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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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NO. 40151-7-II

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

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**RICHARD D. MANTHEI and KARIN R. MANTHEI,**

**Appellants,**

**v.**

**BARBARA NEVINS HALL REVOCABLE LIVING TRUST,**

**Respondent.**

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**APPELLANTS' BRIEF**

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I.  
**ASSIGNMENTS OF ERROR**

Appellants Richard and Karin Manthei (hereafter referred to as “the Mantheis”) assigns error to the Findings of Fact, Conclusions of Law and the Judgment entered in the above entitled matter on December 4, 2009, and specifically as follows:

1. Conclusion 2.2 that the covenant dated October 13, 1998 and recorded under Pierce County Auditor’s file no. 9810290598 (hereafter the “Covenant”) is a valid and enforceable covenant affecting the parties.
2. Conclusion 2.4 that the easement dated June 14, 1999 and recorded under Pierce County Auditor’s Recording No. 9903120193 (hereafter the “Easement”) is an invalid and void easement because it is in direct violation of the Covenant.
3. The unnumbered Conclusion that the Respondent Barbara Nevins Hall Revocable Living Trust (hereafter referred to as the “Trust”) was entitled to an Order that the Easement is terminated by operation of law and to quieting of title in the Trust.

4. The Judgment granting the Trust's complaint to quiet title and terminate easement and ordering the Mantheis to remove their concrete driveway from the easement.
5. The Judgment in favor of the Trust against the Mantheis for statutory attorney's fees and costs.

**ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court err in concluding that the covenant dated October 13, 1998 and recorded under Pierce County Auditor's file no. 9810290598 (hereafter the "Covenant") is a valid and enforceable covenant affecting the parties?
2. Did the trial court err in concluding that the easement dated June 14, 1999 and recorded under Pierce County Auditor's Recording No. 9903120193 (hereafter the "Easement") is an invalid and void easement because it is in direct violation of the Covenant?
3. Did the trial court err in concluding that the Respondent Barbara Nevins Hall Revocable Living Trust (hereafter referred to as the "Trust") was entitled to an Order that the Easement is terminated by operation of law and to quieting of title in the Trust?

4. Did the trial court err in granting the Trust's complaint to quiet title and terminate easement and ordering the Mantheis to remove their concrete driveway from the easement?
5. Did the trial court err in granting judgment in favor of the Trust against the Mantheis for statutory attorney's fees and costs?

**II.**  
**STATEMENT OF THE CASE**

The Mantheis) own and reside on real property located at 7018 71<sup>st</sup> Avenue NW, Gig Harbor, Washington. (CP 30, lines 8-10) The Mantheis purchased the property in December 2003 from bankruptcy trustee Kathryn Ellis, who was the trustee overseeing the bankruptcy of the prior owner and developer of the property. (CP 30, lines 10-12) At the time the Mantheis purchased the property the Manthei home was already constructed and in place. (CP 30, lines 12-14)

The Trust owns unimproved real property directly to the west of the Manthei property. (CP 20, lines 2-5; CP 36-40) The Trust acquired the property in 2002 and has been working since acquisition to market it for future residential development. (CP 20, lines 5-7)

In 1997, the Millennium Corporation (the past and present owner of a tract of land located to the south of the Trust and Manthei properties) sued the Mantheis' predecessors in interest, Loren and Turid Bentley. The Bentleys owned the four lot subdivision in which the Mantheis presently own Lot 3. (CP 31, lines 1-3) The lawsuit settled prior to trial and resulted in part in the creation of a covenant between the two parties (the "Millenium Covenant"). The Millenium Covenant states in pertinent part, "... that there shall be no ingress and egress from the easement road delineated on the large lot subdivision across the Bentley Property from or to any property lying West of the Bentley Property". (CP 31, lines 4-10)

The Manthei property enjoys the use of an ingress, egress and utilities easement located on the Trust's property and recorded under Pierce County Auditor's Recording No. 9903120193 (the "Manthei easement") (CP 70, lines 9-12; CP 73-78). The Manthei easement was originally granted by the plaintiff's predecessors in interest to the Mantheis' predecessors in interest in 1999, and by its terms "runs with the land and applies to all heirs and assigns and future owners of both properties." (CP 70, lines 12-15; CP 73-78) The location and boundaries of the Manthei easement are depicted

on a Record of Survey prepared by Dale E. Oaks of Sadler/Barnard & Assoc., Inc. on March 27, 2009. (CP 32, lines 10-12; CP 59)

The Manthei home is located at the extreme western edge of the Manthei property, within fifteen feet of the boundary with the plaintiff's property. (CP 70, lines 19-20) Shortly after purchasing the property, the Mantheis installed a concrete driveway, portions of which are located on the plaintiff's property, within the area of the Manthei easement. (CP 71, lines 1-3) The Mantheis use the Manthei easement and driveway to access the front of their home, which faces the plaintiff's property. (CP 71, lines 4-6) Portions of the Mantheis' utilities are also located within the Manthei easement. (CP 71, line 10)

Photographs submitted with the Declaration of Karin Manthei illustrate that the Mantheis' home was sited and constructed in reliance on the easement located on the plaintiff's property, which remains critical for the Mantheis' use and enjoyment of their home and property. (CP 89, lines 5-14; CP 90-95)

At various times over the past few years the trust has complained to the Mantheis regarding their placement and/or storage of items of personal property on the Trust property. The Mantheis in response to these complaints removed their personal

property previously stored or located on the Trust property. (CP 32-33)

The Trust recently formed the opinion that the Manthei easement violates the terms of the Millenium Covenant. (CP 61, lines 16-18) Accordingly, on July 10, 2008 the Trust filed its complaint to, among other things, terminate the Manthei easement.

The parties stipulated to trial by affidavit pursuant to Pierce County local rules, and trial was held on October 16, 2009. The Trial Court filed its Findings of Fact and Conclusions of Law and its Judgment Quieting Title and Terminating Easements on December 4, 2009. The Mantheis filed their appeal on December 22, 2009.

### III.

#### **ARGUMENT**

##### **A. The Millenium Covenant Does Not Affect the Trust and Is Not Enforceable By The Trust.**

As the Trust noted in its trial brief, "The prerequisites for a covenant to "run with the land are these: (1) the covenants 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 benefitted 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. Leighton v. Leonard, 22 Wash.App. 136, 139, 589 P.2d 279 (1978) (CP 33)

In the present case, the Millenium Covenant does not “touch and concern” the Trust property. The Trust cannot thus meet the second required element set forth above. Nor is there vertical privity of estate between the original parties to the Millenium Covenant and the Trust. The Trust therefore cannot meet the fourth required element set forth above, and thus has no right to enforce the terms of the Millenium Covenant.

The original parties to the Millenium Covenant were the Millenium Corporation on the one hand and the Loren and Turid Bentley on the other. As noted above, the Millenium Corporation was and is the owner of property located to the south of the Trust and Manthei property (Verified Facts, page 3, lines 1-2), while the Bentleys were the owners of the Mantheis’ property. While there is vertical privity of estate between the Bentleys and the Mantheis, there is no privity of estate, vertical or otherwise, between the

Millenium Corporation and the Trust, nor is the Trust's property touched by the covenant.

The Trust thus has no more right to enforce the Millenium Covenant than does any other third party not privy to that covenant. The Millenium Corporation is not a party to this litigation, nor has it at any time complained that the Manthei easement violated the covenant or made any attempt to enforce the Millenium Covenant. Because the Trust has no independent right to enforce the covenant rights of the Millenium Corporation or its successors, the Court clearly erred in holding that the Trust had the right to enforce the Millenium Covenant.

Because the Trust has no rights under the Millenium Covenant, nor any right to enforce the terms of the Millenium Covenant, both the Court's conclusion that the Millenium Covenant affects the Trust and the Court's judgment terminating the Manthei easement as a violation of the Millenium Covenant are clearly erroneous and must be reversed.

**B. The Easement Does Not Violate The Millenium Covenant.**

Even if the Trust had any right to enforce the Millenium Covenant, the Easement does not violate the terms of the Millenium Covenant. In the Millenium Covenant the Bentleys

agreed “that there shall be no ingress and egress from the easement road delineated on the large lot subdivision across the Bentley Property from or to any property lying west of the Bentley Property”. (CP 31, lines 4-10) This is a negative restriction, limiting the use of the Bentley property for access to or from the Trust property.

Courts interpret covenants as a matter of law. Meresse v. Stelma, 100 Wn.App. 857, 864, 999 P.2d 1267 (2000). “Our primary goal in interpreting covenants that run with the land is to ascertain and give effect to the covenants' intended purposes.” Hollis v. Garwall, 137 Wn.2d 683, 695, 974 P.2d 836 (1999);

The Trust provided no testimony from any of the original parties to the Millenium Covenant as to the intended purpose of the covenant. Thus the only evidence as to the intended purpose of the Millenium Covenant is the language of the covenant itself. That language in no way restricts the rights of the Bentleys or their successors in interest, the Mantheis, to acquire or enjoy easement rights across other properties. Thus, for example, while the Millenium Covenant prohibits the use of the Manthei property for access to the Trust property, nothing in the covenant prohibits the Mantheis from acquiring easement rights over the Trust property.

The covenant for the benefit of the Millenium Corporation simply has absolutely no bearing on the validity of the Manthei easement over the Trust's property.

The Manthei easement is located on the Trust's property, not the Manthei property, and is for the positive benefit of the Manthei property. The existence of the Manthei easement on the Trust's property cannot in any way increase the burden on or otherwise affect the Millenium Corporation property to the south. The Manthei easement thus in no way conflicts with or is prohibited by the covenant, which is likely why the Millenium Corporation has never complained about the existence of the Manthei easement.

The Court's conclusion that the Manthei easement somehow violates the terms of the Millenium Covenant, and its judgment terminating the Manthei easement based on that conclusion, is clearly erroneous and must be reversed.

**C. The Easement Does Not Fail To Accomplish Its Purpose.**

The trial court made no findings or conclusions regarding the Trust's claim that the Manthei easement fails to accomplish its intended purpose. However, the Mantheis are cognizant that an Appellate Court may affirm the Trial Court's judgment on any

grounds established by the pleadings and supported by the record. Truck Ins. Exch. v. VanPort Homes, Inc., 147 Wash.2d 751, 766, 58 P.3d 276 (2002). The Mantheis will thus address the Trust's claim that the Manthei easement fails to accomplish its intended purpose.

It is undisputed that the document creating the Manthei easement was recorded and that it provides that the easement runs with the land. The Trust was thus on notice of the existence of and the burdens imposed by the Manthei easement before purchasing its property. The Trust nonetheless claimed in its complaint that the Manthei easement should be terminated because, according to the Trust, the easement fails to accomplish its purpose for the following reasons:

1. The easement does not provide ingress and egress for the Mantheis, and is instead a loop to nowhere.
2. The Mantheis' property does not adjoin and thus does not have access to the easement area.
3. The area defined in the easement does not connect to points that provide legal access to the County road.

(CP 8)

The Trust abandoned and did not present any evidence at trial regarding the first two assertions from its complaint, which appear to have been based largely on the same erroneous assumption, that the Manthei property does not adjoin the

easement area. In fact, as depicted on the survey maps and drawing submitted by the parties at trial, the easement area runs along and is contiguous with the Manthei property's entire western border. And as is agreed by both parties, the Mantheis use the easement area to access the front of their home on the driveway they have constructed within the easement area.

At trial, the Trust focused its argument on its third assertion, that changed conditions have made it impossible for the Manthei easement to serve its intended purpose as alleged by the Trust – to connect to the County road to the east of the Manthei property. (CP 61, lines 5-9; CP 63-68; CP 103, lines 7-15; CP 101-104) The Trust acknowledged that “the purpose for [the easement's] creation is unclear.” (CP 61, lines 4-5) It nonetheless speculated, based on a document from Pierce County addressing wetlands on the Manthei property, that the “intent” of the Manthei easement may have been to create an alternate method of access to the County road to the east of the Manthei property. (CP 61, lines 5-9; CP 63-68; CP 103, lines 7-15)

There is no evidence to support the Trust's speculation, as the document creating the Manthei easement does not include any statement or other indication that the easement was meant to

provide access to the County road. Moreover, the easement document was signed on February 26, 1999 and recorded on March 12, 1999, while the Pierce County wetland approval was not issued until many months later, on November 5, 1999. There is thus simply no connection between the Pierce County wetland approval and the Manthei easement.

The changed conditions doctrine set forth in the *Restatement (Third) of Property: Servitudes* § 7.10 (2000). Section 7.10 of the *Restatement* states:

(1) When a change has taken place since the creation of a servitude that makes it impossible as a practical matter to accomplish the purpose for which the servitude was created, a court may modify the servitude to permit the purpose to be accomplished. If modification is not practicable, or would not be effective, a court may terminate the servitude. Compensation for resulting harm to the beneficiaries may be awarded as a condition of modifying or terminating the servitude.

Subsection (1) reflects the common law rule that an easement for a particular purpose terminates when it becomes impossible to use the easement for the purpose intended in the granting instrument. *Restatement (Third) of Property: Servitudes* § 7.10, at 399 (Reporter's Note); 25 Am.Jur.2d *Easements and Licenses* § 96 (2004) ("An easement granted for a particular

purpose normally terminates as soon as such purpose ... is rendered impossible of accomplishment.”).

The Trust, as the plaintiff, bears the burden of proving both the original intent of the easement and that the original intent has been frustrated. Yet the Trust cannot provide any evidence as to the original intent of the easement, and acknowledges that in its view the original intent was “unclear”. And, as discussed above, there is no evidence of any change of conditions that have frustrated the purpose of the Manthei easement. Indeed, there is no evidence that the intent of the easement was ever anything more than the purpose it currently serves, to provide ingress and egress over a portion of the Trust property for access to the front of the Manthei home, and there most certainly is no basis for the Court to terminate the Manthei easement based on the Trust’s claim of changed conditions.

**D. The Court Erred In Awarding The Trust Statutory Attorney’s Fees and Costs.**

The Trial Court determined that the Trust was the prevailing party and thus awarded the Trust statutory attorney’s fees and costs. However, if the Court of Appeals reverses the decision of the Trial Court, than the Mantheis will be the prevailing party and

will be entitled to an award of statutory attorney's fees and costs, while the award to the Trust will need to be vacated.

#### IV. **CONCLUSION**

The Manthei easement provides the Mantheis with ingress and egress across a small portion of the Trust property in order to access the front of their home, which is located very near the common property boundary. The Mantheis have continually used the easement for this purpose since acquiring ownership of their property, and the Trust for many years did not challenge such use.

Though the Trust belatedly formed the opinion that the Manthei easement somehow violates the terms of a prior covenant between the Millenium Corporation and the Mantheis' predecessors in interest, the Bentleys, the Trust was not a party to the covenant and has no privity with any party to the covenant. The Trust thus has no rights under the covenant and cannot enforce it.

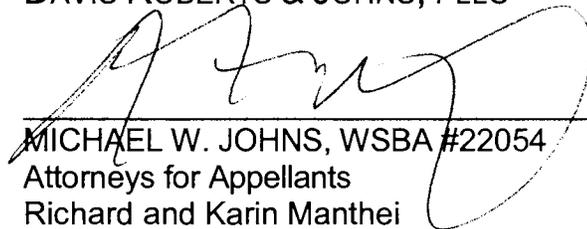
Moreover, the Manthei easement across the Trust property in no way violates the terms of the covenant. Nor is there any evidence that the purpose of the Manthei easement has been frustrated by changed conditions. There thus is no basis for the

Trial Court's conclusion that the Manthei easement should be terminated, or the judgment terminating that easement.

The Mantheis therefore respectfully request that this Court reverse the decision of the Trial Court and direct the Trial Court to reinstate the Manthei easement, vacate the order that the Mantheis must remove their driveway from the easement area, and award the Mantheis statutory attorney's fees and costs.

Respectfully submitted this 10<sup>th</sup> day March, 2010.

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Attorneys for Appellants  
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AFFIDAVIT OF MAILING

STATE OF WASHINGTON     )  
  ) ss.  
County of Pierce         )

PAMELA M. GIBSON, being first duly sworn on oath,  
deposes and says:

That on the 10<sup>th</sup> day of March, 2010, she sent via U.S.

Mail to:

Jacob L. Potak  
Law office of Jacob L. Potak  
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Gerold E. Johnson  
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Tacoma, WA 98405

the following items: **Appellants' Brief and this Affidavit of Mailing**; that she placed the same in an envelope; affixed proper postage thereto, sealed the same, and placed it in a receptacle maintained by the United States Post Office for such purpose, County of Pierce, State of Washington.

  
PAMELA M. GIBSON

SIGNED AND SWORN to before me this 10<sup>th</sup> day of March, 2010.

  
NOTARY PUBLIC in and  
for the State of  
Washington, residing at  
Redmond