

No. 47642-8-II

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION II

JAMES JOHNSTON, M.D. and ULRIKE JOHNSTON,

Appellants,

v.

HIDDEN COVE PROPERTY OWNERS ASSOCIATION LLC, a
Washington limited liability company;

Respondent,

SUSAN and GARY DE WITT, and their marital community;
KATHLEEN and CORBIN DERUBERTIS, and their marital
community; DONALD and NANCY LORIMER, and their marital
community; COURTENAY and PAM HEATER, and their marital
community,

Defendants.

BRIEF OF RESPONDENT

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INTRODUCTION

Since at least 1995, Hidden Cove residents had freely used a trail connecting their neighborhood to nearby Manual Road. That ended in 2008, when James and Ulrike Johnston moved in and began blocking the trail. These efforts eventually escalated to a physical altercation, sparking concern amongst neighbors.

The Property Owners Association briefly discussed trail use at a September 2009 POA meeting, voting not to take legal action to pursue an easement. All attending agreed that no one spoke negatively about the Johnstons or plotted against them.

Over the next few months, a few concerned neighbors found an alarming article online and confronted the Johnstons' landlord. This gave rise to the Johnstons' lawsuit against these individuals, other residents, and the POA. The sole issue remaining on appeal is whether the POA is liable for the actions of a few individuals, each of whom stated under oath that they acted on their own, without the POA's knowledge or consent.

The Johnstons' appeal relies overwhelmingly on emails between concerned neighbors addressing the Johnstons' efforts to close the trail. None implicates the POA. Absent any nexus to the POA, summary judgment was proper. This Court should affirm.

STATEMENT OF THE CASE

Appellants James and Ulrike Johnston are required to provide a “fair statement of the facts and procedure relevant to the issues presented for review, without argument,” along with citations to the record to support each factual assertion. RAP 10.3(a)(5). By page three of their opening brief, it is obvious that the Johnstons have utterly failed to comply with RAP 10.3(a)(5).

Their statement of the case does not state facts, but makes sweeping, one-sided categorizations, such as: “[t]he initial dispute between the parties erupted when the plaintiffs became concerned for the safety of their daughters and attempted to limit the parade of strangers traveling through their front yard as well as the late night parties and other illicit activity on the trail.” BA 3 (citing CP 15-17, 737). The Johnston’s continue: “Disregarding the plaintiffs’ property and liberty interests, the defendants took it upon themselves to coordinate their efforts using unlawful means to force the Johnstons from their home in a misguided attempt to achieve their collective goal of controlling the trail for use by the HCPOA’s members.” BA 3-4 (citing CP 736-39). The “statement of the case” does not improve from there.

Rather than point out each unsupported and argumentative statement, Respondent Hidden Cove Property Owners Association (POA) provides a fair recitation of the facts below, and addresses the arguments in the argument section. The POA carefully distinguishes the POA from individual homeowners in the neighborhood, all of whom are POA members. This distinction, entirely overlooked by the Johnstons, is crucial to this case.

A. Since at least 1995, residents in the Hidden Cove neighborhood have used a pedestrian and bike trail connecting the neighborhood to nearby Manual Road.

Appellants James and Ulrike Johnston and their two daughters moved to Washington in September 2008, renting a home from William Gibson in the Hidden Cove neighborhood on Bainbridge Island Washington. CP 453, 793. A pedestrian and bike path ran across the rental property, and neighboring properties as well, connecting the neighborhood to Manual Road. CP 243. Neighborhood kids used the trail as a shortcut to their school bus stop, and many used it as a bike path, including the Mayor's husband. CP 243, 592. This use had gone on without incident since at least 1995. CP 243.

B. After renting a home in the neighborhood, Jim and Ulrike Johnston objected to their neighbors using the portion of the trail running over their yard.

By May 2009, the Johnstons began objecting to their neighbors using the trail. CP 243. Jim Johnston yelled at longtime residents Pam and Courtenay Heater's son Jesse when he was using the trail, and placed rocks and tree trunks over the trail in an apparent effort to prevent its use.¹ CP 148, 243. After hearing that Johnston had confronted Jesse, Don Lorimer emailed the Heaters asking "[w]hat is the deal with that trail? I understood that that trail was made after the last house was built." CP 897. Lorimer thought it "un-neighborly" to cut off access given that the kids had a long walk to and from the school bus. *Id.* Pam Heater responded that the Johnstons were upset about people using the trail, possibly because they had young children, so did not want "strangers" around. *Id.*

Months later, on August 8, 2009, Johnston had an altercation about the trail with Don Lorimer's son James and his friends. CP 246-47, 417-18. James and a friend walked down the trail to meet another friend. CP 417-18. As the group walked back along the trail on their way to the Lorimers' house, Johnston came out and

¹ This brief use first names where necessary to avoid confusion. No disrespect is intended.

“confronted” them. CP 418. He was “very agitated,” yelling at the boys to get off his land and waving a large stick or club in the air. *Id.* The boys tried to calm Johnston down, explaining that they were leaving and would get off the trail. *Id.*

Johnston then shoved James Lorimer and his friend William Moore. *Id.* When Johnston made an aggressive move toward a third boy, he pushed Johnston down before Johnston pushed him. *Id.* Johnston then became even more aggressive and “out of control,” so the boys took off running for the Lorimers’ home. *Id.* A fourth friend, Anthony El-Assal, who had been waiting at the trailhead, heard Johnston threaten to get a gun if the boys returned. CP 421.

Don and Nancy Lorimer were home when the boys arrived, “obvious[ly] distress[ed],” yelling that Johnston had threatened them, pushed them, and threatened a gun if they came back. CP 148, 418, 421. Johnston came driving past in “hot pursuit,” aggressively turning around and stopping in the Lorimers’ drive when he saw the boys there. CP 148. Agitated and angry, Johnston asked whether the boys, still standing in the driveway, were the Lorimers’ children. CP 145. Don Lorimer tried to talk to Johnston, but he was irrational, unreasonable, and out of control. CP 148. Johnston left shortly after arriving. *Id.*

The police arrived about 15 minutes later, responding to a call from Ulrike Johnston during the altercation. CP 148, 247. The police report provides that Johnston told police that James Lorimer and his friends ignored Johnston's demand to get off his property, "bantered" him, and pushed him down. CP 246. The police report also provides that although the boys admitted pushing Johnston, they stated that Johnston pushed them too. *Id.* The boys agreed to stay off the trail in the future, and the Johnstons did not press charges. *Id.*

The Johnstons discount sworn statements from the boys involved in the altercation, arguing that their statements that Johnston waived a stick at them or threatened to get a gun were not in the police report, so must be untrue. BA 5-6. The police did not question EI-Assal, so his statement to that effect plainly is not reflected in the police report. CP 421-22.

Moore explained that the police questioned the boys to elicit "yes" or "no" answers and that given the question and answer format, Johnston's threat to get his gun if the boys returned did not come up. CP 418-19. They did, however, tell police that Johnston was waving a big stick at them. CP 419. EI-Assal's and Moore's sworn statements are consistent with what all the boys were yelling when they ran into the Lorimers' driveway in "obvious distress." CP 148.

Two days later, Don Lorimer sent an email to POA president Courtenay Heater to “relate” what had happened. CP 148. Lorimer relayed his concern that Johnston had quickly become violent, where in Lorimer’s opinion, the boys’ actions did not warrant such a strong response. *Id.* He advised Heater that Johnston’s neighbor Dan Samaniego would try to work out a “peaceful resolution” with the Johnstons. CP 148. He expressly stated that he did not expect Heater to take any action, but wanted him to be aware that the Johnstons’ objection to trail usage had become quite serious. *Id.*

The Johnstons claim that Lorimer’s email is defamatory, arguing that it falsely states that Johnston placed “dangerous traps and hazards on the trail,” that Johnston “assaulted” the boys, that Johnston threatened to assault the boys with a stick and with a gun, and that he was a danger to the neighborhood. BA 5-6. Lorimer personally encountered a wire strung across the trail over the rental property at neck level, and considered it to be dangerous. CP 148. Others had the same experience. CP 194. The remainder of Lorimer’s email is entirely consistent with the sworn testimony from the boys involved and their excited utterances as they ran into the

driveway. CP 417-19, 420-22.² And his statement that Johnston presented a threat is protected opinion. *Duc Tan v. Le*, 177 Wn.2d 649, 663-64 300 P.3d 356 (2013) (discussing RESTATEMENT (SECOND) OF TORTS § 566 *cmt. c* (1977)).

After the altercation, Lorimer decided that he and his family would no longer use the trail. CP 411-12. He felt that it was “best to just stay away” to avoid any further interaction with Johnston. *Id.*

Heater’s responsive email to Lorimer expressed his concern and his hope that the Samaniegos would succeed in their efforts to resolve the situation amicably. CP 414. Heater stated that he was “open to any ideas of how to bring about some reasonable understanding that doesn’t infringe on anyone’s personal space.” *Id.* Stating that a “joint effort” was required, Heater continued, “count me in as one who desires to restore comity and tolerance while respecting people[’s] prerogatives.” *Id.*

The next day, August 11, Lorimer responded to Heater, stating his opinion that if the trail is on the Johnston’s rental property, then all the neighbors must respect the law and keep off it. *Id.* He pondered whether the Johnstons might give individuals permission

² In any event, the issue on appeal is not whether there are fact questions about the August altercation.

to use the path. *Id.* He stated that like Heater, he believes that an open discussion solves most anything. *Id.*

C. At the September 12, 2009 POA meeting, POA members briefly discussed a potential easement right to use the trail, electing not to pursue legal remedies.

1. All those at the September 2009 meeting swore under oath that no one spoke negatively about the Johnstons, much less hatched some sort of plan against them.

After the altercation, the neighborhood became interested in the issues surrounding continued trail use. CP 453. Thus, Heater put trail use on the agenda for the next POA meeting, scheduled for September 12, 2009. *Id.* Since the POA had not held a meeting since September 2007, the primary purpose of the meeting was to discuss the POA's corporate status and to address a land use decision affecting the neighborhood. *Id.* Both matters were urgent and required immediate attention. *Id.* The third purpose was to discuss the trail. *Id.*

The meeting lasted about two hours – only ten to fifteen minutes was spent discussing the trail. CP 440, 454. Don Lorimer was asked to address the August altercation and he declined. CP 234-35. Since the trail was on the rental property, there was nothing more to discuss as far as Lorimer was concerned. *Id.* Several other

property owners spoke, principally addressing whether the public had any easement rights to use the trail. CP 235, 454.

POA attorney Ryan Vancil, who attended the meeting to address the POA's corporate status and the land-use issues, generally addressed prescriptive easements. CP 440, 454. Jeffrey Sneller, who had developed the rental property, said he would look into whether there was a dedicated easement. CP 454. The owners voted unanimously not to hire an attorney with respect to a potential easement over the trail. CP 440, 454. "That was it." CP 454.

According to Heater, who conducted the meeting, "[t]here were no negative comments about the Johnstons. There was no discussion about the Johnstons' backgrounds, about trying to damage the Johnstons' reputations, about writing a letter to or speaking with Mr. Gibson about the Johnstons, about disseminating information about the Johnstons, about trying to force the Johnstons from the neighborhood, or about any other course of action with respect to the Johnstons." CP 454. There simply was "no plot or scheme" discussed at the meeting. *Id.*

Entirely consistent with Heater's sworn statement, attorney Vancil gave a sworn declaration providing that he was at the POA meeting to address its corporate status and a pending land use

application the POA was considering opposing. CP 439-40. Vancil agreed that of the two-hour meeting, the trail discussion lasted about ten-to-fifteen minutes and that the discussion pertained to potential easement rights. CP 440. He agreed that the owners decided not to take any action regarding the trail. *Id.* He agreed that there was no discussion about trying to damage the Johnstons' reputations, speaking with Gibson, disseminating information about the Johnstons, or trying to force them out of the neighborhood. *Id.* He agreed that no plot or scheme was discussed at the meeting. *Id.*

In addition to Heater, there were seven property owners who attended the September 2009 meeting personally or by video conference – Don Lorimer, Pamela Roth-Heater, Susan De Witt, Corbin de Rubertis, Dan and Kerry Samaniego, and Jeffrey Sneller. CP 145-46, 401, 445, 450-51, 464-65, 466-67, 471-72, 473-74, 892.

All but Sneller gave the same account:

- ◆ The trail discussion lasted about 15 minutes and pertained to whether the public had an easement rights to use the trail;
- ◆ The owners decided that Sneller would look into whether there was a dedicated easement in the Title documents;
- ◆ The owners voted not to hire an attorney to address the potential easement issue;
- ◆ The Johnstons were not discussed during the meeting;
- ◆ No plan or scheme was discusses at the meeting.

CP 145-46, 445, 450-51, 464-65, 466-67, 471-72, 473-74. Sneller did not recall the trail discussion at all, or agreeing to look into a dedicated easement. CP 397-99. Sneller did not recall anyone disparaging the Johnstons at the meeting, or any discussion about trying to “oust” the Johnstons. CP 402, 404-05.

2. The Johnstons rely principally on hearsay from one individual who was not at the meeting.

The Johnstons rely principally on a February 2010 statement from Kathleen de Rubertis, who did not attend the September 2009, meeting: (1) that at unidentified POA “meetings,” people were talking about the August confrontation; and (2) that at an unidentified “meeting[,]” someone raised talking to Gibson, but no one pursued it. BA 17-18 (citing CP 1035-36). There were only two POA meetings after the Johnstons moved in – September 12, 2009, and November 20, 2010. CP 453, 455, 456. Thus, the only meeting de Rubertis could have been talking about was the September 12 meeting. CP 453, 455, 456, 1035-36.

But the Johnstons omit that Kathleen de Rubertis did not attend the September meeting. CP 468-69. Kathleen acknowledged that she had no personal knowledge of what was said or done at that meeting. CP 468-69. She deferred to the meeting minutes and to

the recollections of those who were there. CP 469. She admitted that her statements about the meeting were hearsay. CP 468-69.

3. The meeting notes and final minutes reflect the short trail discussion and the vote not to hire counsel to pursue any potential easement rights.

The Johnstons next discuss at great length the notes and final minutes from the September 12 meeting. BA 9-11. POA president Heater took notes during the meeting on a typed agenda, and drafted minutes shortly after the meeting. CP 429, 892-95, 912-14. The section regarding the trail did not change. CP 429. The minutes do not contain much text regarding the trail, where the discussion was brief and where Heater makes it a practice not to record specific homeowner comments. *Id.*

The POA secretary approved the minutes a few weeks later, and Heater distributed the minutes to POA members several months later. *Id.* The POA unanimously approved the minutes the next time the POA met, in November 2010. *Id.*

The Johnstons claim that there “appears to have been extensive discussions concerning the trail issue at the 2009 association meeting.” BA 9 (citing CP 908-10, 912-14). The Johnstons cite only the meeting notes taken by Heater, but the notes do not give any indication how much time was spent on any agenda

item, much less indicate that the discussion of the trail was “extensive.” *Id.* Again, eight people present at the meeting, including POA attorney Vancil, swore under oath that the trail discussion lasted about 15 minutes. CP 145, 440, 450, 454, 464, 466, 471, 473.

The Johnstons also discuss at great length Heater’s notes taken at the September 2009 meeting and the final meeting minutes, asking this Court to infer something nefarious from purported omissions from the notes, or claimed inconsistencies between the notes and the final minutes. BA 9-11. They claim, for example, that the minutes omit a discussion of the trail issue. BA 10-11 (CP 908-10, 912-14). That is false.

The meeting notes reflect that there is “no[] legal trail,” but there remained a question as to whether neighbors had a prescriptive easement. CP 913. The notes reflect who spoke on the trail issue and that they addressed the historical pattern of trail use, as well as the intentions of neighbors, the developer, and the owner (and any prior owners). CP 834, 910, 913. Finally, the notes reflect that research would be done to “promote resolution.” CP 913, 914. Again, the discussion lasted about 15 minutes. CP 145, 440, 450, 454, 464, 466, 471, 473.

The Johnstons next claim “significant inconsistencies,” between the meeting notes and final minutes. BA 10. But the only example the Johnstons provide pertains to the meeting notes only; *i.e.* they state that the meeting notes recorded the vote on the first two agenda items, but not on the third item, the trail issue. *Id.* Again, seven people who attended the meeting swore under oath that the POA decided not to hire counsel to address the trail issue. CP 145, 440, 450-51, 454, 464-65, 466-67, 471-72, 473-74. The final meeting minutes reflect that the POA voted 7-0 against hiring counsel to “examine [the] history of [the] path in order to facilitate resolution of dispute.” CP 894.

The Johnstons next point out that the meeting notes reflect that Susan de Witt and Kerry Samaniego spoke at the meeting, but that their statements are “omitted” from the final adopted minutes. BA 10-11 (citing CP 834). The notes identify four speakers, none of whom are identified in the final minutes. *Compare* CP 894 *with* CP 913. Neither the notes, nor the minutes reflect what any individual said. CP 892-95, CP 908-14. It is Heater’s practice not to record precise statements. CP 455. Again, all present swore under oath that no one spoke negatively about the Johnstons, or planned to take

action against them. CP 145-46, 440, 445, 450-51, 454, 464-65, 466-67, 471-72, 473-74.

Finally on this point, the Johnstons claim that the meeting notes reflect that “discrete sub-topics concerning the trail dispute were discussed during the meeting,” but were “omitted” from the final adopted minutes, reflecting a “striking . . . contrast” in the detail provided on the first two agenda items, and on the trail issue, the third agenda item. BA 11 (citing CP 892-95, 908-10, 912-14). Again, the first two items were addressed for about 1 hour 45 minutes, while the trail was discussed for about 15 minutes. CP 145, 440, 450, 454, 464, 466, 471, 473.

D. After the September 2009 meeting, four individuals addressed their concerns to the Johnstons’ landlord without the POA’s knowledge or consent.

1. After finding a concerning newspaper article on the internet, four individual homeowners signed a letter to the Johnstons’ landlord addressing the newspaper article.

After the September 2009 meeting, the POA did not meet again until November 20, 2010. CP 453, 455, 456. These were the only POA meetings after the Johnstons moved into the neighborhood. *Id.* Again, all who attended the September 2009 meeting agreed that no one present spoke negatively about the

Johnstons or addressed a plan to act against them. CP 145-46, 402, 404-05, 440, 445, 450-51, 454, 464-65, 466-67, 471-72, 473-74.

On December 5, 2009, Susan de Witt and Kathleen de Rubertis delivered a letter to the Johnstons' landlord William Gibson, signed by Susan, Kathleen, and Dan and Kerry Samaniego, the Johnstons' next door neighbors. CP 267, 516, 572, 829. The letter was the result of online research revealing a New York Times article covering charges against Jim Johnston brought in Texas, involving accusations of sexual misconduct against patients. CP 279, 573, 819, 885-86. Kerry Samaniego found the article online and shared it with the de Witts after becoming concerned about the August altercation between Johnston and James Lorimer. CP 241, 279, 885.

The letter states that Johnston had "molested 8 women" but plead to a lesser charge of "inappropriate touching," that he was fined, and that the drafters understood that he was no longer licensed to practice medicine. CP 267. The letter explains that the Johnstons' effort to stop trail use had caused a lot of unrest in the neighborhood. *Id.* It seeks Gibson's help in addressing the matter. *Id.*

At least as it pertains to the allegations against Johnston, the letter is largely inaccurate. CP 793-94. The POA does not now and

has not ever defended this letter. CP 146, 445, 451, 465, 467, 469-70, 472, 474.

The letter was drafted and delivered without the POA's knowledge or participation. CP 469-70. Kathleen de Rubertis and Susan de Witt together decided to approach Gibson. *Id.* When they spoke with Gibson, they introduced themselves as neighbors on Sivertson, not as representatives of the POA. CP 470, 516. Indeed, Gibson plainly testified under oath that de Witt and de Rubertis did not introduce themselves as representatives of the POA. CP 516. As far as he was aware, "they were just two individuals from the Sivertson Road neighborhood." *Id.*

2. These four individuals acted in the individual capacities, not on the POA's behalf.

All four neighborhood residents who signed the letter stated under oath that they acted in their individual capacity, not as a member, officer or agent of the POA. CP 451, 469, 472, 474. All four stated that to the best of his or her knowledge, the POA did not authorize or ratify these their individual acts. *Id.* Indeed, the Johnstons acknowledge that Heater, the POA president, did not even know these individuals were going to Gibson until after it happened. BA 15 n.2.

3. The emails the Johnstons rely on do not implicate the POA.

Without any citations to the record, the Johnstons allege that following the September 2009 meeting, the POA members and officers “escalated their coordinated efforts to harass, intimidate, and subject the Johnstons to hatred, contempt and ridicule throughout the neighborhood.” BA 11-12. They continue that “[t]hey” tried to get the Johnstons evicted and to prevent Jim from practicing medicine on Bainbridge Island. *Id.* They claim that the POA “sent a contingent of its members” to Gibson’s home. BA 14.

But again, the Johnstons admit that Heater did not even know individuals planned on going to Gibson. BA 15 n.2. And again too, all who attended the September 2009 meeting denied speaking negatively about the Johnstons or plotting against them. CP 145-46, 402, 404-05, 440, 445, 450-51, 454, 464-65, 466-67, 471-72, 473-74. There was no other POA meeting before de Witt and de Rubertis took the letter to Gibson. CP 455, 516, 829.

The Johnstons rely principally on personal emails between de Witt and Kerry Samaniego, none of which reflect POA involvement. BA 11-14 (citing CP 926, 928-29, 931-32, 951, 978, 980, 1099-1100). The Johnstons ignore the unequivocal testimony from all four

individuals involved in the letter to Gibson, stating that they acted in their individual capacities, not on behalf of the POA. CP 451, 469, 472, 474. They cite no evidence of POA involvement, eliding the distinction between the POA as an entity, and its members, all individual neighborhood residents. BA 11-14.

The Johnstons cite a single email exchange between the Samaniegos and Heater, in which they claim that Heater “unequivocally acting as the president of the HCPOA, identified the trail dispute as an HCPOA issue and pledged the HCPOA’s support in ‘any effort’ to control the trail for the neighborhood.” BA 12-13 (emphasis Johnstons’) (citing CP 1209). Heater’s email offers help in “promoting an amicable solution” to the trail dispute. CP 1208. He says nothing pledging support to “control the trail for the neighborhood.” BA 12-13. He pledged only his support to “cooperate with any effort brought to resolve the matter.” CP 1208. And the “pledge of support” the Samaniegos accepted had only to do with the POA’s willingness to look into a potential easement right to the trail. BA 12-13; CP 939, 1208.

The Johnstons argue that Heater considered drafting new rules to “exclude” the Johnstons. BA 13 (citing CP 1099-1100). In

context, it is plain that the discussion pertained to renters' rights to participate in POA meetings, nothing more. CP 1099-1100.

The Johnstons next argue that “[a]s late as February 10, 2010, Mr. Heater, as HCPOA president, continued to recruit the aid of the neighbors on Manual Road to join efforts to end the so-called ‘blockade’ of the trail.” BA 13 (citing CP 941-43). Manual road neighbors had used the trail for many years without incident and were upset that Johnston had blocked the trail. CP 941-43. This email chain seeks “a fair and just resolution of this issue.” CP 942.

The Johnstons next discusses at length the letter to Gibson (BA 14-17), culminating in the assertion that the POA “endorsed” the actions of the four individuals who signed the letter. BA 17-18. Again, the POA does not defend the letter and never has.

The Johnstons’ claim that the POA “endorsed” the letter relies exclusively on testimony from Kathleen de Rubertis, in which she states: (1) that she had discussed the trail issue with her friend and neighbor Susan de Witt; (2) that the same was being discussed around the neighborhood; and (3) that it had been discussed at a meeting during which someone suggested talking to Gibson. BA 17-18 (citing CP 1035-36). The Johnstons omit de Rubertis’ statement,

immediately following the quoted portion, that “no one pursued” talking to Gibson. CP 1036.

The Johnstons also again ignore: (1) that de Rubertis was not at the September 2009 meeting; (2) that there was no other POA meeting until November 2010 – long after the two individuals delivered the letter to Gibson; (3) that de Rubertis was not at the November 2010 meeting; and (4) that de Rubertis acknowledged under oath that she had no personal knowledge of any meeting discussions, that she deferred to others regarding what was or was not discussed at the meetings, and that her testimony the Johnstons rely on is hearsay. CP 468-70.

In yet another full paragraph without any citations to the record, the Johnstons claim that “[t]he effort to force the Johnstons out of the neighborhood using any means necessary” was not a few individuals acting alone, but “a coordinated effort with various HCPOA members and officers each making their own contribution to the HCPOA’s cause.” BA 18. The POA does not disagree that the four individuals behind the letter to Gibson coordinated their efforts. BA 18. That is not the issue. The Johnstons again ignore that those individuals were acting in their individual capacities, not on behalf of

the POA, and that the POA had no prior knowledge of their action. CP 451, 455, 469-70, 472, 474; BA 15 n.2.

The only “evidence” the Johnstons rely on to support their claim is: (1) an email from de Witt to Heater purporting to update him on the situation; and (2) emails from Lorimer to Heater stating that the POA should tread carefully around the topic. BA 18-20. The de Witt/Heater correspondence the Johnstons refer to addresses whether there were sufficient funds in the POA’s bank account to pay attorney Vancil’s fee for time spent on the POA’s reincorporation. CP 1087-88. In that discussion, de Witt, the POA treasurer at the time, took it upon herself to inform Heater that she and Kathleen de Rubertis had delivered the letter to Gibson and that an unnamed individual had sent three pages of the New York Times article to Johnston. CP 1088. In response to the latter, Heater thanked de Witt for keeping him “posted on the neighborhood trends,” stating that he would like to “get a meeting going sooner than later.” CP 1087. Heater did not otherwise comment on de Witt’s actions, much less say anything indicating his support. *Id.*

The Lorimer email the Johnstons rely on, sent sometime in December 2009, notified Heater that Lorimer was aware that “some” had approached Gibson and that there was some “pretty

inflammatory things” circulating about Jim Johnston. BA 19 (citing CP 1090-91). Lorimer stated that the POA “need[s] to tread carefully around the topic of the tenants in the Gibson house,” explaining “[i]f people want to act on their own that’s one thing but we need to be careful about acting on behalf or seeming to act on behalf of the HCPOA.” CP 1091. Nothing in this email suggests that the POA was taking any action against the Johnstons, much less suggests a POA plan to “forc[e] the Johnstons from their home.” BA 19-20.

Finally, the Johnstons claim that Lorimer’s later email stating “United we stand” is evidence that Lorimer and the POA were complicit in the actions of the four individuals who signed the letter to Gibson. BA 19-20 (citing CP 1093-95). The Johnstons take this email out of context. *Id.*; CP 237.

In February 2010, the Johnstons sought anti-harassment orders against Susan de Witt and Kathleen de Rubertis. CP 440, 451, 469. The POA was not a party. CP 451, 469. De Witt and de Rubertis paid for their defense. *Id.* The email the Johnstons rely on, sent February 9, 2010, is part of an exchange between Lorimer and Corbin de Rubertis, in which Corbin asked Lorimer to draft a declaration supporting Kathleen’s defense against the Johnstons’ harassment claim. CP 1093-95. The reference to being “united”

addresses Lorimer's opinion that the POA should meet to discuss "this topic," referring to the harassment claims. CP 237, 1093-95. Lorimer felt that litigation was imminent and that the POA needed to address how it would respond. *Id.* The email has nothing to do with the letter sent to Gibson or the related acts of the four individuals who signed the letter. *Id.*

E. The next POA meeting was called in November 2010 after the Johnstons threatened to sue.

After the September 12, 2009 meeting, the POA did not meet again until November 20, 2010. CP 455. Earlier that month, POA attorney Vancil received a letter from the Johnstons' attorney threatening to sue the POA and several individuals. CP 440-41. Heater called a special POA meeting to discuss whether to respond to the Johnstons' litigation threat and to finalize documents related to the POA. CP 441, 455.

F. The POA did not discuss the Johnstons, other than to address whether to respond to their threatened litigation.

The November 2010 meeting was the first opportunity to formally approve the minutes from the September 2009 meeting, which the POA unanimously approved. CP 455. All who attended, including attorney Vancil, agreed that the POA did not discuss the Johnstons other than in the context of unanimously voting not to

respond to the Johnstons' litigation threats. CP 441 (Ryan Vancil); CP 445 (Don Lorimer); 446-47 (Nancy Lorimer); 448-49 (Gary de Witt); 455-56 (Courtenay Heater); 465 (Pamela Roth-Heater); 467 (Corbin de Rubertis); 472 (Dan Samaniego).

Vancil stated unequivocally that the only discussion pertaining to the Johnstons was whether to responds to their threatened litigation. CP 441. The POA voted not to respond:

The members decided unanimously not to respond to the letter. In this meeting, as in the September 2009 meeting, there was no discussion about the Association or HCPOA trying to damage the Johnstons' reputations, trying to force the Johnstons from the neighborhood, any other course of action with respect to the Johnstons (except to defend against the threatened lawsuit), or initiating a collective plot or scheme concerning the Johnstons.

Id. POA president Heater concurred, unequivocally stating that the POA voted unanimously not to respond to the threatened litigation. CP 456. Heater swore under oath that there was no discussion about trying to damage the Johnstons' reputations, force them from the community, or scheme against them. *Id.*

Heater explained that the September 2009 and November 2010 meetings were the only POA meetings while the Johnstons lived in the neighborhood. CP 456. At neither meeting did the POA do anything to harm the Johnstons. *Id.* Heater had no prior

knowledge about the letter drafted to Gibson or that there was a plan to present it in person, learning about it for the first time over a month later. CP 454-55; BA 15 n.2. The POA never discussed those individual actions, or authorized or ratified them. CP 455.

As discussed above, all POA members who attended the September 2009 meeting swore under oath that the Johnstons were not negatively discussed at the meeting and that no one discussed a plot a scheme against the Johnstons. CP 145-46, 402, 404-05, 440, 445, 450-51, 454, 464-65, 466-67, 471-72, 473-47. The same is true for the November 20, 2010 meeting. CP 445 (Don Lorimer); 446-47 (Nancy Lorimer); 448-49 (Gary de Witt); 455-56 (Courtenay Heater); 465 (Pamela Roth-Heater); 467 (Corbin de Rubertis); 472 (Dan Samaniego). These individuals all also stated that to the best of their knowledge, the POA had never authorized or ratified any of the actions taken by the four individuals who signed the letter to Gibson. *Id.*

Neither Susan de Witt, nor Kerry Samaniego, who delivered the letter to Gibson, attended the November meeting. CP 451, 474. Both swore under oath that to the best of their knowledge, the POA had never authorized or ratified any of the actions taken by the four individuals who signed the letter to Gibson. *Id.* De Witt, the former

POA treasurer who resigned in February 2010, swore that other than her attendance at the September 2009 meeting, her actions were in her individual capacity and not as a member, officer, or agent of the POA. CP 451, 817, 1110-11. Samaniego also swore that she had not acted on the POA's behalf. CP 474.

G. Procedural history.

The Johnstons' procedural history begins with a lengthy discussion of the legal proceedings against Johnston that are the subject of the New York Times article that prompted Susan de Witt and Kathleen de Rubertis to approach Gibson. *Supra*, Statement of the Case § D.1; BA 20-24. Most of the discussion is without record support, and this Court should disregard it. *Id*; RAP 10.3(a)(5).

The Johnstons then address their harassment claims against Susan de Witt and Kathleen de Rubertis, noting that both women were represented by POA attorney Vancil. BA 24-25. The Johnstons omit that the POA did not hire Vancil to represent de Witt and de Rubertis or pay any portion of his fee. CP 440. Vancil asked Heater to provide a declaration in his individual capacity. *Id*. The POA was not a party to the proceedings. *Id*.

The remainder of the Johnstons' procedural history is replete with argument, such as asking this Court to draw inferences about

the POA from tactical legal decisions made by other parties. BA 26-28. The Court should ignore these improper arguments. RAP 10.3(a)(5).

The following is a procedural history, without argument, for the Court's convenience. On November 10, 2010, the Johnstons sent the POA a letter providing notice of impending litigation. CP 440-41, 923. The POA voted not to respond, other than to acknowledge receipt. *Id.*

The Johnstons served the complaint on January 1, 2011 and filed it on January 20. CP 13, 710-11. The complaint named the POA, the de Witts, de Rubertis, Lorimers, Samaniegos, and Heaters. CP 13. In February and March, the parties separately filed amended answers. CP 25-34, 35-49, 50-55, 56-64, 65-67, 68-78.

The Lorimers moved for summary judgment in May 2012, and the court denied their motion in July. CP 79, 423. The POA and the de Witts moved for summary judgment in September 7. CP 425, 517. The de Witt's struck their motion before the hearing set in September. RP 2. After hearing argument on the matter, the trial court granted the POA's summary judgment motion, stating that the Johnstons showed no nexus between individuals' actions and the POA. RP 30-31; CP 1177-79.

By July, 2013, the Johnstons settled with all of the parties, aside from the Heaters and the POA. CP 1578. In April 2014, the Johnstons moved to revise the order dismissing the POA on summary judgment, entered a year and a half earlier. CP 1180. The court denied the Johnston' motion. CP 1276. The Johnstons then moved for reconsideration and for CR 54(b) certification, both of which the court denied. CP 1279, 1320, 1322, 1347.

On April 30, 2015, the court entered a stipulation dismissing the Heaters, leaving the POA the only defendant remaining in the case. CP 1583. The Johnstons appealed. CP 1349.

ARGUMENT

A. The standard of review is *de novo*.

This Court reviews an order granting summary judgment *de novo*, construing the facts in the light most favorable to the non-moving party. ***Michael v. Mosquera-Lacy***, 165 Wn.2d 595, 601-02, 200 P.3d 695 (2009). Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. ***Michael***, 165 Wn.2d at 601; CR 56(c). "A genuine issue of material fact exists only where reasonable minds could reach different conclusions." 165 Wn.2d at 601. The nonmoving party has the burden to show questions of

material fact, and “may not rely on speculation, [or] argumentative assertions that unresolved factual issues remain.” *Id.* at 602 (alteration in original) (quoting ***Seven Gables Corp. v. MNM/UA Entm’t Co.***, 106 Wn.2d 1, 13, 721 P.2d 1 (1986)).

B. The evidence the Johnstons rely on does not create a material question of fact regarding the POA’s alleged involvement in the acts of individual home owners.

The Johnstons provide a list of evidence, arguing that it presents a material fact question precluding summary judgment. BA 29-31. As they have throughout this matter, the Johnstons fail to distinguish between acts carried out by individuals on their own behalf and acts attributable to the POA. This Court should affirm.

The Johnstons again rely principally on municipal court testimony from Kathleen de Rubertis, claiming that she “admit[ed] to the HCPOA’s involvement in the conspiracy.” BA 29. There, de Rubertis stated that people were talking about the trail incident at a POA meeting and that someone suggested talking to Gibson. CP 279-80. She admitted that no one pursued it. CP 280.

The Johnstons omit that this statement is inadmissible hearsay. The only POA meeting after the trail incident and before de Rubertis and de Witt spoke to Gibson was in September 2009. CP 453. The previous POA meeting was more than two years before,

and the next POA meeting was over one year later. CP 453, 456. Thus, the September 2009 meeting is the only one de Rubertis could have been referring to. *Id.*

But de Rubertis did not attend the September 2009 meeting. CP 468. She had no personal knowledge of what was discussed at that meeting, admitting that her municipal court testimony was based on hearsay. CP 468-69. De Rubertis thus deferred to the recollections of those who were actually at the meeting (CP 469), all of whom agreed that the trail was briefly discussed, that no one spoke negatively about the Johnstons, and that the only potential action addressed was looking into an easement. CP145-46, 440, 445, 450-51, 464-65, 466-67, 471-72, 473-74.

Hearsay is any statement made by someone other than the declarant offered into evidence to prove the truth of the matter asserted. ER 801. Here, de Rubertis – the “declarant” – was quite plainly testifying about statements made by persons other than herself. CP 279-80. The Johnstons equally plainly offer these statements to prove the truth of the matter asserted – that people at and POA meeting discussed talking to Gibson. BA 29, 31. Thus, de Rubertis’ testimony as inadmissible hearsay. ER 801.

Further, de Rubertis' testimony does not implicate the POA in any event. De Rubertis states only that some individuals at a POA meeting talked about going to Gibson, but then failed to follow through. CP 279-80. This is not evidence that the POA as an entity sent anyone to talk to Gibson, or even agreed that someone should talk to Gibson. And it certainly is not evidence that the POA voted in support of de Rubertis' actions.

The Johnstons next claim that Don Lorimer admitted that the POA "as an organization, was united in its efforts against the Johnstons." BA 30 (citing CP 1093-95, 872). While all neighborhood residents are POA members, Lorimer has never been a member of the board. The Johnstons do not suggest, and there is no support for a claim, that Lorimer is or ever has been authorized to speak for the POA.

In any event, the email the Johnstons rely on plainly does not evidence the POA's involvement in the actions of the four individuals who signed the letter to Gibson. BA 30. As discussed in detail above, Lorimer's statement "United we stand" addresses Lorimer's opinion that the POA should meet to discuss its response to the Johnstons' potential lawsuit, which he felt was imminent. CP 237, 1093-95. The email – sent months after de Rubertis and de Witt

spoke to Gibson – is not addressing their conduct. CP 237, 267, 1093-95.

The Johnstons next refer to a series of emails to or from Heater, arguing that they “concern[] the efforts of the HCPOA members and officers’ [sic] to force the Johnstons out of the neighborhood.” BA 30 (citing CP 904, 916, 918-19, 939, 941-43, 1087-88, 1209).³ CP 904 is the email from Lorimer advising Heater of the trail incident. It says nothing about a POA “effort” to do anything, and specifically states that Lorimer is not asking the POA to take action. CP 904. CP 916 is correspondence between Heater and Sneller, the original developer, addressing Sneller’s inquiry as to why the Johnstons put up a fence. The email simply explains that the Johnstons obtained Gibson’s permission to build a fence to prevent people from using the trail. CP 916. And CP 941-43, written in February 2010, is Heater’s response to a request that he provide information in response to the Johnstons’ anti-harassment suit against de Rubertis and de Witt. It provides Heater’s opinion of the history of the trail’s use and the dispute. *Id.* It says nothing and implies nothing about ousting the Johnstons. *Id.*

³ CP 918-19, 1087-88, and 1209 are addressed immediately below in response to separate arguments regarding these particular emails. CP 939 is part of the email correspondence at CP 918-19, addressed below.

The Johnstons next rely on emails from Susan de Witt stating that “everyone in the neighborhood wanted the Johnstons gone.” BA 30 (citing 928-29, 931-32, 1087-88). De Witt is not entitled to speak for the entire neighborhood. That said, there is little doubt that the Johnstons’ efforts to prevent residents from continuing to use the popular and historically open trail were not popular. Disliking the Johnstons’ behavior and wishing it would stop does not indicate participation in a conspiracy. BA 30.

Similarly unpersuasive is the Johnstons’ reliance on emails between POA members supposedly “detailing their unlawful efforts to force the Johnstons from their home.” BA 30 (citing 926, 928-29, 931-32, 934-35, 985, 1012-13, 1019, 1080, 1082). These emails are all between the four individuals who authored the letter to Gibson, and say nothing about POA involvement in their actions. CP 926, 928-29, 931-32, 934-35, 985, 1012-13, 1019, 1080, 1082. Indeed, these four individuals all swore under oath that the POA had no involvement in their actions. CP 451, 469-70, 472, 474.

The Heater emails the Johnstons rely on plainly do not endorse the actions of the individuals who went to Gibson. BA 30 (citing CP 918-919, 1087-88). The first citation is to an email from Heater thanking the Samaniegos for informing him of their efforts to

determine whether there is an easement over the trail. CP 918-19, 937. The emails occurred about one month after the September 2009 meeting, in which the POA discussed looking into an easement right to use the trail. *Id.* The emails do not remotely address going to Gibson, which occurred two months later. *Id.*

The second reference is to a mid-January 2010 email chain started by Heater, asking then POA treasurer de Witt about the POA's account balance. CP 1087-88. When responding to that inquiry, de Witt volunteered that she and de Rubertis "went to see" Gibson. CP 1088. Heater's only response was to thank her for keeping him "posted on neighborhood trends." CP 1087. He did not say anything else at all – much less anything that could be construed as endorsing her actions. *Id.*

Even less persuasive is the Johnstons' reliance on emails purporting to show that the POA tried to "recruit and encourage neighbors in the HCPOA's efforts to force the Johnstons from their home." BA 30 (citing CP 941-43, 1209). CP 941-43 addresses that the trail has historically been open and that Manual Road residents are also upset about the Johnstons' efforts to close it. This email seeks "a fair and just resolution." CP 942. The email referenced at CP 1209 addresses the trail discussion at the September 2009

meeting, and expresses support in finding an “amicable solution.” CP 1208. These emails have nothing to do with “forcing” the Johnstons out. *Id.*

The Johnstons next claim that there were formal and informal POA meetings to discuss ways to force the Johnstons to “relent” to trail use. BA 30-31 (citing CP 892-95, 906, 923-34). Again, the only discussion at the September 2009 POA meeting was whether to look into possible easement rights. CP 439-40, 453-54. The draft minutes (CP 923-24), a pre-meeting email regarding the agenda (CP 906), and the final minutes (CP 892-95) do not indicate otherwise.

Finally, the Johnstons rely on an email from Heater identifying the “trail issue” as important, meeting minutes identifying it as “critically important,” and an email from Heater purportedly “pledging the HCPOA's support in ‘any effort’ to control the trail” or “force the Johnstons from their home.” BA 30, 31 (citing CP 892-96, 906, 941-43, 1209). Referring to the trail issue as “important” says nothing. Neighbors had freely used the trail for many years and wanted to continue using it. CP 243. The Johnstons’ efforts to stop trail use had resulted in a physical altercation and police report. CP 151-52. The issue was plainly “important.” But in any event, both references to “important” are to all three items on the September 2009 meeting

agenda, including the curing defects in the POA's corporate status and opposing a land use proposal. CP 892-95, 906. Both garnered considerably more attention during the September meeting. CP 439-40, 453-54.

And again, it is simply false to say that Heater pledged the POA's support in controlling the trail or forcing the Johnstons to move. BA 30, 31 (citing CP 1209). His pledge was only to "cooperate" to resolve the dispute amicably. CP 1208.

C. None of the above discussed "evidence" indicates the POA in a civil conspiracy.

Here too, the Johnstons overlook the distinction between the POA and neighborhood residents. The Johnstons have the burden to prove a civil conspiracy by clear, cogent, and convincing evidence. ***Sterling Bus. Forms, Inc. v. Thorpe***, 82 Wn. App. 446, 450, 918 P.2d 531 (1996). Yet they provide nothing other than their own unreasonable suspicions. This Court should affirm.

A civil conspiracy exists only when two or more people work together to accomplish an unlawful purpose, or to use unlawful means to accomplish an otherwise lawful purpose. ***Herrington v. David D. Hawthorne, CPA, P.S.***, 111 Wn. App. 824, 840, 47 P.3d 567 (2002). Although a conspiracy may be proven by circumstantial

evidence, the “circumstances must be inconsistent with a lawful or honest purpose and reasonably consistent only with [the] existence of the conspiracy.” **Herrington**, 111 Wn. App. at 840 (quoting **Sterling**, 82 Wn. App. at 451). Further, “mere suspicion” is not enough. **Herrington**, 111 Wn. App. at 840.

The Johnstons provide almost no legal analysis, and their summary reliance on **Herrington** is particularly misplaced. **Herrington** involved an elaborate Ponzi scheme in which Philip Harmon and his accountant, Michael Cheesman, pled guilty to civil conspiracy to defraud more than 230 people to the tune of \$16 million. 111 Wn. App. at 828. After settling with Harmon, investors sued Harmon’s business partner John Duke, alleging civil conspiracy. *Id.* at 828-29.

In addition to expert testimony implicating Duke in the scheme, Cheesman declared that Duke was specifically told that investor money was being transferred to Marvel Enterprises, in which Duke and Harmon were partners, and that Marvel’s debts were growing without any increase in assets. *Id.* at 840-41. Cheesman discussed with Duke financial matters relating to Harmon’s businesses and Duke was “generally familiar with the nature of the business defendants’ operations.” *Id.* at 841.

Duke participated in three meetings addressing investor dissatisfaction and Harmon's "substantial financial difficulties." *Id.* at 841-42. In one, Duke heard from a "disgruntled" investor who expressed concern that Harmon would not be able to repay investors. *Id.* at 842.

In short, Duke had sufficient information such that he knew or should have known that there were "serious problems in Harmon's businesses," including Marvel. *Id.* Crucial to the **Herrington** analysis is that Duke possessed pertinent knowledge while the scheme was ongoing, but did nothing. *Id.* It was his failure to stop the ongoing conspiracy that implicated him in it. *Id.*

This matter bears no resemblance to **Herrington**. Here, the POA did not know that a few individuals planned to talk to Gibson, much less that they planned to do or say something unlawful. The Johnstons acknowledge, as they must, that Heater did not know that de Witt and de Rubetis intended to talk to Gibson until months after it happened. BA 15 n.2. Indeed, there is no evidence that any POA board member knew in advance, aside from de Witt, who swore that she acted in her individual capacity. CP 451. Unlike Duke who sat through meeting after meeting hinting at a conspiracy to defraud investors, every person who was actually at the September 2009

meeting swore that there was no negative conversation about the Johnstons and that no plan or scheme was hatched. CP 145-46, 440, 445, 450-51, 464-65, 466-67, 471-72, 473-74. Rather, they simply addressed potential easement rights and voted not to take any legal action to pursue it further. *Id.*

Moreover, the Johnstons have to show that the circumstance they rely on – the POA’s failure to stop the supposed “Gibson ambush” – is “inconsistent with a lawful or honest purpose and reasonably consistent only with [the] existence of the conspiracy.” ***Herrington***, 111 Wn. App. at 840. Unlike selling promissory notes with no ability to repay them, talking to Gibson has many lawful and honest purposes, including asking him to help resolve the trail dispute amicably, as the landlord of the tenant objecting to trail use.

Even the Johnstons’ smoking gun evidence – de Rubertis’ inadmissible hearsay statement – says only that neighbors at a POA meeting discussed that “someone should talk to . . . Gibson . . . and then no one pursued it.” CP 280. It is lawful for neighbors to be concerned – or even angry – about another neighbors’ conduct, to talk about what to do, and even to address their concerns to the landlord. That is not “reasonably consistent only with [the] existence of the conspiracy.” 111 Wn. App. at 840. It is the content of the

communication with Gibson, not the communication itself, that arguably crossed a line. But the Johnstons do not even speculate that the POA knew about the content of the communications with Gibson in advance. In short, the Johnstons simply have no evidence that the POA knew about illegal or dishonest activities and chose to ignore them.

Lacking any direct or circumstantial evidence, the Johnstons rely on unreasonable inferences. BA 33-36. The Johnstons first claim that emails between Kerry Samaniego and Susan de Witt demonstrate the unlawful purpose of “getting rid of the Johnstons.” BA 33-34. None of these emails implicate the POA. CP 926, 928-29, 931-32, 934-35. A couple of neighbors wishing the Johnstons would open up the trail or move is not unlawful.

The Johnstons next claim that the POA “employ[ed] any and all means necessary to force the Johnstons from their home” citing Heater’s declaration in the municipal court proceedings. BA 34 (citing CP 1212-14). Heater testified that he had been told by various neighborhood residents that an “adversarial situation” had developed regarding trail use. CP 1212. Heater felt that he could do nothing other than “put it on the agenda.” *Id.* Nothing Heater said

supports a reasonable inference that the POA was working to “force” the Johnstons out. BA 34.⁴

Also unpersuasive is the email exchange in which de Witt told Heater – over a month after the fact – that she had spoken to Gibson. BA 35 (citing CP 1087-88). At that point, the supposed conspiracy had “failed,” as the Johnstons admit. BA 35. Failing to stop an already-failed effort does not prove participation in it.

In a similar vein, the Johnston’s have no authority for their assertion that failing to “denounce” efforts to have the Johnstons removed implicates the POA in a civil conspiracy. BA 35 & n.7 (citing 1090-91). Again, failing to “denounce” a failed effort upon learning about it months later, does not implicate the POA in a conspiracy.⁵

In sum, the Johnstons rely solely on evidence that has many lawful purposes, and is not consistent only with the alleged conspiracy. Their mere speculation is insufficient. This Court should affirm.

⁴ The Johnston’s persistent claim that Heater pledged POA support to anything unlawful is addressed above. *Supra*, Argument § B.

⁵ The Johnstons’ rehash of email exchanges is addressed above. *Supra*, Argument § B.

D. The POA is not vicariously liable for the acts of neighborhood residents that it plainly did not authorize, and which were not carried out on its behalf.

The Johnstons argue – for the first time on appeal – that the POA is vicariously liable for defamation, outrage, invasion of privacy and harassment, alleged against neighborhood residents. BA 36-50. But when reviewing a summary judgment order, this Court “considers only evidence and issues raised below.” *Douglas v. Jepson*, 88 Wn. App. 342, 347, 945 P.2d 244 (1997); RAP 9.12. The Court should disregard this new argument and affirm.

In any event, the Johnstons principally rehash the facts underlying their tort claims, addressed repeatedly above. BA 36-50. As they correctly acknowledge, however, “the only question is whether the individual members and officers of the HCPOA committed these torts on their own, or whether liability for these torts can be imputed to the HCPOA under a theory of vicarious liability.” BA 37. Since there is no evidence that the POA authorized any act the Johnstons complain of, summary judgment was plainly appropriate. Again, this Court should affirm.

An agency relationship exists only when one party – the agent – acts under the direction and control of another – the principal. *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229,

268, 215 P.3d 990 (2009). The Johnstons bear the burden of establishing an agency relationship. **Deep Water**, 152 Wn. App. at 268.

A principal may be vicariously liable for the unauthorized conduct of its agent, if that agent is acting on the principal's behalf. 152 Wn. App. at 268. This rule follows from the agent's duty to communicate his knowledge to the principal. *Id.* Thus, a principal generally is charged with his agent's notice or knowledge, but only when the agent is acting on the principal's behalf. *Id.* at 268-69.

For their scant legal argument, the Johnstons rely exclusively on **Deep Water**, which is plainly inapposite. There, a developer purchased a right-of-way from the restaurant owner, who included an agreement to limit houses in the affected development to a certain height. *Id.* at 238. Jack Johnson, the sole shareholder and president of the development company, incorporated a homeowners association and appointed himself the president. *Id.* at 239-40. Through a series of convoluted transactions, Johnson failed to record covenants that reflected the agreed-upon height restriction, also taking other steps inconsistent with the height restriction. *Id.* at 241. This eventually resulted in a subsequent purchaser of the

restaurant suing to enjoin construction that would violate the height restriction. *Id.* at 242.

To avoid vicarious liability for Johnson's torts, the HOA argued that Johnson acted only on behalf of his development company, not the HOA. *Id.* at 269. But the HOA was incorporated, at least in part, to prevent homes in the development from interfering with the view protected by the sales agreement. *Id.* at 267-69. When Johnson failed to protect those views by his action and inaction, he was acting as the president of the HOA. *Id.* at 269-70. Thus, the HOA was plainly vicariously liable for his torts. *Id.* This matter is nothing like ***Deep Water***.

The Johnstons do not even address agency other than to summarily conclude that "each individual defendant was either an officer or member of the HCPOA at all relevant times . . . [i]n other words, they were the agents of the HCPOA." BA 37. That is a *non sequitur*.

The only "agent" of the POA who went to Gibson was de Witt. There is no indication that the other three were under the POA's direction and control, nor do the Johnstons claim otherwise. ***Deep Water***, 152 Wn. App. at 268. The Johnstons' unsupported claim that

all members are POA agents by sheer virtue of their membership is meritless. BA 37.

Since de Witt was a POA officer when she talked to Gibson, and since her actions were unauthorized, the remaining question is whether her unauthorized acts were on behalf of the POA. **Deep Water**, 152 Wn. App. at 268. De Witt unequivocally swore that she acted on her own accord, not on behalf of the POA. CP 451. The Johnstons offer no “evidence” to the contrary, only speculation and conjecture.

The Johnstons rely solely in the supposed “common goal” between the POA and the four individuals who went to Gibson. BA 38-39. But the only goal ever articulated by the POA was to look into a potential easement. CP 892-95, 912-14. The only “goal” Heater ever articulated was to amicably resolve the trail dispute. CP 1208.⁶

The Johnstons next focus on each tort and the individuals who allegedly committed them, spending little time addressing the POA’s supposed involvement. BA 38-50. Thus, their arguments are almost entirely irrelevant. *Id.*

⁶ The POA does not here repeat its answers to the Johnstons’ unreasonable assertions that Heater pledged support to some nefarious cause, that referring to agenda items as important proves ill-intent, or the like. BA 37-39.

The Johnstons first claim that Lorimer defamed the Johnstons by relaying to Heater the confrontation between Johnston and Lorimer's son and his friends. BA 40. Lorimer is not a POA officer or agent, so the POA cannot be vicariously liable for his acts. In any event, he was telling the truth – the ultimate defense to defamation.

The Johnstons rely on personal email correspondence between de Witt and her friend, but never even suggest that de Witt's emails were on behalf of the POA. BA 40. They again assert that four neighbors signed the letter to Gibson, ignoring: (1) that three of them were never POA officers; (2) that the only officer swore she was acting on her own behalf; and (3) that all four swore that the POA did not authorize their acts. CP 451, 469-70, 472, 474, 817.

The Johnstons allege for three pages outrageous conduct carried out by neighborhood residents, without ever attributing any of the conduct to the POA. BA 41-44. Their only argument related to the POA reverts back to de Rubertis' hearsay testimony and de Witt's participation in delivering the letter to Gibson in her individual capacity and without POA authorization. BA 45; CP 451, 468-69. And again, Heater did not "endorse" these individual's actions when he learned about them months after-the-fact, but only thanked de Witt for keeping him in the loop. BA 45; CP 1087.

The Johnstons' remaining claims principally focus on the same facts asserted in relationship to the defamation claim BA 45-50. The POA will not repeat its responses again here. .

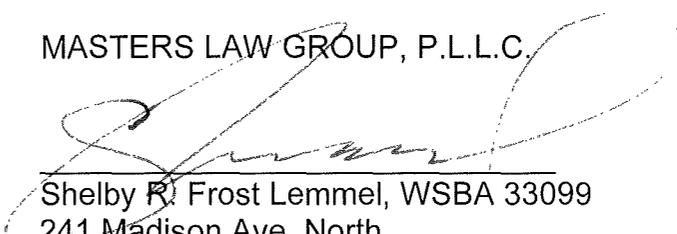
In short, this Court should not address this vicarious liability argument raised for the first time on appeal. In any event, the Johnstons' scant effort to link these torts to the POA is unavailing. This Court should affirm.

CONCLUSION

As they have throughout this matter, the Johnstons fail to distinguish between individuals acting alone, and the POA acting as an entity. As the trial court correctly concluded, there simply is no nexus to the POA. This Court should affirm.

RESPECTFULLY SUBMITTED this 26th day of October,
2015.

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CERTIFICATE OF SERVICE BY MAIL AND/OR EMAIL

I certify that I caused to be mailed, postage prepaid, via U.S. mail and/or emailed a copy of the foregoing **BRIEF OF RESPONDENT** on the 20th day of October 2015, to the following counsel of record at the following addresses:

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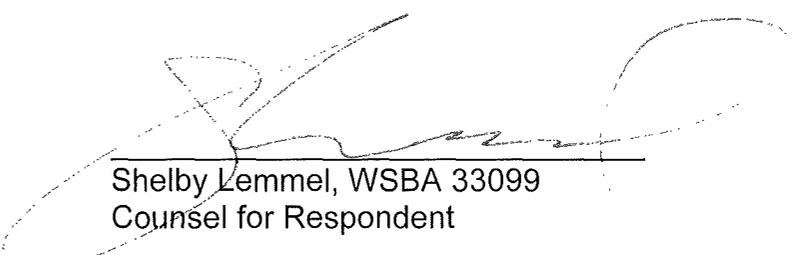
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