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DIVISION II

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STATE OF WASHINGTON

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**COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON
Case No. 47033-1-II**

CASEY DOUGHERTY

Appellant,

v.

HOLIDAY HILLS COMMUNITY CLUB, INC.

Respondent.

Brief of Respondent Holiday Hills Community Club, Inc.

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**COURT OF APPEALS, DIVISION II
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Casey W. Dougherty,

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and

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**Brief of Respondent
Holiday Hills Community
Club, Inc.**

I. INTRODUCTION

The primary issue in this case concerns the continued right to locate a community water tank, serving over 150 rural Pierce County residents, on the appellant, Casey Dougherty's ("Dougherty")¹, real property. A secondary issue is whether the appellant has been properly assessed charges for the water system and community road maintenance.

The respondent, Holiday Hills Community Club, Inc. ("Holiday Hills"), owns and operates a water system serving 60+ properties in Eatonville, charging its members assessments for water and for road maintenance. Dougherty is a member of Holiday Hills and owns the real property where Holiday Hills' upper-level water storage tank is located.

¹ Appellant will be referred to hereafter as "Dougherty" for ease of identification and brevity's sake.

The water tank is within the bounds of a utility easement and replaced an older tank originally installed 34 years ago.

The trial court on summary judgment declared the water tank was properly installed within the bounds of the utility easement, that the tank and related improvements could remain on Dougherty's property, and that Holiday Hills could continue to access the tank over Dougherty's property, by prescriptive right. Dougherty requests this Court reverse, declaring that Holiday Hills' has only a "permissive license...in the discretion of the Appellant [Dougherty]" to maintain its water tank on his property.

If Dougherty is granted his requested relief, he has the power to revoke the purported "license," potentially depriving over 150 persons of their water service. Similarly, if Dougherty prevails on his challenge to the community's assessments, which include assessments used to pay a Washington State Drinking Water loan obtained to improve the community's water system, he will jeopardize continued water service to all of Holiday Hills' members.

II. RESTATEMENT OF THE ISSUES

Issue No 1: Holiday Hills' claims for declaration of easement rights presented no genuine issues of material fact and the trial court properly

granted summary judgment on those claims as a matter of law.

Issue No. 2: The trial court made no ruling on Holiday Hills' alternate claims for relief, which were rendered moot by summary judgment, Dougherty did not prevail on those claims, and even if the trial court's rulings are reversed, those alternate claims must be adjudicated on remand.

Issue No. 3: Holiday Hills' claims for past due assessments presented no genuine issues of material fact and the trial court properly granted summary judgment on those claims as a matter of law.

Issue No. 4: Holiday Hills is entitled to statutory attorney fees and costs on appeal.

III. COUNTER STATEMENT OF THE CASE

Dougherty's Statement of the Case contains inaccurate, disputed and immaterial facts, and statements without any citation to the record. Holiday Hills' offers the following Counter Statement of the Case, citing only those facts which are material to the issues on appeal, and which are undisputed.

A. Holiday Hills: Years 1968 to 2007.

Holiday Hills is a joint and mutual, non-profit corporation created in

1968. CP 415-421. Holiday Hills owns and operates a water system classified by the Washington State Department of Health as a “Group A Public Water System,” which requires compliance with all applicable State regulations even though water is provided only to Holiday Hills’ members, not the general public. CP 110-111, 124; WAC 246-290-020.

All lot owners in “Holiday Hills” and eleven lot owners in an adjacent neighborhood, “Alderview Estates,” have the option to receive Holiday Hills’ water in exchange for payment of Holiday Hills’ assessments. CP 424-427. Holiday Hills also maintains and charges assessments for community road maintenance. CP 424-427. Approximately 150 persons are served by Holiday Hills’ water system. CP 413.

Around January 31, 1981, Holiday Hills installed a 20,000 gallon upper level water storage tank at the highest point in the neighborhood, to facilitate gravity feed. CP 399, 402. It was an old gasoline tank, later enclosed in a building on top of “Nob Hill.” CP 411. The tank was located partially on Lot 27 and partially on Lot 24 of Alderview Estates. CP 384, Appendix p. A-1. Lot 24 was then owned by Andrew and Mildred Munden (also known as “Pat and Millie” Munden), who were also purchasing the adjacent Lot 25. CP 263-264, 265.

All but a small portion of the northwest and northeast corners of the tank installed in 1981 was located within the bounds of the “F-3” easement created by the 1976 Plat of Alderview Estates. CP 384, Appendix p. A-1. The “F-3” easement is for “Access and Utilities” and designated to benefit Lots 24 through 27 of Alderview Estates. CP 156. The upper level tank is connected to and works in conjunction with a mid-level tank, and both tanks service *all* Holiday Hills’ water system users, not just Lots 24 through 27 of Alderview Estates. CP 407-410.

Historic records describe the 1981 installation of the upper level water tank, but all direct participants and witnesses to its installation are deceased. CP 399, 402-403. There is a letter from then-President of Holiday Hills, Cecil Hughes, dated January of 1981. CP 399. There are also typewritten notes entitled “The Water System for Holiday Hills” dating back to 1967 and through a class action settlement in December of 1981. CP 402-403. According to the historic documents, Cecil Hughes had the tank delivered January 31, 1981, water lines dug in April of 1981, pipe laid in May and June 1981, and by June 29, 1981 the tank was complete and serving everyone in Holiday Hills with gravity-fed water. CP 402-403. A building was constructed around the tank on October 31, 1981. CP 402-

403.

There is direct witness testimony about the winding, gravel road which has always been used to access the tank from 502nd Street to the top of Nob Hill. CP 411. The road was there before 1980, is the same road used to access the (new) water tank today, and is located (in part) on Lots 24 and 25 of Alderview Estates. CP 411.

B. Holiday Hills: Years 2007 to Present.

By 2007, the converted gasoline tank was leaking, risked failure, and posed a danger to the public. CP 410-411. As a result, in 2008 Holiday Hills obtained a \$343,316.00 low-interest loan from Washington's State Drinking Water Fund to install new water pipelines, water meters, and a new upper level water tank. CP 309-344. The improvements were made in phases, with the construction of a 54,000 gallon replacement, upper-level water tank as one of the final projects. CP 322-323. Holiday Hills granted a security interest to Washington State in all improvements made with the loan monies. CP 338-344.

Holiday Hills' Bylaws generally require a simple majority vote of members present at meetings to take any action. CP 532-538. There are two regular meetings each year – the first in May and the second in

September. CP 533. Assessments for the coming year are voted on at the regular September meeting, and corporate officers elected. CP 533. In September of 2007, there was unanimous approval by all members present at the regular meeting to enter into the loan agreement with Washington State for the new water tank and related improvements. CP 548-550.

Holiday Hills had a professional surveying and engineering firm prepare all required surveys and engineered drawings for the water system improvements, and assist in the permitting process for the replacement water tank. CP 374-377. A variance application was submitted to Pierce County for installation of the replacement tank within the bounds of the "F-3" easement, and a variance issued after public hearing on November 17, 2010. CP 134-141. The new upper-level tank was approved for installation in the "F-3" easement, adjacent to the old tank and consistent with a Landslide Hazard Geotechnical Letter, which concluded this was the necessary location due to severe slopes on Lot 24. CP 137-138, CP 375. The approved site plan notes the existing tank will be kept in operation until the new tank construction is complete. CP 384.

The variance hearing notice was posted at the real property, published in a local newspaper, and served on designated property owners, including

the owners of Lots 24 and 25 (then, Andrew and Mildred Munden), Lot 26, and Lot 27 (owned by Darryl Franz) of Alderview Estates, as well as Kyle Quaranto (owner of Lot 11, Alderview Estates, on which the community well is located). CP 363, 366-371. After consideration of public comment, including written objections from Darryl Franz and Andrew and Mildred Mundens' son, who thought the location of the tank would decrease the value of his parents' property and present a hazard if it ruptured, the hearing examiner approved the Master Application consistent with the recommendation of the Staff Report of the Pierce County Land Use and Planning Department. CP 349-350, CP 133-141.

C. Dougherty purchases Lots 24 and 25 with knowledge of old and new tanks.

In January of 2011, Dougherty entered into an agreement to purchase Lot 25 of Alderview Estates for \$235,000.00 from Pat and Millie Munden. CP 217-232. By Addendum and for no additional consideration, the purchase included Lot 24, the lot on which Holiday Hills' old water tank was then located. CP 232. The listing for Lot 25 was \$249,990.00, and the listing for Lot 24 was \$60,000.00. CP 405-406.

The "Seller's Disclosure - Form 17" provided to Dougherty prior to closing his purchase of Lots 25 and 24, listed the water fee for the "new

storage tank.” CP 236. In correspondence from Dougherty to Holiday Hills in May of 2012, Dougherty also admitted “When [he] purchased the parcel, [he] was told that a new tank would be constructed on the property.” CP 249. In support of his summary motion, Dougherty testified under oath:

“After the Mundens contracted with [Dougherty] to sell him AE 24 and 25, Bryce Beard, acting on behalf of the Mundens, disclosed that [Holiday Hills] intended to build a new 54,000 gallon water tank on AE 24, that the Old Tank would be promptly removed and the New Tank would be painted to blend in with the surroundings and conceal its dramatically larger size.” CP 75-76, paragraph 45.

The new 54,000 gallon tank, pump house and related improvements were all completed in 2011, when Dougherty was owner of Lot 24. CP 252-253. Dougherty voiced no objection during construction, even though he sued the Mundens for unrelated claims shortly after he purchased their property. See CP 459-469. He made no claims against Holiday Hills (or the Mundens) relative to the new, upper level tank until the tank was entirely completed and the old tank decommissioned. CP 1-10.

D. Procedural History.

Dougherty’s initial Complaint against Holiday Hills contained 59 numbered allegations relating to the water tank, sought a declaration of his

and Holiday Hills' "rights and obligations" and a lease against Holiday Hills for the new tank, along with injunctive relief.² CP 3-10. Holiday Hills replied, alleging affirmative defenses including equitable estoppel, and counterclaims. CP 11-42. Holiday Hills alleged there was no record of any permission sought or granted to place the original water tank (partly) on Lot 24 in the 1980's, that the new tank was in the same area (the "F-3" easement), and that Dougherty knew of the tank and related improvements, including the access road over his property, when he purchased his properties and was not entitled to any relief. CP 17-18.

Holiday Hills requested an irrevocable easement for its new tank and related improvements, and a prescriptive easement over the existing route for access to the tank. CP 18-20. Holiday Hills also pled for alternative relief under the doctrines of adverse possession, mutual recognition and acquiescence, an express or implied agreement in law, or estoppel *in pais*. CP 18-20. Holiday Hills requested a judgment for unjust enrichment if Dougherty prevailed on his claims, and also judgment for Dougherty's unpaid assessments. CP 19-20.

Dougherty moved for partial summary judgment, alleging the old

² The requests for injunctive relief are no longer at issue.

water tank was located on his property with the revocable permission of his predecessors, the Mundens. CP 43-70. Dougherty offered only his own declaration to support his motion, along with 41 documentary exhibits. CP 71-276. The sole evidence submitted to support Dougherty's allegation that the 1981 tank was placed in the "F-3" easement with "permission" of his predecessors was hearsay, and not considered by the trial court. RP, October 17, 2014, p. 13, lines 10-25; Appendix, p. A-2. Dougherty's proposed order on summary judgment requested 15 fact findings and an order that Holiday Hills pay him an indeterminate lease amount, backdated to 3/1/2011, which Dougherty could then adjust "from time to time" in exchange for Holiday Hills' "use" of his land for its water tank, water lines, and the access road. CP 67-69.

Holiday Hills requested Dougherty's summary motion be denied, and that the court direct partial summary judgment in Holiday Hills' favor for easements rights for the water tank and related improvements, and access to those improvements. CP 277.

The trial court entered partial summary judgment in favor of Holiday Hills, finding that no genuine issues of material fact existed on the claims for easement rights for the new water tank and related improvements, and

access to the tank and related improvements. Appendix, p. A-2.

Dougherty's partial summary judgment motion was denied, and his claims for attorney fees and costs, declaratory judgment, quiet title, diminution in property value, and imposition of a lease were dismissed, with prejudice. Appendix, P. A-2. The trial court imposed non-exclusive easements over Dougherty's Lots 24 and 25 for the water tank and related improvements, utility lines and water meters, and ingress and egress over the existing road to access the tank and improvements. Appendix, p. A-2.

After the court's initial partial summary judgment ruling, all alternate claims were rendered moot but for Dougherty's request for injunctive relief⁴ and Holiday Hills' request for a judgment on past due assessments. Holiday Hills brought a final summary judgment motion, obtaining a judgment for the past due assessments. Appendix, p. A-3.

Dougherty appeals both partial summary judgment orders issued in favor of Holiday Hills.

IV. ARGUMENT

A. Standard of Review.

Holiday Hills agrees that the standard on review of the trial court's summary rulings at issue is *de novo*, with the court engaging in the same

inquiry as the trial court. TransAlta Centralia Generation LLC v. Sicklesteel Cranes, Inc., 134 Wn.App. 819, 825, 142 P.3d 209 (2006).

B. Summary Judgment Standard.

The purpose of a summary judgment is to avoid a useless trial when there is no genuine issue of any material fact. Seven Gables Corp. v. Mgm/Ua Entm't Co., 106 Wn.2d 1 (Wash. 1986), citing Olympic Fish Prods., Inc. v. Lloyd, 93 Wn.2d 596, 602, 611 P.2d 737 (1980). On review of a summary judgment, the court must decide whether the affidavits, facts, and record have created an issue of fact and, if so, whether such issue of fact is material to the cause of action. Id. citing Lamon v. McDonnell Douglas Corp., 91 Wn.2d 345, 352, 588 P.2d 1346 (1979). The adverse party must set forth specific facts showing there is a genuine issue for trial or have the summary judgment, if appropriate, entered against them. CR 56(e).

The defending party on a summary judgment may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having his affidavits considered at face value; for after the moving party submits adequate affidavits, the nonmoving party must set

³ Not at issue in this appeal.

forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists. Seven Gables Corp. v. Mgm/Ua Entm't Co., 106 Wn.2d 1 (Wash. 1986), citing Dwinnell's Cent. Neon v. Cosmopolitan Chinook Hotel, 21 Wn. App. 929, 587 P.2d 191 (1978).

Additionally, evidence submitted in opposition to summary judgment must be admissible. SentinelC3, Inc. v. Hunt, 181 Wn.2d 128, 141, 331 P.3d 40 (2014), citing Bernal v. Am. Honda Motor Co., 87 Wn.2d 406, 412, 553 P.2d 107 (1976). Hearsay evidence does not suffice. Id. citing State v. (1972) Dan J. Evans Campaign Comm., 86 Wn.2d 503, 506-07, 546 P.2d 75 (1976) (statements in affidavits based on hearsay evidence carry no weight at summary judgment).

C. Legal Authority and Argument.

Issue 1: Holiday Hills' claims for declaration of easement rights presented no genuine issues of material fact and the trial court properly granted summary judgment on those claims as a matter of law.

a. Holiday Hills has the right to maintain its water tank in the "F-3" easement.

Dougherty argues there is no express easement for placement of Holiday Hills' water tank at the top of "Nob Hill" and also claims the tank

is not located within any easement. Section III(C)(1)(a) and (d), Brief of Appellant. In fact, there *is an easement* at the top of “Nob Hill,” the old water tank was within that easement and the new water tank is, likewise, located within that easement, and the easement allows for location of utilities within its boundaries.

There is an easement designated “F-3” for “Access and Utilities” created in the Alderview Estates Plat approved by Pierce County and recorded in 1976, originating at the bottom of “Nob Hill” at 502nd Street and extending up to the top of the hill across Lots 24, 25, 26 and 27 of Alderview Estates. CP 153-156. The easement by its terms burdens and benefits these Lots 24, 25, 26 and 27 and, by actual usage for location of the community water tank, has benefitted *all members* of Holiday Hills for over 30 years. CP 153-156. Holiday Hills’ original upper-level water tank was constructed within the bounds of this “F-3” easement⁴ in 1981 and remained there for over 30 years until it was replaced by the new tank, located entirely within the bounds of the “F-3” easement. CP 399, 402-403, CP 384.

A “utility” is a service, such as a supply of electricity *or water*, that

⁴ Only the two corners of the building enclosing the tank were slightly outside the bounds of the “F-3” easement. CP 384.

is provided to the public. Merriam-Webster, Online Dictionary (2014), emphasis added. A water storage tank, including its appurtenant parts, is a “utility” by common definition and the “F-3” easement is a proper place to have located the water tanks (old and new). To the extent objection is made that the “utility” easement was never “intended” to be used for a water tank, there is no evidence of such intent in this record. In fact, the old water tank was located within the easement for over 30 years.

While the “F-3” easement created by the plat was for utilities for the use and benefit of Lots 24 through 27, the scope of the benefitted parties was expanded to include all members of Holiday Hills who received water from the upper level water storage tank beginning in 1981 (and additional lots in Alderview Estates). CP 399, 402-403. This expansion is permissible under Washington law. Washington’s Supreme Court has noted the following authority on the scope of easements:

“ . . . With respect to the scope of easements, five types of circumstances have frequent importance, namely, (a) whether the easement was created by grant or by reservation; (b) whether the conveyance was, or was not, gratuitous; (c) the use of the servient tenement prior to the conveyance; (d) the parties' practical construction of the easement's scope; and (e) the purpose for which the easement was acquired.” Moe v. Cagle, 62 Wn.2d 935, 938; 385 P.2d 56 (1963) citing 3 Powell on Real Property, § 415, p. 459.

Dougherty urges this Court to find only a “license” existed for Holiday Hills to locate its water tanks in the “F-3” easement, but not only is there no evidence to support existence of a license (*there is in fact* an easement designated on the plat), there is also:

“[A] marked tendency of the law ... to minimize the consequences of defects in the formalities of a transaction and thus to increase the frequency of easements and correspondingly to decrease the frequency of licenses so created.” Moe, supra, citing 3 Powell on Real Property § 429, p. 519.

In Moe, supra, Washington’s Supreme Court reversed a trial court’s ruling in favor of servient estate owners which established that a garage located within the bounds of an easement on their property was a permissive, revocable use. The Supreme Court found that grants of easement may be broadened or restricted by written covenants, but the written expressions of the parties should not be strictly construed. Moe at 937. To the contrary, the surrounding circumstances should be considered in determining the parties’ intentions. Moe at 938.

The Alderview Estates Plat created Dougherty’s Lots 24 and 25. CP 153-156. The Alderview Estates Plat also created the “F-3” easement. CP 153-156. Dougherty’s lots are both subject to this easement, it is a

“utilities” easement, and no further “express conveyance” is necessary.⁵ Creation of this easement was “gratuitous” and its plain purpose was facilitating utilities to benefit Lots 24 through 27 of the plat. Both the 1981 and new water tanks *do benefit* these lots, in addition to the other lots in Alderview Estates and Holiday Hills for which the tanks supply water. The parties’ practical interpretation of the “F-3” easement was that it permitted location of the community’s water storage tank within its boundaries and, once the community’s tank was placed there and lines installed and connected to the mid-level tank to service *all other members* of the association, the scope of the easement was expanded and should not now be limited to a “revocable license” over 34 years later.

b. Holiday Hills is entitled to prescriptive easements for its water tank and related improvements, and to access those improvements over the existing roadway.

Dougherty argues that the location of the community water tank and related improvements at the apex of “Nob Hill,” including access to the tank over the existing roadway, is “permissive” and cannot continue as a matter of right. The argument fails as a matter of law.

⁵ Dougherty also mentions in passing a 1981 deed from the Estate of Moore to Holiday Hills (CP 124). This deed conveyed any interest the deceased, Darl F. Moore, had in the then-existing water system. Holiday Hills’ ownership of the water tank and system component parts is not at issue in this appeal, so the deed is immaterial.

i. There is no evidence of permissive use.

First, there is no evidence of any permission sought or granted for locating the water tank (old or new) and related improvements on Lot 24, nor for use of the existing roadway over Lot 25 to access those improvements for the past 34+ years. Dougherty's sole evidentiary support for finding permissive use are handwritten notes by a board member who has testified he has no direct knowledge of any permission sought or granted, and a comment by then-President of Holiday Hills at the variance hearing in 2010, also hearsay. See Appellant's Brief, p. 3, citing CP 126 and CP 136-137. Dougherty argues permissive use even where he has conceded that there is no evidence as to whether permission was sought or granted. RP, October 17, 2014, p. 19, lines 8-10; Appendix, p. A-2.

The trial court properly ruled the handwritten notes on which Dougherty relies were hearsay and lacked foundation. RP, October 17, 2014, p. 13, lines 10-25; Appendix, p. A-2. The author of these notes, Robert White, testified that the notes were not based on his personal knowledge, and that he actually has no personal knowledge as to whether placement of the original water tank was permissive or in a "legal easement." CP 409.

The comment made by then-President of Holiday Hills, David Jenkins, at the variance hearing in 2010 is also hearsay, lacking any foundation and not provided by sworn affidavit. CP 136. Moreover, the comment was that Lot 24 was the only place where Holiday Hills had permission to place the tank *“as one is present there now.”* CP 136. Dougherty ignores this qualifying phrase, directed to the fact that the old tank was located in the “F-3” easement for decades, such that the new tank should be able to be located there as well.⁶

The admissible and undisputed evidence is devoid of any reference to permission sought or granted for placement of the water tank or related improvements, or access to the tank over the existing roadway.

ii. Any presumption of permissive use is overcome.

Second, any presumption of permissive use is overcome in this case. Dougherty argues that Holiday Hills’ use of Lots 24 and 25 is “presumed to be permissive,” citing Turner v. Davisson, 47 Wn.2d 375, 384-85, 287 P.2d 726, 732 (1955) and the lone fact that Lot 24 is unenclosed land (notably, Lot 25 is improved land, which appellant fails to distinguish in the record). The Turner case is totally dissimilar to the case

⁶The hearing examiner’s reference to a “leasehold” was clearly in error as there is no evidence of any leasehold anywhere in the record. CP 137.

at hand and does not support an argument that a “presumption” should apply here. Further, even if there is a presumption of permissive for use of Lot 24, Dougherty’s argument ignores long established law that the presumption is overcome when use is proven to be open, notorious, continuous and uninterrupted for a 10 year period *and where there is no evidence of permissive use.*

In Turner, the plaintiffs requested an easement or a right of access over certain streets purportedly dedicated in 1890 by the platting of a subdivision. The court noted the streets were used only intermittently by the public during the period in question and vacated in 1895 by operation of law, at which time the public lost any easement rights. Turner at 385-386, citing 1889-1890 Wash. Laws Ch. XIX, § 32, p. 603. The court found a presumption of permissive use for intermittent past use of this “prairie land,” and no prescriptive easement or right of access by law. Id. The Turner case bears no factual similarity to this case and does not present authority for a “presumption” of permissive use to apply here. The case also fails to address circumstances where the “presumption” is overcome.

The case of Hovila v. Bartek, 48 Wn.2d 238, 241, 292 P.2d 877 is similar to the instant action and demonstrates the error in the Dougherty’s

argument regarding presumption of permission use.

In Hovila, an owner installed a water pipeline on his neighbor's property, leading to a "ram" he installed in a creek, to irrigate to his land. The "ram" lifted the water from the creek to the pipeline. The evidence showed that prior owners of the land over which the pipeline extended recognized the installer as the "owner" of the pipeline and water system, and there was no evidence of permissive use. Based on these facts, the court found the installer was the owner of the pipeline and water system, and had a prescriptive easement.

The current owners of the property over which the Hovila installer's system was located objected. They contended that the installer's use of their land for construction and maintenance of the pipeline was permissive at its inception. The court rejected this, citing lack of evidence that permission was ever given to the installer by any of the objecting party's predecessors in title.

Per Hovila, a finding that the installer's use was permissive would be based solely upon the legal "presumption" that, when one enters or goes upon another's property, he does so with the true owner's permission. However, the Hovila court found that proof of use which is open,

notorious, continuous, and uninterrupted for the required time “creates a presumption that the use was adverse unless it is otherwise explained; and the burden is then upon the servient owner to show that the use was permissive”. Hovila at 241, citing Northwest Cities Gas Co. v. Western Fuel Co., 13 Wn. (2d) 75, 123 P. (2d) 771; Roediger v. Cullen, 26 Wn. (2d) 690, 175 P. (2d) 669; Gray v. McDonald, 46 Wn. (2d) 574, 283 P. (2d) 135; 1 Thompson on Real Property (Perm. ed.) 718, § 436.

Just like Hovila, Holiday Hills installed its water system and accessed it for decades without there being any record of permission. There should be no “presumption” of permission where there is no evidence of it. Nor can it be reasonably argued that it was implicit “neighborly accommodation” to allow a permanent and substantial structure be placed on the property, connected to water distribution and transmission lines extending to a mid-level water tank, and operating in conjunction with that tank to provide water service to hundreds of people for over 30 years.

In addition, there is ample evidence here that the prior owners of Dougherty’s property (the Mundens) recognized Holiday Hills’ to be the owner of this system – Holiday Hills paid all costs associated with the

water system and its maintenance, and collected assessments from its members (including the Mundens) for the water service. CP 133-141, 309-344, 399, 403-403, 410-411.

Where undisputed facts establish a use that is open, notorious, continuous and uninterrupted for the 10 year period, *and there is no evidence at all of permission sought or obtained*, the “presumption” of permission, even if one existed, is overcome. It is now Dougherty’s burden to prove Holiday Hill’s use was “permissive.” Dougherty cannot meet this burden; his reliance on the legal “presumption” of permissive use is misplaced and there is no admissible evidence to show permission sought or granted.

iii. The undisputed facts support issuance of prescriptive easements.

Dougherty lastly argues that Holiday Hills cannot be granted declaratory rights to use the “F-3” easement for its water tank and related improvements, and also be granted prescriptive easements. The argument lacks merit. Holiday Hills’ position is consistent with the undisputed facts, and the trial court’s rulings on prescriptive rights should be upheld.

The trial court noted that the water tank and related improvements located within the “F-3” easement were “utilities” and properly located

there. RP, October 17, 2014, p. 46, lines 11-22; Appendix, p. A-2. This includes the water tank itself, the pumphouse, and water distribution and transmission lines and connections located within the “F-3” easement. CP 384. The trial court also found a basis for prescriptive rights, but only to the extent the original “F-3” easement grant was “expanded” in scope. RP, October 17, 2014, p. 47, lines 1-19; Appendix, p. A-2. This ruling was necessary and proper as there is a “RIPRAP” pad (erosion control device surrounding an emergency discharge pipe, see CP 787-788), water lines, and an access road which are located *outside* the boundaries of the “F-3” easement.

To establish a “prescriptive easement” requires: (1) use adverse to the right of the servient owner, (2) open, notorious, continuous, and uninterrupted use for the entire prescriptive period, and (3) knowledge of such use by the owner at a time when he was able to assert and enforce his rights. Dunbar v. Henrich, 95 Wn.2d 20; 622 P.2d 812 (1980). The period required to establish a prescriptive easement is 10 years’ use adverse to the servient owner, similar to adverse possession. Id.

Here, the admissible and undisputed evidence is that the original water tank was delivered January 31, 1981, water lines dug in April of

1981, and pipe laid in May and June 1981. CP 399, 402-403. By June 29, 1981 the tank was complete and serving everyone in Holiday Hills with gravity-fed water. CP 402-403. The water distribution and transmission lines to and from the old tank to the mid-level tank have thus been located on Dougherty's Lot 24 ever since 1981. CP 384 depicts the location of these lines as well as a "RIPRAP" pad. The same roadway also has been used to access the tanks from 1981 to present date. CP 411. There is no record anywhere of the owners of the Lots 24 or 25 giving any permission for installation of the water tank, water lines, or to use the access road.

The original water tank was at the apex of Nob Hill from 1981 to 2012, much longer than the required 10 year period. CP 399, 402-403, 133-141, 143. During that entire time, the tank was connected to water lines (filling and refilling, and providing water to all members of Holiday Hilld), via distribution and transmission lines evident from their connection to the tank itself. CP 384. The tank and pump house were accessed by Holiday Hills via "Nob Hill Road." CP 399, 402-403, 410-411. Robert White, who is personally familiar with the 1981 tank and the roadway usage, testified that the road was in place before the old tank was installed, and that the road has been in its same location, used to access the

tank built in 1981 and now the new tank, for 30+ years. CP 410-411. Mr. White also testified to having covered the water lines installed for the old tank as part of a volunteer work party. CP 411. There is nothing in the record to demonstrate that the old and new distribution and transmission lines are in different locations today than they were for the past 30+ years. CP 384.

To the extent new distribution and transmission lines replaced the old once the variance was granted for the new tank, the prescriptive rights to keep those lines running under Lot 24 had long ago ripened into a legal right. To the extent there is a “RIPRAP” pad slightly outside the bounds of the “F-3” easement, there is no evidence other than that being an area of rocks to control potential erosion, protecting Dougherty’s lot and required by the variance permit. CP 133-141, CP 143.

CR 56(c) requires that on summary judgment the Court consider only affidavits stated on personal knowledge, and facts which would be admissible in evidence. The only documents in existence which are admissible on the issue of permission are the historic business records of Holiday Hills, well over 20 years old. CP 399, 402-403. The only eye-witness testimony of installation of the water lines and use of the access

road is that of Robert White. CP 410-411. This evidence reveals no requests for permission, and no grant of permission – either for the water tank, use Nob Hill Road to access the tank, nor for the distribution and transmission lines leading to and from the tank to the mid-level tank below. Holiday Hills was properly granted summary judgment on the claims for prescriptive easements as a matter of law.

c. There has been no unconstitutional “taking.”

Dougherty claims the trial court found that the Pierce County Hearings Examiner’s decision established a property interest in favor of Holiday Hills, depriving Dougherty of his property without due process of law under Article 1, Section 3 of the Washington State Constitution. Appellant’s Brief, pp. 19-21. The trial court did not make that ruling and only noted the significance of the variance proceeding in response to Dougherty’s varied and inconsistent arguments at the summary hearing.

In its oral ruling, the trial court did mention the Pierce County Hearing Examiner’s decision which granted a variance to locate the new water tank at the top of “Nob Hill” and within the “F-3” easement. RP, October 17, 2014, p. 46, lines 23-25, p. 47, lines 1-10; Appendix, p. A-2. The decision was significant because it took place in November of 2010,

before Dougherty purchased his Lots 24 and 25, but on notice to his predecessors' in interest, the Mundens. It is now a final decision and not subject to any appeal. The trial court cited the decision in response to Dougherty's claim that he was not actually aware of the variance decision, was unaware that a larger tank would be constructed on his property or where it would be located, that he actually purchased the old water tank from the Mundens, and demand for monetary judgment against Holiday Hills based on these allegations. RP, October 17, 2014, p. 16, lines 5-25, p. 17, lines 1-3; Appendix, p. A-2.

At the summary hearing on October 17, 2014, Dougherty actually argued that he owned Holiday Hills' water tank:

“The Mundens...had contracted for the sale of the home, 10 acres, and other structures when the only other [*sic*] structures were the woodshed and the old tank. **I argue we have title to the tank itself.**” RP, October 17, 2014, p. 20, lines 4-8; Appendix, p. A-2. See also RP, October 17, 2014, p. 16, lines 5-14; Appendix, p. A-2.

Dougherty's argument was contrary to the record and even his own, sworn testimony in which he confirmed he had notice from the Mundens' realtor that it was Holiday Hills' water tank located on Lot 24 and that Holiday Hills' was replacing the tank with a 54,000 gallon tank:

“After the Mundens contracted with [Dougherty] to sell him AE 24 and 25, Bryce Beard⁷, acting on behalf of the Mundens, disclosed

⁷ Bryce Beard acted as Buyer's and Seller's agent for the purchase and sale. CP 217.

that [Holiday Hills] intended to build a new 54,000 gallon water tank on AE 24, that the Old Tank would be promptly removed and the New Tank would be painted to blend in with the surroundings and conceal its dramatically larger size.” CP 75-76, paragraph 45.

Despite Dougherty’s allegations to the contrary, there was due process notice and public hearing before the replacement tank was permitted to be constructed on his Lot 24. CP 363, 366-371. Pierce County permitted the new tank’s placement within the bounds of the “F-3” easement, and also permitted construction of related improvements outside the easement boundaries and onto Lot 24. CP 133-141, CP 143. This took place before Dougherty purchased his Lot 24, but the record below reveals he was aware of it and, if he did not know the precise details, those details were available to him in the public record of the variance proceeding. He certainly knew of the existence of the old tank, as it was present and highly visible on the property he purchased. CP 388 is a photograph of the old tank, enclosed within a large building, the majority of which was located on Dougherty’s Lot 24.

There has been no unconstitutional “taking” of Dougherty’s property without due process – the Mundens were aware of the tank, water lines, and access used to reach the tank, and had their opportunity to protest over many decades during which the tank and all appurtenances

were located on their real property. Dougherty was admittedly aware of the old and intended new tank when he purchased this property from the Mundens. The timeframe within which to complain about the utility's location in the "F-3" easement, and the improvements connected to the utility but located outside the bounds of that easement, had long ago expired when Dougherty purchased his properties.

Issue No. 2: The trial court made no ruling on Holiday Hills' alternate claims for relief, which were rendered moot by summary judgment, Dougherty did not prevail on those claims, and even if the trial court's rulings are reversed, those alternate claims would remain to be adjudicated on remand.

a. The trial court's failure to rule on alternate claims once summary judgment was granted on other legal bases, was proper.

Dougherty urges this Court to rule on Holiday Hills' adverse possession claims as a matter of law, and then award attorney fees to him as "prevailing party" under RCW 7.28.083(3). Dougherty also requests this Court summarily dismiss Holiday Hills' alternate theory for mutual recognition and acquiescence. Neither request is properly before this Court. The trial court made no rulings on these claims. The claims were rendered "moot" by issuance of the summary judgment in Holiday Hills' favor on other theories of relief.

While Dougherty requested the trial court dismiss Holiday Hills' alternate claims for relief, the trial court did not rule on his request – it was rendered moot:

“The Plaintiff’s [Dougherty’s] request for partial summary judgment is accordingly denied. I do believe there are material disputed facts on some of the issues associated here, but it really becomes a moot point since I am prepared to sign an order that declares an easement on behalf of ... [Holiday Hills] here.” RP, October 17, 2014, p. 47, line 25, p. 48, lines 1-6, Appendix, p. A-2.

The trial court further noted:

“The request for attorney fees by Mr. Dougherty is denied. *Neither side has prevailed on the issue of adverse possession* as called for in RCW 7.28.083.” RP, October 17, 2014, p. 48, lines 7-9. Appendix, p. A-2. Emphasis added.

The trial court’s rulings were correct. Dougherty has presented no authority requiring a trial court rule on claims rendered moot. If this Court should reverse the trial court, Holiday Hills’ alternate theories should remain to be decided by the trial court on remand. Notably, this includes an equitable estoppel claim against Dougherty. Dougherty is not entitled to any fees as he has not and should not “prevail” under RCW 7.28.083(3).

b. The trial court’s dismissal of alternate claims was not warranted.

Furthermore, and as presented to the trial court, there was sufficient evidence to proceed with alternate claims if the trial court did not enter

judgment in Holiday Hills' favor based on other legal bases.

i. Adverse possession.

To establish adverse possession, a claimant's use and possession must be open and notorious, actual and uninterrupted, exclusive, and hostile, all for the statutorily prescribed period of 10 years. Itt Rayonier v. Bell, 112 Wn.2d 754, 758, 774 P.2d 6 (1989). Dougherty claims Holiday Hills' adverse possession claim fails as a matter of law because its use of the land in question was "permissive" and also because the old tank and new tank are not in the precise same location. These arguments should be rejected.

As to permissive use, there is no evidence to support that claim. See Section C, Issue 1, subpart (b) above.

As to whether removal and replacement of the old tank has bearing on the claim for adverse possession, title acquired through adverse possession cannot be divested by acts other than those required to transfer a title acquired by deed. Gorman v. City of Woodinville, 175 Wn.2d 68, 283 P.3d 1082 (2012) citing Mugaas v. Smith, 33 Wn.2d 429, 206 P.2d 332 (1949). "[T]he law is clear that title is acquired by adverse possession upon passage of the 10-year period." Gorman, citing Halverson v. City of

Bellevue, 41 Wn. App. 457, 460, 704 P.2d 1232 (1985). There is no “abandonment” when a structure on adversely possessed land has been replaced; once title is acquired by adverse possession for location of its water tank, Holiday Hills’ has title to that area against the world.

The "hostility/claim of right" element of adverse possession requires only that the claimant treat the land as his own as against the world throughout the statutory period. Itt Rayonier, 112 Wn.2d 754, 761, citing Chaplin v. Sanders, 100 Wn.2d 853, 857, 676 P.2d 431 (1984). The nature of his possession will be determined solely on the basis of the manner in which he treats the property. His subjective belief regarding his true interest in the land and his intent to dispossess or not dispossess another is irrelevant to this determination. Id.

The “exclusive” element of adverse possession does not require absolute exclusion of all others. To be exclusive, "the possession must be of a type that would be expected of an owner . . ." ITT Rayonier, Inc. v. Bell, 51 Wn. App. 124, 129, 752 P.2d 398 (1988).

Holiday Hills’ possession of the water tank area was non-permissive and of a type which can only be expected of an owner. Its 20,000 gallon water tank was located at the top of “Nob Hill” for 30+ years. The access

road to the tank is the same as it was in 1981. There is no admissible evidence that the tank was placed there with permission of the then-property owners. In fact, there are several concurrent records from Holiday Hills which refer to the tank without any mention of the then-property owners at all. CP 399, 402-403. While permission under some circumstances may be implied, that can hardly be the case with a fixture as substantial and permanent as a water tank.

While Dougherty complains that the new water tank is located next to the footprint of the old tank, not its precise same location, his complaints have no bearing on the outcome of the claim.

First, Holiday Hills had a vested right to place its new water tank within the existing utility easement because that the easement area was where the old tank had been located for over 30 years. It was not possible to locate the new tank in the footprint of the old. There was a population of 150 people relying on this water source and the old tank had to store the water while the new tank was built. The landslide hazard on Lot 24 is severe and the geo-hazard report required the new tank be placed in its current location for public safety. CP 374-382.

Second, in cases of adverse possession it is not required that the tanks

have been located on the precise same surface area. Washington courts have recognized the “penumbra principle” allows adverse possession of an area reasonably necessary to carry out the non-record claimant’s objective, whether that be the precise footprint of the adverse use or not. See Lloyd v. Montecucco, 83 Wn.App. 846, 924 P.2d 927 (1996). This principle could be exercised to allow Holiday Hills’ adverse possession claim to the land on which its new tank is located.

The “penumbra principle” also applies to Dougherty’s argument that adverse possession fails due to the fact that the new tank has only been completed since 2011. The old tank establishes the claim to quiet title to the area on which the old tank was located, and the additional area reasonably necessary to locate its replacement.

ii. Mutual recognition and acquiescence.

The doctrine of mutual recognition and acquiescence supplements adverse possession. Lloyd v. Montecucco, 83 Wn. App. 846, 855, 924 P.2d 927 (1996) (citing William B. Stoebuck, Wash. Pract. Real Estate: Property Law § 8.21, at 519 (1995)). A party may establish a boundary by mutual acquiescence by proving an express agreement to a well-defined line, designated on the ground in some way, for example, by monuments, roadways, or fence lines. Absent an express agreement, the claiming party

must show that the adjoining landowners, or their predecessors in interest, have in good faith recognized and accepted the designated line as the true boundary line by their acts, occupancy, and improvements. Finally, the claiming party must show continuous mutual recognition and acquiescence to the line for the period required for adverse possession. See Lamm v. McTighe, 72 Wn.2d 587, 592-93, 434 P.2d 565 (1967). An express or implied-in-law agreement can also apply, however.

Since 1981, Holiday Hills had its community water tank at the top of “Nob Hill.” All lot owners recognized Holiday Hills’ right to locate its tank there, by virtue of their having been absolutely no challenge to its location for 30 years. While Darryl Franz (Lot 27 owner) and also the Mundens’ (Lot 24 and 25 owners) son, Jodie Munden, voiced objection to the tank’s location at the 2010 variance hearing, this was while the existing tank had already been located there for decades, was supplying water to a population of 150, and was posing “great danger to the public from potential contamination.” CP 133-141.

At the public hearing on the variance, David Jenkins, then-President of Holiday Hills is noted as commenting that Lot 24 “was the only place that [Holiday Hills has] permission to place the tank, *as one is present there now.*” CP 136. Mr. Jenkins recognized the crux of the argument for mutual recognition and acquiescence – once a party has acquiesced for decades in the placement of a community water tank within

a utility easement, the utility has the right to keep it there, including to replace it when necessary for the public health and welfare.

Issue 3: Holiday Hills' claims for past due assessments presented no genuine issues of material fact and the trial court properly granted summary judgment on those claims as a matter of law.

The trial court also entered a \$2,536.00 summary judgment against Dougherty, adding \$299.90 in prejudgment interest and \$441.00 in statutory costs and fees, for assessments owed Holiday Hills. Dougherty appeals, requesting remand and a trial on these claims. The trial court's order was proper, there are no disputes of fact or law presented for trial on these claims, and the claims should not be remanded.

a. No amendment to the Bylaws is required to impose assessments.

Dougherty first argues that Holiday Hills' Bylaws need to be amended to fix a "maximum sum" for its assessments for water and roads. Without a Bylaws amendment, Dougherty claims Holiday Hills' acted outside its authority and its actions are thus "voidable" per the authority of Hartstene Pointe Maint. Assn. v. Diehl, 95 Wn.App. 339, 345, 979 P.2d 854, 857 (1999). The argument has no basis in fact or law – Hartstene is

not on point, a Bylaws amendment is not required, and the statute of limitations to complain about these assessments has long ago expired.

i. **Hartstene is inapposite authority.**

In Hartstene, Dougherty's sole cited authority for his argument that Holiday Hills' did not "properly and legally" impose assessments for water and roads, a member of an owner's association was denied permission to remove a particular tree from his property by an Architectural Control Committee ("ACC"), then later assessed a monetary fine by the owner's board and suffered loss of voting rights and other privileges. In the ensuing litigation, the trial court invalidated some of the fines and found the neighborhood CCR's (Covenants, Conditions and Restrictions) did not authorize the Board or the ACC to impose fines. Numerous challenges were raised on appeal, and the appeals court agreed that the ACC was not properly constituted under the governing documents for the community, which was dispositive of the case.

The appeals court in Hartstene found that the ACC did not meet the requirements of either the neighborhood CC&Rs or of RCW 24.03.115. The appeals court found that the plain language of the CC&Rs and the statute authorized an architectural committee of three members,

not three or more, and the statutory mandate was that such committee consist of two or more directors. The makeup of the Hartstene ACC was flawed as there was only one board member and more than three members. The appeals court analyzed the doctrine of “ultra vires,” which prohibits corporate transactions that are outside the purposes for which a corporation was formed and, thus, beyond the power granted the corporation by the Legislature, but found the doctrine inapplicable. Hartstene citing Twisp Mining & Smelting Co. v. Chelan Mining Co., 16 Wn. 2d 264, 293-94, 133 P.2d 300 (1943). There was no contention that Hartstene had authority to regulate the architectural development of the community, it was the manner in which they did so which did not conform to the governing documents of the corporation.

Hartstene is not on point. Here, Holiday Hills has followed its Articles, Bylaws, Operating Policy and Constitution to the letter. Holiday Hills has only exercised those powers set forth in its governing documents, and only in the manner permitted in those documents. Paragraph 14 of the Articles does not mandate that there be a fixed maximum in the Bylaws for assessments, Holiday Hills has never fixed a “maximum” for its assessments, and to rule that this is “required” by the Articles when it has

never been done since formation of the corporation in 1968 would invalidate the manner in which *all* Holiday Hills' assessments have been imposed for decades.

ii. There is no “fixed maximum” for water assessments.

Per Holiday Hills' corporate Articles of Incorporation, one of the purposes for which the corporation was formed was to appropriate, purchase, divert, acquire and store water from streams, water courses, wells or any other source, and to distribute the water for use upon the lands of its members. CP 527 at paragraph 13. In furtherance of its corporate purpose, Holiday Hills' Articles grant the corporation authority “[t]o fix, establish, levy and collect annually such charges and/or assessments as may be necessary, in the judgment of the board of trustees to carry out any or all of the purposes for which this corporation is formed, but not in excess of the maximum from time to time fixed by the By-Laws”. CP 527, paragraph 14.

Holiday Hills' Bylaws generally require a simple majority vote of members present at regular meetings to take any action. CP 534. There are two regular meetings each year – the first in May and the second in September. CP 533. Assessments for the coming year are voted on at the

regular September meeting. CP 533.

In September of 2007, there was unanimous approval by all members present at the regular meeting to enter into a loan agreement with the Washington State Drinking Water State Revolving Fund program to construct a new upper-level water tank, to replace the water lines and install new meters with back-flow valves. CP 548-550. The loan was thereafter obtained and the water system improvements are substantially complete. CP 309-344. The schedule of assessments for the water system improvements was determined in the same manner as other assessments, by majority vote in accord with the Bylaws at the regular scheduled meetings of the membership.

There is no “fixed maximum” in the Bylaws for the water assessment. In fact, the fee for the water system is “determined yearly by Water System users.” CP 533. To the extent Holiday Hills incurred a debt now owed to Washington State which is repaid by collecting assessments, this is entirely permissible under the Articles which allow Holiday Hills “to borrow money” and “pledge...security” (CP 528, paragraph 17), as well as “to expend moneys [*sic*] collected by said corporation from assessments” (CP 527, paragraph 15).

To the extent Dougherty complains that “a separate fixed amount” is not set forth in the Bylaws for water assessments, he cites no authority for this requirement and the fact is the water assessment has been “separately” fixed. See Holiday Hills’ corporate records at CP 546 and CP 720, for instance.

iii. There is no “fixed maximum” for road assessments.

Holiday Hills’ Articles of Incorporation at Paragraph 2 describe the corporation’s responsibilities with regard to roads. CP 524-530. Holiday Hills is responsible to build, improve and maintain roadways and “to make and collect charges to cover the costs and expenses therefor.” CP 525.

There is no limitation on the amount of the road assessment under Paragraph 2 of the Articles. The Articles state unambiguously the charges are “to cover” the costs and expenses of the maintenance.

Holiday Hills’ governing documents are interpreted in accordance with accepted rules of contract interpretation: “Washington courts follow the objective manifestation theory of contracts, imputing an intention corresponding to the reasonable meaning of the words used.” Realm, Inc. v. City of Olympia, 168 Wn. App. 1, 5, 277 P.3d 679 (2012). In addition, where a provision of the articles of incorporation is inconsistent with a

bylaw, the articles of incorporation are controlling. RCW 24.06.025.

In 1968, Holiday Hills' Bylaws initially set the road assessment at \$24 per year (CP 532) and Dougherty argues that amount can never change unless there is a valid amendment to the Bylaws. He cites to Paragraph 14 of the Articles which allows general levy of assessments "but not in excess of the maximum from time to time fixed by the By-Laws." CP 527. The argument fails for several reasons.

In the first place, nowhere in the Bylaws is an intent expressed to make the \$24 a "fixed maximum." Second, the Articles (which trump the Bylaws) elsewhere allow imposition of assessments for road costs without reference to any "fixed maximum." CP 525. Indeed, the Articles clearly state that the road assessments is imposed "to cover" the costs and expense of the maintenance. CP 525, Paragraph 2. The Articles at Paragraph 2 do not require the Bylaws be amended to provide for the \$45 yearly charge for roads. It is within the authority of the non-profit at the Articles at Paragraph 2, not Paragraph 14, to impose a road assessment, and there is no limitation on the road assessment.

**iv. The statute of limitations has expired on
Dougherty's legal challenge to the assessments.**

Dougherty cannot legally challenge Holiday Hill's water and road

assessments because he became a member of the non-profit after any alleged wrong had been committed and the statute of limitations on any complaint had expired.

Generally, a stockholder who purchases his shares after an alleged wrong has been committed by officers of the corporation cannot complain about those actions unless the effects of mismanagement continued to the stockholder's injury. R.T. Davis, Jr. v. C.L. Harrison et al., 24 Wn.2d 1, 16,167 P.2d 1015 (1946). The statute of limitations runs three years from the date on which the alleged objectionable corporate actions were made or were ascertainable. R.T. Davis, Jr. v. C.L. Harrison et al., 24 Wn.2d 1, 16,167 P.2d 1015 (1946).

The road assessment about which Dougherty complains is \$45 per year. It was imposed by Holiday Hills' simple majority voting process by those present at the September 2006 regular, bi-annual meeting. CP 543-546. The water system improvement loan and related assessment about which Dougherty complains was approved in September of 2007, again by approval of the majority of members present at the regular, bi-annual meeting. CP 548-550.

Dougherty became a member of Holiday Hills on February 25,

2011 (CP 22-23), more than three years after both the \$45 road assessment was imposed and the Washington State Drinking Water loan and related assessment was approved. Dougherty has no standing to complain about the past corporate actions which resulted in these assessments. While Dougherty argues that he does not challenge Holiday Hills' actions as "ultra vires" but complains only that Holiday Hills "did not follow its rules," there is little distinction here. The assessments are approved way of the process described in the Bylaws, by the membership at the regularly scheduled September meetings. A challenge to the actions taken at the September 2007 meeting, wherein entering into the Washington State loan was approved by the members present and to be repaid by collection of this assessment, is clearly an "ultra vires" claim.

b. Holiday Hills' compliance with "open meeting" requirements is not genuinely at issue.

Dougherty's final challenge to the judgment for assessments is based on the "open meeting" requirements of RCW 64.38.035. RCW 64.38.035 applies only to "homeowners' associations" as defined by RCW 64.38.010(11) and Holiday Hills does not fit within that statutory definition. A "homeowners' association" is an entity whose members pay costs associated with property not owned by its members. Holiday Hills

doesn't own any real property for which it assesses its members.

Assuming for argument's sake that RCW 64.38.025 applies to this case, Dougherty alleges that Holiday Hills' assessments were "not lawfully enacted" if he did not receive notice of meetings. The facts do not support his claim, nor does the law.

Dougherty failed to even identify which meetings he claimed to be unaware of. CP 596-601. His declaration alleged summarily that Holiday Hills "repeatedly failed to provide [him] notice of various meetings, of anticipated votes, mail [him] ballots, or give [him] the ability to comment as a community member..." CP 599, paragraph 26, and CP 897, paragraph 897. This is *the only* testimony Dougherty submitted to the trial court on the issue of notice, and is wholly insufficient to present a genuine issue for trial.

Since Dougherty became a member of the non-profit, there have been 8 meetings, twice yearly in May and September 2011, 2012, 2013 and 2014. Dougherty was notified of these meetings, along with all other Holiday Hills' members, by advance mailing of meeting notices. CP 882-883, CP. Then-secretary of Holiday Hills, Robert White, authenticated the many letters Holiday Hills received from Dougherty during these years,

indicating his awareness of the meetings. CP 848-864. Dougherty apologizes in one letter for his inability to attend the “semi-annual” meeting (CP 865). Notably absent from the voluminous correspondence is any mention of Dougherty not receiving meeting notices or other mail from Holiday Hills. Also notable are Dougherty’s complaints in these letters about assessments, clear indication he received Holiday Hills’ invoicing on which meeting notices are printed. CP 692.

RCW 64.38.035 does not provide that failure to strictly comply with the meeting notice requirement invalidates any action taken at the meeting. There is no legal authority for that proposition at all. On the contrary, Washington’s Appeals Court has held a trial court did not abuse its discretion in finding 18 violations of the meeting notice requirements of RCW 64.38.035, but failing to grant any affirmative relief with respect to the violation. Roats v. Blakely Island Maintenance Commission, Inc., 169 Wn.App. 263, 279 P.2d 943 (2012).

In Roats, property owners sought declarations that their community covenants were invalid, and that their homeowner association did not have authority to take certain actions, including owning and operating a marina. The property owners also alleged 28 violations of RCW 64.38.035. The

trial court granted summary judgment in favor of the association on the issue of its authority to operate the marina, and take related actions such as entering into a lease. The trial court also granted summary judgment to the property owners, finding at least 18 violations of RCW 64.38.035. In spite of the violations, the trial court granted no additional relief to the property owners for these violations, including denying the property owners' request for attorney fees.

Dougherty did not testify he was not aware of the regular, semi-annual meetings. He did not testify that he had any intention to come to the meetings, but missed them because he didn't know they were taking place. Dougherty has alleged no cognizable claim related to lack of notice, even if such lack of notice is assumed based on his meager testimony. Summary judgment was proper even assuming lack of notice of (an unspecified) meeting.

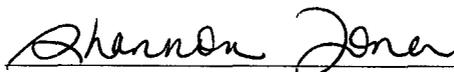
Issue 4: Holiday Hills is entitled to statutory attorney fees and costs on appeal.

Holiday Hills requests statutory costs and attorney fees under RCW 4.84.030, RCW 4.84.080 and RAP Title 14. Dougherty is not entitled to a fee or cost award.

V. CONCLUSION

Holiday Hills requests this appeal be denied and the just and proper orders of the trial court be upheld.

Respectfully submitted this 20 day of May, 2015.



Shannon R. Jones, WSBA #28300
Campbell, Dille, Barnett & Smith, PLLC
Attorneys for Respondent, Holiday Hills
Community Club, Inc.

APP-1

APP-2

FILED
COURT OF APPEALS
DIVISION II
2015 MAY 20 PM 3:24
STATE OF WASHINGTON
BY cm
DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CASEY DOUGHERTY

Appellant,

v.

HOLIDAY HILLS COMMUNITY CLUB,
INC.

Respondent.

Case No. 47033-1-II

**DECLARATION OF
SERVICE**

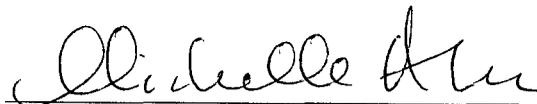
THE UNDERSIGNED, hereby declares as follows:

That I am now and at all times herein mentioned a citizen of the United States and a resident of the State of Washington, over the age of 18 years, not a party to the above entitled action and competent to be a witness therein. That on the 20th day of May, 2015, she placed a true copy of the Brief of Respondent Holiday Hills Community Club, Inc. on file in the above-entitled matter, to be delivered to Mark Bardwil, at the address below stated below via ABC Legal Messengers and also caused the original to be filed with the clerk of the Court of Appeals, Division II:

Mark Edward Bardwil
Attorney at Law
615 Commerce St., Ste. 102
Tacoma, WA 98402-4605

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Signed at Puyallup, Pierce County, Washington this 20 day of May, 2015.


Michelle A. Lea

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

CASEY DOUGHERTY,)	
)	
Plaintiff,)	Superior Court
)	No. 13-2-15936-3
vs.)	
)	Court of Appeals
HOLIDAY HILLS COMMUNITY CLUB,)	No. 47033-1-II
INC.,)	
)	
Defendant.)	

VERBATIM TRANSCRIPT OF PROCEEDINGS
Motion

October 17, 2014
Pierce County Superior Court
Tacoma, Washington
Before the
HONORABLE JERRY T. COSTELLO

Natasha Semago
Official Court Reporter
930 Tacoma Avenue
334 County-City Bldg.
Department 7
Tacoma, Washington 98402

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A P P E A R A N C E S

FOR THE PLAINTIFF:

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FOR THE DEFENDANT:

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BE IT REMEMBERED that on Friday, October 17, 2014, the above-captioned cause came on duly for hearing before the **HONORABLE JERRY T. COSTELLO**, Judge of the Superior Court in and for the County of Pierce, State of Washington; the following proceedings were had, to wit:

<<<<<< >>>>>>

THE COURT: Casey Dougherty vs. Holiday Hills Community Club, 13-2-15936-3. We have -- go ahead and make your appearances for the record.

MR. DOUGHERTY: I am Casey Dougherty. I'm the Plaintiff and counter-claim Defendant. And Shannon Jones, she represents Holiday Hills as the Defendant and counter-claim Plaintiff.

THE COURT: All right. I have received the motion for partial summary judgment from Mr. Dougherty and the response and the reply. I have studied these materials. I have also received Mr. Dougherty's motion for sanctions under the Civil Rules.

Do you have a preference? Do you have a desire which matter you want to argue first?

MR. DOUGHERTY: At Your Honor's discretion.

THE COURT: Ms. Jones, does it matter to you?

MR. JONES: No. Thank you, Your Honor.

1 THE COURT: All right. Well, I will entertain
2 brief argument on the first -- first on the question of
3 sanctions.

4 MR. DOUGHERTY: I come before the Court today
5 seeking sanctions pursuant to Civil Rule 26(e) and (g).
6 The Supreme Court has positioned concerns Exchange vs.
7 Fison's court -- and they made clear that sanctions are
8 required for violations of Civil Rule 26(g). That was a
9 sad case where a two-year-old suffered permanent brain
10 injury, and the corporation had created the medication that
11 two-year-old had, had reason to know it would cause adverse
12 effects on the child.

13 In that particular case, the Supreme Court found the
14 trial court erred in refusing to impose sanctions prior to
15 the proponent seeking to compel discovery. It opined:
16 "Concern about discovery abuse has led to widespread
17 recognition that there is a need for more aggressive
18 judicial control and supervision. Sanctions to deter
19 discovery abuse would be more effective if they were
20 diligently applied, not merely to penalize those whose
21 conduct may be deemed to warrant such a sanction, but deter
22 those who might be tempted to such conduct in the absence
23 of such a deterrent." They continued: "...The concept
24 that a spirit of cooperation and forthrightness during the
25 discovery process is necessary for the proper functioning

1 of modern trials is reflected in decisions of our Courts of
2 Appeals."

3 I served my first discovery request upon the Defendant
4 in late November of last year. Within those discovery
5 requests was an interrogatory with the later requests for
6 production requesting identification and production of all
7 contracts or agreements of any kind entered into relating
8 to the 50,000-gallon water tank, the company pump house,
9 and property on which the tank and the pump house were
10 located. I also requested copies of my second discovery
11 requests that all documents supported or pertained to
12 Defendants' denials of Plaintiff's claims and documents
13 supporting its counterclaims.

14 These requests were not overbroad or unreasonable,
15 were specifically targeted to obtain evidence related to
16 Holiday Hills' denial of my claims and counterclaims, were
17 well within Holiday Hills' requirement -- requirements of
18 production under Civil Rule 26(g). Yet the only additional
19 discovery received were letters I had forwarded to Holiday
20 Hills', a copy of the Alderview Estates' plat map showing
21 Holiday Hills didn't have an easement to build where it
22 did, and a copy of the variance hearing decision.

23 In its 12-day late response, a myriad of documents
24 within its possession evidencing agreements regarding the
25 water system, its placement, legal rights, or my property,

1 it only referenced to provide a copy of the five. As part
2 of my attempts to get the admitted documents, Holiday Hills
3 promised to provide the meeting minutes. However, despite
4 its promise, it only provided minutes from 1983 to present
5 even though most of the facts of this case concern the 70s
6 and early 80s. I followed up again seeking the admitted
7 documents and telling Holiday Hills those documents were
8 important to my case. However, Jones certified they didn't
9 exist. Of course they did exist. They were within Holiday
10 Hills' files and Jones' files. And Holiday Hills and Jones
11 together have certified to Pierce County that they intended
12 to use one of those very documents in another one of their
13 cases.

14 When I brought the false information to Jones'
15 attention, she emailed one of the admitted documents, but
16 didn't disclose the existence of the others, provide copies
17 of those, or amend Holiday Hills' discovery responses in
18 regard to more than a hundred pages of admitted documents.
19 Although, I have never been given access to email accounts
20 that Holiday Hills currently uses or has used to maintain
21 its documents, I was finally provided access to their files
22 on July 30th, more than six months after much of it should
23 have been provided to me.

24 Within just a few hours, I located a myriad of
25 documents that could have been easily located and were

1 responsive to my case. As an example, included with the
2 admitted discovery, were Robert White's notes suggesting
3 that Holiday Hills only had oral permission to build the
4 old water tank; a letter from Skillings Connolly, the F(3)
5 easement did not allow it to build the new tank where it
6 intended to build; a detailed building time line showing
7 the construction didn't begin on the new tank until a month
8 after I had made my initial offer for the property; and
9 minutes showing that Andrew Munden and Alderview Estates
10 were not part of Holiday Hills when it negotiated with the
11 Estate of Daryl Moore or filed suit against his estate as
12 example of just how important these documents are.

13 In defense of my motion for partial summary judgment,
14 Holiday Hills submitted declaration in copious discussions
15 concerning just Robert White's notes as it suggests so
16 pointedly that Holiday Hills had only obtained verbal
17 permission to build the tank. I was clearly entitled to
18 receive the evidence I requested. I don't know if Holiday
19 Hills just repeatedly failed to look through its documents
20 before responding to my discovery requests, or if this was
21 intentionally hiding the documents from me.

22 What is clear was that the result was I didn't get
23 access to the discovery I was entitled to until I extended
24 substantially more time and money that I otherwise
25 shouldn't need to. What is also clear is that when I told

1 Holiday Hills that evidence was important to me, it
2 certified it didn't exist. It also certified precisely to
3 the contrary to the Pierce County Superior Court 14 months
4 earlier.

5 Holiday Hills' admissions -- not only is Holiday Hills
6 required to give me the evidence, it was required to update
7 its prior erroneous discovery responses per Civil
8 Rule 26(e) when it became aware they were incorrect. To
9 date, it has chosen to ignore that portion of the Civil
10 Rules as well. As the court in Physicians quoted, "The
11 goal of liberal discovery rules is to make a trial less a
12 game of blind man's bluff and more a fair contest with the
13 basic issues and facts to disclose to the fullest
14 practicable extent. Failure to provide discovery can and
15 should be sanctioned by this Court to deter future wrongful
16 conduct." Thank you, Your Honor.

17 THE COURT: Thank you.

18 Ms. Jones.

19 MR. JONES: Your Honor, no sanctions are
20 warranted in this case. I have been and my client has been
21 completely forthcoming with this Plaintiff. He served his
22 first request for discovery before the case was even filed.
23 So when he complains that our responses were 12 days late,
24 this was at a time when I was still preparing our answer in
25 our counterclaim. So this is at the very commencement of

1 the case. And, in fact, I objected to several of his
2 requests because they were vague, and they were overly
3 broad. But when I made that objection, Mr. Dougherty and I
4 had several CR 26(i) conferences. I put in my declaration
5 we had several hours in total of CR 26(i) conferences. And
6 as a result, I voluntarily provided him with documentation
7 that he did not even ask for. And that includes these
8 minutes and this document that he's complaining about that
9 I certified in another case that I had.

10 Does Your Honor want me to go into the details of
11 that? Because I did that in my responsive declaration.
12 And I think the emails truly speak for themselves. We have
13 a minutebook that goes back to 1983, and that is what I
14 voluntarily provided to Mr. Dougherty. I have given him
15 hundreds of documents, Your Honor. I have copied them. I
16 have mailed them to him without any charge to him. He did
17 not have a formal discovery request for that, but he
18 emailed me back that he wanted minutes from prior to that
19 date. We did not have them in the minutebook, and I told
20 him that. And then I went to my client and I said, "Do you
21 have any minutes predating 1983?" "No." They are looking
22 at the minutebook.

23 We had a letter from 1979 that I had used in a prior
24 lawsuit not related to this case where I had over 50
25 exhibits. I don't have any personal recollection of all

1 the exhibits I had in that lawsuit. Apparently,
2 Mr. Dougherty knew all about it. He didn't ask me for that
3 1979 letter. He persisted in these vague emails saying,
4 are you sure you don't have the minutes? Well, obviously
5 he was setting me up for a trap. And then he sprung his
6 trap and said, are you denying that you had this exhibit
7 from a prior case? Of course not. If that's what you
8 want, ask me for it. I pulled my file. I emailed it to
9 him. This all took place in less than a day.

10 And this 1979 letter has nothing to do with this case.
11 It's totally irrelevant. And that was in April. And that
12 was just the start of Mr. Dougherty's persistent harassing
13 and bullying tactics using his discovery in this case.

14 We responded to 198 requests for admission. I have
15 supplemented my discovery responses five times for the
16 first set, at least once for the second set. Every time I
17 produced him the documents, I have copied them and mailed
18 them to him without charge.

19 When I recently sent him discovery requests and
20 requests for production of documents, he didn't send me a
21 scrap of paper. And when I went to him and said, when is a
22 reasonable time for me to look at your documents? He said,
23 come to my house in Seattle overnight. Come to my cabin on
24 the weekend.

25 So I had to send a copy service over. Even when I did

1 that, he said, well, I will only allow it under these
2 strict parameters. So my copy service had to be at his
3 residence in Seattle at 5:00 p.m. And then we had to copy
4 what ended up to be 10,000 documents -- 10,000 pages of
5 documents in less than 24 hours because his other demand
6 was you can come get them at 5:00 p.m., but you have to
7 return them to this office address in Seattle by 4:00 p.m.
8 the very next day. And if you do not, I will get
9 extensions of all these case deadlines that are upcoming in
10 our case schedule. And now he seeks sanctions against me
11 and my client. It's ridiculous. It's frivolous. And I
12 would like the motion to be denied. Thank you.

13 THE COURT: Mr. Dougherty, if you knew about
14 specific documents that you were interested in, and you
15 felt that the Defendant had them but wasn't turning them
16 over, why didn't you just ask her about the specific
17 documents?

18 MR. DOUGHERTY: I wasn't looking for one
19 specific set of minutes. Ms. Jones is mischaracterizing
20 what I was looking for. I was looking for the pivotal
21 evidence to this case, which is all the discovery from a
22 time period of roughly 1976 to 1983, '84.

23 The idea that there is the -- that she didn't provide,
24 the Defendant didn't provide one set of minutes and lied
25 about it in an email is really a side bar. There were a

1 hundred pages of admitted discovery. There were other
2 minutes responsive to my request when -- Ms. Jones
3 indicates that the 1979 minutes were irrelevant to the
4 case. Those are precisely the minutes that show that
5 Alderview Estates was not part of Holiday Hills. These
6 minutes have a list of all the attendees that shows that
7 Andrew Munden was not among them. This is the case.

8 THE COURT: All right. Based on this record,
9 Mr. Dougherty, plainly you don't agree with this, but I
10 don't think Ms. Jones did anything wrong here. I can't
11 make that finding based on this record. It appears to me
12 Ms. Jones has bent over backwards to comply with her
13 obligations and even then some. The request for sanctions
14 in this instance, it's just not well-taken. I am denying
15 the motion.

16 MR. DOUGHERTY: Thank you, Your Honor.

17 THE COURT: You're welcome. Before I hear
18 argument on the motion for partial summary judgment, as a
19 preliminary matter, I want to address -- you don't have
20 to -- you can sit down if you like. I want to address the
21 arguments from the defense about certain exhibits attached
22 to Mr. Dougherty's motion. The contention is certain
23 exhibits are hearsay, should not be considered by the
24 Court.

25 So I will tell you what I am considering in this

1 matter. The exhibits at issue were Exhibit J, these would
2 be the notes; Exhibit Y, like Yanky; Exhibit AA, BB, CC,
3 and FF. What I have concluded on this is that with the
4 exception of Exhibit J, the other exhibits indeed, in the
5 Court's perspective, they are not hearsay. They are
6 statements of a party opponent -- letters from HHCC's
7 Board. I believe from their president. I see those
8 exhibits as falling under 801(d)(2)(ii) as not hearsay,
9 statements of a party opponent. So I am considering them.

10 Exhibit J is another matter. These statements, these
11 written notes, they are offered by the Plaintiff for their
12 truth, including any legal conclusions therein. I have to
13 be able to conclude that there's a foundation for these out
14 of court statements either as not being hearsay or as an
15 exception to the hearsay rule. And I don't see a
16 foundation here for the Court to be able to conclude these
17 notes are not hearsay as statements of a party opponent. I
18 can't make that conclusion.

19 The secondary argument made by the Plaintiff is that I
20 should find that these are recorded recollections
21 80(3)(a)(5), and I'm not able to make that finding either
22 based on the record I have reviewed. So Exhibit J has not
23 been considered by the Court. Of course I had to read it
24 to understand what the issues were here, but I'm not
25 considering it in support of the Plaintiff's motion. All

1 the other exhibits, of course, I have considered: The
2 initial motion, the response, and the reply, and the
3 various supporting declarations and exhibits.

4 Now the -- I will get to that in a bit. I may as well
5 comment on it right now. Both sides are contending that
6 the counterclaim from the defense, that Mr. Dougherty has
7 wrongfully not paid his assessments, that that is an issue
8 not ripe for summary judgment. There are material facts in
9 dispute on that. Unless I have misunderstood the arguments
10 of the parties here, that is a matter that should not be
11 decided today, and I don't intend to decide that today.

12 Do I have that correct, Mr. Dougherty?

13 MR. DOUGHERTY: I believe so, Your Honor.

14 THE COURT: Ms. Jones, talking about that
15 finite counterclaim.

16 MR. JONES: That finite counterclaim was not a
17 part of his motion, the Plaintiff's motion, and I did not
18 address it in my response. I will just say for the record,
19 it could perhaps be resolved on a summary motion, but I
20 agree it's not before the Court today.

21 THE COURT: I think you did mention it in your
22 response, but maybe I am wrong. In any event, I'm not
23 deciding that issue today. Fair enough.

24 Mr. Dougherty, this is your motion. You can make
25 argument.

1 MR. DOUGHERTY: Thank you, Your Honor. I come
2 before the Court today seeking partial summary judgment on
3 a number of Holiday Hills' claims as well as my claims that
4 Holiday Hills must adjust the lighting and paint the new
5 tank; that I was a bonafide purchaser for value taking
6 superior title; that I am entitled to a reasonable lease
7 rate for use of my property; and my property was damaged by
8 \$55,900 by Holiday Hills' tortious actions.

9 Although there's copious evidence, the Court need only
10 find on a few points of law to decide this motion. Both
11 the Plaintiff and defense agree that the facts relating to
12 whether Holiday Hills had a prescriptive or explicit
13 easement are not disputed. The Court can decide those
14 issues as a matter of law.

15 Quite simply, those facts are that around 1981, the
16 then owner of Alderview Estates Lots 24 and 25, Andrew
17 Munden, along with members of Holiday Hills, installed the
18 20,000-gallon water tank on the top of Nob Hill partly on
19 Munden's land, and then Munden maintained it for years to
20 follow.

21 Most of the tank, but not all, was installed on land
22 that's also covered by an easement. That easement reads,
23 "restricted to the house and benefits of Lots 24 through 27
24 Alderview Estates." The tank was placed across the
25 property line on Lots 24 and 27. There is no evidence

1 directed from Circa 1981 showing whether permission was
2 sought or given for installation of the old tank other than
3 it's undisputed that Munden helped install the tank and
4 maintain it.

5 The Mundens disclosed as part of selling the property
6 to me back in 2011, the very day we agreed on price and
7 terms, that there were no outstanding leases, options,
8 encroachments, boundary agreements, or disputes, easements,
9 survey notices, or other restrictions on the property. The
10 Mundens even counterclaimed against me that they had
11 contracted with me for the house, 10 acres, and other
12 structures. The only other structures on the land at the
13 time of the sale were small woodshed and the old water
14 tank. Other than the rights in the explicit easements
15 noted in the 1976 plat, my title company turned up no
16 encumbrances in its search. The Mundens also disclosed
17 prior to purchase that there was a water fee for a new
18 storage tank of \$42 a month, but not where or when that
19 tank would be built.

20 After I contracted for the property, Holiday Hills
21 began constructing a new water tank on my land without my
22 permission almost three times as large as the existing tank
23 adjacent to the original. This tank was built
24 predominantly over the top of the driveway, that until the
25 tank was built was used regularly by the owners of the lots

1 for both access and for parking. Unlike the old tank, the
2 new tank was built exclusively on Alderview Estates Lot 24.
3 But, again, not entirely within the F(3) easement.

4 Pierce County required that Holiday Hills' paint the
5 tank as a condition of granting the variance and adjust the
6 lighting so it didn't go onto neighboring property. It's
7 undisputed that Holiday Hills has not painted the tank.
8 And I have submitted photographs to the Court how the
9 lighting is pouring onto my property.

10 One argument Holiday Hills has presented is that an
11 easement created by the Alderview Estates plat should be
12 read far more expansively than its explicit language allows
13 to permit Holiday Hills to use Lots 24 and 25 for access to
14 the tank and placement and access of community water lines,
15 and Lot 24 for placement of the tank, pump house, and
16 riprap pad. The F(3) easement plainly reads, "Restrictive
17 to the use and benefit of Alderview Estates Lots 24 through
18 27."

19 The Supreme Court in Sunnyside Valley Irrigation
20 District vs. Dickie in 2003 articulates the method the
21 Court should engage in to determine the scope of clearly
22 articulated easements. It makes it clear that when an
23 easement is expressed clearly, as here, that the court
24 should not look beyond that document for the intent of the
25 parties. However, Holiday Hills is urging the Court to do

1 just that by suggesting that the intent of the parties with
2 easements be read to encompass 15 times as many lots and an
3 additional water tank in a totally different location than
4 when the easement was created in 1976.

5 This is plainly contradicted by the explicit language
6 of the easements. Even if the Court found the explicit
7 language ambiguous and researched the intent of the parties
8 when creating the easement, it would find Moore reserved
9 himself a spot for a 10,000-gallon water tank, several
10 wells, and water lines. There is no evidence that the
11 parties ever intended to have an additional and larger
12 water tank on the top of Nob Hill in 1976.

13 Even if the Court was to read the easement so contrary
14 to its explicit restriction, it also would not be
15 appropriate to have Holiday Hills lay claim to land both
16 within and outside the easement as well as try to retain
17 title to the land where the old tank once sat as they are
18 doing in this case.

19 Once the Court resolves the scope of the F(3)
20 easement, since both Holiday Hills and I agree that there
21 is no other recorded deed relevant here for Holiday Hills'
22 use of the property, the burden shifts to Holiday Hills
23 taking all evidence in its favor to show each element of an
24 exemption to the requirement for a deed. The Court can
25 resolve a number of these overlapping claims since Holiday

1 Hills has no evidence showing there was permission -- that
2 there wasn't permission granted for placement of the old
3 tank and access to it.

4 If Holiday Hills can't carry its burden of showing
5 permission -- permissive use didn't exist or ended, then
6 the hostility element is missing from not only Holiday
7 Hills' claims for prescriptive easement, but also adverse
8 possession and mutual recognition and acquiescence. It is
9 undisputed there is no written evidence, Circa 1981, as to
10 whether permission was sought or granted.

11 What we do know is that Andrew Munden helped build the
12 water tank on his land and then maintained it. It defies
13 logic that a property owner would both help build and
14 maintain an infrastructure on his property when he hadn't
15 given permission for it to be there in the first place.
16 Further, the Supreme Court in Petersen vs. Port of Seattle
17 tells us that in the absence of evidence regarding
18 permission, permission is presumed to have been granted.

19 However, the Court doesn't need to rest merely on that
20 presumption or that Munden help build and maintain the
21 tank. I have also offered as evidence letters from a
22 former president of Holiday Hills suggesting that
23 permission would need to have been sought for Munden before
24 building the tank and that he granted it. Holiday Hills
25 also a -- the former president of Holiday Hills even

1 testified for purposes of obtaining the variance that
2 Holiday Hills has permission. And the Variance Committee
3 found a leasehold, another permissive use.

4 The Mundens counterclaimed they had contracted for the
5 sale of the home, 10 acres, and other structures when the
6 other only structures were the woodshed and the old tank.
7 I argue we have title to the tank itself. Even taking all
8 evidence in its favor, Holiday Hills can't rebut the
9 presumption of permissive use or overcome the myriad of
10 evidence suggesting permission was granted.

11 Holiday Hills' claims for prescriptive easement,
12 adverse possession, and mutual recognition and acquiescence
13 must also fail because they built on land they previously
14 didn't occupy less than three years before I initiated this
15 lawsuit. The land Holiday Hills built on is not the same
16 land that was used for the old tank. It was used as a
17 driveway and for parking by the owners of the land at the
18 top of Nob Hill. While the old tank was on Lots 24 and 27,
19 the new tank is exclusively on Lot 24. In fact, both tanks
20 were on Lot 24 at the same time.

21 Further, Holiday Hills did not have right to build
22 where it did in 1981 absent permission from Munden, so
23 there was no boundary line to negotiate and recognize for
24 purposes of mutual recognition and acquiescence.

25 In regard to Holiday Hills' claim of equitable

1 estoppel, Holiday Hills incorrectly asserted that I was
2 trying to take advantage of it by buying my property and
3 not more promptly objecting to Holiday Hills' conduct or
4 being aware prior to buying my property of Holiday Hills'
5 anticipated tortious conduct.

6 The reality was that I was engaged in a lawsuit with
7 the Mundens on an unrelated matter and didn't have the
8 bandwidth, in addition to my full-time job, to also pursue
9 a case against Holiday Hills more promptly. I was
10 diligently researching the history and legal standing of
11 Holiday Hills to build a tank where it did without my
12 permission. My research wasn't helped by dealing with the
13 then 85, or 86-year-old Mr. Munden who is alledgedly
14 suffering from Alzheimer's or dementia.

15 When I could, I began writing letters to Holiday Hills
16 trying to sort out this issue, get them to paint the water
17 tank and adjust the lighting. And after close to two years
18 of them refusing to help me resolve these matters, I filed
19 my lawsuit, but I have not sought ejectment. In Nickell
20 vs. Southview, a Court of Appeals decision from 2012, the
21 court found that it was not unreasonable for the Nickells
22 to wait 18 months to raise concerns while Southview
23 improperly removed a portion of the Nickells' lawn,
24 installed a complete septic system, and filed an updated
25 plat. The court specified that equitable estoppel is

1 disfavored under the law.

2 Holiday Hills would have to prove three elements by
3 clear and convincing evidence to find estoppel here: One,
4 an admission, statement, or act inconsistent with the
5 claims afterwards asserted; two, an action by the other
6 party on the faith of such admission, statement, or act;
7 and three, injury to such other party resulting from
8 allowing the first party to contradict or repudiate such
9 admission, statement, or act.

10 In this case, Holiday Hills began construction around
11 the time I closed on the property. Clearly, they were not
12 relying on my acts in their choice to begin construction.
13 Further, my silence was both reasonable and was not
14 inconsistent with my claims asserted in this case. As
15 indicated before, I was involved in other lawsuit and
16 researching my rights.

17 The Nickell court offered the following details on a
18 property owner remaining silent: Quote, mere silence
19 without positive acts to effect an estoppel must have
20 operated as a fraud, must have been intended to mislead,
21 and itself must have misled. The party keeping silent must
22 have known or had reasonable grounds for believing the
23 other party would rely and act upon his silence. The
24 burden of showing these things rests upon the party
25 invoking the estoppel. Also, the court noted: "The mere

1 silence or acquiescence will not operate to work an
2 estoppel where the other party has constructive notice of
3 public records which disclose the true facts." Clearly,
4 Holiday Hills had equal or better access to records. They
5 didn't rely on anything I did or did not do in constructing
6 the tank, and I had no intention to deceive or mislead them
7 by not bringing my case sooner.

8 Another issue before the Court is whether with my
9 submitting evidence evaluation in an absence of
10 Holiday Hills submitting any evidence whatsoever regarding
11 the valuation change on Lot 24 if the Court should find in
12 my favor. All the Defendant offers is self-serving
13 declarations in support of its position. Even its
14 opposition quotes that "Mr. Dougherty received a reduction
15 in his real property taxes because of the water tank's
16 location on Lot 24."

17 A self-serving declaration with no supporting evidence
18 showing the change in property value is precisely the
19 evidence that should be ignored in this summary judgment
20 motion. The Pierce County assessor valued my property and
21 noted the reason for diminishing my property value. In
22 absence of any evidence to the contrary, the Court should
23 honor the Pierce County Assessor's change in valuation.

24 I have also asked the Court to assign a lease term for
25 the use of my land. Holiday Hills has objected because I

1 didn't suggest a particular valuation. I intentionally did
2 not suggest a valuation because it would normally be
3 negotiated at arm's length. Here, Holiday Hills has
4 asserted the tank is a fixture, and now that it's built, I
5 can't legally negotiate this term at arm's length, so I am
6 asking the Court to do it.

7 In regard to painting the tank and adjusting the
8 lighting, it's undisputed that Holiday Hills was the
9 applicant for a variance to build a new water tank where it
10 did and that Pierce County required that the tank be
11 painted dark green or dark brown and that lighting be
12 adjusted. It is similarly undisputed that Holiday Hills
13 has failed to paint the tank. And I have offered into
14 evidence photographs showing the light pouring onto my
15 property just two weeks ago.

16 The Court could find that the conditions of the
17 variance were in consideration to the property owners for
18 placing the tank so close to the property line. The Court
19 should require Holiday Hills to complete its obligations.
20 Thank you, Your Honor.

21 THE COURT: Mr. Dougherty, how do you
22 respond -- with respect to painting and adjusting the
23 lights, how do you respond to the argument that you just
24 don't have standing?

25 MR. DOUGHERTY: My response, Your Honor, is

1 that the Court can look at it as consideration offered to
2 the property owners on top of Nob Hill for placing the tank
3 so close to the water line. The Court could also find an
4 equity that it's unjust to allow an entity to assert to one
5 party that, for conditions of placing the tank in one
6 location, that it would conduct certain acts to protect
7 property owners, and then for three years, ignore those
8 requirements.

9 THE COURT: I am just concerned about whether
10 that issue is properly in front of me. I mean, the county
11 is not part of this suit.

12 MR. DOUGHERTY: True, Your Honor. And
13 Ms. Jones has eloquently made that point.

14 THE COURT: Thank you.

15 MR. DOUGHERTY: Thank you.

16 THE COURT: Ms. Jones, your turn.

17 MR. JONES: Your Honor, I am going to divert at
18 the beginning from my prepared argument to address a couple
19 of points while they are in my mind. The Plaintiff in his
20 argument presented as if he's making a claim to ownership
21 of the water tank. And I want to state for the record that
22 is not what his complaint states, and that's not what his
23 motion states. That's not what his proposed partial
24 summary judgment order stated. It has always been a claim
25 for a lease of the land underneath the tank. And I think

1 the Court should be keenly aware that I have put into the
2 record our agreement with the State of Washington, our low
3 interest drinking water fund loan. And at the tail end of
4 that agreement, you will find the State of Washington has a
5 security interest in all of our water systems: the storage
6 tank, the water lines, the entire utility and its component
7 parts are security for this loan that has outstanding over
8 \$300,000. So if now the Plaintiff's claim is that he owns
9 this water tank, we have a whole different claim at issue
10 than what I prepared to argue about.

11 THE COURT: I didn't understand him to be
12 arguing in that fashion.

13 MR. JONES: That's what I heard him say.

14 THE COURT: Mr. Dougherty, are you -- you are
15 not making that contention, are you?

16 MR. DOUGHERTY: Not before the Court today,
17 Your Honor. One of the reasons why I chose not to bring a
18 summary judgment motion today for the dues on the water
19 tank is that there's evidence supporting the idea that the
20 tank is actually not owned by Holiday Hills, especially the
21 old tank.

22 The Mundens, when they transferred the property to me,
23 indicated that they were transferring 10 acres, they were
24 transferring the house, and they were transferring
25 buildings, plural. There were only two buildings on the

1 property at the time: the 20,000-gallon water tank and the
2 woodshed. I believe there are other arguments that I might
3 bring before the Court at trial to address that, but I have
4 not intentionally brought that before the Court today,
5 instead relying on the issues that I believe are ripe for
6 summary judgment.

7 THE COURT: All right.

8 MR. JONES: Your Honor, I don't disagree that
9 there are some issues that can be resolved on a partial
10 summary judgment. There are any number of undisputed facts
11 that are relevant to this water storage tank and our access
12 to the tank that are not disputed. So the Court can find
13 as a matter of law what rights we have to continue to
14 access the tank and to keep it on the Plaintiff's property
15 without having any legal obligations to him at all, whether
16 it's a lease or diminution in his property value or
17 whatever his claim might be.

18 Can I walk around and use my exhibit? So I enlarged a
19 copy of the exhibit from the Pierce County Hearing
20 Examiner's file. This is Steven Catsow's (phonetic)
21 Exhibit No. 2. And it has his notations, and it has, in
22 different colors, the various lot lines and so forth. So I
23 find it helpful in making any argument.

24 So what we have here in terms of the lot lines is
25 Mr. Dougherty's Lot 24, his Lot 25, and then there are two

1 other lots on this Nob Hill. We call it Nob Hill. So this
2 is our site plan for our new storage tank that was
3 considered and approved by the Pierce County Hearing
4 Examiner. It actually does show the existing older tank
5 that had been there since 1981 and then the proposed
6 location of our new tank. And then what's most helpful, I
7 think, is it shows -- I kind of consider this like a
8 horseshoe shape. Do you see this yellow?

9 THE COURT: Yes.

10 MR. JONES: That's the F(3) access and
11 utilities easement. And that is truly the key to this case
12 because the Court really needs to look no further than that
13 easement to find in favor of the nonprofit and its rights
14 to keep our water tank and our component parts within the
15 bounds of this easement.

16 I cited in my brief the generic laws regarding
17 easements, and it very clearly matters whether or not this
18 easement was created in an original plat. And it was. It
19 was created in a plat in 1976 for Alderview Estates, and it
20 very explicitly is for access and utilities. Well, a water
21 tank is a utility, and water lines are a utility. And
22 that's by common definition, and it can't be disputed.

23 As a matter of fact, we did put our utility, our old
24 water storage tank, in the F(3) easement. The Plaintiff's
25 arguing, well, it wasn't totally in the F(3) easement. You

1 can see. It's the corner of the building that encased the
2 tank and then this little corner. I mean, the majority of
3 the old water tank was in the F(3) easement. And then in
4 terms of the new location, it's in the same area now
5 entirely within the bounds of the F(3) easement as is our
6 storage shed.

7 And that, Your Honor, is consistent with the necessity
8 that the old tank remain in place while we build the new
9 tank. And although you couldn't make it out unless you
10 came forward, there is notation on the site plans to say,
11 we have to have our water supply continuous during this
12 process, so we are going to keep using the old tank until
13 the new tank is completed, filled, and we know that it
14 passes inspection. And only then will we discontinue use
15 of the old tank. We have hundreds of people and their
16 families relying on this water supply. That has been the
17 case since 1981 when the old tank was put up on Nob Hill.

18 The Plaintiff argues that the scope of the easement is
19 limited, and he has cited to these cases about scope of
20 easement. They are not on point. Those cases have to do
21 with where you are trying to either relocate the easement
22 entirely, or use it for an entirely different purpose.
23 This is a utility easement, and we are using it for a
24 utility. We are not enlarging the scope at all.
25 Mr. Dougherty would not be able to build a house where our

1 tank is. That's within the bounds of a utilities and
2 access easement. He could not have done that.

3 Now, we couldn't either because of the lot lines and
4 so forth, and that's why we had to apply for this special
5 permit. And there was public notice and there was a
6 hearing. And the Mundens, who at that time owned Lot 24
7 and Lot 25, their son even objected to approval of the
8 replacement tank.

9 He wrote a letter. And it's referenced in the Hearing
10 Examiner's decision, and it was considered by the Hearing
11 Examiner. And he said, I'm concerned about this proposal
12 because I think it will reduce my parents' property values.
13 And then he also expressed a concern that maybe the tank
14 would rupture, and he had a concern about that as well.

15 So the Munden's, through their son anyway, even voiced
16 an objection, and yet it was approved anyway after
17 consideration of that. We had a geotechnical landslide
18 report that fixed the location right here. These are very
19 steep slopes, and you can see this says, "existing top of
20 slope." This is where they start. So quite literally, the
21 rest of this property is sloped down. This is the only
22 place wherein the bounds of the utility easement that we
23 were able to replace the tank so we could avoid any
24 landslide hazards.

25 The Plaintiff cites the Petersen case. And he takes a

1 sentence from that case completely out of context. Says it
2 stands for the proposition that "use of property at its
3 inception is presumed permissive." And he's arguing that
4 we have failed to meet the required element of hostility or
5 adversity because all of this was put there permissively.

6 I looked up that case, and it's actually an inverse
7 condemnation case. It had to do with an avigation
8 easement. I didn't even know what that was. It's
9 apparently a prescriptive easement acquired by flying your
10 airplanes over property. And the case has absolutely no
11 factual similarity to ours. But when I was researching
12 that case and citations that were made, I did find a case,
13 and I want Your Honor to consider it -- and I would like to
14 provide a copy to Your Honor and to Mr. Dougherty -- called
15 the Hovila vs Bartek case.

16 And that particular case does have a striking
17 similarity to ours. In that case, there was a gentleman
18 who built a ram and a water supply line on his neighbor's
19 property. And it was by a river, and he actually built
20 this water system on his neighbor's property, used it for
21 decades to get a domestic water supply to his property next
22 door, and similar to our case, we didn't have any evidence
23 of permissive use. We had no evidence at all. But we had
24 property owners throughout the decades who treated that
25 water system and the pipelines and so forth as if this man

1 who put them there owned them.

2 So similar to our case, where since 1981 we had our
3 tank up on Nob Hill and all the water lines, there was no
4 evidence in this huge record of documents that anyone ever
5 treated that tank as owned by anyone other than the
6 nonprofit. We have all kinds of minutes as far back as
7 1981 saying that it was the nonprofit and the nonprofit's
8 membership who put it up there to begin with and who
9 maintained it all throughout the years.

10 I heard Mr. Dougherty say more than once that the
11 Mundens maintained it, and the Mundens built it. I
12 don't -- honestly, Your Honor, I don't know what record he
13 is referring to, but as far as the records I reviewed,
14 there is no record that the Mundens helped build it. In
15 terms of maintaining it, yes, they were officers of the
16 nonprofit board for several years, and there was certainly
17 board minutes to say they were part of work parties of the
18 nonprofit membership.

19 These are all volunteers, these people who use this
20 water supply. And they quite literally would have work
21 parties where they would go up to Nob Hill and this old
22 tank, which is actually a gasoline tank, if you can
23 believe it. That's what they used for their water. I
24 mean, it was horrible. It was failing. They had to repair
25 it all the time. The community did it. They voluntarily

1 did it. And Mr. White has testified -- Robert White, who
2 is in the courtroom today, his parents used to own property
3 there. He still owns property there. He was there in
4 1981. The access along the road that bypasses through
5 Mr. Dougherty's Lot 25 is the same road they used for all
6 these decades. That's the road you take up to the old
7 water tank. That's the road you take up to the new. Bob
8 White even helped to cover the water lines that the
9 community put in there.

10 In this Hovila case, that was sufficient to find a
11 prescriptive right. What the Court found was when this man
12 put his ram and his water lines on the neighbor's property,
13 and then for decades he actually used that water source for
14 his own domestic water supply and no one complained about
15 it and everybody treated it like, well, that's your water
16 line and that's your ram, whatever that is. It's something
17 that is at the river head, I think. That that was
18 sufficient to show that he had acquired a prescriptive
19 right.

20 And that's exactly our case. I would encourage Your
21 Honor to read it because I found it to be almost exactly
22 the same except for the fact that in that case the man who
23 built the water system owned the neighboring property,
24 whereas our nonprofit doesn't own any of the property. In
25 our case, we just have the utility easement.

1 But these arguments that I am making, they have more
2 to do with what in Washington we call these practical
3 location doctrines. So all of these alternate claims I
4 made, adverse possession and prescriptive rights and mutual
5 recognition, those are practical location doctrines to help
6 us fix property rights because over the years people
7 through their improvements, maintenance, and usage of
8 property have become entitled to that bundle of rights.

9 And I don't think Your Honor has to go down that road.
10 I don't think Your Honor has to actually invoke the
11 Practical Locations Doctrine to find we have a right to
12 keep our water storage tank here. I think it's enough for
13 Your Honor to find that we placed it within the F(3)
14 utility easement, that we applied for all the appropriate
15 permits to do that, and they were granted; that the then
16 owners had notice and opportunity to object. They did.
17 And then when their objection, at least through their son,
18 was overruled and we were granted permission -- which under
19 the Land Use Planning Act is an absolute right to build
20 there -- they had 21 days to file a LUPA appeal. They
21 didn't. So at that time regardless of whether they sell it
22 to Mr. Dougherty the next day, we have a right to build
23 within the scope of the easement in accordance with the
24 permit, and that's what we did.

25 Now, I did make an argument about equitable estoppel.

1 And a lot of the Plaintiff's argument was diverted to that,
2 so I want to address it. I stated an affirmative defense
3 of an equitable estoppel. The Plaintiff's motion did not
4 seek to dismiss that. So I really just touched on that in
5 my opposition, and I don't think it's appropriate for Your
6 Honor to dismiss that on a summary motion.

7 And the reason I mentioned it at all is because when
8 Mr. Dougherty makes these claims for diminution in value
9 and leasehold interest, I think it's important for the
10 Court to note that he had access to this exact record.
11 This is an exhibit to the Hearing Examiner's decision that
12 you can access at the Pierce County Annex today. I looked
13 at it not too long ago. You sit there, order it, read it
14 through. He had every opportunity to do that. Whether he
15 did or he didn't, it's really irrelevant.

16 It's a matter of fact when he purchased he knew -- and
17 it's undisputed he knew -- there was an existing tank here,
18 and it was going to be replaced. So for him to complain
19 now it's twice the size, and they didn't ask my permission,
20 too little too late. By the time we had obtained that
21 Hearing Examiner's decision, we were already engaging the
22 contractor. We were in the process when he was buying this
23 property of putting this tank here, then we did that. And
24 it's not until the whole thing is complete that he says,
25 well, you are going to have to lease the land underneath

1 from me. You are going to have to pay me for my diminution
2 in value.

3 He bought this property knowing there was an old tank
4 and new tank going in. How can he claim for diminution in
5 value. He bought the property for what it was worth
6 knowing these things, so he got what he paid for is what I
7 am saying. I don't think his evidence on that is
8 sufficient anyway. But for you to summarily dismiss the
9 equitable estoppel, I think, fundamentally is incorrect
10 because that would be one of our major arguments at trial,
11 and I think it's a good argument.

12 You know, he bought into this. I'm not saying he had
13 any ill-intent. And he is saying, well, I was busy suing
14 the Mundens, and I can only handle one lawsuit at a time.
15 That may or not be true. He moves from one suit to
16 another, I guess. But, you know, you can't allow a major
17 utility improvement on your property and then after the
18 fact say, by the way, I don't want you to build there, and
19 I have all these problems with that. Maybe I own the tank
20 and maybe I get to lease it to you. He could have backed
21 out of this sale. He had that opportunity, and he didn't
22 take it apparently. I don't know why. His deposition is
23 Tuesday, maybe I will find out.

24 THE COURT: Ms. Jones, what I hear you asking
25 me to find and conclude is that this new tank is fully

1 within the boundary of the original F(3) easement. How do
2 you respond to the argument that the F(3) easement language
3 was fairly, narrowly limited to four different lot owners'
4 use and benefit and that this would represent a large
5 expansion?

6 MR. JONES: It does. And I don't dispute the
7 language of the actual easement. But when that expansion
8 was allowed and has been allowed since 1981, then we have
9 acquired a right to use the easement for that purpose. And
10 just because we happen to locate it in this -- in the same
11 bounds, but you know, a slightly a different spot, that's
12 of no difference. It's still within the same easement.
13 And the easement -- all of the parties to this easement,
14 which would be the utilities, my nonprofit defendant, and
15 all of the water users, they have all treated this as owned
16 by the utility and having been allowed in the F(3)
17 easement. So that's sufficient. It is.

18 You don't have to read within the scope of the
19 easement, this exclusivity requirement, when in actual fact
20 it was ignored by all the parties to the easement. And I
21 do mean all the parties because the Mundens obtained water
22 from this source too as do the other lot owners.

23 THE COURT: So you are arguing that I don't
24 need to make any distinction or finding as to a
25 prescriptive easement?

1 MR. JONES: I think your finding needs to be
2 that having our water tank utility is permitted by the F(3)
3 easement. And to the extent limited -- you know, the
4 actual easement in the plat is limited to these four
5 lots -- has been expanded, and we have obtained the
6 prescriptive right to that expansion because of our decades
7 of use.

8 The easement itself exists, and whether we had our
9 tank there or not, it would always exist. But, you know,
10 in terms of like access and things, what happened is you
11 have your access here. It hasn't impeded anyone's access
12 is what I am -- is the point I am trying to make.

13 THE COURT: All right.

14 MR. JONES: I can't recall now if I have
15 touched on this issue over the conditions of the
16 conditional use permit, but it's just like a nuisance case.
17 So we have a county code provision that probably prevents
18 loud noise nuisance. And if you decide to sue your
19 neighbor, you don't enforce the code provision. You make a
20 common law nuisance claim.

21 So if the Plaintiff has a claim against us for not
22 painting the tank and this adjustment of the lighting, he
23 has to make a claim under the common law or some other form
24 of statute. He doesn't get to invoke the conditions of our
25 permit like those are rights immuned to him. There is just

1 no authority for that.

2 Of course, we admit we haven't painted the tank, but
3 we have not been cited for noncompliance. And like
4 Mr. White's declaration says, we just don't have the
5 resources, and we will paint the tank when we do. But you
6 have seen pictures of the tank. It's not necessarily
7 something that a volunteer crew can tackle. I mean, we
8 need to have the resources, and that's very expensive. So
9 obviously we are having to devote our resources elsewhere
10 at this point. But if the county issues a noncompliance
11 issue, then we will have to deal with it at that time.

12 On the lighting, we have adjusted the lighting, so
13 that -- I think he can't recover on that for the same
14 reasons, but there's an issue of fact anyway because he is
15 saying I am still disturbed by the lighting, and we have
16 said, no, we have basically solved that problem.

17 Did Your Honor have any other questions?

18 THE COURT: You are asking me to find as a
19 matter of law that based on a lack of disputed facts, or
20 material facts anyways, that your client has and continues
21 to have an easement for this tank. In order to make that
22 kind of a finding, is it necessary that I decide the issue
23 of -- that Mr. Dougherty has raised regarding whether he is
24 a bonafide purchaser? Do I need to settle that question?
25 He is saying he has a superior right, that he's a bonafide

1 purchaser for value, that his right is superior.

2 Simultaneously, he is arguing that you really don't have an
3 easement, but would I need to address that?

4 MR. JONES: I don't think so because we have
5 his deed in the record. He took title to these lots
6 subject to the easements of record in the 1976 Alderview
7 Estates plat. And that includes the utilities and access
8 easement designated as F(3).

9 And even more than that, Your Honor, he had actual
10 knowledge that the F(3) easement had and was being used for
11 this old water tank and that it was being replaced, so it's
12 on the face of his deed. I understand his complaint is,
13 well, I didn't know exactly how big it was going to be or
14 exactly where it would be positioned.

15 Remember, this is a decision from November 2010. He
16 didn't purchase until February 2011. Had he investigated
17 further, you know, he would have found out all of these
18 details. Whether he did or did not is immaterial because
19 he had constructive, if not actual, knowledge. He had
20 actual knowledge of a lot of the facts and definitely
21 sufficient facts to do further investigation if he wanted
22 to. But I think because on the face of his deed he takes
23 subject to that, I don't think his being a bonafide
24 purchaser has any relevance really. He doesn't make
25 claims, and he hasn't made claims against the Mundens.

1 Well, they are both now deceased, but he did sue them, and
2 he didn't make any claims relevant to this.

3 THE COURT: Well, he's asking me to quiet
4 title, and I gather that as a part of that he wants me to
5 make that sort of a finding. But I understand your
6 argument to be that it's a straightforward analysis, that
7 this falls under the original easement, and that the
8 homeowners have complied with the County's requirements
9 with the exception of painting and -- at least with the
10 exception of painting, but that the tank was permitted, and
11 I don't need to go any farther.

12 MR. JONES: No. I think the analysis of the
13 Hearing Examiner and these notes is -- I mean, it's just
14 very demonstrative. He outlines the utility easement and
15 the location of the lot lines and the easement itself and
16 that was sufficient for the permit to issue. That should
17 be sufficient for this Court to find that we had the
18 absolute right and still do have the absolute right to have
19 it there. Thank you.

20 THE COURT: Thank you very much.

21 Mr. Dougherty, you can make rebuttal argument, if you
22 wish. Are you familiar with this Bartek case?

23 MR. DOUGHERTY: I was not, Your Honor. I --
24 briefly scanning through it, I noticed that there's a
25 material difference at Page 878, Paragraph 2. It looks

1 like Line 6. Reading, "However, Mr. Johnson, the then
2 owner of Tract B, refused permission for the pipeline to
3 cross through his property." And then it continues on. So
4 this court went through and found that there was actual
5 evidence of an owner saying, you don't have permission.

6 Contrary to this, the Defendant inquired how did I
7 come to the conclusion that Mr. Munden helped build this
8 tank. How did I come to the conclusion that Mr. Munden
9 help maintain it. Mr. Munden was the longest serving
10 president of Holiday Hills' Community Club. The Defendant
11 admitted in Paragraph 1.7, Exhibit H, that Mr. Munden
12 helped build the improvements on the property. I'm not
13 sure why they are reversing themselves now and saying they
14 have no knowledge. This is inconsistent with their
15 response. This is just curious.

16 The Defendant has indicated that they are relying upon
17 this variance, this idea that I was aware. I have no
18 specific recollection of whether or not I actually had seen
19 the variance minutes. If I had, again because I don't know
20 for certain, I would have found a finding of fact
21 indicating there was a leasehold. I don't know how I would
22 have concluded from a finding of fact there's a leasehold
23 that the F(3) easement reading restrictive to Lots 24
24 through 27 Alderview Estates would apply to Holiday Hills.

25 Similarly, the defense suggests they were a party to

1 that easement. They are not. Alderview Estates Plat, the
2 F(3) easement, the face of the document explicitly
3 restricts that to the use and benefits of those lots. They
4 are trying to shoehorn in an idea that Daryl Moore
5 transferred the majority of the water system to them back
6 in 1981 and because this water tank was hooked up to the
7 water system -- at the time it happened to be on my land --
8 that therefore they somehow get access to this F(3)
9 easement. That's not this case. They were never a party
10 to the F(3) easement.

11 Further, on this chart, the defense has suggested that
12 it's clear that there's nothing that actually is built
13 outside of this F(3) easement. The reality is that this is
14 a riprap pad. This is a drainage ditch they put on my
15 property outside of the F(3) easement. To explain to the
16 Court all this is inside the F(3) easement is just not
17 correct. It's just -- it is just -- just playing fast and
18 loose with the facts.

19 They also assert that the Mundens -- the Munden's son
20 complained, yet I haven't seen a record before the Court
21 specifying who the individuals are that lodged complaints.
22 I haven't seen that within Defendant's records. It hasn't
23 been provided to me, authenticated to the Court. Again, I
24 don't know how to --

25 THE COURT: Counsel described that it was

1 mentioned in the Hearing Examiner's report.

2 MR. DOUGHERTY: Yeah. I have looked through
3 that Hearing Examiner's report, and I can assert I have
4 never seen a reference to a complaint specifically made
5 contributed to Jodi Munden.

6 MR. JONES: There is a copy of it in the
7 planning -- Pierce County Planning and Land Use file. And
8 Jody Munden is copied. Jody was their son's name. And he
9 is copied on the Hearing Examiner's decision because of
10 that because Jody Munden had made that public comment that
11 had been considered at the hearing.

12 THE COURT: Well, in any event, Mr. Dougherty,
13 you are not arguing, are you, that the Mundens weren't
14 properly notified of this process?

15 MR. DOUGHERTY: No. And in fact, they engaged
16 with Skillings Connolly. They hired Skillings Connolly to
17 do a lot of this work. So I think it's -- there's evidence
18 in the record to suggest he may have had -- Mr. Munden may
19 have had some mental difficulties, but I haven't figured
20 how far back that goes. What we do know is they moved to
21 Florida roughly a year later. The permits started being
22 applied for to build this tank. He wasn't there, so he
23 hired Skillings Connolly to act on his behalf in the master
24 application. Which, again, would lead a reasonable
25 purchaser looking at this from a 30,000-foot level to say,

1 here's an individual who hires an agent to build the tank
2 on his property in his own name. Sure he may have some
3 sort of license or agreement with Holiday Hills for
4 placement of the tank close to the property line or
5 otherwise, but in no way would -- would an individual
6 conclude that despite the variance committee concluding
7 there was a leasehold, that somehow it actually was -- they
8 were operating within the F(3) easement and outside the
9 F(3) easement in placement of that.

10 Do you have any other questions that I can address?

11 THE COURT: No.

12 MR. DOUGHERTY: Thank you, Your Honor.

13 THE COURT: All right. I have already
14 described the documents that I have considered, and I
15 listened with interest to the arguments of counsel here
16 today as well. The Plaintiff, in writing, repeatedly
17 asserted that the facts are clear and well developed and
18 the Court need only apply the law. The defense agrees with
19 that to a point arguing that its claim for adverse
20 possession is subject to trial on disputed facts. But the
21 defendant is likewise asking the Court to summarily decide
22 for the Defendant on its claim for easement rights for this
23 new water tank and the related improvements and for an
24 easement for right of access to the improvements.

25 The Plaintiff has encouraged the Court to make Factual

1 Findings supporting his position that would, if I were to
2 make those Findings, I think they would have to inexorably
3 lead to an outcome in his favor. In deciding a motion for
4 summary judgment, as we all know or should know, it's -- in
5 my view it's both unnecessary and fruitless to make a
6 series of Findings because the Court of Appeals, assuming
7 this ends up there, the Court of Appeals reviews the record
8 de novo if I enter a judgment. So I am -- I decline to
9 make more than what I think are a few necessary Findings in
10 this case.

11 I do find that there are no material disputed facts
12 precluding the entry of a judgment on the Defendant's
13 claims for easements. I agree with the Defendant's
14 arguments on the law. The Court is granting the
15 Defendant's request for a judgment declaring easements for
16 Holiday Hills for both the use of the 54,000-gallon tank
17 and the improvements connected to it as well as an access
18 easement across Lot 24 to be able to maintain the utility.
19 The Court is satisfied this is a utility within the meaning
20 of the original F(3) easement. The Court does find that
21 this tank was placed within the easement. There really is
22 no dispute, that I can see, that it was properly permitted.

23 The predecessors in interest to Mr. Dougherty for this
24 land, the Mundens, they had proper notice of it. The Court
25 finds that Mr. Dougherty at least had constructive

1 knowledge of the Hearing Examiner's decision and findings.
2 There was no appeal taken from the decision, so this --
3 from the Court's view, this tank was properly built where
4 it was built. To the extent the Court needs to find a
5 prescriptive easement for an expansion of the original
6 language of the easement, I am satisfied that by all
7 indications, Holiday Hills was the owner of the original
8 tank, held itself out as such. That satisfies me that the
9 element of hostility is -- has been proven for purposes of
10 a prescriptive easement.

11 The fact that the tank is close to but not on
12 precisely the same spot as the original tank does not cause
13 me to hesitate in concluding that a prescriptive easement
14 to expand the original easement for the benefit of dozens
15 of additional users, that prescriptive easement hasn't been
16 in place for a requisite time frame. The placement of the
17 new tank is indisputably done because of the geotechnical
18 problem and for the absolute necessity for all the
19 homeowners to be able to have continuing water.

20 So I suppose I would have to conclude that really the
21 new tank is in the penumbra of the location of the other
22 tank, but I really don't have to make that kind of a
23 finding because the tank is clearly within the easement.
24 So I will sign an order consistent with the order proposed
25 in the Defendant's response. The Plaintiff's request for

1 partial summary judgment is accordingly denied. I do
2 believe there are material disputed facts on some of the
3 issues associated here, but it really becomes a moot point
4 since I am prepared to sign an order that declares an
5 easement on behalf of the defense here. There may or may
6 not be any issues left for trial.

7 The request for attorney fees by Mr. Dougherty is
8 denied. Neither side here has prevailed on the issue of
9 adverse possession as called for in RCW 7.28.083. The
10 question of painting the tank and adjusting the lighting,
11 this is -- this is problematic. It just seems to me the
12 Defendant should have painted that tank in accordance with
13 the variance that was granted, but I can't find this is
14 properly before the Court.

15 This action was brought by Mr. Dougherty on a claim to
16 quiet title, not an action to enforce the terms of a
17 variance. Mr. Dougherty has raised the issue in his
18 complaint, but I don't believe he has standing to sue for
19 this as a private person for an alleged violation of the
20 terms of the variance.

21 MR. DOUGHERTY: Question, Your Honor?

22 THE COURT: No. The Court is not convinced
23 that the original easement and a prescriptive easement that
24 the Court has found to exist has diminished the value of
25 Mr. Dougherty's land -- I'm not convinced of that -- as

1 contrasted with market forces, other reasons. And I have
2 already indicated I believe that Mr. Dougherty had at least
3 constructive knowledge of the installation of this new
4 tank. So it's equally important to me that he had that
5 knowledge. I do believe and I find that the Plaintiff had
6 knowledge of the exact location of this tank when he made
7 the contract to buy the two parcels that he bought.

8 So he bought with knowledge that this tank was going
9 to be built at least with constructive knowledge, which is,
10 in effect, the same thing. So any reduction in value that
11 might have been directly attributable to the new tank is
12 something Mr. Dougherty has to live with having that
13 knowledge when he signed the contract. It would be
14 inequitable, in the Court's view, to award him damages
15 under these circumstances.

16 So Mr. Dougherty has done a really good job of putting
17 his position in writing and he's been very thorough, but
18 you are going to have to take your arguments and your
19 issues to the Court of Appeals, Mr. Dougherty, because I'm
20 denying your motion, and I am granting the request for
21 relief made by the Defendants.

22 All right. You had a question?

23 MR. DOUGHERTY: The question was since Your
24 Honor's Finding is that the F(3) easement already
25 encompasses the tank, I would ask Your Honor not to modify

1 the F(3) easement beyond its explicit language. The
2 defense has asked for a quite expansive modification of
3 that, which Your Honor's just indicated, it's unnecessary.

4 THE COURT: I am going to sign an order with an
5 order consistent proposed by the defense. I think that's a
6 proper thing to do to settle the property interest involved
7 here going forward. All right.

8 You had a question, counsel?

9 MR. JONES: Can I order a transcript of your
10 oral decision and incorporate those Findings -- I have the
11 form of order that I attached to my opposition, but
12 obviously it does not have the Findings Your Honor made on
13 the record today. Do you want those Findings in my order,
14 in which case, I would need to order a transcript and
15 present with my signature at a later date?

16 THE COURT: Counsel, if you think it's
17 important in your client's interest that oral Findings that
18 I made be reduced to writing, I am willing to consider
19 Findings.

20 MR. JONES: I think in light of Your Honor's
21 preliminary comments about not needing to have those
22 Findings given the standard on appeal, I would present what
23 I had already prepared.

24 THE COURT: I will sign that order. Ms. Jones,
25 I don't have that proposed language right in front of me,

1 but does it include -- I think it does include an order
2 denying Mr. Dougherty's motion.

3 MR. JONES: It does. It does not include --
4 and this was my omission -- it has -- it includes language
5 that -- I will hand forward a copy of it. It denies the
6 Plaintiff's motion and it grants my motion and it has the
7 easement language. It doesn't specifically state that the
8 Plaintiff's claims to quiet title are dismissed. I don't
9 know whether it needs to because by granting the easement,
10 I mean, that's what we accomplish. But that's one thing I
11 did not put in there. It doesn't clearly identify what
12 claims and defenses might still remain for trial, which
13 would be something I maybe should add.

14 THE COURT: Well, if you want to add that, I am
15 willing to consider -- I don't feel compelled to sign this
16 today.

17 MR. JONES: I think I would rather do that and
18 make it very clear what issues remain in the case, and I
19 will note a presentment.

20 THE COURT: It would probably be helpful to
21 both sides and helpful to the Court. So if you can't come
22 to an agreement on the language of this order, then you
23 will have to note it up for presentation, and we will go
24 from there. Counsel, thank you both for your thorough
25 briefing and arguments. Court's adjourned.

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(Court adjourned.)

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

CASEY DOUGHERTY,)	
)	Superior Court
Plaintiff,)	No. 13-2-15936-3
)	
vs.)	Court of Appeals
)	No. 47033-1-II
HOLIDAY HILLS COMMUNITY CLUB, INC.,)	
)	
Defendant.)	

REPORTER'S CERTIFICATE

STATE OF WASHINGTON)	
)	ss
COUNTY OF PIERCE)	

I, Natasha Semago, Official Court Reporter in the State of Washington, County of Pierce, do hereby certify that the forgoing transcript is a full, true, and accurate transcript of the proceedings and testimony taken in the matter of the above-entitled cause.

Dated this 3rd day of November, 2014.

NATASHA SEMAGO, CCR
Official Court Reporter
CCR #3251