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No.73832-1-I

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SUSAN KEPLER and RICHARD KEPLER, husband and
wife;and TANYA KEPLERKNAUS

Appellants

v.

DONNA DETAMORE and PAUL DWIGHT, husband and
wife;and JOHN ZIMMERMAN and TRACY ZIMMERMAN,
husband and wife,

Respondents

APPELLANTS' REPLY BRIEF

AND

RESPONSE TO CROSS-APPEAL

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I. INTRODUCTION

Appellants Susan, Richard, and Tanya Keppler (“the Kepplers” or “Appellants”), appeal the trial court’s denial of their motion for summary judgment, award of summary judgment to Plaintiffs/Respondents Donna Detamore, Paul Dwight, and Tracy and John Zimmerman (“Detamore et al.” or “Respondents”), and injunction requiring them to cut all large, mature trees of native varieties on the north, east, and south sides of their property.

The trial court went out of its way to interpret the Supplemental Covenant for Ledgewood Beach Division No. 3 restricting fences or hedges to six feet in height to apply to the Kepplers’ large, mature trees, despite applicable rules of covenant interpretation and despite the absurd results effectuated by its interpretation. Further, the trial court rejected the Kepplers’ unrefuted evidence of abandonment, instead reading into the covenant exceptions and assumptions to ignore the proliferation of similar rows and groups of large trees throughout the subdivision.

The trial court ultimately concluded that there was a “hedge” on three sides of the Keppler Property, and applied the covenants prohibiting hedges over six feet to require the cutting or removal of

all of the evergreen trees and all of the large, mature native varietal trees on the north, east, and south sides of the Keplers' property, which went beyond the authority provided by the covenant, including as interpreted by the LedgeWood Beach Property Owners Association ("the Association"). Respondents Detamore et al. do not address the trial court's application of the covenant in any detail, instead relying on the abuse of discretion standard to avoid analysis of the trial court's specific ruling. But the Respondents are incorrect in their asserted standard of review. The trial court misapplied law to facts and abused its discretion.

II. SUMMARY OF INJUNCTION

The trial court concluded that the Keplers' trees formed a hedge on three sides of their property—the north, east and south boundaries. CP at 9 (Finding of Fact No. 3).

Along the north property line, there is a group of three trees: a vine maple, cedar and hemlock; and then a very large gap until the northeast corner of the property, where there is a maple tree and a pine "bush"-like tree. See CP at 563 (color version attached hereto in Appendix A); CP at 189 (tree #s 17 & 18). Along the entire northern property line, of these well spaced five trees, the trial court allowed only the small, ornamental vine maple to remain. CP at 10-11; RP at 35; CP at 189 (tree #19).

Along the east side or rear of the Keppler property there are four cedars (one of which is set into the property), one fir (partially on the neighboring lot), and one small, ornamental plum tree set into the Keppler Property. See CP at 189-90. Of these six trees, and along the entire east property line, the trial court allowed only the ornamental plum tree to remain. CP at 10-11; RP at 35; CP at 189 (tree #14). The court did not allow even one cedar to remain.

Along the south side of the property, there are four trees near the boundary, with a small apple tree set into the interior towards the east of the property, and two vine maples set into the interior towards the west of the property (other than three crab apples near the road that are not grouped with the other trees). Of these well-spaced trees, the trial court allowed only the ornamental apple tree and the two vine maples to remain. CP at 10-11; RP at 35; CP at 189. The trial court required the well-spaced pine tree, bush, and maple near the road, as well as the maple towards the rear of the yard to be removed. CP at 149, 151, 567 (Appendix A).

Of the 18 trees that the trial court found to form part of the hedges, it allowed only 5 to remain, none of which were evergreen and none of which were large, mature native varieties. CP at 10-11. The court's ruling went beyond the authority provided by covenant, interpreting it to prohibit not only hedges—but large, native trees.

III. ARGUMENT - REPLY ON THE KEPPLERS' APPEAL

A. The trial court erred in interpreting the hedge covenant to prohibit the Keplers' trees.

The trial court failed to properly apply the rules of covenant interpretation, and improperly read into the covenant prohibiting only “hedges” or “fences” over six feet tall, a more general view protection prohibiting any large trees near or along property boundaries that impede views. There is no indication that the drafters intended to restrict vegetation other than commonly defined hedges. The plain meaning of the term “hedge” or “fence” does not apply to the large, mature trees, well-spaced throughout the Kepler Property—and at the very least would only apply to the four cedars and along the east line. See *e.g.*, CP at 149-152, 563, 566, 567, attached in color at Appendix A.

In interpreting a covenant, the courts apply the rules of contract interpretation, with the objective to determine the drafters' intent. *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wn.2d 241, 250, 327 P.3d 614 (2014). The courts are instructed to “examine the language of the restrictive covenant and consider the instrument in its entirety.” *Id.* The court must give covenant words their ordinary, usual, and popular meaning unless the entirety of the document clearly demonstrates contrary intent. *Hearst Commc'ns*,

Inc. v. Seattle Times Co., 154 Wn.2d 493, 504, 115 P.3d 262 (2005). The lack of an express term with the inclusion of similar terms is evidence of the drafters' intent. *Burton v. Douglas County*, 65 Wash.2d 619, 622, 399 P.2d 68 (1965). The court should reject “forced or strained” interpretations of covenant language leading to absurd results. *Wilkinson*, 180 Wn.2d at 255. The court also should not read into the covenant language or distinctions. *Crystal Ridge v. City of Bothell*, 182 Wn.2d 665, 751, 343 P.3d 746 (2015).

The trial court went beyond the common, popular definitions of hedge or fence, which all include reference to rows of bushes, shrubs or small trees, densely or closely planted together. Brief of Appellants (“App. Br.”) at 25-26. The trial court focused almost exclusively on the fact that trees were planted near the boundaries—not on the proximity of the trees to each other or the density of vegetation. RP at 14:19:24 (“Another more general definition is, quote, ‘Any fence or wall marking a boundary or forming a barrier.’”); RP at 15:23-16:6 (focusing on fact trees near boundaries). The trial court converted the covenant to one prohibiting individual trees near property boundaries. Respondents similarly rely on the fact the trees are near boundaries, despite their spacing. Brief of Respondents (hereinafter “Resp. Br.”) at 21-22.

The trial court failed to properly consider the “hedge covenant” in the context of the other plat documents and covenants. While the Supplemental Covenants do contain a height restriction for homes to one story above the highest grade on the property, the trial court found it unimportant that the covenants exclude the height restriction for houses where properties would not impede the views of other benefited properties, but do not do so in the case of the hedge covenant. App. Br. at 29-30; CP at 502; RP at 22-23. Likewise, there is no provision that height of fences/hedges be measured from the highest existing ground level, as is the case with home height, which means that a home may be two stories or more depending on the slope of the property, but no fence anywhere on the property could be more than six feet tall regardless of the slope of the property. CP at 502; App. Br. at 30.

Further, the drafters, Mr. and Mrs. Keith specifically created view restrictions on specifically identified properties in the original plat. CP at 497. As the courts routinely hold, where a drafter shows knowledge and intent to provide for a provision in one place, and does not do so in another location, it can be inferred that the drafter did not intend to include such provision. *Day v. Santorsola*, 118 Wn. App. 746, 755-56, 76 P.3d 1190 (2003) (holding “had the developer

intended to make view a specific consideration with respect to the permissible height of houses, it could have included a provision similar to the one regarding the height of shrubs and trees.”).

The trial court and Respondents distinguished *Day* on the ground that the “committee” approving structures had previously approved plans allowing homes to impact the views from other properties. RP at 20:17-25; Resp. Br. at 31. But such consideration was only after looking at the language of the covenants as contextual evidence of the drafter’s intent. Further, reliance on the committee’s interpretation was questionable because it was not relevant to the drafter’s intent for a covenant and plat recorded in 1958. This Court has held that evidence of events after the drafting of the covenants is not relevant to the drafter’s intent for the covenants. See, e.g., *Bauman v. Turpen*, 139 Wn. App. 78, 82, 160 P.3d 1050 (2007) (holding 1997 building codes were not relevant in construing 1949 deed restrictions and the drafter’s intent therefore).

Here, the drafters knew how to protect views and did so in the original plat with respect to certain properties, but chose not to do so in the case of Division No. 3 and the hedge covenant. The reasonable conclusion is that the drafters intended uniform fences/hedges for aesthetic purposes rather than to protect views.

The trial court and Respondents also fail to acknowledge that application of the hedge covenant to prohibit large trees on or near property lines will lead to absurd results. The Supplemental Covenants limit the height of buildings on certain properties, requiring them to be no more than one story “above the highest existing ground level.” CP at 502. Therefore, a home could be multiple stories, so long as one story is below the highest grade—which is the case for many properties in the subdivision, including each of the Plaintiffs’ properties here. No similar variation for the “highest existing ground level” was made as to fences and hedges. This height limitation, allowing the equivalent of two story homes, demonstrates how unreasonable and unlikely that the drafters would have intended the restriction on fences and hedges to limit groups or rows of trees under six feet in height, where homes on properties could be multiple stories tall, dwarfing the trees.

Finally, the asserted interpretation, if applied uniformly, as the courts are required to do, would require the cutting or removal of vast numbers of trees in Wagner Park, which is located on Lots 29, 30, and 31 of Block 9, and is subject to the hedge covenant. CP at 157-160, attached in color to the Brief of Appellants at Appendix B. Again, it is a “forced and strained” interpretation leading to

absurd results that would require rows or groups of trees in a dedicated park to be cut to six feet in height.

The trial court dismissed these concerns out of hand and Respondents have not addressed them.

B. The trial court erred in concluding that the hedge covenant—as applied to large, mature trees of native varieties—had not been abandoned despite the Keplers’ overwhelming and unrefuted evidence.

If a covenant applying to an entire tract has been habitually and substantially violated so as to create an impression that it has been abandoned, equity will not enforce the covenant. *White v. Wilhelm*, 34 Wn. App. 763, 769, 665 P.2d 407 (1983).

1. The Keplers’ properly characterized the persuasive authority they cited.

The assertion that the Keplers’ citation to out of state authorities was improper is a red herring. Resp. Br. at 37. As exemplified by Respondents’ briefing, there are very few cases in Washington articulating factual circumstances where restrictive covenants are deemed abandoned. The vast majority of cases in Washington that have addressed this issue have concluded simply that a few violations are insufficient to establish

abandonment.¹ See, e.g., *Mountain Park Homeowners Ass'n, Inc. v. Tydings*, 125 Wn.2d 337, 342, 883 P.2d 1382 (1994) (no evidence of violations of antenna covenant); *Reading v. Keller*, 67 Wn.2d 86, 90–91, 406 P.2d 634 (1965) (one violation not abandonment); *Green v. Normandy Park*, 137 Wn. App. 665, 697, 151 P.3d 1038 (2007) (a few instances of failed enforcement not enough); *Peckham v. Milroy*, 104 Wn. App. 887, 891, 17 P.3d 1256, 1258-59 (2001) (four violations of a covenant in a subdivision of 41 blocks with 38 to 40 lots in each block insufficient for abandonment); *Sandy Point Improvement Co. v. Huber*, 26 Wn.App. 317, 319, 613 P.2d 160 (1980) (two violations not abandonment).

The Keplers do not disagree with such holdings finding a handful of violations insufficient to establish abandonment. But this is not the case where there are merely a “handful” of violations. Here, there is un-rebutted photographic evidence of rows and groups of large, mature, native varietal trees throughout the subdivision.

¹The case of *White v. Wilhelm*, 34 Wn. App. 763, 769, 665 P.2d 407 (1983), found abandonment, but the conclusion was based on the fact that there was no architectural control committee in existence and the requirement to obtain approval of plans by such committee could not be complied with.

2. Detamore et al. failed to rebut the Kepplers' evidence of abandonment.

Appellant Susan Keppler presented photographs and declaration testimony that more than 50 of the 88 properties within Division No. 3, or 57% of the total properties, have groups or rows of large, mature trees over six feet in height similar to the Kepplers' trees (though in most cases much more densely growing than the Kepplers' trees). CP at 582-609, (Keppler Decl., Ex. N –attached in color as Appendix A to the Brief of Appellants); CP at 73-74 (Defs' Reply at 14-15). No reasonable person travelling though the subdivision, even if they knew of the restriction as to the height of hedges, would assume that it applied to large, mature trees of the nature at issue. CP at 546-47 (Keppler Decl. ¶¶ 17-19).

Detamore et al. provided no evidence to refute the Kepplers' photographic evidence.

On appeal, Detamore et al. assert that it “was relatively undisputed that any hedges or fences that did exceed 6 feet did not impact any views.” Resp. Br. at 40. While Appellants are unsure what “relatively undisputed” would mean, this assertion is simply false. As the photographs provided show, many of the rows of large trees do block views. See, e.g., CP at 586, 587, 588, 592, 593, 594, 598, 600, 601, 606 (in color at Appendix A to Brief of Appellants).

3. The trial court improperly implied exceptions to the hedge covenant in order to find no abandonment.

The trial court's refusal to consider the abandonment issue stems from its willingness to "read into" the subject covenant exceptions and assumptions in order to weigh or justify existing violations. RP at 24:13-25:4; 28:3-29:1; 29:17-30:17 (concluding the covenant is only violated if a view is restricted, and not if undeveloped properties are at issue, etc.).

But the "hedge" covenant at issue provides one, uniform restriction as to height. CP at 502. There is no provision in the covenant that it only applies to hedges interfering with views, to hedges running in a north-south direction, or hedges that abut a developed lot. Reading the *entire* 1963 Supplemental Covenants requires the opposite conclusion. In the same Supplemental Covenants, the drafters expressly excluded certain properties that were not required to comply with the 800-square foot floor area requirement and expressly excluded specific properties that did not need to comply with the home height restriction. CP at 502. No similar exception was made for the hedge restriction. In the original plat, the developers created a view restriction but applied it to only specific lots. CP at 497. No such effort was made here. A proper contextual reading requires the conclusions that there are no

implied restrictions in the hedge/fence covenant to limit application to situations where: (1) views are impacted; (2) properties are developed; or (3) the hedges are oriented north to south.

The Washington Supreme Court has repeatedly refused to “read into” covenants language, restrictions, or clarification that are not provided in a plain reading of the entire covenants, particularly where contextual or extrinsic evidence suggests a contrary intent.²

4. Enforcement on two properties is insufficient in the face of widespread violation.

The Court should consider whether the average person would readily observe sufficient violations so that he or she would logically infer that the property owners neither adhere to nor enforce the subject restriction. That is the case here, as depicted in the Keppler photos—groups and rows of large trees are so prolific that a reasonable person could not assume they are restricted.

Yet, Detamore et al. asserts that enforcement should only occur if someone complains and that lack of enforcement without complaints is not relevant to abandonment. Resp. Br. at 41-42. But

²See e.g., *Crystal Ridge Homeowners Assoc. v. City of Bothell*, 182 Wn.2d 665, 343 P.3d 746 (2015) (concluding that the Court would not “read a distinction into the plat” between treatment of storm water and ground water “where the record is completely devoid of evidence suggesting that the plat’s drafters contemplated the distinction.”); *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 696-97, 974 P.2d 836 (1999) (rejecting an interpretation of a restrictive covenant because adopting the interpretation “would require this court to redraft or add to the language of the covenant.”).

the only evidence provided of the Association asking members to cut trees to comply with the hedge covenant were in the case of the Kepplers' predecessor in title and the predecessor in title to the adjacent property to the north, Lot 18. CP at 282, 289-91; 292-94. The only enforcement by property owners involves the subject plaintiffs, who have now sued two property owners. This selective enforcement in the face of widespread existence of rows and groups of large trees is not enough to avoid abandonment.

The case of *Town of Clyde Hill v. Roisen*, 11 Wn.2d 912, 767 P.2d 1375 (1989), cited by Detamore et al. at page 41 of the Brief of Respondents has no application here, because a city ordinance rather than a restrictive covenant was at issue in the *Clyde Hill* case, and the Court there conducted no analysis of any asserted "abandonment" of such ordinance.

C. The trial court erred in applying the hedge covenant to conclude that there was a "hedge" on three sides of the Keppler Property.

1. The trial court improperly weighed the evidence to arrive at its conclusion.

Summary Judgment is improper if the issues require weighing "competing, apparently competent evidence." *Larson v. Nelson*, 118 Wn. App. 797, 810, 77 P.3d 671 (2003). While the Kepplers acknowledge that at summary judgment they agreed that

the Court could rule as a matter of law, that does not change the fact that the trial court weighed competing, competent evidence in order to arrive at its conclusions. This does not make the Keplers' position improper or disingenuous; the trial court was not required to weigh the competing evidence.

The Keplers provided photographic evidence that depicted well-spaced trees on each of their north and south property lines, with large amounts of area in between and around each tree, that did not create a wall of dense vegetation as is asserted with respect to the evergreen trees along the east property line. See, .e.g, CP at 149- 152, 563, 566, 567 (color copies of these few photos are attached hereto as Appendix A). Further, the Keplers specifically refuted the graphical representation provided by Detamore et al. that suggested that the vegetation of the trees on the north and south sides of the property overlapped—particularly to the degree represented. See CP at 133-135 (Reply Kepler Decl. ¶¶ 5-8).

But the trial court expressly weight the graphical exhibit at CP 189 more heavily and to the apparent exclusion of the photographic evidence. RP at 6:5-15. While the trial court did not need to weigh the competing evidence in this manner and could have relied on the photographs, which speak for themselves, the

trial court improperly relied on the graphical representation of the Kepplers' trees that was specifically disputed by the Kepplers.

2. Even if the trial court did not improperly weigh evidence, the trial court's ruling finding a hedge on the north and south property lines should be reversed.

Even if the trial court properly concluded that the hedge covenant applied to large, mature trees of native varieties and even if the trial court properly concluded that the hedge covenant had not been abandoned as applied to large, mature trees of native varieties, the trial court misapplied the covenant in concluding that the handful of trees on the north and south sides of the Keppler Property constituted part of a "hedge."

Respondents Detamore et al. did not address this portion of the Kepplers' argument on appeal—that the trial court misapplied the covenant to the trees at issue to find a hedge on the north and south sides of the property. See App. Br. at 45-47. Instead, Detamore et al. focused solely on the tailoring of the injunction, and asserted in a conclusory fashion that trial court's ruling should be reviewed solely for abuse of discretion. Resp. Br. at 43. But Respondents do not rely on the correct standard. The application of law to the facts of the case is a question of law reviewed de novo.

Wash. Imaging Servs., LLC v. Wash. State Dep't of Revenue, 171 Wn. 2d 548, 555, 252 P.3d 885, 888 (2011) (citing cases).

Here, given the plain meaning of the terms “hedge” and “fence,” and given the extensive analysis already provided as to the intended meaning of the hedge covenant and the potential for absurd results of interpreting it to restrict well-spaced, mature trees, the trial court erred as a matter of law in concluding that the handful of trees along the north and south property lines formed hedges.

D. Even if the trial court correctly applied the covenant to find a hedge, the trial court misapplied the covenant in concluding that all evergreen trees and all large, native varieties needed to be removed to bring compliance.

“While the fashioning of the remedy may be reviewed for abuse of discretion, the question of whether equitable relief is appropriate is a question of law. *Neimann v. Vaughn Comm’y Church*, 154 Wn.2d 365, 374, 113 P.3d 463 (2001); see also *Puget Sound Nat’l Bank of Tacoma v. Easterday*, 56 Wn.2d 937, 943, 350 P.2d 444 (1960) (holding the question of whether the trial court exceeded its authority in applying cy pres to be a question of law).

Further, this Court has expressly held that the trial court’s interpretation and application of a restrictive covenant cannot exceed the authority provided by the subject covenant. *Saunders v. Meyers*, 175 Wn. App. 427, 444-45, 306 P.3d 978 (2013). There,

this Court reviewed the trial court's summary judgment interpretation of a covenant restricting the height of certain trees, which included a provision that they "not unnecessarily interfere with the view of another residence." *Id.* The association instructed the property owner defendant to trim a large maple to 30 feet in width or to remove the tree entirely if cutting it would impact its health, and the trial court ordered such relief. But this Court found that the application went beyond the authority provided by the covenant to restrict the "unnecessary" interference with views.

Specifically, this Court reasoned that "[p]roperty owners have the right to own trees." *Id.* at 444. While the covenant at issue conditioned the right, it did not take it away. *Id.* Because the covenant prohibited only "unnecessary" interference with views, the Court concluded that where cutting a tree to protect views would kill the tree, the interference with the view was necessary to the tree's survival. *Id.* This Court held that application of the covenant to determine what was an "unnecessary interference" "must be factually based, applying the correct standard" and cannot "exceed what is authorized by the covenant." *Id.* This Court reversed the trial court's ruling, which exceeded the covenant's authority.

Here, the trial court went beyond the authority of the covenant that restricted “hedges” over six feet in height by requiring the removal of every large, mature tree on the north, east, and south sides of the Keplers’ property, much more than was authorized by the covenant or required to cure any hedge found.

The trial court’s application of the covenant was expressly contrary to the Association’s prior application of the covenant—which Detamore et al. assert is relevant to the trial court’s interpretation. See Resp. Br. at 35. On the limited number of occasions in which the Association asked property owners to trim or remove trees to comply with the hedge covenant, the Association only required that sufficient trees be removed to remove the hedge quality—not that all the trees on the property, or even in one row, be cut or removed. See, .e.g., CP at 276, 283, 289-291 (these documents include a communication by the Association to Mary Halsen, the Keplers’ predecessor in title, that she has trees constituting a “hedge” over six feet in height, as well as a response from Ms. Halsen proposing to remove a handful of the trees to remove the “hedge” quality, and a reply from the Association that Ms. Halsen had complied with the covenant, so long as she ensured that two adjacent cedars not grow together).

Detamore et al. assert that this case is analogous to the hypothetical situation where Keplers would have a twelve-foot picket fence. Resp. Br. at 45. It would not be appropriate, they assert, to require the Keplers to remove only some of the “slats” or sections of the picket fence, because the fence itself would still remain and would violate the covenant. *Id.*

But the present situation is not analogous. The trial court concluded, and the plaintiffs conceded, that the subject covenant does not regulate individual trees. RP at 24:4-12 (concluding plaintiffs had not argued that individual trees not associated with other trees would violate the hedge covenant). Further, this Court has held that property owners have a right to have trees, subject to specific, well-applied covenants conditioning such right. *Saunders*, 175 Wn. App. at 444. If numerous trees along the boundaries are required to be removed, there is necessarily a point at which the remaining trees constitute individual specimen trees, rather than a hedge. Otherwise two trees along an entire boundary line can constitute a hedge—and that is clearly beyond the plain meaning of the covenant and its authority.

Further, the fact that a few trees might eventually grow towards each other or together to form a hedge does not mean that

the trial court had authority now to require the removal of the trees to prevent such possibility. The courts are prohibited from issuing advisory opinions based on speculative facts, and must only adjudicate actual, ripe controversies. *To–Ro Trade Shows v. Collins*, 144 Wn.2d 403, 416, 27 P.3d 1149 (2001); *Clallam County v. Dry Creek Coal*, 161 Wn. App. 366, 393, 255 P.3d 709 (2011).

E. Even if the trial court’s ruling was not an error of application of facts to law, the trial court abused its discretion.

An injunction is distinctly an equitable remedy and is “frequently termed ‘the strong arm of equity,’ or a ‘transcendent or extraordinary remedy,’ and is a remedy which should not be lightly indulged in, but should be used sparingly and only in a clear and plain case.” *Kucera v. State, Dep’t of Transp.*, 140 Wn. 2d 200, 209, 995 P.2d 63, 68 (2000) (citing 42 Am.Jur.2d *Injunctions* § 2, at 728 (1969)). The terms of the injunction are reviewed for abuse of discretion. *Wash.Fed’n of State Employees v. State*, 99 Wn.2d 878, 887, 665 P.2d 1337 (1983). A trial court necessarily abuses its discretion if the decision is based upon untenable grounds or the decision is manifestly unreasonable. *Id.* A misapplication of the law likewise is an abuse of discretion. *Hisle v. Todd Pac. Shipyards Corp.*, 113 Wn.App. 401, 426-27, 54 P.3d 687 (2002) (holding that

misapplication of the law is based on untenable grounds and, thus, is an abuse of discretion). Further, a decision is manifestly unreasonable if it falls outside the range of acceptable choices, given the facts and the applicable legal standard; the record does not support the factual findings; or the court misapplies the law. *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

Here, the trial court's decision requiring the removal of every evergreen tree on the north, east and south lines, and leaving five small, ornamental trees constituted an abuse of discretion. The trial court's ruling fell "outside the range of acceptable choices," and misapplied the authority provided for by the hedge covenant—unilaterally determining what trees were appropriate on the Kepplers' property despite the fact that the covenant prohibited only a "hedge" over six feet tall. If anything, the Court should have ruled that the Kepplers could have a certain number of trees, and that the Kepplers could determine which trees they wished to keep.

F. Respondents have established no basis to award attorney fees and no basis exists here.

Respondents Detamore et al. assert without citing authority other than RAP 18.9 that the Kepplers should be sanctioned and Respondents should be awarded their attorney fees.

RAP 18.9(a) permits an appellate court to award attorney fees as sanctions or compensatory damages when a party files a frivolous appeal. A frivolous action is one that cannot be supported by any rational argument on the law or facts.

In determining whether an appeal is frivolous the Court is guided by the following principles:

- (1) A civil appellant has a right to appeal under RAP 2.2;
- (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant;
- (3) the record should be considered as a whole;
- (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous;
- (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.

Tiffany Family Trust Corp. v. City of Kent, 155 Wn.2d 225, 241, 119 P.3d 325 (2005) (internal quotation marks omitted) (quoting *Green River Comty. Coll. Dist. No. 10 v. Higher Educ. Pers. Bd.*, 107 Wn.2d 427, 442–43, 730 P.2d 653 (1986)).

Respondents provide a blanket statement that “Appellants raise no debatable issues on appeal.” Resp. Br. at 48. Yet, Respondents nonetheless chose to respond to Appellants’ factual and legal arguments with 47 pages of briefing (in contrast to the three-quarters of one page devoted to their cross-appeal).

Respondents assert that the Keplers' allegation of a dispute of fact on appeal where they moved for summary judgment is frivolous. Resp. Br. at 48. But the Keplers have expressly addressed this issue and explained that while there need not have been a dispute of material fact, the trial court improperly weighed disputed evidence and relied on a graphical representation over the best objective evidence available—photographs.

Respondents also assert without citation that the Keplers' citation to out of state authority as factual examples of abandonment of a restrictive covenant "warrants an award of fees." Resp. Br. at 49. The Keplers provided examples of factual circumstances justifying abandonment where such examples were not available in Washington cases. The Keplers in no way misled the Court or asserted that the authority was precedential or binding.

Finally, Respondents assert that because the Keplers cited to one unpublished case in a footnote, the Court should assess fees. Again, the Keplers in no way misled the Court. The Keplers specifically put the case reference in a footnote and stated that it was not cited as precedential "authority, "which is the express prohibition of GR 14.1, but rather served as a unique factual

example.³ In the Washington Supreme Court opinion cited by Respondents, *Condon v. Condon*, 177 Wn.2d 150, 166, 298 P.3d 86 (2013), the Court expressly held the assessing attorney fees was inappropriate despite its conclusion that unpublished authority should not have been cited.

Each of Respondents' arguments in favor of assessing attorney fees is spurious, not supported by citation to authority, and fails to establish a basis to award fees. Parties have a right to appeal cases, and they have a right to advance factual and legal arguments made in good faith based on existing law or a good faith argument for the extension of the law. Court rules such as CR 11 and RAP 18.9 are intended to serve as safeguards against baseless filings designed to harass and delay—not to punish litigants pursuing their rights in good faith. Because this Court must resolve all doubts in favor of the appellants, and because the Keplers have in no doubt raised debatable issues on appeal even if they do not ultimately prevail, this Court should reject Respondents' baseless request for attorney fees.

³ Indeed, the express limitation of GR 14.1 to prohibiting citation of unpublished cases as authority was noted by Division Three in the opinion cited by Respondents, *State v. Sanchez*, 74 Wn. App. 763, 765 n. 1(1994).

IV. ARGUMENT – RESPONSE TO CROSS APPEAL

Respondents Detamore et al. raise only one issue on appeal—whether the trial court should have ordered the Keplers to trim overhanging branches from adjacent properties to effect compliance with the hedge covenant. See Resp. Br. at 2, 47. Respondents devote approximately three-quarters of one page to argument on this issue and cite merely one case from 1921 for the proposition that an owner “may” cut branches overhanging onto one’s property from an adjacent property. See Resp. Br. at 47.

Detamore et al. provided no legal authority on this issue at summary judgment, raising the request that branches overhanging from adjacent lots be cut only in the conclusion of their brief as the request for relief. Further, Detamore et al. presented no factual evidence at summary judgment as to the existence or extent of “branches” overhanging from neighboring properties or how those branches relate to the alleged hedges on the Keplers’ property. Detamore et al.’s primary evidence of vegetation forming a fence on the Kepler Property is the graphical depiction created by Paul Dwight. See CP at 189-90. But there is no reference whatsoever in said graph to any vegetation overhanging from neighboring properties (other than trees that straddle property lines, which are a

distinct issue). There simply was no evidence or argument provided to the trial court as to what vegetation overhung the property line, why it was part of the alleged hedge on the Keppler property, and why the Kepplers should be legally required to remove it to comply with the covenant rather than forcing the owners of the vegetation to remove any "hedge."

On appeal, while Respondents Detamore et al. have shown that one "may" cut branches overhanging onto its own property from a neighboring property Respondents have wholly failed to establish that: (1) branches from adjacent properties violated the hedge covenant as a factual matter and as a matter of law; (2) the Kepplers should be legally required to cut overhanging branches despite the fact that they are not part of the trees forming the alleged hedge on the Kepplers' property; and (3) the trial court abused its discretion in fashioning its injunction by failing to include the removal of branches from adjacent properties.

It appears that Respondents Detamore et al. have largely abandoned their cross-appeal, yet they nonetheless seek to maintain their status as cross-appellants without providing factual and legal argument to which the Kepplers may respond. But the Kepplers should not be required to make Respondents' arguments

for them only to refute them, and Respondents should not be entitled to flesh out their argument for the first time in reply at which point the Keplers would have no opportunity to respond.

This Court does not generally consider arguments a party first makes on appeal. RAP 2.5(a); *State v. Williams*, 137 Wn.2d 746, 749, 975 P.2d 963 (1999); *Hansen v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 482 (1992); *State v. Smith*, 130 Wn. App. 721, 728, 123 P.3d 896 (2005). To do so would deprive the Keplers the opportunity to respond to the argument before the trial court and would deprive the trial court the opportunity to rule on the issue. See *State v. Avendano-Lopez*, 79 Wn. App. 706, 710, 904 P.2d 324 (1995).

Further, where a party fails to flesh out an argument on appeal with specific reference to the facts in support of the argument and as to legal authority as to the trial court's error, this Court need not address the issue on appeal. See RAP 10.3(a)(6); *State v. Garland*, 169 Wn. App. 869, 894, 282 P.3d 1137, 1150 (2012) (holding that appellant "having failed to brief this court sufficiently on any authority for finding legal error with the trial court's ruling, we do not further address the merits of this argument.").

Finally, it would not be appropriate for Respondents to only develop their argument in reply, without any opportunity for the Kepplers to respond. See *W. Norman Timber v. State*, 37 Wn. 2d 467, 471, 224 P.2d 635, 637 (1950) (holding that the Court does not consider arguments or authorities presented for the first time in a reply brief.); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (arguments raised for the first time in reply or unsupported by proper citation to the record or relevant authority will not be considered).

Respondents Detamore et al. have not established a factual or legal basis to reverse the trial court's refusal to include in its injunctive relief a requirement that the Kepplers to cut overhanging branches. Respondents provided no factual or legal authority for this issue before the trial court and provide no factual or legal authority now on appeal to prove that the trial court erred. Respondents should be deemed to have waived the right to argue this issue, both before the trial court and on appeal.

V. CONCLUSION

The trial court went out of its way to interpret the Supplemental Covenant for Ledgewood Beach Division No. 3 restricting fences or hedges to six feet in height to apply to the

Kepplers' large, mature trees, despite applicable rules of covenant interpretation. Further, the trial court read into the covenant exceptions and assumptions to ignore the proliferation of similar rows and groups of large trees throughout the subdivision.

The trial court ultimately concluded that there was a “hedge” on three sides of the Keppler Property, and applied the covenant to require the cutting or removal of all of the evergreen trees and all of the large, mature native varietal trees on the north, east, and south sides of the Kepplers' property, leaving only one ornamental tree on the north side, one ornamental tree on the east side, and three ornamental trees on the south side. The trial court's ruling went beyond the authority provided by the covenant, including as interpreted by the Association. The trial court did not “apply” the hedge covenant as written and intended—the trial court modified the covenant in order to require no large, mature, native trees on or near a property line. The trial court went too far and erred as a matter of law and abused its discretion.

Respectfully submitted this 21st day of March, 2016.


KATHRYN C. LORING, WSBA # 37662
Attorney for Appellants

APPENDIX

Appendix A: Attached hereto are a handful of color copies of photographs specifically relied on herein, which were attached to the May 11, 2015, Declaration of Susan Keppler in Support of Defendants' Motion for Summary Judgment and the June 5, 2015, Reply Declaration of Susan Keppler in Support of Defendants' Motion for Summary Judgment.

No. 73832-1-I

IN THE COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

PAUL M. DWIGHT and DONNA J.
DETAMORE, husband and wife,
and JOHN W. ZIMMERMAN and
TRACY C. ZIMMERMAN,
husband and wife,

Respondents/Cross-
Appellants,

v.

TANYA J. KEPPLER-KNAUS, a
single woman, and RICHARD C.
KEPPLER and SUSAN G.
KEPPLER, husband and wife,

Appellants.

Island County
Superior Court
Cause No. 14-2-
00761-7

DECLARATION OF
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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 21st day of March 2016, in the manner indicated below, I caused delivery of copies of the following documents:

Appellants' Reply Brief and Response to Cross-Appeal

To:

Attorney for Respondents:

Catherine W. Smith
Valerie A. Villacin
1619 8th Avenue North
Seattle, WA 98109

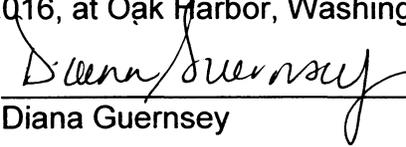
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Signed this 21st day of March 2016, at Oak Harbor, Washington.



Diana Guernsey