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COURT OF APPEALS
DIVISION II

07 JUN -7 PM 4: 16

STATE OF WASHINGTON
BY _____
DEPUTY

NO. 35301-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

GOLD CREEK UMBRELLA ASSOCIATION,
a Washington nonprofit corporation,

Appellant,

v.

GOLD CREEK NORTH LIMITED PARTNERSHIP, a Washington limited partnership; PAUL E. MILLER, an individual; and DEIDRA J. MILLER, an individual,

Respondents.

# BRIEF OF RESPONDENTS

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## I. INTRODUCTION

This appeal arises from a bench trial concerning two parcels of land. Plaintiffs/respondents Gold Creek North Limited Partnership, Paul E. Miller, and Deidra J. Miller (collectively, "the Millers") own "Gold Creek North." Defendant/appellant Gold Creek Umbrella Association (the "Umbrella Association") owns "Gold Creek South." The principal question in this case is whether the Millers, as owners of Gold Creek North, have an easement across Gold Creek South.

The exhibits entered into evidence by both parties establish as a matter of law that the Millers own an easement across Gold Creek South. Several documents establish the existence of this easement. In the mid-1970s, the Miller family, Edward, Juanita, Paul and Deidra, owned the entire Gold Creek property—both Gold Creek North and Gold Creek South. The Miller family agreed to sell Gold Creek South to Donald Huber, one of the predecessors in interest to the Umbrella Association. The agreements between the Miller family and Huber provided Gold Creek North (the

dominant estate) with an easement across Gold Creek South (the servient estate). The easement prescribed by these agreements was recorded on February 26, 1980 and has never been extinguished.

Despite the existence of this recorded easement, the Umbrella Association has resisted allowing the Millers to develop Gold Creek North. Having exhausted other attempts to resolve this matter, the Millers eventually filed the lawsuit at issue in this appeal. The trial court recognized that this case turns on the documents. Based on the undisputed documents, the trial court entered judgment in favor of the Millers.

This Court should affirm the trial court's judgment. This matter concerns the parties' property rights. The existence of those rights turns on the documents, and especially on recorded documents. The documents offered to the trial court by both parties confirm the existence of the easement. In light of the documentary evidence, the trial court did not err in granting judgment in favor of the Millers.

The arguments offered by the Umbrella Association do not

alter this analysis. The Umbrella Association attempts to muddy the issues by focusing on only one set of the documents, and in particular on a 1979 agreement between the Millers and Donald Huber. The Umbrella Association's arguments about the 1979 agreement are irrelevant: the existence of the easement at issue is also reflected in the 1980 Real Estate Contract between Huber and the Millers. This agreement was recorded, and every individual now included in the Umbrella Association purchased his or her property with actual or constructive notice of the 1980 agreement—and thus with notice of the easement.

In short, the documents establish as a matter of law that the Millers own an express easement across Gold Creek South—i.e., the property owned by the Umbrella Association. Given this undisputed documentary evidence, this Court should affirm the trial court's entry of judgment in favor of the Millers.

The Umbrella Association's procedural arguments are also without merit. First, the Umbrella Association acquiesced in the procedure that resulted in the trial court's entry of judgment in this

matter. The Umbrella Association moved for entry of judgment as a matter of law at the end of the Millers' case. The Umbrella Association recognized that this case turned on the documents—but it failed to recognize that the documents called for entry of judgment in favor of the Millers. When the trial court indicated that it had heard enough and was in a position to make a final ruling, the Umbrella Association did not object, attempt to call any witnesses, or make any offer of proof. It is telling that, on appeal, the Umbrella Association complains bitterly that it had no opportunity to put on its case, but it never says a word about the evidence that it would have offered to avoid entry of judgment in favor of the Millers.

Similarly, the Umbrella Association's argument about unadmitted exhibits is utterly lacking in merit. The Umbrella Association never identifies any problem with the allegedly unadmitted exhibits; it never makes any effort to show that any of these exhibits was unauthentic or inadmissible. Instead, it simply complains about the procedure. But that procedural argument is

without merit. First, the three exhibits at issue were effectively admitted by the trial court, regardless whether that admission was on the record. Second, none of the three exhibits is critical to this case. And third, the Umbrella Association itself offered two of the exhibits of which it now complains.

In short, the documentary evidence confirms that the trial court properly recognized the existence of an easement across Gold Creek South. This Court should affirm the trial court's judgment.

## II. STATEMENT OF THE CASE

### A. Factual Background

The relevant documentary history establishes that the Millers owned a large piece of property near the Narrows Bridge which they intended to develop in two phases. After selling the south piece of the property to be developed—the piece now owned by the Umbrella Association—they reserved an access easement so that the north piece, which lacked access to a public road—the piece retained by the Millers—could later be developed. This easement was recorded in 1980 and has never been abandoned,

extinguished or otherwise lost.

The timeline for this case is set out in the following table, which is described in further detail below:

| **Date** | **Action** |
|---|---|
| 1970s | Millers own both Gold Creek North and Gold Creek South |
| March 1, 1977 | Millers and Huber enter into option agreement for sale of Gold Creek to Huber |
| August 23, 1979 | Huber enters into Concomitant Agreement with City of Tacoma (Gold Creek South) |
| December 27, 1979 | Huber and Millers execute Gold Creek Parcel A Real Estate Purchase and Sale Agreement (Gold Creek South); "**As a material consideration to Seller, Buyer has agreed to grant Seller an unspecified and undefined easement for road and utility access....**" |
| December 27, 1979 | Huber and Millers execute Statutory Warranty Deed (Gold Creek South) |
| December 27, 1979 | Huber and Millers execute Gold Creek Easement Agreement for Buyer's Easement (benefiting Gold Creek South—i.e., the property now owned by the Umbrella Association and its individual members) |

| | |
|---|---|
| December 28, 1979 | Huber and Millers execute Real Estate Contract (Gold Creek South); **"Purchasers shall provide all access and utility easements to Sellers in accordance with Section 8 of the Gold Creek Parcel A Real Estate Purchase and Sale Agreement...."** |
| March 3, 1981 | Huber and Millers execute Amendment to Gold Creek Easement Agreement (correcting the legal description); **"[T]he terms and conditions of the Gold Creek Parcel A Real Estate Purchase and Sale Agreement...shall remain in full force and effect."** |
| August 21, 1985<br>October 2, 1985 | Millers and Citizen Federal execute Gold Creek Parcel A Stipulation |
| October 30, 1985 | Millers and Citizen Federal execute Statutory Warranty Deed |
| October 2, 1987 | Towne Collins deeds Umbrella property to Umbrella Association |

In this action, the Millers seek to enforce their easement across Gold Creek South. The documents confirm the existence of that easement.

1. Initial Development of the Millers' Property

The Millers own certain real property in Pierce County,

Washington commonly known as Gold Creek North. CP 2; RP I, 60:10-17. The Umbrella Association owns certain real property commonly known as Gold Creek Condominiums, Gold Pointe, and Goldmont (collectively, "Gold Creek South"). Gold Creek South lies just south of Gold Creek North. The Umbrella Association is composed of owners of condominium units in Gold Creek South. Gold Creek South includes approximately 173 condominium units. The Millers wish to build 62 premium homes on Gold Creek North, which is currently undeveloped. CP 64.

In the 1970s both Gold Creek South and Gold Creek North were owned by the Miller family, which included Edward, Juanita, Deidra and Paul. (Gold Creek North Limited Partnership, Deidra Miller, and Paul Miller – plaintiffs and respondents in this lawsuit – are successors in interest to the Miller family.) On March 1, 1977, the Millers entered into a purchase option with Donald Huber, which provided for Huber to purchase both Gold Creek South and Gold Creek North. CP 62. The option called for staged development, with Gold Creek South being purchased and

developed first. *Id.* Under the agreement, Huber could purchase Gold Creek North only after he had successfully developed Gold Creek South. *Id.*

2. The Purchase and Sale Agreement

To initiate the first stage of development, Huber requested that Gold Creek South be rezoned, which resulted in a Concomitant Agreement with the City of Tacoma dated August 23, 1979. CP 62. Following the rezone, Huber purchased Gold Creek South. On December 27, 1979, Huber and the Millers executed the Gold Creek Parcel A Real Estate Purchase and Sale Agreement ("Purchase and Sale Agreement"). CP 62; Plaintiffs' Ex. 3.

Section 8 of the Purchase and Sale Agreement provided the Millers with a "Sellers' Easement" over Gold Creek South for the purpose of developing Gold Creek North in the future.[1] The location of the Sellers' Easement was to be determined by mutual agreement of the Millers, Huber, and the City of Tacoma in

[1] The Seller's Easement set forth in the Purchase and Sale Agreement is referred to in a number of recorded documents, including the Real Estate Contract (Plaintiffs' Ex. 6) and the Amendment to Gold Creek Easement Agreement (Plaintiffs' Ex. 7).

conjunction with the Millers' application for preliminary plat approval for the development of Gold Creek North. CP 62. The Sellers' Easement was a necessary condition of the sale to Huber: the Millers would not have sold Gold Creek South without first obtaining an easement to access Gold Creek North. RP I, 52:22-53:4.

On December 27, 1979, Huber and the Millers executed a Statutory Warranty Deed for Phase I of the Gold Creek Condominiums.[2] Plaintiffs' Ex. 5. Additionally, the Millers provided Huber with a Buyer's Easement, as required under Section 4 of the Purchase and Sale Agreement, for access to Phase 1. The Gold Creek Easement Agreement was executed on December 27, 1979.[3] Plaintiffs' Ex. 4.

3. The Real Estate Contract

On December 28, 1979, the Millers and Huber entered into a Real Estate Contract related to the purchase of Gold Creek South

[2] This Deed was recorded on February 26, 1980. CP 63.
[3] The Gold Creek Easement Agreement was recorded on February 26, 1980. CP 63.

("Real Estate Contract"). Plaintiffs' Ex. 6. The Real Estate Contract required the purchaser, Huber, to provide all access and utility easements to the Millers in accordance with Section 8 of the Purchase and Sale Agreement:

> **Sellers' Easement. Purchasers shall provide all access and utility easements to Sellers in accordance with Section 8 of the Gold Creek Parcel A Real Estate Purchase and Sale Agreement by and between the parties dated December 22nd, 1979.**

The Real Estate Contract was duly and properly recorded on February 26, 1980, years before the appellant or any Gold Creek South resident took title to their property. CP 63. Consequently, the Millers had an easement at that time, and that easement has never been extinguished.

4. The "Buyer's Easement" and the Umbrella Declaration

Both the Statutory Warranty Deed for Phase I and the Gold Creek Easement Agreement were subsequently modified to adjust the legal descriptions. CP 63. On March 6, 1981, an Amendment to the Gold Creek Easement Agreement ("Amendment") was recorded. CP 63; Plaintiffs' Ex. 7. The Amendment states that,

"except for the modifications set forth in this Amendment, the terms and conditions of the [Purchase and Sale Agreement] by and between the parties hereto shall remain in full force and effect." Plaintiffs' Ex. 7.

On May 18, 1982, Huber executed the Gold Creek Umbrella Declaration and Covenants, Conditions, Restrictions, Easements and Reservations ("Umbrella Declaration").[4] The Umbrella Declaration provided future Gold Creek South residents with the means of governing their property.

Section 1.1.5 of the Umbrella Declaration defines "Declarant" as "Gold Creek Limited Partnership." Huber was the General Partner of Gold Creek Limited Partnership. RP I, 68:18-20. Under Section 16.4, titled "Reservation of Access and Utilities Easements Related to Declarant's Other Parcel," of the Umbrella Declaration, Huber reserved an access and utility easement for future access to Gold Creek North, on which Huber had secured a

[4] The Gold Creek Umbrella Declaration and Covenants, Conditions, Restrictions, Easements and Reservations were recorded on May 28, 1982.

purchase option. Under the terms of the Umbrella Declaration, this easement would expire if Huber failed to exercise it within five years from the date of the declaration. **Huber's easement rights under the Umbrella Declaration are separate and distinct from the Millers' easement, which was specifically identified as the Sellers' Easement in the Purchase and Sale Agreement and the Real Estate Contract.** Nothing in the Umbrella Declaration purports to modify—much less extinguish—the Millers' easement.

During construction of Phase I of the Gold Creek Condominiums, Huber filed for bankruptcy, and Citizens Federal Bank ("Citizens Federal") became successors in interest to Huber. RP I, 59:10-19. In July 1985 Citizens Federal requested a deed for the balance of the Gold Creek South parcel under the terms of the Real Estate Contract. CP 63. On August 6, 1985, Citizens Federal requested further information about the location of the Millers' easement. *Id.*

At the time, the Millers were not ready to proceed with the development of Gold Creek North. The Millers and Citizens

Federal agreed that the precise boundaries of the easement would be defined later; that agreement is reflected in the Gold Creek Parcel A Stipulation ("Stipulation").[5] Plaintiffs' Ex. 11. The Stipulation reaffirmed that the Millers owned an easement across Gold Creek South, as originally set forth in Section 8 of the Purchase and Sale Agreement. *Id.* The Stipulation was executed by the Millers on August 21, 1985, and by Citizens Federal on October 2, 1985. *Id.*

A Statutory Warranty Deed from the Millers to Citizens Federal was executed on October 30, 1985, after full execution of the Stipulation. Plaintiffs' Ex. 13. On November 5, 1985, the Stipulation, together with the Warranty Deed, were forwarded to Citizens Service Corporation, the escrow arm of Citizens Federal, along with instructions to record the Warranty Deed after recording the Stipulation. Citizens Service Corporation failed to record the Stipulation as instructed, but it was ultimately recorded on October

[5] The Millers did, however, identify the general location of the easement in correspondence with Citizens Federal in August 1985. Plaintiffs' Ex. 10A.

2, 1991, along with the original Purchase and Sale Agreement.[6] CP 64.

A Statutory Warranty Deed from Citizens Federal to Towne Collins was executed on October 24, 1985.[7] Execution and recording of this Deed precedes the Statutory Warranty Deed from the Millers to Citizens Federal.

Title to Gold Creek South was transferred from Towne Collins to the Umbrella Association by Quit Claim Deed recorded on October 2, 1987. Plaintiffs' Ex. 32.

### B. Procedural History

This case rests on the documents relating to the original sale of Gold Creek South to Huber. *See* RP II, 248:7-12. Following the Millers' application for a preliminary injunction to establish their easement rights, the trial court accelerated the trial on the merits of their express easement claim, which began on June 26,

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[6] The Stipulation was re-recorded on November 6, 1992.
[7] This Deed was recorded on October 29, 1985.

2006.[8] The parties submitted exhibit lists, and the trial court pre-admitted certain of the exhibits from both parties. RP I, 46-48.

At the end of the Millers' case, the Umbrella Association moved for judgment under CR 41(b)(3). RP III, 203. Despite the Umbrella Association's assertions to the contrary, the trial court informed the parties that it would be issuing "what amounts to almost a final decision by the Court, something that you can appeal or agree to." RP III, 248:24-249:3. Notwithstanding the court's comment, the Umbrella Association's counsel remained silent, never asking that the Umbrella Association be allowed to put on testimony or offer any additional evidence.

On August 28, 2006, the court issued its Order Denying Defendant's Motion to Dismiss and Granting Equitable Relief, finding that the Millers were entitled to an express easement over

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[8] The Millers' Complaint asserted other claims, including a claim for easement implied by necessity, based on the fact that the property cannot be reasonably accessed without an easement over Gold Creek South. Because the Millers prevailed on their express easement claim, it was not necessary for the trial court to reach the merits of the Millers' alternative claims. In the event this matter is remanded, however, the Millers would also be entitled to prevail at trial based on their alternative claims.

the Umbrella Association property. CP 739-745.

## III. ARGUMENT

### A. Standard of Review

The Umbrella Association does not identify the standard of review applicable to the issues on appeal. The Umbrella Association argues that, as a matter of law, the trial court erred in denying the Umbrella Association's motion to dismiss under CR 41(b)(3). This Court reviews such an order de novo and views the evidence in the light most favorable to the nonmoving party—in this case, the Millers. *See In re Dependency of H.S.,* 135 Wn. App. 223, 229, 144 P.3d 353 (2006) ("Because the determination was made pursuant to a CR 41(b)(3) motion, and was made as a matter of law, our review is de novo viewing the evidence in the light most favorable to the nonmoving party . . . .").

"It is a general rule of appellate practice that the judgment of the trial court will not be reversed when it can be sustained on any theory, although different from that indicated in the decision of the trial judge." *Sprague v. Sumitomo Forestry Co.,* 104 Wn.2d

751, 758, 709 P.2d 1200 (1985); *see also State v. Norlin*, 134 Wn.2d 570, 582, 951 P.2d 1131 (1998) (same).

Because this Court must review the question *de novo,* the question is not whether this Court agrees with the particular analysis adopted by the trial court. Instead, the question on appeal is whether the *judgment* entered by the trial court was in error. As set out below, the undisputed documentary evidence in this case compels the conclusion that the Millers have an express easement across Gold Creek South. In light of that evidence, this Court should conclude that the trial court did not err in granting judgment in favor of the Millers. The trial court's judgment should therefore be affirmed.

### B. The Millers Have Express Easement Rights Pursuant to the Real Estate Contract

Easements are interests in land. *Bakke v. Columbia Valley Lumber Co.*, 49 Wn.2d 165, 170, 298 P.2d 849 (1956) (citation omitted). Thus, express easements must comply with the statute of frauds, which requires that "[e]very conveyance of real estate, or

any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed...." *Berg v. Ting*, 125 Wn.2d 544, 551, 886 P.2d 564 (1995) (quoting RCW 64.04.010). Deeds must "be in writing, signed by the party to be bound thereby, and acknowledged...." RCW 64.04.020.

No particular words are necessary to constitute a grant of easement. "[A]ny words which clearly show the intention to give an easement...are sufficient to effect that purpose, providing the language is sufficiently definite and certain in its terms." *Beebe v. Swerda*, 58 Wn. App. 375, 379, 793 P.2d 442 (1990) (citations omitted). The decisive factor in determining whether an easement exists is whether the parties intended to create it. *See Kemery v. Mylroie*, 8 Wn. App. 344, 346, 506 P.2d 319 (1973) ("The intentions of the parties to a contract are paramount in the absence of some overriding public policy which would prohibit creation of the entity intended."); *see also Butler v. Craft Eng. Constr. Co.,* 67 Wn. App. 684, 698, 843 P.2d 1071 (1992) ("A court's primary job in interpreting a restrictive covenant or easement is to ascertain the

intent of the parties."). If the intent of the parties is unclear from the plain language of the grant of easement:

> [E]xtrinsic evidence is allowed to show the intentions of the original parties, the circumstances of the property when the easement was conveyed, and the practical interpretation given the parties' prior conduct or admissions.

*Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

The Millers have express easement rights under RCW 64.04.010 by virtue of the Real Estate Contract and its express reference to the Purchase and Sale Agreement.

Section 8 of the Purchase and Sale Agreement states in unambiguous terms that the Millers have an easement across Gold Creek South:

> As a material consideration to [the Millers], [Huber] has agreed to grant [the Millers] an unspecified and undefined easement for road and utility access down and across to the [Millers'] properties located adjacent to the south and north sides of the sale property and abutting the Burlington Northern Railroad right-of-way on the west.

CP 62; Plaintiffs' Ex. 3.

The parties' subsequent Real Estate Contract meets the requirements of RCW 64.04.020: it is in writing; it is signed by the parties; and it is acknowledged. *See* Plaintiffs' Ex. 6. The Real Estate Contract specifies that Huber would provide all access and utility easements to the Millers in accordance with Section 8 of the Purchase and Sale Agreement. *Id.* That language suffices to provide the Millers with an easement.

The fact that the Real Estate Contract does not establish the actual location of the easement is irrelevant:[9]

> A deed [of easement] is not required to establish the actual location of an easement, but is required to convey an easement which encumbrances a specific servient estate.

*Berg*, 125 Wn.2d at 551 (citation omitted); *see also Sunnyside*, 149 Wn.2d at 880 (noting that an "easement defined in general terms, without a definite location or description, is called a floating or

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[9] The easement was to be determined by mutual agreement of the Millers, Huber (or subsequent buyers) and the City of Tacoma in conjunction with the Millers' application process for preliminary plat approval for the development of Gold Creek North. CP 62.

roving easement"). According to *Berg*, it is enough that "[t]he servient estate [is] sufficiently described." *Id.* at 551.

The Real Estate Contract explicitly describes the servient estate, Gold Creek South, in the attached legal description. Moreover, the Real Estate Contract specifically provides for an "access and utility easement" and refers to Section 8 of the Purchase and Sale Agreement, which further defines the scope of the Millers' easement. CP 62; Plaintiffs' Exs. 3, 6. The reference in the Real Estate Contract, together with the reference to the Purchase and Sale Agreement, satisfies the statute of frauds. *See Bigelow v. Mood*, 56 Wn.2d 340, 341, 353 P.2d 429 (1960) ("[I]n order to comply with the statute of frauds, a contract or deed for the conveyance of land must contain a description of the land sufficiently definite to locate it without recourse to oral testimony, or else it must contain a reference to another instrument which does contain a sufficient description.") (citations omitted).

The Purchase and Sale Agreement and the Real Estate Contract explicitly create an express easement over Gold Creek

South for the benefit of the Millers as owners of the dominant estate. Despite the Umbrella Association's denial of the Millers' easement rights, the Umbrella Association has never produced a shred of evidence showing that the Millers and Huber did *not* intend to create an express easement in 1979. Thus, the Millers have express easement rights over Gold Creek South. Further, that easement is effective against all subsequent purchasers—including the Umbrella Association and all individual members of that association. *See, e.g., Bank of America, N.A. v. Wells Fargo, N.A.*, 126 Wn. App. 710, 714, 109 P.3d 863 (2005) ("The purpose of the [recording] statute is to make a deed recorded first in time superior to any other conveyance of the property, unless a mortgagee has actual knowledge of an unrecorded transfer.").

Because the Real Estate Contract and the Purchase and Sale Agreement created an easement over Gold Creek South, and because that easement has not been extinguished, the Millers have the right to enjoy that easement. In light of that undisputed documentary evidence, this Court should affirm the judgment of

the trial court.

### C. The Umbrella Declaration Does Not Extinguish the Millers' Easement Rights

The Umbrella Association has argued that the Millers extinguished their express easement rights by signing the Umbrella Declaration. That argument, too, is without merit. Once created, an express easement cannot be extinguished by implication. The Umbrella Declaration nowhere refers to the Millers' easement rights. Because the Umbrella Declaration does not expressly extinguish the Millers' easement, that easement still exists, and the Millers are entitled to its use and enjoyment.

Express easements may be extinguished in only one of three ways: release, abandonment, or adverse possession. *See* 17 Stoebuck & Weaver, Wash. Prac., Real Estate: Property Law § 2.12 (2d. ed. 2004). To **release** an express easement, the easement holder must "execute a proper instrument releasing it to the grantor or his successor." *Id.* Alternatively, "**abandonment** requires the confluence of two elements, a physical relinquishment of the thing

by its owner, with an intent to give up ownership." *Id.*(emphasis added). Finally, **adverse possession** requires open and notorious use, adverse to the title holder, that is continuous and uninterrupted for the ten-year statutory period. *See* RCW 4.16.020.

The Umbrella Association has not produced any evidence demonstrating that the Millers released their easement, abandoned it, or lost it to adverse possession. Moreover, courts will not infer that an easement has been either extinguished or abandoned absent express and unmistakable conduct aimed at achieving that goal. *See* 17 Stoebuck & Weaver § 2.12.

The Umbrella Association rests its argument on Article 24 of the Umbrella Declaration, which provides as follows:

> For and in consideration of Ten Dollars ($10.00) and other valuable consideration, receipt and sufficiency of which are hereby acknowledged, Edward P. Miller and Juanita J. Miller, husband and wife, and Deidra J. Miller, as her separate estate, and Paul E. Miller, as his separate estate, each of whom has a real estate contract vendor's interest in portions of the Entire Property, for each of themselves, their heirs, successors, and assigns, hereby joins with Declarant in this

> Umbrella Declaration and hereby subject to this Umbrella Declaration their or any of their interest or interests in that Contract of Sale recorded February 26, 1980 . . . and their or any of their interest or interests in all or any of the Entire Property.

The Umbrella Declaration does not satisfy the requirements of release or abandonment. The declaration fails even to mention the Miller's easement, and nowhere does it state that the Millers agreed to give up their easement over Gold Creek South. Instead, the Umbrella Declaration does nothing more than outline the official governance structure of the proposed Gold Creek Condominiums.

At most, the phrase "subject to" means that the Millers' easement will not contravene any relevant provisions contained in the Umbrella Declaration. The Millers' express easement rights under the Real Estate Contract and the Purchase and Sale Agreement are fully consistent with the purpose of the Umbrella Declaration. And even if the Millers' easement rights were inconsistent with the Umbrella Declaration (and they are not),

those rights would still trump the Umbrella Declaration for the simple reason that the Umbrella Declaration is silent regarding those rights.[10]

The Millers' actions following execution of the Umbrella Declaration confirm that the Millers never intended for the Umbrella Declaration to extinguish their express easement rights. For example, just four years after signing the Umbrella Declaration, Leisure Development Company, owned by plaintiff Paul Miller, filed a preliminary plat map for development on Gold Creek North. The plat map depicted the Millers' proposed access point over the Gold Creek driveway. RP I, 90:15-91:7. Clearly, the Millers did not intend for the Umbrella Declaration to extinguish their express easement rights.

The Umbrella Association has also argued that the Millers were required to comply with Section 16.4 of the Umbrella

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[10] The Umbrella Association argues at length that the Millers were required to reserve their easement rights in the Umbrella Declaration. But only the Declarant, in this case Huber, is required to expressly reserve in the Declaration its development or accompanying easement rights over the common property. *See* 18 Stoebuck & Weaver, Wash. Prac., Real Estate: Transactions § 12.4 (2d ed. 2004).

Declaration in order to preserve their easement rights. Section 16.4 relates only to the Declarant's (Huber) easement, not the Millers' easement established in the Real Estate Contract:[11]

> Declarant shall, as soon as reasonably possible, and in any event within ten years of the recording of this Declaration, establish of record, the location of all easements and related improvements arising out of this Section 16.

The "Declarant" was Huber—not the Millers. RP I, 68:15-20. Consequently, this section of the Umbrella Declaration has absolutely nothing to say about the Miller's easement.

Even if Section 16.4 had anything to do with the Millers' easement (and it does not), the Millers fulfilled the conditions of that section. **First,** the Millers identified the location of the easement within 10 years by virtue of correspondence with Citizens Federal (the owner, at the time, of Gold Creek South) and the Gold Creek Parcel A Stipulation dated August 23, 1985.

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[11] Section 1.1.5 of the Umbrella Declaration defines "Declarant" as "Gold Creek Limited Partnership." Huber was the General Partner of Gold Creek Limited Partnership. RP I, 68:15-20.

**Second,** the Millers recorded the Stipulation on October 24, 1991, well within the 10-year time frame. **Third and finally**, the Millers already had title to Gold Creek North, precluding the need for the Millers to acquire title to the property.

In short, even if this Court accepts the Umbrella Association's primary (and specious) argument—that the Millers were subject to Section 16.4 of the Umbrella Declaration—the Millers met the necessary requirements to establish an express easement over Gold Creek South. For this reason alone, the trial court's judgment should be affirmed.

### D. The Umbrella Association Is Not Entitled to Take Advantage of the Defense of Comparative Innocence

The Umbrella Association has argued that it is entitled to take advantage of the rule of comparative innocence, which would (if permitted) prevent the Millers from enforcing their easement rights against the Umbrella Association. That argument, too, is without merit. Because the easement was referenced in recorded documents, none of the purchasers of the condominiums qualifies

as an "innocent purchaser."

The rule of comparative innocence holds as follows:

> [W]here one of two innocent parties must suffer from the wrongful act of another, the loss should fall on the one who created the circumstances which enabled the third party to perpetrate the wrong.

*Bergin v. Thomas*, 30 Wn. App. 967, 972, 638 P.2d 621 (1981).

The Washington Supreme Court applied the rule of comparative innocence in *Paganelli v. Swendsen*, 50 Wn.2d 304, 311 P.2d 676 (1957). In *Paganelli*, the plaintiffs filed suit to quiet title to a piece of property. *Id.* at 306. The plaintiffs originally acquired the property at issue from defendant Swendsen's father, but failed to record their deed in a timely manner. *Id.* Following his father's death, Swendsen sold the property to a third party, co-defendant Hostetler. *Id.* at 307. The court concluded that because the plaintiffs were negligent in failing to record the deed reflecting their interest in the property, the plaintiffs, rather than an innocent third party, "should bear the loss." *Id.* at 311.

In contrast to *Paganelli*, only two parties are involved in

this dispute: the Millers and the Umbrella Association. The Umbrella Association has argued that the Millers' failure to record the Purchase and Sale Agreement until 1991 prevents the Millers from enforcing their easement rights against the Umbrella Association under the comparative innocence rule. But the issue of the recording of the Purchase and Sale Agreement is a herring of the reddest hue, apparently intended to draw the Court's attention away from the undisputed fact that **the Millers recorded the Real Estate Contract in 1980.** Plaintiffs' Ex. 6; CP 63. The 1980 recording of the Real Estate Contract provided each and every member of the Umbrella Association with record notice of the Millers' express easement. Consequently, the Umbrella Association is not a bona fide purchaser, in contrast with the innocent third party in *Paganelli*. Thus, the rule of comparative innocence does not apply to defeat the Millers' easement.

### E. <u>The Merger Rule Does Not Defeat the Millers' Express Easement Rights</u>

The Umbrella Association also argues that the 1985

Statutory Warranty Deed from the Millers to Citizens Federal extinguished the Millers' easement rights under the merger rule. Although Washington courts have generally recognized the merger rule, "[a]n exception to the general rule exists for stipulations in the contract, which are not contained in, not performed by, and not inconsistent with the deed and which are held to be collateral to or independent of the obligation to convey." *Barnhart v. Gold Run, Inc.*, 68 Wn. App. 417, 423, 843 P.2d 545 (1993) (citation omitted); *see also People's Nat'l Bank of Washington v. National Bank of Commerce of Seattle*, 69 Wn.2d 682, 689, 420 P.2d 208 (1966) ("There are exceptions to the merger rule, when the terms of the contract of sale of real estate provide that the contract is not fully performed by the delivery of the deed.").

> In all cases then, where there are stipulations in a preliminary contract for the sale of land, of which the conveyance itself is not a performance, the true question must be whether the parties have intentionally surrendered those stipulations. The evidence of that intention may exist in or out of the deed. . . . [I]n the absence of all proof there is no presumption that either party, in giving

> or accepting a conveyance, intends to give up the benefit of covenants of which the conveyance is not a performance or satisfaction.

*Black v. Evergreen Land Developers, Inc.*, 75 Wn.2d 241, 248-49, 450 P.2d 470 (1969) (citation omitted).

In *Black*, the plaintiffs sought to enforce an oral covenant preserving the view of the east channel of Lake Washington from their property. *Id.* at 242-43. The court concluded that the oral covenant was not inconsistent with the warranty deed and further noted that there was no evidence of any intention on the part of either party to surrender the covenant by merger. *Id.* at 249. Thus, the merger rule did not apply to defeat the covenant. *Id.*

Here, there is no evidence that the Millers or Citizens Federal intended to extinguish the Millers' easement rights by virtue of the merger rule. In fact, the evidence is entirely to the contrary. In conjunction with Citizens Federal's acquisition of the property, the Millers and Citizens Federal prepared the Gold Creek Parcel A Stipulation ("Stipulation"), which reaffirmed the Millers'

easement rights as originally set forth in Section 8 of the Purchase and Sale Agreement. Plaintiffs' Ex. 11. The Stipulation was executed by the Millers on August 21, 1985, and by Citizens Federal on October 2, 1985. CP 64. Thereafter, on October 30, 1985, the Millers executed a Statutory Warranty Deed for the balance of the Gold Creek South property. Plaintiffs' Ex. 13. The executed Stipulation demonstrates that the parties did not intend for the merger rule to extinguish the Millers' easement rights.

Furthermore, the Real Estate Contract and the Stipulation contemplate further action on the part of Citizens Federal and the Millers to establish the Millers' easement pursuant to the terms of the Purchase and Sale Agreement. "Under such circumstances, there is no presumption that either party, in giving or accepting the deed, waives the performance of the remaining terms of the contract." *Peoples Nat'l Bank*, 69 Wn.2d at 68.

In summary, there is no evidence that the Millers intended to extinguish their easement rights. Instead, the undisputed evidence confirms that the Millers intended to retain and enforce

those easement rights. In light of that undisputed evidence, the trial court did not err in entering judgment in favor of the Millers.

### F. The Umbrella Association Acquiesced—and Even Encouraged—the Court to Rule Without Hearing Any Evidence from the Umbrella Association; Consequently, the Umbrella Association's Procedural Complaints Should Be Rejected

This matter was tried to the bench. When the trial court judge stated that he had heard enough evidence and was ready to recess and issue his final ruling, counsel for the Umbrella Association made no objection. *See* RP III, 247-50. That failure constituted a waiver of any objection to the trial court's proceeding.

The Washington Supreme Court has long recognized that failure to object to a trial court procedure may result in a waiver of the objection:

> It is the duty of counsel for all parties to promptly call the court's attention to any error in the trial. Counsel may not secretly nurture an error, speculate upon a favorable verdict, and then, in the event it is adverse,

> bring forth the error as a life preserver on a motion for a new trial.

*Agranoff v. Morton*, 54 Wn.2d 341, 345, 340 P.2d 811 (1959). As the *Agranoff* court further explained: "[A] party may not remain silent and take his chance on a verdict and then, if it is adverse, complain of some inadequacy which could have been quite easily corrected." *Id.*

The Umbrella Association may complain that the trial court violated its constitutional rights to due process, but a party may waive even those rights by sitting on its hands:

> Even a due process right may be waived. . . . Were the rule otherwise a litigant, notwithstanding his knowledge of the disqualifying factor, could speculate on the successful outcome of the case and then, having put the court, counsel and the parties to the trouble and expense of the trial, treat any judgment entered as subject to successful attack.

*Brauhn v. Brauhn,* 10 Wn. App. 592, 597–98, 518 P.2d 1089 (1974) (citations omitted).

In this case, trial counsel for the Umbrella Association

elected to remain silent when the trial court announced that it was ready to rule. Having remained silent at a time when the alleged problem could have been cured, the Umbrella Association cannot now complain about its own failure to raise a timely objection and request that the trial court hear its evidence.

The fact that the trial court intended to issue a dispositive ruling is confirmed by Judge Cuthbertson's comments on the record at the end of the case:

> . . . I indicated to counsel at side bar that there are some legal cases, some legal precedents I need to review and study, facts that I need to summarize, and then I need to apply the facts and the law and in that way decide whether or not the plaintiffs have met their burden. I think the motion clearly could be dispositive depending on how I rule on the motion and whether or not we need to go forward with any additional testimony or not. I want to make sure that in ruling on the motion that any findings of fact and conclusions of law that the Court reaches in support of the decision on the motion are really well thought out in the event that either side wants to appeal that ruling. And so the other thing that I'm going to mention that I mentioned at side bar is that this is – in addition to Mr. Miller's testimony, **this is**

> **largely a document-driven case an under other circumstances may have been a case that could have been brought on Summary Judgment.** I think it was actually helpful in this case to hear testimony from Mr. Miller at least, to view the property and to have a formal hearing like we've had with exhibits and other things; it's been helpful to me. I think that the way we've proceeded in deciding this case has been good. . . . So what we are going to do is we're going to recess, and I'll give notice to counsel . . . about when I have a decision on the motion. And what I anticipate is that it may even be a couple of weeks but hopefully **what you have in a couple of weeks is what amounts to almost a final decision by the Court, something that you can appeal or agree to.**
>
> . . . **I feel at this point I kind of heard what I need to hear to start to rule on this case.**

RP III, 247:19 – 250:6 (emphasis added).

The Court's comments signal unambiguously that the judge had heard the evidence that he believed to be dispositive and intended to present the parties with an appealable order in a document-driven case. Given all of those signals, it behooved counsel for the Umbrella Association to inform the trial court if it

had any concerns about the court entering an appealable order at that time. But the association's counsel acquiesced in the trial court's announced approach. When the judge then asked, "Anything else at his time?" counsel for the Umbrella Association responded simply by thanking the Court. RP III, 250:9, 13. Having failed to speak up at that time, when the trial court could have effectively addressed the issue, the Umbrella Association waived its arguments on this issue.[12]

The Umbrella Association demonstrates that its argument is empty by failing to explain how the testimony that it might have offered could have prevented entry of judgment in favor of the Millers.[13] It is significant that this case concerns rights in land. The

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[12] In this regard, it is worth noting that the Umbrella Association did not move in the trial court for reconsideration or a new trial. The clear implication is that it knew that this case turns on the documents and that the trial court had before it all of the documents necessary for determination of the issues at trial.

[13] The Umbrella Association has stated that it intended to present the testimony of Russell Tousley, one of the authors of the 1982 Umbrella Declaration. However, when interviewed, Mr. Tousley stated that he had no specific memory of drafting the Umbrella Declaration. In addition, Mr. Tousley never spoke to the Millers in connection with the negotiation, meaning or execution of the document. Therefore, Mr.

Millers' easement rights can be established or extinguished only through written documents—not through oral evidence. *See* Section III. C., *supra*. The Umbrella Association complains loudly that it was denied an opportunity to offer any evidence that might have contradicted the documents offered in evidence by both parties—but it never even suggests how that evidence could have added to or varied the documents on which this case turns. Its complaint is purely procedural.

In short, the Millers were entitled to judgment as a matter of law against the Umbrella Association. To avoid entry of judgment as a matter of law, the Umbrella Association needed to do more than simply complain that it did not have a chance to present its case. Instead, it needed to show why its lost opportunity was so important. It failed to do so. In light of the Umbrella Association's failure to identify the merest shred of evidence that

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Tousley could not have presented any factual testimony regarding the Umbrella Declaration. CP 629-631. Further, as explained above, the Umbrella Declaration is irrelevant: the Millers' easement rights were established by the Real Estate Contract; the Umbrella Declaration does not even mention the Millers' easement rights and thus cannot have affected those rights.

would prevent entry of judgment against it, judgment against the Umbrella Association should be affirmed.

### G. The Trial Court Did Not Err in Relying on Exhibits Whose Authenticity Is Undisputed

The Umbrella Association's complaint that the trial court relied on exhibits not formally admitted is also without merit. "[M]any cases have held that evidence treated by the trial court and the parties as if it had been admitted is, for all practical purposes, admitted." *Travelers Indem. Co. of Rhode Island v. Starkey,* 157 S.W.3d 899, 904 (Tex. App. 2005).

In this case, there is no dispute as to the authenticity or admissibility of any of the three exhibits at issue. In fact, the Umbrella Association itself offered two of the challenged exhibits. *See* CP 758. The trial court's failure to mark the three exhibits as admitted does not alter the fact that the trial court obviously admitted the exhibits. The Umbrella Association has not shown that any of these exhibits were inadmissible. Under these circumstances, reversal would constitute a triumph of form over

function. Neither the courts' nor the parties' resources should be wasted in such an exercise.

### H. The Umbrella Association Has Not Demonstrated Any Bias on the Part of the Trial Court

It is telling that the Umbrella Association has requested that, on remand, this matter be assigned to a different judge. The Umbrella Association complains that Judge Cuthbertson is biased against it—but the only evidence offered by the Umbrella Association is the fact that Judge Cuthbertson ruled against it. The Umbrella Association appears to suggest that our trial court judges are creatures of instinct, unable to apply the law neutrally and instead respond instinctively to perceived slights to their intelligence.

The mere fact that a judge has ruled against a litigant does not establish that the judge was biased against the litigant. Instead, the disappointed litigant must establish must establish some alternate, pre-existing bias on the part of the judge. *See Lunsford v. Waldrip*, 6 Wn. App. 426, 429, 493 P.2d 789 (1972). The Umbrella

Association has failed to offer any such evidence. Instead, it has complained only that the trial court, having heard the evidence offered by plaintiff and implicitly agreed to by the Umbrella Association, ruled against it.

If the Umbrella Association's proposed rule were the standard, then every prevailing appellant would be entitled to have a different judge on remand. Because that is not the rule, and because the Umbrella Association has not offered any explanation other than its current disappointment, its request should be rejected.

Judge Cuthbertson is familiar with the prior testimony in this matter. The parties should not be put to the entirely unnecessary expense of presenting the Millers' testimony to another judge. Thus, should this matter be remanded to the trial court (and it should not), then it should be referred to the same judge, who will be able to render a decision after having heard the purely hypothetical evidence that the Umbrella Association may offer in support of its defense.

In this regard, the Millers note further that, even if this Court were to conclude that the Millers do not have an express easement, this matter would not be at an end: the Millers would then be entitled to have the trial court rule on their alternative argument that they have an easement by necessity. That intensely factual question would have to be decided in the first instance by the trial court.

### I. The Millers Are Entitled to Attorneys' Fees and Costs on Appeal

Two of the documents at issue in this matter contain valid and enforceable attorneys' fees provisions. *See* Plaintiffs' Ex. 3; Plaintiffs' Ex. 8. Under RAP 18.1, the Millers should be awarded their attorneys' fees and costs.

## IV. CONCLUSION

The undisputed evidence in this case shows that the Millers obtained an express easement under the terms of the 1980 Real Estate Contract. That contract was recorded, and all of the members of the Umbrella Association were on actual or

constructive notice of the existence of the easement. That easement has never been extinguished. The Millers are entitled to enforce that easement.

The Umbrella Association has failed to identify a shred of evidence that would preclude recognition of the Millers' easement rights. The Umbrella Association attempts to direct the Court's attention away from the relevant documents and a transparently irrelevant argument based on the Umbrella Declaration. And even if that argument were accepted, the Millers met their (nonexistent) obligations under the terms of that declaration.

In short, the undisputed evidence demonstrates that the Millers have an easement across Gold Creek South. That easement has never been extinguished. This Court should therefore affirm the trial court's judgment in favor of the Millers.

Even if the Court does remand this matter for further consideration, it should nevertheless reject the Umbrella Association's request that the matter be referred to a different judge.

DATED this 7th day of June, 2007.

RIDDELL WILLIAMS P.S.

By: _____

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| GOLD CREEK NORTH LIMITED PARTNERSHIP; PAUL E. MILLER, an individual; and DEIDRA J. MILLER, an individual,<br>Plaintiffs-Respondents,<br><br>v.<br><br>GOLD CREEK UMBRELLA ASSOCIATION, a Washington nonprofit corporation,<br>Defendant-Appellant. | NO. 35301-6-II<br><br>DECLARATION OF SERVICE |

I, Donna Hammonds, declare as follows:

1. I am over 18 years of age and a U.S. citizen. I am employed as a legal secretary by the law firm of Riddell Williams P.S.

2. On June 7, 2007, I caused to be delivered, via the method listed below true and accurate copies of the following documents:

A. Brief Of Respondents; and

ORIGINAL

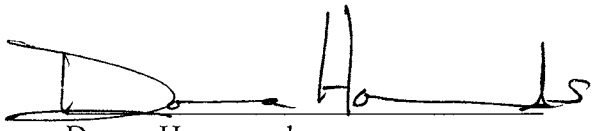
B. This Declaration of Service

on the following parties:

| | |
|---|---|
| Robert G. Casey<br>Eisenhower & Carlson, PLLC<br>1200 Wells Fargo Plaza<br>1201 Pacific Avenue<br>Tacoma, WA 98402-4395<br>Fax: 253-272-5732 | ☒ U.S. Mail<br>☒ By Facsimile<br>☐ By Messenger<br>☐ By Federal Express<br>☒ By Email @<br>RCasey@Eisenhowerlaw.com |

I declare under penalty of perjury of the laws of the state of Washington, that the foregoing is true and correct.

Executed this 7th day of June, 2006



Donna Hammonds

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