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I. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR # 1: The trial court erred by failing to grant Plaintiffs' motion for summary judgment.

ASSIGNMENT OF ERROR # 2: The trial court erred by granting Defendant's motion for summary judgment.

ASSIGNMENT OF ERROR # 3: The trial court erred by granting monetary judgment to Defendant against Plaintiff.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The sole issue pertaining to the Assignments of Error Nos. 1 through 3 is: Does Defendant/Appellee, Driftwood Key Club, Inc. (hereinafter "DKC") have the legal authority to assess dues and assessments against the persons or properties of Plaintiffs/Appellants, Feola, Willis and Smith when there are no covenants on the properties that grant to the DKC such authority?

ANSWER: No.

III. STATEMENT OF THE CASE

This case involves an appeal from a summary judgment by the Kitsap County Superior Court providing declaratory judgment regarding the right of Defendant, Driftwood Key Club, Inc (hereinafter referred to as “DKC”), to collect dues and enforce liens against real property owned by the Plaintiffs, Michael R. Feola and Sharon L. Feola (hereinafter collectively referred to as the “Feolas”), husband and wife; George Willis (hereinafter referred to as “Willis”), a single person; and Linda C. Smith (hereinafter referred to as “Smith”), a single person. The appeal also contests the Court’s grant of monetary judgment to DKC against Feola, Willis and Smith. The real property owned by Feola, Willis and Smith is located in Hansville, Washington in the north end of Kitsap County.

A. The Feolas

The Michael and Sharon Feola purchased Lot 51 of the Eighth Addition to Driftwood Key in Hansville on February 3, 1998. *CP 112*. Pursuant to the deed, the property was subject to the covenants, conditions and restrictions contained in the following instruments: 852358 (*CP 20-21*), 8806220095 (*CP 274*), 8811020072 (re-recording of 8806220095)(*CP 274*) and 9401120022 (*CP 291-294*). The covenants are essentially architectural controls for the neighborhood, and each

subdivision ("Addition") has its own covenants, the "then owners" of which may "change in whole or in part". *CP 20, 21, 44.*

The only provision which provides for the collection of dues is contained in Covenant 16 which provides:

"If the parties hereto, or any of them or their heirs, or assigns, shall violate or attempt to violate any of the covenants herein, it shall be lawful for any other person or persons owning real property situated in said sub-division to prosecute any proceedings at law or in equity against person or persons violating or attempting to violate any such covenants and to prevent him or them from so doing or to recover damages or other dues for such violation."
CP 21.

The same covenants, conditions and restrictions were noted on Schedule B of their title report. *CP 123.* At the time of purchase of their residence and pursuant to the HUD-1 presented to them at closing, the Feolas reimbursed the seller for dues of \$28.40 the seller had paid to DKC. *CP 127.* They did also pay dues under protest over the years to DKC.

The Feolas sued the DKC in February of 2006 in Kitsap County District Court, Small Claims Division, under Cause No. Y6-890. *CP 163-165.* The Feolas again sued the DKC in August of 2006 in the same Court under Cause No. Y6-3674. *CP 169.* The Feolas once again sued the DKC in February of 2007 in the same Court under Cause No. Y7-684. *CP 171-173.* The DKC sued the Feolas in the same Court in March of 2007 under Cause No. Y7-3016. *CP 177-187.* Although the Feolas did not prevail in

any of these lawsuits, the Honorable Stephen J. Holman, stated as part of his decision in Cause # Y7-684:

“I think if you want to bring an equitable action in Superior Court, to raise your issues there and have some judge rule, taking into account everything that you have said on the question of whether or not you are...should be held to be a member of this association, I think you are free to do that. I don’t think a judge is going to look to small claims court and say oh no, I can’t, I can’t make that sort of a ruling. Steve Holman in small claims court has already... I don’t carry any precedential weight in Superior Court.”
CP 194.

The Feolas researched their chain of title and found the original deed from one of the developers of the Driftwood Key area to the original purchaser of their lot. *CP 281.* This deed contains no reference to the heretofore recited covenants.

On October 10, 2005, DKC filed a claim of lien against the Feola property. *CP 16-18.* The Feolas paid the claim and a satisfaction of lien was recorded on December 20, 2006. *CP 19.*

B. Willis

George Willis purchased Lot 25 of the Eighth Addition to Driftwood Key on December 26, 2002. *CP 139, 140.* Pursuant to the deed, the property was subject to the covenants, conditions and restrictions contained in the following instruments: 852358 (*CP 20-21*), 8806220095 (*CP 274*) and 9401120022 (*CP 291-294*). The same covenants, conditions and restrictions were noted on Schedule B of his title report. *CP 147.* At

the time of closing of the purchase of his home, Willis reimbursed the seller for dues that the seller had paid to the DKC. *CP 131-132*. The DKC recorded a claim of lien against the Willis property on December 18, 2007. *CP 38-40*. This claim of lien still clouds the title to the Willis property.

C. Smith

Linda Smith purchased Lot 69 Fifth Addition to Driftwood Key on November 16, 1989. *CP 152*. Smith's property is in the "Fifth Addition to Driftwood Key" as opposed to the Feola and Willis properties in the "Eighth Addition to Driftwood Key". Pursuant to the deed, the property was subject to the covenants, conditions and restrictions contained in the following instruments: 776050 (not filed by either Plaintiff or Defendant, but noted as the plat record for the plat called "Driftwood Key" in *CP 25, 27*) and 8811020072 (re-recording of 8806220095)(*CP 274*). The Smith plat is not situated within the bounds of plat 776050 named Driftwood Key. The deed also recited: "SUBJECT TO: LIABILITY FOR ASSESSMENTS LEVIED BY DRIFTWOOD KEY CLUB..." *CP 152*. The covenants, conditions and restrictions under 776050 and 8811020072 were noted on Schedule B of her title report (*CP 157-158*). At the time of closing of the purchase of her home, Smith also reimbursed the seller for dues the seller had paid to DKC. *CP 160*.

The original deed from one of the developers, Park Development Co, Inc. to the original purchasers of the lot now owned by Smith, contains no mention of the covenants that now constrain the Smith property, nor does it mention the DKC. *CP 333*.

D. Driftwood Key Club

The DKC is a Washington non-profit corporation formed in 1962 by filing articles of incorporation with the Secretary of State. *CP 93*. In addition to the Articles, DKC has By-Laws. *CP 258-272*.

The DKC Articles of Incorporation, Paragraph 20, contain a jurisdictional statement with a legal description describing the property over which the DKC claims alleged jurisdiction. *CP 97-98*. A surveyor prepared a graphic description of the area this legal description encompassed at Plaintiffs' request. *CP 305-307*. Because of the poor quality of reproducing the shading on this illustration, a hopefully better quality representation is included in the appendix to this brief.

Defendant also submitted the legal description to a surveyor who produced their own graphic description. *CP 295-301*. Although the surveyors have some disagreement as to the boundary lines of the legal description, both surveyors agree that the Feola and Willis properties lie within the bounds of the legal description. It is agreed that at least 3 subdivisions listed in the Notice to Members clearly lie outside the bounds

of the description. They also both agree that the Smith property lies outside the bounds of the legal description.

On April 1, 2008, DKC filed a “Notice to Members of Driftwood Key Club of Existence of Corporate Documents” *CP 25-35*. It is interesting to note that, according to this document, there are approximately 15 different plats that comprise the Driftwood Key neighborhood and each plat is subject to its own recorded covenants. There is also commercial property that is located within the Driftwood Key subdivisions, in the Sixth Addition to Driftwood Key. *CP 32*. Per the 1981 published bylaws, “Ownership of a tract at Driftwood Key is not a condition precedent to membership.” (*CP 266-267*).

DKC presented no evidence to the trial court that membership in DKC would enhance the property values of Plaintiffs.

E. Procedural History

This case was initiated by Plaintiffs Feola, Willis and Smith by filing a summons and complaint with the Kitsap County Superior Court on April 9, 2008. The complaint sought declaratory judgment contesting the authority of DKC to assess dues against the properties or persons of Plaintiffs. The suit also sought to quiet title against the lien on the Willis property.

On the same day that the Plaintiffs filed suit, they learned that DKC filed a “Notice to Members of Driftwood Key Club of Existence of Corporate Documents” which further clouded title to all of the Plaintiffs’ property. *CP 25-35*. The Plaintiffs immediately amended their summons and complaint to quiet title in their respective properties as against the new “Notice”. *CP 1-7*.

Plaintiffs brought a motion for summary judgment alleging that: (1) the DKC had no legal cause or justification for assessing dues or recording a lien against Plaintiffs’ properties; (2) to quiet title in Plaintiffs in their respective properties against DKC’s “Notice to Members of Driftwood Key Club of Existence of Corporate Documents”; and (3) to quiet title in Plaintiff Willis’ in his property against the claim of lien recorded by the DKC. *CP 8-13*. The summary judgment motion was based on the Amended Declaration of Michael R. Feola and Sharon L. Feola (with attachments) (*CP 14-35*); the Amended Declaration of George Willis (with attachments)(*CP 36-40*); and the Amended Declaration of Linda C. Smith (with attachments) (*CP 41-44*).

The DKC responded with its own cross-motion for summary judgment based on theories of issue preclusion for the Feolas based on the actions in small claims court; privity of Willis and Smith with the Feolas on issue preclusion; implied contract; and equitable estoppel. *CP 57-76*. Their motion was based on the Declaration of Bruce O’Connor (*CP 77-*

79) and the Declaration of Jamal Whitehead (with attachments)(*CP 80-204*).

Plaintiffs' response and opposition to the cross-motions for summary judgment included: (1) Plaintiff' Response to Defendant's Motion for Summary Judgment (*CP 217-226*); (2) Responsive Declaration of Michael R. Feola and Sharon L. Feola (*CP 227-232*); Plaintiffs' Supplemental Brief on Cross-Motions for Summary Judgment (*CP 288-294*); and the Declaration of James R. Goldsworthy, Surveyor (*CP 305-307*).

DKC's responses and oppositions to the cross-motions for summary judgment included: Defendant's Opposition to Plaintiffs' Amended Motion for Summary Judgment (*CP 205-216*); Reply in Support of Defendant's Motion for Summary Judgment (*CP 233-239*); Declaration of Jamal Whitehead (with attachments)(*CP 240-251*); Declaration of Roger Hillman (with attachment)(*CP 295-301*); and the Response to Plaintiffs' Supplemental Brief (*CP 302-304*).

The Court issued an oral ruling on October 3, 2008 (Verbatim Report of Proceedings) (*CP 309-324*). An Order Denying Plaintiffs' Motion for Summary Judgment and Granting Defendant's Motion for Summary Judgment in Part was entered on November 7, 2008. *CP 325-327*.

Plaintiffs filed a Motion for Reconsideration on November 17, 2008 (CP 328-335). This Motion was denied on December 5, 2008 (CP 340-341). The Court entered final monetary judgment for past dues and assessments against Plaintiffs on December 17, 2008 (CP 342-345). Notice of Appeal was filed contesting these action by the trial Court on December 4, 2008 (CP 336-339).

IV. ARGUMENT

A. Preface.

Plaintiffs' basic premise in this case is that the DKC has no authority to charge either their persons or properties with dues or assessments. Although, review by the Court of Appeals of the summary judgment granted by the trial court is "de novo", Plaintiffs will herein make their own argument as to why the DKC does not have the authority to assess dues. They will also present their initial response to the theories laid out by DKC in their cross-motion for summary judgment. At the trial court level, these theories included issue preclusion; implied contract; and equitable estoppel. Plaintiffs, at this point, do not know which theory or theories DKC will rely on in this appeal.

B. Review of Summary Judgment is De Novo.

Summary judgment is reviewed de novo. *Brutsche v. City of Kent*, 193 P.3d 110, 114 (2008); *Osborn v. Mason County*, 157 Wash.2d 18, 22, 134 P.3d 197 (2006). Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Evidence is construed in the light most favorable to the nonmoving party. *Osborn*, 157 Wash.2d at 22, 134 P.3d 197.

C. No Legal Justification for Defendant to file a lien against Plaintiffs' property.

The essential position of the Feolas, Willis and Smith is that DKC has no authority or legal justification to charge their persons or property with dues and assessments. All of the covenants that bind "Eight Addition to Driftwood Key" are contained in the plat recorded in Volume 12 of Plats, pages 7 & 8, records of Kitsap County, Washington. These same covenants have been recorded under Auditor's File Nos. 776050 (not filed by either Plaintiff or Defendant, but noted as the record for an independent plat called "Driftwood Key" in CP 25, 27), 852358 (CP 20-21), 8806220095 (CP 274) & 8811020072 (re-recording of 8806220095)(CP 274).

Although the covenants are plat specific, these recorded documents all basically contain the same language. They are architectural guidelines. They do

not contain any language that empowers Defendant to assess dues or record liens against property owners within the plat except as noted in Covenant 16 and this covenant is limited to "damages or dues" stemming from architectural violations, and is collectible by "any other person or persons owning real property situated in said sub-division". It is notable that the DKC does not own real property in either the Fifth Addition to Driftwood Key, or the Eighth Addition to Driftwood Key. The covenants that bind the Fifth Addition to Driftwood Key, where the Smith property is situated, seem are similar. We could not locate a recording number that these documents were recorded under except the original plat located in Volume 11 of Plats, pages 49 & 50, records of Kitsap County, Washington and as noted on the "Notice to Members of Driftwood Key Club of Existence of Corporate Documents. CP 25 & 44.

Further, RCW 65.08.070 provides:

RCW 65.08.070 Real property conveyances to be recorded

A conveyance of real property, when acknowledged by the person executing the same (the acknowledgment being certified as required by law), may be recorded in the office of the recording officer of the county where the property is situated. Every such conveyance not so recorded is void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration from the same vendor, his heirs or devisees, of the same real property or any portion thereof whose conveyance is first duly recorded. An instrument is deemed recorded the minute it is filed for record.

RCW 65.08.070

In *Ellingsen v. Franklin County*, 117 Wash.2d 24, 810 P.2d 910 (1991),

the Washington Supreme Court found that a grant of easement recorded in the

county engineer's office, did not provide constructive notice under RCW 65.08.070:

The issue is whether a conveyance of an easement gives constructive notice to a bona fide purchaser when that conveyance is "recorded and filed" in the county engineer's office, but is not recorded with the county auditor? The answer is that "recording and filing" in the county engineer's office does not give constructive notice.
Ellingsen at 25.

Similarly, in the instant case, filing articles of incorporation with the Washington Secretary of State was insufficient to provide either actual or constructive notice of DKC's claimed authority to collect dues or assessments.

In Dickson v. Kates, 132 Wash.App. 724,133 P.3d 498 (2006), this Court stated:

"We recognized in Lake Limerick ... that Washington generally does not distinguish between real covenants and equitable covenants. (citations omitted). But the court did recite the two different standards the Washington Supreme Court had used to determine the validity of real versus equitable covenants. Lake Limerick, (citation omitted).

'(1) the covenant must have been enforceable between the original parties, such enforceability being a question of contract law *except insofar as the covenant must satisfy the statute of frauds*; (2) the covenant must "touch and concern" both the land to be benefited and the land to be burdened; (3) the covenanting parties must have intended to bind their successors in interest; (4) there must be vertical privity of estate, *i.e.*, privity between the original parties to the covenant and the present disputants; and (5) there must be horizontal privity of estate, or privity between the original parties. Lake Limerick ... (citations omitted).'

In order to bind successors, an equitable covenant must be (1) a promise, in writing, which is enforceable between the original parties; (2) which touches and concerns the land or which the parties intend to

bind successors; and (3) which is sought to be enforced by an original party or a successor, against an original party or successor in possession; (4) who has notice of the covenant. (citation omitted).” Dickson at 732.

Again, we return to the notice requirement. Plaintiffs had neither actual notice nor constructive notice of DKC’s intent to collect dues and assessments from them.

D. The Statute Of Frauds

The Statute of Frauds requires that every conveyance of real estate or any interest therein shall be by deed:

Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed....
RCW 64.04.010.

This includes acknowledgement and the full formalities of a deed:

Every deed shall be in writing, signed by the party bound thereby, and acknowledged by the party before some person authorized by this act to take acknowledgments of deeds.
RCW 64.04.020

In the subdivision setting, the Washington Courts have found the writing requirement satisfied in three different ways: (1) as a declaration of covenants, *see Mountain Park Homeowners Ass’n, 125 Wash.2d 337, 883 P.2d 1383 (1994)*; (2) set forth as a restriction contained in the deed transferring an interest in the property; or, (3) on the face of the subdivision plat. *See Thorstad v. Federal Way Water & Sewer Dist., 73*

Wash.App. 638, 870 P.2d 1046 (1994); Hagemann v. Worth, 56

Wash.App. 85, 782 P.2d 1072 (1989).

In the instant case, none of the three methods has been satisfied. There is no authority granted in a declaration of covenants, in the deed or on the face of the subdivision plat for the DKC to collect dues or assessments except as in Covenant 16 (and then only if DKC is an owner of real property in said subdivision).

E. The District Court Lacked Jurisdiction To Bind Plaintiffs

Defendant argued at summary judgment that the Feolas were precluded by their previous cases in small claims court from bringing this lawsuit.

Article IV of the Washington State Constitution provides that only the Washington State Superior Courts has jurisdiction over disputes involving title to real property:

“SECTION 6. JURISDICTION OF SUPERIOR COURTS...The superior court shall have original jurisdiction in all cases at law which involve the title or possession of real property...”

Wash. Const. Article IV §6.

In the State Farm Mut. Auto Ins. Co. v. Avery, 114 Wn. App. 149, 57 P.3rd 300 (2002) cited by Defendant, the Court found that the small claims Court had the jurisdiction to hear a “money” case in the amount of \$3,500.00. This case involves the title to real property, a subject matter that small claims Court has no jurisdiction to hear. Consideration of the

following factors was warranted in evaluating whether giving preclusive effect to small claims court judgment would serve the ends of justice: character of the court, scope of jurisdiction, procedural informality, and procedural safeguards, including appeal. *Id.* Further, Judge Holman, in his oral decision led the Plaintiffs Feola on to Superior Court which had the subject matter jurisdiction to hear all of the issues raised by the Feolas.

F. Privity

DKC also argued that Willis and Smith were in privity with the Feolas regarding the alleged issue preclusion from the Feolas small claims court actions.

Even if the decisions of Small Claims Court had preclusive effect against the Feolas (and we maintain that they do not), Plaintiffs Willis and Smith cannot be bound. Plaintiffs Smith and Willis were unaware of the Feolas court actions until they were over. They did not cooperate with the Feolas in any of these Court action. Small claims court, pursuant to the Washington State Constitution. does not have the subject matter jurisdiction to hear the issues in this case. These Plaintiffs now elect to pursue their claims in a Court of competent jurisdiction.

G. An Implied-In-Law Contract Does Not Exist

Defendant, in their summary judgment motion, relied on the case of *Lake Limerick Country Club v. Hunt Mfg. Homes, Inc.*, 120 Wash.App.

246, 84 P.3d 295 (2004) to support its theory that an implied-in-fact contract binds the Plaintiffs to pay dues and assessments to the DKC.

Lake Limerick concerned a homeowner's association, the Lake Limerick Country Club (hereinafter "LLCC"), that sued a lot owner on theories that unpaid dues were a lien on the property and that the lot owner was also personally liable for the dues.

In that case, the Court discussed the elements required for an equitable restriction to be placed on the land:

"(1) a promise, in writing, which is enforceable between the original parties; (2) which touches and concerns the land or which the parties intend to bind successors; and (3) which is sought to be enforced by an original party or a successor, against an original party or successor in possession; (4) who has notice of the covenant."

Lake Limerick Country Club v. Hunt at 254.

Even though the DKC may have duly executed articles of incorporation and bylaws, they lack the underlying authority, granted in deed or covenant, to charge dues and assessments against lots and lot owners. Without a writing that satisfies the Statute of Frauds and that runs with the land, the DKC has no authority to collect dues and assessments except for architectural control violations as contained in Covenant 16 as is the right of every property owner in their respective subdivisions with similar covenants.

In Lake Limerick, the Court went through a detailed analysis prior to considering that an implied-in-fact contract existed. The Court, in discussing the facts of the case, stated:

“On December 20, 1967, LLA recorded a “Declaration of Restrictions” that provided in part as follows: The owners of any Lot in said Tract or portion of said Tract shall be bound by the Articles of Incorporation and the By-Laws of the Lake Limerick Country Club. Dues and Assessments as levied in accordance with said By-Laws and Articles of Incorporation of the Lake Limerick Country Club, Inc. shall constitute a lien against the lots in the Tract described in Article I and can be foreclosed by Lake Limerick Country Club, Inc. in the manner provided by the laws of the State of Washington for the foreclosure of liens, including interest on the amount due together with reasonable attorney fees.” Lake Limerick at 249-250.

Prior to the implied in law contract analysis, the Court first considered whether or not the LLCC had the authority to charge dues and assessments. As part of this analysis, the Court found that under the facts of the case, that: (1) the Declaration of Restrictions gave rise to a covenant running with the land effective with the original conveyance of the lot in question (Lake Limerick at 258); (2) the Statute of Frauds had been satisfied by the Declaration of Restrictions (Lake Limerick at 259); (3) that horizontal and vertical privity were satisfied (Lake Limerick at 259-260); and (4) that the Declaration of Restrictions, read with the by-laws, of LLCC, created binding obligation to pay dues and assessments on both the lot and lot owner (Lake Limerick at 260).

Defendant would have the Court proceed to the last step of the analysis and not deal with the very large and fatal flaw in Defendant’s claimed authority. There is no writing that binds this land. The only restrictions placed on these properties are the architectural controls contained within the face of the plats and the creation of the DKC to

enforce specific architectural controls. The Defendant cannot point to any case law in Washington where the courts found an implied in fact contract for a homeowners association or membership club to collect dues from “members” unless there existed an obligation in writing to do so that satisfied the Statute of Frauds and “ran with the land”. In both Lake Limerick and Rodruck v. Sand Point Maint. Com. 48 Wash.2d 565, 295 P.2d 714 (1956) cited by Defendant, these elements were satisfied. In the instant case, these elements are not satisfied.

H. The Only Notice to Plaintiffs Had was of Architectural Control

Defendant claimed in its summary judgment motion, in various ways, that Plaintiffs had notice of the authority of Defendant to charge dues and assessments against lot and lot owners. Defendant, in its briefing, included only part of the notice contained in the deeds conveying the respective lots to Plaintiffs. For instance, the Feolas deed contains the following language: “...liability for assessments or charges as imposed by the Driftwood Key Homeowners Association as recorded under Recording No. 852358...”. (CP 112).

If you look at this recorded documents referred to in the deed, you will find it to be the same architectural control contained in the original plat. (CP 20-21, 274, & 291-294). This document contains no authority for the DKC to levy dues and assessments against lots and lot owners in

the various subdivisions as is the right of every property owner in their respective subdivision to enforce the architectural controls. Similarly, the notice referred to the Feolas' title insurance, refers to the same recorded document under Recording No. 852358. (*CP 123*). Again, we return to the architectural controls which is a common right among all of the property owners with land in subdivision bound by similar covenants (*CP 20-21 & 44*).

The title insurance mistakenly calls the DKC, "Driftwood Key Homeowners Association", an entity which does not appear on any recorded land or corporate document concerning this case. *CP 123*.

There is nothing contained in the covenants to refer a person to the articles of incorporation or bylaws of the Driftwood Key Club. There is also no direction or requirement in the covenants to contact the club for any reason prior to purchase.

It is also interesting to note that DKC is not a homeowners association as defined under RCW 68.30.010, which provides in pertinent part:

64.38.010. Definitions

For purposes of this chapter:

(1) "Homeowners' association" or "association" means a corporation, unincorporated association, or other legal entity, each member of which is an owner of residential real property located within the association's jurisdiction, as described in the governing documents, and by virtue of membership or ownership of property is obligated to pay real property taxes, insurance premiums, maintenance costs, or for improvement of real property other than that which is owned by the

member.
RCW 64.38.010.

RCW 64.38.015 provides:

64.38.015. Association membership

The membership of an association at all times shall consist exclusively of the owners of all real property over which the association has jurisdiction, both developed and undeveloped.
RCW 64.38.015 .

The DKC is not a homeowners association because, contrary to the definition, there are members who are owners of commercial property.

CP 25-26. Membership has been open to persons who do not own property within the Driftwood Keys additions. *CP 266-267.*

**I. Promissory Estoppel Cannot Avoid The Statute Of Frauds,
Equitable Estoppel May Only Be Used As A Shield**

DKC made estoppels arguments in its motion for summary judgment. Equitable estoppel is properly applied “as a ‘shield’ or defense, while promissory estoppel can be used as a ‘sword’ in a cause of action for damages. *Harberd v. City of Kettle Falls*, 120 Wash.App. 498, 519-520, 84 P.3d 1241, 1252 (2004). In *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wash.2d 255, 616 P.2d 644 (1980), the Court discussed the doctrine of equitable estoppel in further detail:

Equitable estoppel is based upon a representation of existing or past facts, while promissory estoppel requires the existence of a promise. Equitable estoppel also is available only as a “shield” or defense, while promissory estoppel can be used as a “sword” in a cause of action for

damages.
Klinke at 259 (citations omitted).

Equitable estoppel is not favored and therefore requires a showing of clear, cogent and convincing evidence by the asserting party. *Gross v. Sunding, 139 Wash.App. 54, 65, 161 P.3d 380, 386 (2007).*

Defendants attempt to use the legal doctrine of “equitable estoppel” to demonstrate that a contract exists that requires Plaintiffs to pay dues and assessments.

In order to create an estoppel it is necessary that the party claiming to have been influenced by the conduct or declarations of another to his injury, was himself not only destitute of knowledge of the state of facts, but was also destitute of any convenient and available means of acquiring such knowledge; and that where the facts are known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel. *Leonard v. Washington Employers, Inc., 77 Wn.2d 271, 280, 461 P.2d 538 (1969).*

Defendants do not exert promissory estoppel as a basis for their claims. If they did, promissory estoppel cannot avoid the Statute of Frauds.

V. CONCLUSION

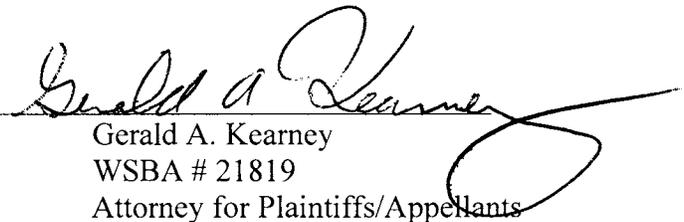
The Plaintiffs had no actual notice or constructive notice of the claim of authority by the DKC to collect notice. Declaratory judgment on this subject is the appropriate relief to provide relief to the Plaintiffs regarding this issue. Declaratory relief should be granted declaring that the DKC has no authority or legal justification to charge the person or property of Feola, Willis and Smith with Dues and assessments.

Title should also be quieted in the Feolas, Willis and Smith as against the Notice to Members of Driftwood Key Club of Existence of Corporate Documents filed by DKC with the Kitsap County Auditor under File No. 200804010153. *CP 25-35*. The Court should also quiet title in Plaintiff Willis as against the Claim of Lien recorded by the DKC under Kitsap County Auditor's File No. 200712180364. *CP 38-40*.

Accordingly, the Court should reverse the rulings of the trial court and: (1) grant Plaintiff's motion for summary judgment; (2) deny Defendant's motion for summary judgment; and (3) vacate the judgment entered by the trial court against Plaintiffs Feola, Willis and Smith.

RESPECTFULLY SUBMITTED on this 9th day of February,

2009 by:


Gerald A. Kearney
WSBA # 21819
Attorney for Plaintiffs/Appellants

APPENDIX

Exhibit A: Jurisdictional map of the Driftwood Key subdivisions.

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STATE OF WASHINGTON
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DEPUTY

MICHAEL R. FEOLA & SHARON
L. FEOLA, husband & wife;
GEORGE WILLIS; & LINDA C.
SMITH,

Plaintiffs/Appellant,

vs.

DRIFTWOOD KEY CLUB, a
Washington State nonprofit
corporation.

Defendant/Appellee.

DECLARATION OF SERVICE

I hereby certify, under penalty of perjury of the laws of the State of Washington,
that on this date I delivered true and correct copies of the following documents:

1. Brief of Appellant

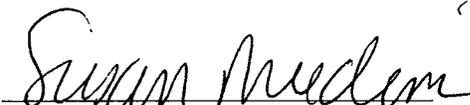
To the following attorneys of record:

Roger Hillman
Garvey Schubert Barer
1191 Second Avenue, 18th Floor
Seattle WA 98101-2939

on February 9, 2009 by United State First Class Mail.

I declare under oath and penalty of perjury that the foregoing statements are true
and accurate.

SIGNED at Kingston, Washington on this 9th day of February, 2009.



Susan Miedema

Secretary to

Gerald A. Kearney

Gerald A. Kearney

Attorney at Law

PO Box 1314

Kingston WA 98346

(360) 297-8500