considerations*

Review should be accepted because the COA's Decision conflicts with the principles of stare decisis and its own decision in *Galbraith*, decisions of other Courts of Appeals, and the Washington Supreme Court, that for there to be retaliation under RCW 49.60.210 does not require that the relationship between Shannon Pardee and the ESBC be either an employee-employer relationship or its functional equivalent.

At page 11 of its Decision, in response to the Pardees' claim of retaliation under RCW 49.60.210(1) because of Shannon Pardee's removal from the ESBC Board of Directors, the COA held:

> The Pardees cannot satisfy the elements of a retaliation claim. *The relationship between Shannon and the ESBC is neither an employee-employer relationship nor its functional equivalent.* [FN 4] The court did not err in dismissing this claim.
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> [FN 4] This claim is not supported by *Galbraith v. TAPCO Credit Union*, 88 Wn. App. 939, 946 P.2d 1242 (1997). See

> *Malo v. Alaska Trawl Fisheries, Inc.*, 92 Wn. App. 927, 965 P.2d 1124 (1998). [Emphasis added.]

RCW 49.60.210(1) addresses the unfair practice of retaliation under the WLAD and when that occurs.[1] In *Sambasivan v. Kadlec Med. Ctr.*, 184 Wn. App. 567, 591, 338 P.3d 860 (2014), Division III of the Court of Appeals cited the COA's holding in *Galbraith v. TAPCO Credit Union*, 88 Wn. App. 939, 946 P.2d 1242 (1997).

Appellant in *Galbraith* was a member of TAPCO Credit Union, respondent, for several years. The respondent terminated appellant's membership for several reasons, including voluntarily assisting plaintiffs that had a pending Reduction in Force lawsuit against the respondent for discrimination under the WLAD. The court explained that the plain language of RCW 49.60.210 supports the conclusion that the WLAD is not

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[1] RCW 49.60.210 states:

> It is an unfair practice for any employer, employment agency, labor union, *or other person* to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter. [Emphasis added.]

RCW 49.60.040(19) defines "person" as:

> [I]ncludes one or more individuals, partnerships, associations, organizations, *corporations*, cooperatives, legal representatives, trustees and receivers, *or any group of persons*; it includes any owner, lessee, proprietor, manager, agent, or employee, whether one or more natural persons; and further includes any political or civil subdivisions of the state and any agency or instrumentality of the state or of any political or civil subdivision thereof. [Emphasis added.]

limited to claims by employee against employer. *Galbraith*, 88 Wn. App. at 951. The court recognized that under RCW 49.60.210, "unfair practices" can be committed, not only by employers, but by any "other person" per the definition in RCW 49.60.040, since a credit union falls within the broad categories set forth in that definition. *Id.*[2] In *Galbraith*, after reviewing the language of RCW 49.60.210 and observing the strong public policy against discriminatory practices, the COA stated that appellant had an actionable claim against respondent (credit union) for retaliatory discrimination under the WLAD.

In *Galbraith* the court concluded that the trial court had improperly granted summary judgment in favor of respondent on appellant's retaliation claim under the WLAD

Like the appellant in *Galbraith*, the Pardees have provided evidence on social media (CP 444-452, 478) and in Respondent Nicholas Palmer's own correspondence (CP 443) proposing Shannon Pardee's removal from the ESBC Board, that shows at the very least that the Pardees bringing this lawsuit, which included WLAD claims, was a factor in Respondents

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[2] In *Certification From the United States District Court for the Eastern District of Washington in Zhu v. North Central Educational Service District-ESD 171*, 189 Wn.2d 607, 404 P.3d 504, 510 (2017), this state's highest court cited *Galbraith*, and favorably referenced the COA's holding therein, stating: "[T]he Court of Appeals has held that it is an unfair practice for a credit union to expel a member because he assisted credit union employees in an antidiscrimination lawsuit, *persuasively reasoning that a credit union is an 'other person' for purposes of RCW 49.60.210.*") [Emphasis added.]

removing her from the Board. The lawsuit is front and center in the social media posts advocating for her removal. As in *Galbraith*, Pardees' retaliation claim under the WLAD was not ripe for summary judgment.[3]

In its Decision, the COA effectively overrules its own precedent in *Galbraith* and adopts the faulty reasoning and holding of Division I of the Court of Appeals in *Malo*. In doing so, the COA ignores and does not even refer to *Galbraith's* positive reception by Division III of the Court of Appeals in *Sambasivan* and the Washington Supreme Court in *Zhu v. North Central Educational Service District-ESD 171*, which are much more recent decisions than *Malo*. In effectively overruling its own precedent, the COA does not engage in the requisite analysis that indicates such an action so many years after *Galbraith* was published, and parties such as the Pardees

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[3] As the COA recognized in *Galbraith*, the WLAD defines the term "person", so there is no need for the court to resort to the common and ordinary meaning of that term in RCW 49.60.210(1) by using the rule of ejusdem generis, as Division I of the Court of Appeals did in *Malo v. Alaska Trawl Fisheries*, 92 Wn. App. 927, 965 P.2d 1124 (1998). In addition, even if we ignored the statutory definition of "person," and resorted to rules of statutory construction to construe the phrase "or other person" in RCW 49.60.210(1), contrary to the court's ruling in *Malo*, the rule of ejusdem generis is inapplicable. The courts have held that ejusdem generis is inapplicable to statutes where general words, such as "or otherwise" were intended to include something more than descriptive words. *McMurray v. Second Bank of Lynnwood*, 64 Wn.2d 708, 714, 393 P.2d 960 (1964) (construing the phrase "'through stock ownership, sale of assets' ... 'or otherwise'" in a statute)The statutory language "or other person" in RCW 49.60.210(1) is not akin to the traditional language in statutes where the rule of ejusdem generis can be conveniently applied to a catch-all phrase. See, e.g., RCW 82.08.935 (". . . single use items such as syringes, tubing, or catheters."); RCW 42.52.010(21)(a) ("'Transaction involving the state' means a proceeding, application, submission, request for a ruling or other determination, contract, claim, case, or other similar matter. . . .") The phrase "or other person" in RCW 49.60.210(1) is akin to "or otherwise."

have relied upon it, is ill conceived.

Stare decisis requires that a court not abandon precedent unless it is determined to be incorrect and harmful. *Rose v. Anderson Hay and Grain Co.*, 184 Wn.2d 268, 282, 358 P.3d 1139 (2015). In *Deggs v. Asbestos Corp. Ltd.*, 186 Wn.2d 716, 729, 381 P.3d 32 (2016), the court explained that respect for precedent is strongest in the area of statutory construction since the legislature is free to amend statutes to address interpretations it disagrees with. 186 Wn.2d at 730. *Galbraith* is controlling, must not be abandoned, and should be applied to the facts of this case.

Furthermore, the COA does not indicate at footnote 4 of its Decision any such rationale for overruling *Galbraith*, but simply cites to the *Malo* decision published by another court. At the very least, this oversight needs to be remedied, and it is necessary for the courts to directly address the doctrine of stare decisis and *Galbraith* under the framework above. Footnote 4 of the Decision does not accomplish this.

2. *The Regatta and its conflict with ESBC members' (including the Pardees') rights as tenants in common and the CCRs*

Review should be accepted because the COA's Decision erroneously concludes that the Regatta does not conflict with ESBC members' (including the Pardees') rights as tenants in common and the CCRs, contrary to extensive precedent in both the Courts of Appeals and

the Washington Supreme Court.

In both January 31, 2018, e-mail correspondence defendant Nicholas Palmer sent to his fellow Board members (CP 393) concerning the Regatta, where he explains that it is the one exception to the so-called "no events" policy for the ESBC park and recreation area, and February 5, 2018, e-mail correspondence to then-ESBC Board member Brianna Manolopoulos (CP 395), Palmer readily admits that the Regatta results in the ESBC's park and recreation area (Tract B) being shut down and limits ESBC members from using the park and recreation area, except for the community pool.

Although the Decision, at pages 4-5, describes how Regatta participants and guests "park mobile homes and set up tents in the park to stay overnight," and "[f]ood vendors and bleachers are set up," it does not take into account that the mobile homes cover the community basketball court and *all* the grass in the park and recreation area, and that the Regatta has exclusive use of the community dock and boat launch, which the ESBC members pay to maintain but cannot use during the Regatta. The Regatta violates ESBC members' rights as tenants in common and the CCRs, regardless of whether as the court points out in its Decision at pages 4-5, one set of bleachers at the Regatta "is reserved exclusively for [ESBC] members, who get free admission to the event."

As the court explains in *Butler v. Craft Eng Construction, Inc.*, 67 Wn. App. 684, 695-696, 843 P.2d 1071 (1992), each cotenant in a tenancy in common has certain rights the other cotenants cannot infringe upon, namely the right to the possession, use and enjoyment of the *whole* of the property. See also *Herring v. Pelayo*, 198 Wn. App. 828, 837, 397 P.3d 125 (2017).

Setting up bleachers and inviting ESBC members to attend the Regatta free of charge, or granting ESBC member access to a portion of the park and recreation area (Tract B) during the Regatta, does not excuse the fact that the Regatta infringes on those members' co-equal rights to the possession, use, and enjoyment of the *whole* park and recreation area (Tract B). As such, contrary to the COA's statement in their Decision at page 18, the Pardees' rights as cotenants in common have been interfered with.[4]

Paragraph 20 of the CCRs (CP 285), which the court sets forth at page 3 of its Decision, states in relevant part that the ESBC park and recreation area (Tract B) "will be accessible to [all divisions], and will be *jointly used by the owners of the lots* in all divisions of EVERGREEN

[4] During the Regatta, ESBC members cannot access the large grass area of the park, the basketball court which is covered with mobile homes, the playground equipment which is surrounded by and subject to odors from running mobile homes, or the dock or boat launch to fish or recreate. Furthermore, the CCRs clearly state that the park and area (Tract B) is to be jointly used by only ESBC members (i.e., owners of lots).

SHORES. . . ." (Emphasis added).[5]

Paragraph 20 of the CCRs clearly states that the ESBC park and recreation area is to be jointly used by ESBC members. The only reasonable interpretation of that covenant, which protects the homeowner's collective interests, is that events such as the Regatta, which would interfere with the ESBC members' use and enjoyment of the whole park and recreation area, are not allowed. To state otherwise, and permit the ESBC Board to rent out the park to events like the Regatta, would defeat the whole purpose of a

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[5] The primary goal in interpreting covenants that run with the land is to determine the intent or purpose of the covenants. *Day v. Santorsola*, 118 Wn. App. 746, 756, 76 P.3d 1190 (2003); *Wimberly v. Caravello*, 136 Wn. App. 327, 336, 149 P.3d 402 (2006)("[O]ur primary task is to determine the intent of the drafters.")(Brackets added). The courts apply basic rules of contract interpretation. *Wimberly*, 136 Wn. App. at 336. The courts interpret restrictive covenants to give effect to the intention of the parties to the agreement incorporating the covenants and to carry out the purpose for which the covenants were created. *Pritchett v. Picnic Point Homeowners Ass'n*, 2 Wn. App.2d 872, 879, 413 P.3d 604 (2018)(citing *Riss v. Angel,* 131 Wn.2d 612, 621, 934 P.2d 669 (1997)). The purpose of those establishing the covenants is the relevant intent. *Id.* at 879-880. The value of maintaining the character of the neighborhood in which the burdened land is located is a value shared by the owners of the other properties burdened by the same covenants. *Id.* at 880 (citations omitted). Accordingly, we must place "special emphasis on arriving at an interpretation that protects the homeowners' collective interests." *Id.* (citations omitted). "If more than one reasonable interpretation of the covenants is possible regarding an issue, we must favor the interpretation which avoids frustrating the reasonable expectations of those affected by the covenants' provisions." *Id.* (citations omitted). In determining the intent of the parties to the agreement incorporating the covenants, we give "covenant language 'its ordinary and common use' and will not construe a term in such a way 'so as to defeat its plain and obvious meaning.'" *Id.* (citations omitted); *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 815, 854 P.2d 1072 (1993)(citations omitted); *Mt. Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 344, 883 P.2d 1383 (1994)("A court must construe restrictive covenants by discerning the intent of the parties as evidenced by the clear and unambiguous language in the document.") (Citations omitted). We examine the instrument in its entirety and use extrinsic evidence to "illuminate what was written, not what was intended to be written." *Pritchett*, 2 Wn. App.2d at 880. (citations omitted). "[T]he intent of the homeowners who voted to adopt the covenants cannot be discerned through the post-hoc statements of individual board members." *Pritchett*, 2 Wn.App.2d at 885 (brackets added).

having a park that members can enjoy, and would pave the way for use of the park and its waterfront facilities (dock and boat launch) by other than ESBC members.

3. *Enforcement of the CCRs*

Review should be accepted because the COA's Decision erroneously concludes that the CCRs mantra that enforcement of the CCRs be by "proceedings at law or in equity" does not just mean civil actions in court, but short of that enforcement by the ESBC Board, contrary to extensive precedent in both the Courts of Appeals and the Washington Supreme Court.

At page 19 of its Decision, the COA states that it disagrees with the Pardees' argument that the ESBC is prohibited from adopting or using the enforcement policy because the CCRs require enforcement through judicial proceeding only. Although the COA notes in its Decision at page 20 that the CCRs provide that "[e]nforcement *shall* be by proceedings at law or in equity against any person or persons violating or attempting to violate any covenants either to restrain violation or to recover damages," [emphasis added] the COA cites *State ex rel. Royal v. Bd. Of Yakima County Comm'rs*, 123 Wn.2d 451, 458, 869 P.2d 56 (1994) for the notion that word "shall" in the CCR provision above broadens what is enforcement under that same provision, stating: "'Shall' is interpreted as directory, rather than

mandatory, when a literal meaning would frustrate the legislative intent."

The COA springboards from this and states at page 20 of the Decision that "[a]n interpretation of 'shall' as mandatory or, in this case, the exclusive method of enforcement would frustrate the intent of the covenants." (citing *Royal*). Although the COA acknowledges at page 19 of the Decision that it is addressing "the Board's authority to adopt the [enforcement] policy" under the CCRs, at page 21 of the Decision it cites to the ESBC Board's rationale behind that policy as support for its reading of the same CCRs, including the ESBC Board's present day determination that "correcting compliance issues at the lowest possible level in in the best interests of the [ESBC] because it reduces the amount of administrative time necessary to deal with infractions, lessens the duration of fractions, and may save in legal expense. It also promotes a harmonious living environment."[6]

Proceedings at law or in equity to impose damages for violation of the CCRs, or to restrain violations of the same per the CCRs, equate to

[6] By interpreting the term "shall" in the CCRs above expansively, to permit enforcement of the CCRs by other than proceedings at law or in equity, the COA is ignoring the plain and obvious meaning of the language therein. In determining the intent of the parties to the agreement incorporating the covenants, we give "covenant language 'its ordinary and common use' and will not construe a term in such a way 'so as to defeat its plain and obvious meaning.'" *Pritchett*, 2 Wn. App.2d at 880 (citations omitted); *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 815, 854 P.2d 1072 (1993)(citations omitted); *Mt. Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 344, 883 P.2d 1383 (1994)("A court must construe restrictive covenants by discerning the intent of the parties as evidenced by the clear and unambiguous language in the document.") (Citations omitted). We examine the instrument in its entirety and use extrinsic evidence to "illuminate what was written, not what was intended to be written." *Pritchett*, 2 Wn. App.2d at 880. (citations omitted).

actions in court, and the alternative remedies of either requesting an injunction to restrain a violation (in equity) or seek damages (at law).

BLACK'S LAW DICTIONARY, 1241 (8th ed.) defines "proceeding" as: "1. The regular or orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment."

BLACK'S LAW DICTIONARY (11th ed. 2019), defines "suit" as:

> Any proceeding by a party or parties against another in a court of law ... Also termed ... *suit at law*.
>
> * * *
>
> Today, since virtually all jurisdictions have merged the administration of law and equity, the terms action and suit are interchangeable.
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> * * *
>
> **suit at law.** . . . A suit conducted according to the common law or equity, as distinguished from statutory provisions .... Under the current rules of practice in federal and most state courts, the term civil action embraces an action both at law and in equity. Fed. R. Civ. P. 2.[7]

In *Saunders v. Meyers*, 175 Wn. App. 427, 306 P.3d 978 (2013), the court addressed a provision of the CCRs that stated that where a party

[7] It is clear from these definitions that the phrase "by proceedings at law or in equity" refers to a civil action in a court of law. See also RCW 9.12.010 ("any false suit at law or in equity in any court of this state. . . ."); *Matter of Guardianship of Hayes*, 93 Wn.2d 228, 232, 608 P.2d 635 (1980) ("The courts of this state have long recognized the inherent power of the superior court 'to hear and determine all matters legal and equitable in all proceedings known to the common law.'"); *Sorenson v. Pyeatt*, 158 Wn.2d 523, 531, 146 P.3d 1172 (2006) ("In matter of equity, 'trial courts have broad discretionary power to fashion equitable remedies.' ... A court will grant equitable relief only when there is a showing that a party is entitled to a remedy and the remedy at law is inadequate.").

violated or attempted to violate any of the CCRs, any person owning real property governed by those CCRs, could lawfully prosecute "any proceedings at law or in equity against the person or persons violating" those CCRs. Based upon this provision, in *Saunders* the court concluded that the respondents "were entitled to bring a *legal action* directly against the [appellants] for violating the covenants." *Saunders*, 175 Wn. App. at 438. [Emphasis added.]

Relying on the ESBC Board's rationale for adopting the policy to aid in interpreting the CCRs, as the COA does, is counter to recent precedent, which requires that "the intent of the homeowners who voted to adopt the covenants cannot be discerned through the post-hoc statements of individual board members." *Pritchett*, 2 Wn.App.2d at 885. Moreover, in interpreting a covenant, admissible extrinsic evidence does not include, among other things, evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term, or evidence that would vary, contradict, or modify the written word. *Saunders v. Meyers*, 175 Wn. App. 427, 439, 306 P.3d 978 (2013).

4. *Statements by Respondents that amount to defamation and defamation per se*

Review should be accepted because the COA's Decision erroneously concludes that statements by Respondents about the Pardees do

not constitute defamation and defamation per se, contrary to extensive precedent in both the Courts of Appeals and the Washington Supreme Court.

At pages 12-13 of the Decision, the COA cites *Dunlap v. Wayne*, 105 Wn.2d 529, 539, 716 P.2d 842 (1986). After citing to portions of the of *Dunlap*, the COA notes at page 13 of the Decision: "In addition, we are cognizant that the statements were posted on a social media page where the audience expects the speaker to use exaggeration, rhetoric or hyperbole." In doing so, the court erroneously equates a neighborhood Facebook page to an editorial page, political debate, and an "ongoing public debate." The Pardees are not public figures in the political arena, but private homeowners.

Irrespective of whether the statements by Respondents about the Pardees at pages 7 and 8 of the Decision were negligent, and therefore constitute defamation, they arguably amount to defamation per se.[8]

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[8] A publication is defamatory per se (actionable without proof of special damages) if it (1) exposes a living person to hatred, contempt, ridicule or obloquy, or to deprive him of the benefit of public confidence or social intercourse, or (2) injures him in his business, trade, profession, or office. *Life Designs Ranch, Inc. v. Sommer*, 191 Wn. App. 320, 328, 364 P.3d 129 (2015). Whether a given communication constitutes defamation per se may be either a question of law or a question of fact. Id. If the statements are sufficiently injurious to amount to defamation per se, the court assumes damages and the plaintiff need not prove actual damages. *Maison de France, Ltd. v Mais Oui!, Inc.*, 126 Wn. App. 34, 44-45, 108 P.3d 787 (2005). The imputation of a criminal offense involving moral turpitude has been held to be clearly libelous per se. *Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters*, 100 Wn.2d 343, 353, 670 P.2d 240 (1983).

The COA states at page 13 of its Decision that "[a]s to the Pardees' allegation that the police report is false and forms the basis for a claim, they have failed to show it was negligently made." The negligence of the police report is irrelevant, given that under *Caruso*, the imputation of a criminal offense in that report involving moral turpitude (i.e., shooting someone) is clearly defamation per se, regardless of whether negligently made.

At page 5 of the Decision the COA explains that "the complaining party told the officer that her teenage son and his friend walked by the Pardees' residence and heard Shannon Pardee yell "Keep looking! Come down here so I can shoot you! or something similar." The Decision continues at page 5: "[t]he complaining party requested that she remain anonymous but did tell the officer that she 'was an HOA board member that is being sued by the other involved party, who is also an HOA board member." CP at 355.[9]

5. Discrimination under the WLAD and "creed"

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[9] When the police report was made on May 15, 2018, the only female Defendant on the Board with a teenage son was Respondent Kris Kinnear. The police report for the 911 incident (CP 453-455), clearly demonstrates that the complaining party was a female member of the ESBC Board with a teenage son. The only other female member of the Board that at that time that had been sued was Sylvia Davenport, who does not have a teenage son. Unless the person that called 911 was someone pretending to be a Defendant Board member with a teenage son, by process of elimination the person involved with the 911 incident, and quoted in the police report for the incident, was Respondent Kris Kinnear. At the very least, this creates a genuine issue of material fact that can be resolved by putting Respondent Kris Kinnear under oath and having her testify. To reiterate, none of the Respondent Board members filed declarations in support of their Motion for Summary Judgment.

Review should be accepted because the COA's Decision erroneously concludes that the term "creed" in the WLAD, 49.60 RCW, is limited to religion and religious beliefs, contrary to precedent in the Courts of Appeals, the Washington Supreme Court, and RPC 8.4

At page 10 of its Decision, the court states that existing case law supports the conclusion that the definition of "creed" in RCW 49.60.030 extends only to religion and religious beliefs. The Court further states: "The Pardees do not cite to legal authority to support the claim the creed extends to any beliefs on any subject." Not so.

In *Kumar v. Gate Gourmet*, 180 Wn.2d 481, 489, 325 P.3d 193 (2014), the court stated that the parties stipulated to the fact that the term "creed" in the WLAD referred to religious beliefs. There has been no such stipulation by the Pardees in this lawsuit.

In the interests of broadly construing the reach of the WLAD, since it is to be liberally construed, the court's decision in *Riste v. E. Washington Bible Camp, Inc.*, 25 Wn. App. 299, 302, 605 P.2d 1294 (1980), referenced in *Kumar*, and which involved prohibited deed restrictions under the WLAD, makes clear that the courts, as the Court did in *Taylor v. Burlington N. R.R. Holdings, Inc.*, 193 Wn.2d 611, 444 P.3d 606, 609 (2019), and as the Pardees advocate for here, in interpreting the term "creed", use dictionaries to define undefined words in the WLAD: "Creed, as used in

the statute and *in its common dictionary meaning*, refers to a system of religious beliefs." (Emphasis added). WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 533 (2002) defines the noun "creed" as: "3 ... b : a religious or religious sect ... c : a formulation or epitome of principles, rules, opinions, and precepts formally expressed and seriously adhered to and maintained .... "

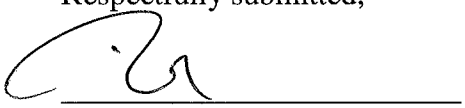
Furthermore, RPC 8.4 states that it is professional misconduct for lawyer to: "(g) commit a discriminatory act prohibited by state law on the basis of sex, race, age, *creed, religion*, color, national origin, disability, sexual orientation, honorably discharged veteran or military status, or marital status, where the act of discrimination is committed in connection with the lawyer's professional activities." [Emphasis added].

VI. CONCLUSION

Pursuant to RAP 13.4(b)(1) and (2), the Pardees have shown that as to any of the five issues addressed above, that the Washington Supreme Court should accept this Petition for Review.

DATED this 19th day of August 2020.

Respectfully submitted,



William G. Pardee, Petitioner
WSBA #31644

DECLARATION OF SERVICE

I, William G. Pardee, hereby certify as follows:

I am a counsel of record for the Appellants and am over the age of 18. On the date set forth below, I served via e-mail a copy of the "Petition for Review" on the following:

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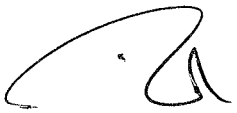
DATED this 19th day of August 2020.



William G. Pardee, Petitioner
WSBA #31644

APPENDIX

Ex. A - COA's Decision, dated June 23, 2020

Ex. B – COA's Denial of Pardees' Motion for Reconsideration, dated July 20, 2020

Ex. C – Copies of statutes of concern to this Petition for Review

Filed
Washington State
Court of Appeals
Division Two

June 23, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

WILLIAM G. PARDEE and SHANNON D. PARDEE, husband and wife,

Appellants,

v.

EVERGREEN SHORES BEACH CLUB, a Washington nonprofit corporation; NICHOLAS PALMER and JANE DOE PALMER, husband and wife; JOHNNY KRAWCHOOK and JANE DOE KRAWCHOOK, husband and wife; KRIS KINNEAR and JOHN DOE KINNEAR, husband and wife; JON KNUTSON and JANE DOE KNUTSON, husband and wife; BRUCE BAMFORD and JANE DOE BAMFORD, husband and wife; SYLVIA DAVENPORT and JOHN DOE DAVENPORT, husband and wife; PAT ANDERSON and JANE DOE ANDERSON, husband and wife,

Respondents.

and

VANTAGE COMMUNITY MANAGEMENT, INC., a Washington profit corporation,

Defendant below.

No. 53126-7-II

UNPUBLISHED OPINION

EXH. A

MELNICK, J. — William and Shannon Pardee,[1] homeowners and members of the Evergreen Shores Beach Club homeowners association (ESBC), brought action against the ESBC, individual ESBC board members, and other residents of the neighborhood for (1) discrimination under the Washington State Law Against Discrimination (WLAD), (2) defamation, defamation per se, and false light, (3) various violations of the ESBC's governing documents, and (4) civil conspiracy. The Superior Court granted the ESBC's motion for summary judgment and the Pardees appealed.

We affirm.

FACTS

The Pardees own property in the Evergreen Shores subdivision in Thurston County. At some point prior to the instant lawsuit, Shannon became an ESBC board member. Evergreen Shores residents are subject to a declaration of covenants, conditions, and restrictions (CCRs) that are enforced by the ESBC.

The ESBC is a nonprofit organization organized under the Washington Nonprofit Corporation Act, chapter 24.03 RCW, and is governed by a board of directors which is subject to the articles of incorporation and the bylaws. A board member can be removed by a two-thirds vote of the ESBC membership.

Evergreen Shores has four divisions, each of which have separate, but nearly identical CCRs. Division three includes a park that fronts Black Lake and contains a "clubhouse" and a "cookshed." Evergreen Shores lot owners each own a 1/482 interest in the park via quitclaim deed. Each lot gets one vote.

[1] Since the Pardees have the same last name, we occasionally use their first names to avoid confusion. We intend no disrespect.

The CCRs state in relevant part:

> 3. Temporary Structures: No structures of a temporary character, including but not limited to trailers, basement houses, tents, garages, barns or other outbuildings shall be used on any lot at any time as a residence either temporarily or permanently.
>
> . . . .
>
> 8. Nuisances: No noxious or offensive activity shall be carried on upon any lot, nor shall anything be done thereon which may be or become an annoyance or nuisance to the neighborhood.
>
> . . . .
>
> 16. Enforcement: Enforcement shall be by proceedings at law or in equity against any person or persons violating or attempting to violate any covenants either to restrain violation or to recover damages.
>
> . . . .
>
> 18. Waiver or Change of Covenants: The restrictive covenants contained herein may be waived or changed by the majority of the then owners when land contours or other circumstances would cause an undue hardship. A majority of the then owners shall be the sole judge of the necessity for waiving or changing the restrictive covenants in cases of undue hardship.
>
> 19. Architectural Control: No building or structure shall be placed, erected, or altered on any lot until the construction plans and specifications and a plan showing the location of the structure have been submitted and approved in writing by the Architectural Planning Committee which shall be composed of three (3) members who will be the elected officers of the EVERGREEN SHORES BEACH CLUB, INC. . . .
>
> 20. Evergreen Shores Beach Club, Inc.: The developer, SUNDOWN, INC., has formed a separate non-profit corporation and has built and is paying for the clubhouse, swimming pool, and designated parking areas, and in addition will, in the future, include a grant to said non-profit corporation approximately seven hundred (700) front feet of Black Lake on an area that is within EVERGREEN SHORES, DIVISION THREE, but will be accessible to [all divisions], and will be jointly used by the owners of lots in all divisions of EVERGREEN SHORES. . . . The vote regarding operation of said beach club shall be on the basis of one (1) vote per lot ownership.

Clerk's Papers (CP) at 282-85.

The articles of incorporation state that one of the purposes of the ESBC is:

> 2. To enforce the conditions, restrictions, charges and restrictive covenants at any time created for the benefit of said property . . . and to pay the expenses incident to the enforcement of the same and the collection of said charges, and the enforcement of all the restrictive covenants applicable to the plat of EVERGREEN SHORES (all Divisions) of which the park and recreation area shall be an integral part.

CP at 254.

In February 2017, the ESBC Board approved an enforcement policy that included a fine and fee schedule. It allowed the Board to fine residents for violations of the governing documents, including the CCRs. The Board determined that "[c]orrecting compliance issues at the lowest possible level is in the best interests of the [ESBC] because it reduces the amount of administrative time necessary to deal with infractions, lessens the duration of infractions, and may save in legal expense. It also promotes a harmonious living environment. To this end, a fine schedule for violations of the Governing Documents helps the [ESBC] ensure residents' compliance with the Governing Documents." CP at 288.

At various times throughout 2017-18, the ESBC Board engaged with residents of Evergreen Shores at the board meetings and through the ESBC newsletter to gather information to revise the CCRs.

I. EVENTS PRIOR TO LAWSUIT

A. The Commonly Owned Park

The ESBC allows members to rent out the clubhouse and cookshed. The ESBC has an unwritten policy of not allowing private parties to rent the entire park for events "because it provides [no] benefit to the neighborhood as a whole," and because those events exclude members from the park. CP at 393.

The exception to this policy involves the Black Lake Regatta. The ESBC rents the park to a third party that hosts a regatta for three days during the summer. The ESBC has rented the park out for the regatta since at least 2015. The regatta participants and guests park mobile homes and set up tents in the park to stay overnight. Food vendors and bleachers are set up. One set of

bleachers is reserved exclusively for Evergreen Shores members, who get free admission to the event.

In March 2017, Shannon e-mailed the ESBC rental coordinator requesting to rent the clubhouse one day a week. The coordinator explained that they would need to know specific dates because each rental would require a new rental agreement, and that "the rentals are a manual process between several people and reserved dates don't always get reflected on the calendar." CP at 403. Shannon eventually rented the clubhouse every week for a number of months.

B. Removal from Facebook Page

In October 2016, Shannon posted to the ESBC Facebook page about Washington statutes and case law regarding dangerous dogs. The post began, "RCW 16.08.020 gives citizens the right to kill dogs under certain circumstances, and places upon owners of such dogs who are notified of their propensities duties to do certain things." CP at 358. The post also included a summary of a decision where the court found that a landowner was justified for shooting dogs on his property.

Sometime in late 2016, after the above-referenced post, Shannon was removed from the ESBC Facebook page and she could no longer post on or access the page. Minutes from a January 2017 board meeting reported that Shannon was removed in part for inappropriate posting about hazardous dogs.

C. Records Request

In late 2017, the Pardees e-mailed Vantage, the ESBC's community management company, to request access to all documentation of the ESBC. The Vantage representative explained that Vantage did not have access to the records kept in the ESBC clubhouse, and a record storage company had the other records. The costs of viewing the records, which included staff time, copies at a per-page cost, and delivery from the storage facility, would be assessed to the

ESBC because Shannon was a board member at the time. Shannon made an appointment to inspect the records but the day prior to the scheduled appointment, Vantage contacted Shannon and informed her that due to short staffing, it would be unable to keep the appointment. Vantage also informed Shannon that the ESBC Board had advised Vantage that her request was not a Board project, and therefore she would need to pay the cost of pulling the files.[2]

The Pardees contended that the ESBC Board never responded to their request to look at records. However, in a deposition, William acknowledged that a long e-mail string existed on this issue. The e-mails were between the ESBC Board and his wife.

II. THE LAWSUIT

The Pardees initially filed a complaint against Vantage, the ESBC, past and present members of the ESBC Board, and other Evergreen Shores residents. The Pardees alleged that the ESBC discriminated against Shannon because of her creed, sex, and disability in violation of Washington's Laws Against Discrimination (WLAD), RCW 49.60.030(l)(b), by "making the Clubhouse . . . available for rental only with considerable arbitrary scrutiny, not allowing [Shannon] or other members to rent the Park in its entirety, . . . and in removing her from the ESBC Facebook account." CP at 36. The Pardees also allege that ESBC violated RCW 64.38.045 and breached the duty of care by denying them access to the ESBC records.

The Pardees also requested injunctive and declaratory relief regarding the ESBC's power to engage in various actions. First, the Pardees claimed that the ESBC did not have the power to adopt or use the enforcement policy adopted in February 2017. Second, the Pardees asserted that the ESBC Board illegally attempted to amend the CCRs by gathering information and preparing to amend the CCRs without first making a finding that amendments were necessary because of

[2] The record on appeal does not contain copies of any of the e-mails regarding the records request.

undue hardship. Third, the Pardees claimed that the CCRs prohibited the ESBC from renting the park to a third party for the Black Lake Regatta. Alternatively, they claimed that the rental violated their right to use and possess the whole of the park as tenants in common. Fourth, the Pardees claimed that the ESBC Board failed to appoint or convene an architectural planning committee as required by the CCRs. The Pardees also claimed that the actions that were contrary to the CCRs constituted negligent acts and a breach of the Board's duty of care.

III. EVENTS FOLLOWING FILING OF LAWSUIT

After the Pardees filed their lawsuit, Ashley Lieb, Zene Snider, Aaron MacLean, and Dan Solie[3] made various comments about Shannon on the ESBC Facebook page. Ashley Lieb encouraged neighbors to attend the next board meeting to vote Shannon off the board.

The post stated that Shannon was a bully; she filed the instant lawsuit because she was voted out as ESBC Board Vice President; she was blocked from the ESBC Facebook site "due to harassment and [making] threats to shoot at people and their dogs if they come near her property"; "she has made false claims towards her neighbors"; she verbally, face-to-face, "attacked" Ashley Lieb's boyfriend; "she screamed at the bus driver for being three minutes late[]"; she was "unstable"; she was voted on to the ESBC Board because of the other members' fear of retaliation if they did not vote for her; "because of her, [the ESBC] will not be able to have anything else fun" at the clubhouse; the ESBC pool may not open because no one wants to deal with her; she is crazy; she is "insane"; the ESBC Board has not been able to complete anything since she became a member due to her always disagreeing with anything good for the community. CP at 456, 458.

[3] Ashley Lieb resided in Evergreen Shores but was not an ESBC member. Zene Snider and Aaron MacLean were ESBC members and they became ESBC board members after the comments at issue were made. Dan Solie was a former ESBC board member and former ESBC member.

Defendant Zene Snider commented on the page several times, stating that "[Shannon] wants to ban the Regatta because she was denied her requested use [of the ESBC clubhouse] free of charge, for monthly homeschool meetings," CP at 459; the instant lawsuit she and her husband filed was frivolous; that she is suing all but two board members; and "if one family with dilutions [sic] is throwing their weight around, scares away anyone that would volunteer, it will be a sad day," CP at 465; and she was "a problem board member." CP at 466.

On another neighborhood social media website, defendant Dan Solie posted "[Shannon] was a plague to the [Board] when I served, it looks like she's still a plague now." CP at 475.

On May 15, a resident of Evergreen Shores called the police to report an incident involving Shannon. The complaining party told the officer that her teenage son and his friend walked by the Pardees' residence and heard Shannon yell "'Keep looking! Come down here so I can shoot you!' or something similar." CP at 355. The complaining party requested that she remain anonymous but did tell the officer that she "was an HOA board member that is being sued by the other involved party, who is also an HOA board member." CP at 355. The police report names Doug Hagen as the caller.

On May 2, Shannon received notice that the ESBC Board planned to call a vote in 19 days to remove her from the Board because of, "general lack of candor, difficulty working with others, unprofessional communications, and interference with Board and [ESBC] projects and [ESBC] contractors." CP at 443. At the meeting, the ESBC members voted to remove Shannon from the Board.

The Pardees filed a second amended complaint, alleging that the ESBC Board's removal of Shannon was in retaliation for filing the instant suit, in violation of chapter 49.60 RCW's anti-

retaliation clause. The Pardees also added claims for defamation, defamation per se, and false light, based on the social media posts and the police report.

All defendants moved for summary judgment and the court granted the motion. The Pardees appeal as to all defendants, except Vantage.

ANALYSIS

The Pardees argue that the court erred in granting summary judgment to the ESBC because they presented sufficient evidence to prove that the ESBC discriminated against Shannon in its rental process, by removing her from the Facebook site and by removing her from the ESBC Board of Directors in retaliation for filing the lawsuit. We disagree.

I. DISCRIMINATION UNDER WLAD

WLAD recognizes the right to be free from discrimination because of race, creed, color, national origin, sex, or the presence of any sensory, mental, or physical disability. RCW 49.60.030. The right to be free from discrimination includes the right to "the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement." RCW 49.60.030(1)(b).

To make out a prima facie case under the WLAD for discrimination in the public accommodations context, the plaintiff must establish four elements, that the (1) plaintiff is a member of a protected class, RCW 49.60.030(1); (2) defendant is or owns a place of public accommodation, RCW 49.60.215; (3) defendant discriminated against the plaintiff, whether directly or indirectly; and (4) discrimination occurred "because of" the plaintiff's status or, in other words, that the protected status was a substantial factor causing the discrimination. RCW 49.60.030; *State v. Arlene's Flowers, Inc.*, 187 Wn.2d 804, 821-22, 389 P.3d 543 (2017), *judgment*

vacated and remanded, 138 S. Ct. 2671 (2018), *aff'd on remand*, 193 Wn.2d 469, 441 P.3d 1203 (2019).

Washington courts have long equated the term "creed" in the WLAD with the term "religion." *Kumar v. Gate Gourmet Inc.*, 180 Wn.2d 481, 489, 325 P.3d 193 (2014); see also *Riste v. E. Wash. Bible Camp, Inc.*, 25 Wn. App. 299, 302, 605 P.2d 1294 (1980) ("Creed, as used in [WLAD] and in its common dictionary meaning, refers to a system of religious beliefs.").

A. ESBC Rental Process and Facebook Page

The Pardees argue that "creed" under the WLAD can be interpreted as any "set of principles and opinions . . . expressed and adhered to," and that the ESBC discriminated against Shannon because of those principles and opinions. Appellant's Br. at 14.

The Pardees' claim fails because they have not proven or even alleged that Shannon is a member of a protected class. Existing case law supports the conclusion that the definition of "creed" extends only to religion and religious beliefs. The Pardees do not cite to legal authority to support the claim that that creed extends to any beliefs on any subject. The Pardees also fail to present any evidence or argue the existence of any specific principles or opinions Shannon holds that caused the ESBC to discriminate against her. The Pardees argument on this issue fails.

B. Removal from the Board

The Pardees claim that Shannon's removal from the Board was due, at least in part, in retaliation for filing the instant lawsuit in violation of RCW 49.60.210(1).

"It is an unfair practice for any employer, employment agency, labor union, or other person to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter." RCW 49.60.210(1).

To maintain a retaliation claim under the WLAD, a plaintiff must establish that "(1) she participated in a statutorily protected activity; (2) an adverse employment action was taken against her; and (3) her activity and the employer's adverse action were causally connected. *Hollenback v. Shriners Hosps. For Children*, 149 Wn. App. 810, 821, 206 P.3d 337 (2009).

The Pardees cannot satisfy the elements of a retaliation claim. The relationship between Shannon and the ESBC is neither an employee-employer relationship nor its functional equivalent.[4] The court did not err in dismissing this claim.

II. DEFAMATION

The Pardees argue that the court erred in granting summary judgment to ESBC as to the claims for defamation, defamation per se, and false light. We disagree.

A. Defamation and Defamation Per Se

"When a defendant in a defamation action moves for summary judgment, the plaintiff has the burden of establishing a prima facie case on all four elements of defamation: falsity, an unprivileged communication, fault, and damages." *LaMon v. Butler*, 112 Wn.2d 193, 197, 770 P.2d 1027 (1989). "The prima facie case must consist of specific, material facts, rather than conclusory statements, that would allow a jury to find that each element of defamation exists." *LaMon*, 112 Wn.2d at 197. "A mere conclusory statement not supported by facts admissible in evidence cannot be considered on a motion for summary judgment." *Mark v. Seattle Times*, 96 Wn.2d 473, 490, 635 P.2d 1081 (1981); CR 56(e).

"If the plaintiff is a public figure or public official, he must show actual malice. If, on the other hand, the plaintiff is a private figure, he need show only negligence." *LaMon*, 112 Wn.2d at

[4] This claim is not supported by *Galbraith v. TAPCO Credit Union*, 88 Wn. App. 939, 946 P.2d 1242 (1997). *See Malo v. Alaska Trawl Fisheries, Inc.*, 92 Wn. App. 927, 965 P.2d 1124 (1998).

197. "The negligence standard is that the defendant knew or, in the exercise of reasonable care, should have known that the statement was false or would create a false impression in some material respect." *Vern Sims Ford, Inc. v. Hagel*, 42 Wn. App. 675, 680, 713 P.2d 736 (1986).

"A publication is defamatory per se (actionable without proof of special damages) if it '(1) exposes a living person to hatred, contempt, ridicule or obloquy, to deprive him of the benefit of public confidence or social intercourse, or (2) injures him in his business, trade, profession or office.'" *Life Designs Ranch, Inc. v. Sommer*, 191 Wn. App. 320, 328, 364 P.3d 129 (2015) (quoting *Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters*, 100 Wn.2d 343, 353, 670 P.2d 240 (1983)).

To establish the falsity element of defamation, the plaintiff must show the offensive statement was "provably false." *Schmalenberg v. Tacoma News, Inc.*, 87 Wn. App. 579, 590, 943 P.2d 350 (1997). Washington does not require a defamation defendant to "prove the literal truth of every claimed defamatory statement." *Mark*, 96 Wn.2d at 494. "A defendant need only show that the statement is substantially true or that the gist of the story, the portion that carries the 'sting', is true." *Mark*, 96 Wn.2d at 494.

"To determine whether a statement is nonactionable [opinion], a court should consider at least (1) the medium and context in which the statement was published, (2) the audience to whom it was published, and (3) whether the statement implies undisclosed facts." *Dunlap v. Wayne*, 105 Wn.2d 529, 539, 716 P.2d 842 (1986).

"[T]he nature of the medium can affect whether a statement is received as 'fact' or 'opinion': statements of opinion are expected to be found more often in certain contexts, such as editorial pages or political debates." *Wayne*, 105 Wn.2d at 539. In regard to the nature of the audience, the court "should thus consider whether the audience expected the speaker to use

exaggeration, rhetoric, or hyperbole." *Wayne*, 105 Wn.2d at 539. "'In the context of ongoing public debates, the audience is prepared for mischaracterizations and exaggerations, and is likely to view such representations with an awareness of the subjective biases of the speaker.'" *Wayne*, 105 Wn.2d at 539 (quoting *Note, Fact and Opinion After Gertz v. Robert Welch, Inc.: The Evolution of a Privilege*, 34 RUTGERS L. REV. 81 (1981)).

We have reviewed the statements the Pardees allege form the bases of their defamation and defamation per se claims. They can be categorized as opinions, substantially true, or not shown to be provably false. In addition, we are cognizant that the statements were posted on a social media page where the audience expects the speaker to use exaggeration, rhetoric, or hyperbole. *Wayne*, 105 Wn.2d at 539. The Pardees have submitted no evidence of either the falsehood of these statements or that the speakers were negligent in making them, they have not met the burden of establishing a prima facie case of defamation or defamation per se.

As to the Pardees' allegation that the police report is false and forms the basis for a claim, they have failed to show it was negligently made. In addition, as to who made the statement in the police report, they have not supported their assertion with any admissible evidence.

The Pardees have failed to make a prima facie case for defamation or defamation per se. The court did not err in dismissing these claims.

B. False Light

"'A false light claim arises when someone publicizes a matter that places another in a false light if (a) the false light would be highly offensive to a reasonable person and (b) the actor knew of or recklessly disregarded the falsity of the publication and the false light in which the other would be placed.'" *Life Designs Ranch, Inc. v. Sommer*, 191 Wn. App. 320, 339, 364 P.3d 129 (2015) (quoting *Eastwood v. Cascade Broad. Co.*, 106 Wn.2d 466, 470-71, 722 P.2d 1295 (1986)).

A plaintiff does not need to be defamed in order to bring a false light claim. *Eastwood*, 106 Wn.2d at 471. However, the plaintiff must allege falsity. *Emeson v. Dep't of Corr.*, 194 Wn. App. 617, 640, 376 P.3d 430 (2016).

Here, for the same reasons the Pardees did not show falsity for their defamation claims, they also fail to show falsity for a false light claim. Additionally, the Pardees did not present any evidence to show that defendants made the statements knowing or recklessly disregarding the falsity. They are unable to establish a prima facie case of false light.

The trial court did not err by granting summary judgement on the false light claim.

III. ACCESS TO THE ESBC RECORDS

The Pardees argue that the court erred in granting summary judgment to ESBC from being denied access to the ESBC records. They argue that they are still entitled to damages caused by the past bad behavior, even if they are no longer seeking access to the records.

The ESBC argues that the claim is moot because the Pardees are no longer seeking access to the records, and even if the claim is not moot, Vantage did not deny the Pardees access to the records because Vantage is permitted to charge a reasonable fee, and the ESBC Board never denied a request. We agree with the ESBC.

RCW 64.38.045(2) states:

> All records of the association, including the names and addresses of owners and other occupants of the lots, shall be available for examination by all owners, holders of mortgages on the lots, and their respective authorized agents on reasonable advance notice during normal working hours at the offices of the association or its managing agent. The association may impose and collect a reasonable charge for copies and any reasonable costs incurred by the association in providing access to records.

"'A case is moot if a court can no longer provide effective relief' and the issues it presents are 'purely academic.'" *Kuehn v. Renton Sch. Dist. No. 403*, 103 Wn.2d 594, 597, 694 P.2d 1078

(1985) (quoting *In re Det. of Cross*, 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983); *State v. Turner*, 98 Wn.2d 731, 733, 658 P.2d 658 (1983)).

An appellant has the burden of producing a record from which a court can decide the issues on appeal. *Brothers v. Pub. Sch. Emps. of Wash.*, 88 Wn. App. 398, 409, 945 P.2d 208 (1997). When the appellant fails to provide an adequate record for review, we must affirm the trial court's ruling. *Story v. Shelter Bay Co.*, 52 Wn. App. 334, 346, 760 P.2d 368 (1988).

Although the Pardees are no longer seeking declaratory or injunctive relief, the complaint also requested damages to be proven at trial due to defendants' failure to allow access to the ESBC documents. The claim therefore is not moot. Nevertheless, the court did not err in granting summary judgment.

The Pardees have requested two sets of records. The first are controlled by Vantage, the community management company. The second are controlled by the ESBC Board and they are stored at the ESBC clubhouse.

The Pardees claim that the fee to inspect the records housed with Vantage was unreasonable. However, the fee is not imposed by the ESBC. This set of records is stored with a third-party company that charges Vantage a per-box fee to deliver. The Pardees did not appeal the claims against Vantage after the court granted summary judgment. Therefore, we do not address whether the fee was reasonable.

Additionally, the ESBC did not deny the Pardees access to the files housed with Vantage. Vantage canceled the meeting and the Pardees chose not to reschedule. Vantage is no longer a party in this case; therefore, we do not address the claims as to the records kept off-site by Vantage.

In regard to the records stored at the ESBC clubhouse, the Pardees claim that ESBC did not respond to Shannon's request to access these records, and the ESBC does not contradict this

assertion. However, in a deposition, William stated that a long e-mail string between Shannon and the Board existed regarding the records request. Because neither the original e-mail to the ESBC nor the e-mail string between Shannon and other board members is included in the record, we cannot determine what, if any, response the Pardees received from the ESBC Board to review the records contained in the clubhouse. It therefore cannot determine whether the Board constructively denied the Pardees' request. Because the Pardees fail to provide an adequate record for review, ESBC prevails on this issue. *Story*, 52 Wn. App. at 346.

IV. VIOLATIONS OF GOVERNING DOCUMENTS

A. Legal Principles

The interpretation of a restrictive covenant is a question of law that we review de novo. *Wimberly v. Caravello*, 136 Wn. App. 327, 336, 149 P.3d 402 (2006).

The primary task in "interpreting a restrictive covenant is to determine the covenant drafter's intent by examining the clear and unambiguous language of the covenant." *Saunders v. Meyers*, 175 Wn. App. 427, 438-39, 306 P.3d 978 (2013). "The court's goal is to ascertain and give effect to those purposes intended by the covenants." *Riss v. Angel*, 131 Wn.2d 612, 621, 934 P.2d 669 (1997). The court must place "special emphasis on arriving at an interpretation that protects the homeowners' collective interests." *The Lakes at Mercer Island Homeowners Ass'n v. Witrak*, 61 Wn. App. 177, 181, 810 P.2d 27 (1991).

"[I]f more than one reasonable interpretation of the covenants is possible regarding an issue, we must favor that interpretation which avoids frustrating the reasonable expectations of those affected by the covenants' provisions." *Green v. Normandy Park*, 137 Wn. App. 665, 683, 151 P.3d 1038 (2007).

B. Amending the CCRs

The Pardees argue that the ESBC Board violated the CCRs by considering amendments without first making a determination that "land contours or other circumstances" leading to undue hardship warranted amending the CCRs. Appellant's Br. at 37.

The CCRs state "the restrictive covenants contained herein may be waived or changed by the majority of the then owners when land contours or other circumstances would cause an undue hardship. A majority of the then owners shall be the sole judge of the necessity for waiving or changing the restrictive covenants in cases of undue hardship." CP 267, 275, 279-280, 285.

The clear and unambiguous language of the provision does not indicate that the board must take any specific action prior to presenting proposed amendments to the membership. Should any owners determine that it is not necessary to make amendments, they may vote against the amendments as provided by the CCRs. We conclude that the court properly granted summary judgment on this claim.

C. The Black Lake Regatta

The Pardees' first argue that their interest in the park creates a tenancy in common, and the rental of the park for the regatta violates their right as tenants in common to use, possess, and enjoy the park. The Pardees also argue that the ESBC violates the CCRs by contracting with a third party to rent the park for the Black Lake Regatta. They contend that the ESBC board members have acted negligently by ignoring the governing documents that prohibit the regatta.

"Every interest created in favor of two or more persons in their own right is an interest in common, . . . unless declared in its creation to be a joint tenancy, as provided in RCW 64.28.010." RCW 64.28.020(1). Each cotenant is entitled to the use, possession, and benefit of the whole of the property. Thus, one tenant in common may lawfully lease, sell, or otherwise dispose of its

interest in the common property, without the consent of the other cotenants. *De La Pole v. Lindley*, 131 Wash. 354, 358, 230 P. 144 (1924). The only limitation is that a cotenant may not interfere with the coequal rights of the other cotenants. *De La Pole*, 131 Wash. at 358.

The deed for a 1/482 interest in the park issued to each homeowner of Evergreen Shores created a tenancy in common. Therefore, each deed holder is entitled to the use, possession, and benefit of the whole property. However, the Pardees' right as a cotenant to the use, possess, or benefit from the property does not preclude any other cotenant from leasing their interest in the property. *De La Pole*, 131 Wash. at 358. The Pardees argue that the regatta excluded them from the park. This allegation is untrue. ESBC members are granted free access to the park during the event and the Pardees have presented no evidence that they have otherwise been excluded. The Pardees' right as cotenants in common have not been interfered with.

There is nothing in the CCRs that explicitly prohibits the rental of the park to a third party for an event. The CCRs only require that the operation of the community area will be on the basis of one vote per lot ownership. Nevertheless, the Pardees argue that the park is subject to the same covenants as the individual lots. We agree to the extent that the park is subject to the covenants, but the Pardees have not presented a genuine issue of material fact as to whether the regatta violates the CCRs. Therefore, we conclude that the court did not err in granting summary judgment on this claim.

D. Architectural Committee

The Pardees argue that the CCRs require the ESBC Board to convene an architectural control committee to evaluate requested changes by owners. We dismiss this claim because it is non-justiciable.

For declaratory judgment purposes, a justiciable controversy is:

> "(1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive."

Nollette v. Christianson, 115 Wn.2d 594, 599, 800 P.2d 359 (1990) (quoting *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973)). Absent these elements, the court "steps into the prohibited area of advisory opinions." *Diversified Indus. Dev. Corp.*, 82 Wn.2d at 815.

The Pardees have neither argued nor presented evidence of any alterations made to lots either by them or other ESBC members that violate the covenants because of the lack of approval from an architectural control committee. They have failed to present an actual dispute that would render a decision by this court anything but an advisory opinion. Therefore, we conclude that the court did not err by granting summary judgment to ESBC on this claim.

E. Enforcement

The Pardees argue that the ESBC is prohibited from adopting or using the enforcement policy because the CCRs require enforcement through judicial proceeding only. They contend that the language used indicates that the developer of the ESBC neighborhood wanted to prevent ESBC Board actions against homeowners for alleged violations of the CCRs, without the due process protection of the courts. We disagree. The record does not show of any instance where the Board has used the enforcement policy, so we only address the Board's authority to adopt the policy.

The CCRs provide that "[e]nforcement shall be by proceedings at law or in equity against any person or persons violating or attempting to violate any covenants either to restrain violation or to recover damages." CP at 267, 275, 279, 284.

The articles of incorporation state that one of the purposes of forming the ESBC is "[t]o enforce the conditions, restrictions, charges and restrictive covenants at any time created for the benefit of said property and all other property in the plat of EVERGREEN SHORES and for the owners thereof." CP at 254.

Unless otherwise provided by governing documents, an association may "[a]dopt and amend bylaws, rules, and regulations" and "[i]mpose and collect charges for late payments of assessments and . . . levy reasonable fines in accordance with a previously established schedule adopted by the board of directors and furnished to the owners for violation of the bylaws, rules, and regulations of the association." RCW 64.38.020(1), (11). "Assessment" means all sums chargeable to an owner by an association in accordance with RCW 64.38.020. RCW 64.38.010(1).

"Shall" is interpreted as directory, rather than mandatory, when a literal reading would frustrate the legislative intent. *State ex rel. Royal v. Bd. of Yakima County Comm'rs*, 123 Wn.2d 451, 458, 869 P.2d 56 (1994).

The bylaws do not explicitly grant the Board with the power to adopt a fine and fee schedule, nor do they prohibit it. Applicable state law allows for the adoption of fee schedule. RCW 64.38.020. Most importantly, one of the primary purposes of establishing the ESBC is to enforce the CCRs.

An interpretation of "shall" as mandatory or, in this case, the exclusive method of enforcement would frustrate the intent of the covenants. *Bd. of Yakima County Comm'rs*, 123

Wn.2d at 458.[5] In creating the policy, the Board determined that "[c]orrecting compliance issues at the lowest possible level is in the best interests of the [ESBC] because it reduces the amount of administrative time necessary to deal with infractions, lessens the duration of infractions, and may save in legal expense. It also promotes a harmonious living environment." CP at 288. Interpreting 'shall' in a way that does not frustrate purpose of the covenants "protects the homeowners' collective interests" in having covenants enforced. *Witrak*, 61 Wn. App. at 181. Therefore, the court did not err in granting summary judgment to ESBC on this claim.

V. CIVIL CONSPIRACY

The Pardees argue that the court erred in dismissing their claim for civil conspiracy because they have "shown evidence . . . of a conspiracy." Appellant's Br. at 50. We disagree.

To establish a claim for civil conspiracy, the plaintiff "must prove by clear, cogent, and convincing evidence that (1) two or more people combined to accomplish an unlawful purpose, or combined to accomplish a lawful purpose by unlawful means; and (2) the conspirators entered into an agreement to accomplish the conspiracy." *All Star Gas, Inc. of Wash. v. Bechard*, 100 Wn. App. 732, 740, 998 P.2d 367 (2000). But, "'[m]ere suspicion or commonality of interests is insufficient to prove a conspiracy.'" *Bechard*, 100 Wn. App. at 740 (quoting *Wilson v. State*, 84 Wn. App. 332, 350-51, 929 P.2d 448 (1996)). A plaintiff attempting to establish conspiracy must show that the factual circumstances are "inconsistent with a lawful or honest purpose and reasonably consistent only with the existence of the conspiracy." *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 224, 450 P.2d 166 (1969).

[5] While principles of statutory construction are not usually used to interpret restrictive covenants, the principle is applicable here because the court's goal is to ascertain and give effect to those purposes intended by covenants. *Riss* 131 Wn.2d at 621.

The Pardees assert that they "have shown evidence above of a conspiracy amongst the Defendants," but do not indicate which evidence supports either element of conspiracy. Appellant's Br. at 50. The only evidence in the record relevant to establishing that defendants had entered into an agreement is a declaration by a former board member stating that he was aware of at least two occasions where the board members met outside of a formal board meeting, and had seen cars belonging to some defendants parked at another defendant's residence. This evidence alone does not show circumstances inconsistent with a lawful or honest purpose and reasonably consistent only with the existence of the conspiracy. We conclude that the court did not err in granting summary judgment to the ESBC on this claim.

Concluding that the trial court did not err, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Sutton, A.C.J.

Cruser, J.

Filed
Washington State
Court of Appeals
Division Two

July 20, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

WILLIAM G. PARDEE and SHANNON D. PARDEE, husband and wife, Appellants, v. EVERGREEN SHORES BEACH CLUB, a Washington nonprofit corporation; et. al., Respondents. and VANTAGE COMMUNITY MANAGEMENT, INC., a Washington profit corporation, Defendant below.	No. 53126-7-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellants, William and Shannon Pardee, move this court to reconsider its June 23, 2020 opinion. After consideration, we deny the motion.

IT IS SO ORDERED.

Panel: Jj. Melnick, Sutton, Cruser.

FOR THE COURT:

Melnick, J.

EXH. B

RCW 42.52.010

Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Agency" means any state board, commission, bureau, committee, department, institution, division, or tribunal in the legislative, executive, or judicial branch of state government. "Agency" includes all elective offices, the state legislature, those institutions of higher education created and supported by the state government, and those courts that are parts of state government.

(2) "Assist" means to act, or offer or agree to act, in such a way as to help, aid, advise, furnish information to, or otherwise provide assistance to another person, believing that the action is of help, aid, advice, or assistance to the person and with intent so to assist such person.

(3) "Beneficial interest" has the meaning ascribed to it under the Washington case law. However, an ownership interest in a mutual fund or similar investment pooling fund in which the owner has no management powers does not constitute a beneficial interest in the entities in which the fund or pool invests.

(4) "Compensation" means anything of economic value, however designated, that is paid, loaned, granted, or transferred, or to be paid, loaned, granted, or transferred for, or in consideration of, personal services to any person.

(5) "Confidential information" means (a) specific information, rather than generalized knowledge, that is not available to the general public on request or (b) information made confidential by law.

(6) "Contract" or "grant" means an agreement between two or more persons that creates an obligation to do or not to do a particular thing. "Contract" or "grant" includes, but is not limited to, an employment contract, a lease, a license, a purchase agreement, or a sales agreement.

(7) "Ethics boards" means the commission on judicial conduct, the legislative ethics board, and the executive ethics board.

(8) "Family" has the same meaning as "immediate family" in RCW **42.17A.005**.

(9) "Gift" means anything of economic value for which no consideration is given. "Gift" does not include:

(a) Items from family members or friends where it is clear beyond a reasonable doubt that the gift was not made as part of any design to gain or maintain influence in the agency of which the recipient is an officer or employee;

(b) Items related to the outside business of the recipient that are customary and not related to the recipient's performance of official duties;

(c) Items exchanged among officials and employees or a social event hosted or sponsored by a state officer or state employee for coworkers;

(d) Payments by a governmental or nongovernmental entity of reasonable expenses incurred in connection with a speech, presentation, appearance, or trade mission made in an official capacity. As used in this subsection, "reasonable expenses" are limited to travel, lodging, and subsistence expenses incurred the day before through the day after the event;

(e) Items a state officer or state employee is authorized by law to accept;

(f) Payment of enrollment and course fees and reasonable travel expenses attributable to attending seminars and educational programs sponsored by a bona fide governmental or

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nonprofit professional, educational, trade, or charitable association or institution. As used in this subsection, "reasonable expenses" are limited to travel, lodging, and subsistence expenses incurred the day before through the day after the event;

(g) Items returned by the recipient to the donor within thirty days of receipt or donated to a charitable organization within thirty days of receipt;

(h) Campaign contributions reported under chapter **42.17A** RCW;

(i) Discounts available to an individual as a member of an employee group, occupation, or similar broad-based group; and

(j) Awards, prizes, scholarships, or other items provided in recognition of academic or scientific achievement.

(10) "Head of agency" means the chief executive officer of an agency. In the case of an agency headed by a commission, board, committee, or other body consisting of more than one natural person, agency head means the person or board authorized to appoint agency employees and regulate their conduct.

(11) "Honorarium" means money or thing of value offered to a state officer or state employee for a speech, appearance, article, or similar item or activity in connection with the state officer's or state employee's official role.

(12) "Official duty" means those duties within the specific scope of employment of the state officer or state employee as defined by the officer's or employee's agency or by statute or the state Constitution.

(13) "Participate" means to participate in state action or a proceeding personally and substantially as a state officer or state employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation, or otherwise but does not include preparation, consideration, or enactment of legislation or the performance of legislative duties.

(14) "Person" means any individual, partnership, association, corporation, firm, institution, or other entity, whether or not operated for profit.

(15) "Regulatory agency" means any state board, commission, department, or officer, except those in the legislative or judicial branches, authorized by law to conduct adjudicative proceedings, issue permits or licenses, or to control or affect interests of identified persons.

(16) "Responsibility" in connection with a transaction involving the state, means the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or through subordinates, effectively to approve, disapprove, or otherwise direct state action in respect of such transaction.

(17) "State action" means any action on the part of an agency, including, but not limited to:

(a) A decision, determination, finding, ruling, or order; and

(b) A grant, payment, award, license, contract, transaction, sanction, or approval, or the denial thereof, or failure to act with respect to a decision, determination, finding, ruling, or order.

(18) "State employee" means an individual who is employed by an agency in any branch of state government. For purposes of this chapter, employees of the superior courts are not state officers or state employees.

(19) "State officer" means every person holding a position of public trust in or under an executive, legislative, or judicial office of the state. "State officer" includes judges of the superior court, judges of the court of appeals, justices of the supreme court, members of the legislature together with the secretary of the senate and the chief clerk of the house of representatives, holders of elective offices in the executive branch of state government, chief

executive officers of state agencies, members of boards, commissions, or committees with authority over one or more state agencies or institutions, and employees of the state who are engaged in supervisory, policy-making, or policy-enforcing work. For the purposes of this chapter, "state officer" also includes any person exercising or undertaking to exercise the powers or functions of a state officer.

(20) "Thing of economic value," in addition to its ordinary meaning, includes:

(a) A loan, property interest, interest in a contract or other chose in action, and employment or another arrangement involving a right to compensation;

(b) An option, irrespective of the conditions to the exercise of the option; and

(c) A promise or undertaking for the present or future delivery or procurement.

(21)(a) "Transaction involving the state" means a proceeding, application, submission, request for a ruling or other determination, contract, claim, case, or other similar matter that the state officer, state employee, or former state officer or state employee in question believes, or has reason to believe:

(i) Is, or will be, the subject of state action; or

(ii) Is one to which the state is or will be a party; or

(iii) Is one in which the state has a direct and substantial proprietary interest.

(b) "Transaction involving the state" does not include the following: Preparation, consideration, or enactment of legislation, including appropriation of moneys in a budget, or the performance of legislative duties by an officer or employee; or a claim, case, lawsuit, or similar matter if the officer or employee did not participate in the underlying transaction involving the state that is the basis for the claim, case, or lawsuit.

(22) "University" includes "state universities" and "regional universities" as defined in RCW **28B.10.016** and also includes any research or technology institute affiliated with a university, including without limitation, the *Spokane intercollegiate research and technology institute and the *Washington technology center.

(23) "University research employee" means a state officer or state employee employed by a university, but only to the extent the state officer or state employee is engaged in research, technology transfer, approved consulting activities related to research and technology transfer, or other incidental activities.

[2011 c 60 § 28; 2005 c 106 § 1; 1998 c 7 § 1; 1996 c 213 § 1; 1994 c 154 § 101.]

NOTES:

Reviser's note: *(1) The Spokane intercollegiate research and technology institute and the Washington technology center were abolished by **2011 1st sp.s. c 14 § 17.**

(2) The definitions in this section have been alphabetized pursuant to RCW **1.08.015**(2)(k).

Effective date—2011 c 60: See RCW **42.17A.919**.

RCW 49.60.030

Freedom from discrimination—Declaration of civil rights.

*** CHANGE IN 2020 *** (SEE **5165.SL**) ***

(1) The right to be free from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability is recognized as and declared to be a civil right. This right shall include, but not be limited to:

(a) The right to obtain and hold employment without discrimination;

(b) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement;

(c) The right to engage in real estate transactions without discrimination, including discrimination against families with children;

(d) The right to engage in credit transactions without discrimination;

(e) The right to engage in insurance transactions or transactions with health maintenance organizations without discrimination: PROVIDED, That a practice which is not unlawful under RCW **48.30.300**, **48.44.220**, or **48.46.370** does not constitute an unfair practice for the purposes of this subparagraph;

(f) The right to engage in commerce free from any discriminatory boycotts or blacklists. Discriminatory boycotts or blacklists for purposes of this section shall be defined as the formation or execution of any express or implied agreement, understanding, policy or contractual arrangement for economic benefit between any persons which is not specifically authorized by the laws of the United States and which is required or imposed, either directly or indirectly, overtly or covertly, by a foreign government or foreign person in order to restrict, condition, prohibit, or interfere with or in order to exclude any person or persons from any business relationship on the basis of race, color, creed, religion, sex, honorably discharged veteran or military status, sexual orientation, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability, or national origin or lawful business relationship: PROVIDED HOWEVER, That nothing herein contained shall prohibit the use of boycotts as authorized by law pertaining to labor disputes and unfair labor practices; and

(g) The right of a mother to breastfeed her child in any place of public resort, accommodation, assemblage, or amusement.

(2) Any person deeming himself or herself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the actual damages sustained by the person, or both, together with the cost of suit including reasonable attorneys' fees or any other appropriate remedy authorized by this chapter or the United States Civil Rights Act of 1964 as amended, or the Federal Fair Housing Amendments Act of 1988 (42 U.S.C. Sec. 3601 et seq.).

(3) Except for any unfair practice committed by an employer against an employee or a prospective employee, or any unfair practice in a real estate transaction which is the basis for relief specified in the amendments to RCW **49.60.225** contained in chapter 69, Laws of 1993, any unfair practice prohibited by this chapter which is committed in the course of trade or commerce as defined in the Consumer Protection Act, chapter **19.86** RCW, is, for the purpose of applying that chapter, a matter affecting the public interest, is not reasonable in relation to

the development and preservation of business, and is an unfair or deceptive act in trade or commerce.

[**2009 c 164 § 1**; **2007 c 187 § 3**; **2006 c 4 § 3**; **1997 c 271 § 2**; **1995 c 135 § 3**. Prior: **1993 c 510 § 3**; **1993 c 69 § 1**; **1984 c 32 § 2**; **1979 c 127 § 2**; **1977 ex.s. c 192 § 1**; **1974 ex.s. c 32 § 1**; **1973 1st ex.s. c 214 § 3**; **1973 c 141 § 3**; **1969 ex.s. c 167 § 2**; **1957 c 37 § 3**; **1949 c 183 § 2**; Rem. Supp. 1949 § 7614-21.]

NOTES:

Intent—1995 c 135: See note following RCW **29A.08.760**.

Severability—1993 c 510: See note following RCW **49.60.010**.

Severability—1993 c 69: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [**1993 c 69 § 17**.]

Severability—1969 ex.s. c 167: See note following RCW **49.60.010**.

Severability—1957 c 37: See note following RCW **49.60.010**.

Severability—1949 c 183: See note following RCW **49.60.010**.

RCW 49.60.040

Definitions.

*** CHANGE IN 2020 *** (SEE **2602.SL**) ***

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Aggrieved person" means any person who: (a) Claims to have been injured by an unfair practice in a real estate transaction; or (b) believes that he or she will be injured by an unfair practice in a real estate transaction that is about to occur.

(2) "Any place of public resort, accommodation, assemblage, or amusement" includes, but is not limited to, any place, licensed or unlicensed, kept for gain, hire, or reward, or where charges are made for admission, service, occupancy, or use of any property or facilities, whether conducted for the entertainment, housing, or lodging of transient guests, or for the benefit, use, or accommodation of those seeking health, recreation, or rest, or for the burial or other disposition of human remains, or for the sale of goods, merchandise, services, or personal property, or for the rendering of personal services, or for public conveyance or transportation on land, water, or in the air, including the stations and terminals thereof and the garaging of vehicles, or where food or beverages of any kind are sold for consumption on the premises, or where public amusement, entertainment, sports, or recreation of any kind is offered with or without charge, or where medical service or care is made available, or where the public gathers, congregates, or assembles for amusement, recreation, or public purposes, or public halls, public elevators, and public washrooms of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants, or any public library or educational institution, or schools of special instruction, or nursery schools, or day care centers or children's camps: PROVIDED, That nothing contained in this definition shall be construed to include or apply to any institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations, though where public use is permitted that use shall be covered by this chapter; nor shall anything contained in this definition apply to any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution.

(3) "Commission" means the Washington state human rights commission.

(4) "Complainant" means the person who files a complaint in a real estate transaction.

(5) "Covered multifamily dwelling" means: (a) Buildings consisting of four or more dwelling units if such buildings have one or more elevators; and (b) ground floor dwelling units in other buildings consisting of four or more dwelling units.

(6) "Credit transaction" includes any open or closed end credit transaction, whether in the nature of a loan, retail installment transaction, credit card issue or charge, or otherwise, and whether for personal or for business purposes, in which a service, finance, or interest charge is imposed, or which provides for repayment in scheduled payments, when such credit is extended in the regular course of any trade or commerce, including but not limited to transactions by banks, savings and loan associations or other financial lending institutions of whatever nature, stock brokers, or by a merchant or mercantile establishment which as part of its ordinary business permits or provides that payment for purchases of property or service therefrom may be deferred.

(7)(a) "Disability" means the presence of a sensory, mental, or physical impairment that:

(i) Is medically cognizable or diagnosable; or

(ii) Exists as a record or history; or

(iii) Is perceived to exist whether or not it exists in fact.

(b) A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of this chapter.

(c) For purposes of this definition, "impairment" includes, but is not limited to:

(i) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine; or

(ii) Any mental, developmental, traumatic, or psychological disorder, including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(d) Only for the purposes of qualifying for reasonable accommodation in employment, an impairment must be known or shown through an interactive process to exist in fact and:

(i) The impairment must have a substantially limiting effect upon the individual's ability to perform his or her job, the individual's ability to apply or be considered for a job, or the individual's access to equal benefits, privileges, or terms or conditions of employment; or

(ii) The employee must have put the employer on notice of the existence of an impairment, and medical documentation must establish a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect.

(e) For purposes of (d) of this subsection, a limitation is not substantial if it has only a trivial effect.

(8) "Dog guide" means a dog that is trained for the purpose of guiding blind persons or a dog that is trained for the purpose of assisting hearing impaired persons.

(9) "Dwelling" means any building, structure, or portion thereof that is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land that is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

(10) "Employee" does not include any individual employed by his or her parents, spouse, or child, or in the domestic service of any person.

(11) "Employer" includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit.

(12) "Employment agency" includes any person undertaking with or without compensation to recruit, procure, refer, or place employees for an employer.

(13) "Families with children status" means one or more individuals who have not attained the age of eighteen years being domiciled with a parent or another person having legal custody of such individual or individuals, or with the designee of such parent or other person having such legal custody, with the written permission of such parent or other person. Families with children status also applies to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of eighteen years.

(14) "Full enjoyment of" includes the right to purchase any service, commodity, or article of personal property offered or sold on, or by, any establishment to the public, and the admission of any person to accommodations, advantages, facilities, or privileges of any place

of public resort, accommodation, assemblage, or amusement, without acts directly or indirectly causing persons of any particular race, creed, color, sex, sexual orientation, national origin, or with any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability, to be treated as not welcome, accepted, desired, or solicited.

(15) "Honorably discharged veteran or military status" means a person who is:

(a) A veteran, as defined in RCW **41.04.007**; or

(b) An active or reserve member in any branch of the armed forces of the United States, including the national guard, coast guard, and armed forces reserves.

(16) "Labor organization" includes any organization which exists for the purpose, in whole or in part, of dealing with employers concerning grievances or terms or conditions of employment, or for other mutual aid or protection in connection with employment.

(17) "Marital status" means the legal status of being married, single, separated, divorced, or widowed.

(18) "National origin" includes "ancestry."

(19) "Person" includes one or more individuals, partnerships, associations, organizations, corporations, cooperatives, legal representatives, trustees and receivers, or any group of persons; it includes any owner, lessee, proprietor, manager, agent, or employee, whether one or more natural persons; and further includes any political or civil subdivisions of the state and any agency or instrumentality of the state or of any political or civil subdivision thereof.

(20) "Premises" means the interior or exterior spaces, parts, components, or elements of a building, including individual dwelling units and the public and common use areas of a building.

(21) "Real estate transaction" includes the sale, appraisal, brokering, exchange, purchase, rental, or lease of real property, transacting or applying for a real estate loan, or the provision of brokerage services.

(22) "Real property" includes buildings, structures, dwellings, real estate, lands, tenements, leaseholds, interests in real estate cooperatives, condominiums, and hereditaments, corporeal and incorporeal, or any interest therein.

(23) "Respondent" means any person accused in a complaint or amended complaint of an unfair practice in a real estate transaction.

(24) "Service animal" means any dog or miniature horse, as discussed in RCW **49.60.214**, that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. The work or tasks performed by the service animal must be directly related to the individual's disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing nonviolent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks. This subsection does not apply to

RCW **49.60.222** through **49.60.227** with respect to housing accommodations or real estate transactions.

(25) "Sex" means gender.

(26) "Sexual orientation" means heterosexuality, homosexuality, bisexuality, and gender expression or identity. As used in this definition, "gender expression or identity" means having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth.

[**2018 c 176 § 2**. Prior: **2009 c 187 § 3**; prior: **2007 c 317 § 2**; **2007 c 187 § 4**; **2006 c 4 § 4**; **1997 c 271 § 3**; **1995 c 259 § 2**; prior: **1993 c 510 § 4**; **1993 c 69 § 3**; prior: **1985 c 203 § 2**; **1985 c 185 § 2**; **1979 c 127 § 3**; **1973 c 141 § 4**; **1969 ex.s. c 167 § 3**; **1961 c 103 § 1**; **1957 c 37 § 4**; **1949 c 183 § 3**; Rem. Supp. 1949 § 7614-22.]

NOTES:

Declaration—Finding—Purpose—Effective date—2018 c 176: See notes following RCW **49.60.215**.

Finding—2007 c 317: "The legislature finds that the supreme court, in its opinion in *McClarty v. Totem Electric,* 157 Wn.2d 214, 137 P.3d 844 (2006), failed to recognize that the law against discrimination affords to state residents protections that are wholly independent of those afforded by the federal Americans with disabilities act of 1990, and that the law against discrimination has provided such protections for many years prior to passage of the federal act." [**2007 c 317 § 1**.]

Retroactive application—2007 c 317: "This act is remedial and retroactive, and applies to all causes of action occurring before July 6, 2006, and to all causes of action occurring on or after July 22, 2007." [**2007 c 317 § 3**.]

Effective date—1995 c 259: See note following RCW **49.60.010**.

Severability—1993 c 510: See note following RCW **49.60.010**.

Severability—1993 c 69: See note following RCW **49.60.030**.

Severability—1969 ex.s. c 167: See note following RCW **49.60.010**.

Construction—1961 c 103: "Nothing herein shall be construed to render any person or corporation liable for breach of preexisting contracts by reason of compliance by such person or corporation with this act." [**1961 c 103 § 4**.]

Severability—1957 c 37: See note following RCW **49.60.010**.

Severability—1949 c 183: See note following RCW **49.60.010**.

RCW 49.60.210

Unfair practices—Discrimination against person opposing unfair practice—Retaliation against whistleblower.

(1) It is an unfair practice for any employer, employment agency, labor union, or other person to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter.

(2) It is an unfair practice for a government agency or government manager or supervisor to retaliate against a whistleblower as defined in chapter **42.40** RCW.

(3) It is an unfair practice for any employer, employment agency, labor union, government agency, government manager, or government supervisor to discharge, expel, discriminate, or otherwise retaliate against an individual assisting with an office of fraud and accountability investigation under RCW **74.04.012**, unless the individual has willfully disregarded the truth in providing information to the office.

[**2011 1st sp.s. c 42 § 25; 1992 c 118 § 4; 1985 c 185 § 18; 1957 c 37 § 12.** Prior: 1949 c 183 § 7, part; Rem. Supp. 1949 § 7614-26, part.]

NOTES:

Findings—Intent—Effective date—2011 1st sp.s. c 42: See notes following RCW **74.08A.260**.

Finding—2011 1st sp.s. c 42: See note following RCW **74.04.004**.

RCW 82.08.935

Exemptions—Disposable devices used to deliver prescription drugs for human use.

The tax levied by RCW **82.08.020** shall not apply to sales of disposable devices used or to be used to deliver drugs for human use, pursuant to a prescription. "Disposable devices used to deliver drugs" means single use items such as syringes, tubing, or catheters.

[2003 c 168 § 404.]

NOTES:

Effective dates—Part headings not law—2003 c 168: See notes following RCW **82.08.010**.

RCW 9.12.010

Barratry.

Every person who brings on his or her own behalf, or instigates, incites, or encourages another to bring, any false suit at law or in equity in any court of this state, with intent thereby to distress or harass a defendant in the suit, or who serves or sends any paper or document purporting to be or resembling a judicial process, that is not in fact a judicial process, is guilty of a misdemeanor; and in case the person offending is an attorney, he or she may, in addition thereto be disbarred from practicing law within this state.

[**2001 c 310 § 3.** Prior: **1995 c 285 § 27; 1915 c 165 § 1; 1909 c 249 § 118;** Code 1881 § 901; **1873 p 204 § 100; 1854 p 92 § 91;** RRS § 2370.]

NOTES:

Purpose—Effective date—2001 c 310: See notes following RCW **2.48.180**.

Effective date—1995 c 285: See RCW **48.30A.900**.

*Attorneys-at-law: Chapter **2.44** RCW.*

*State bar act: Chapter **2.48** RCW.*

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Transmittal Information

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