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No. 52486-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

LANA CHANEY HARMON and SUNSHINE HARMON,
husband and wife,

Appellants/Defendants,

vs.

BENJAMIN A. THOMAS JR. and LINDA KAE FERRIS, Co-Trustees of
the Benjamin A. Thomas, Sr. Credit Shelter Testamentary Trust,

Respondents/Plaintiffs.

BRIEF OF RESPONDENTS

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A. Factual and Procedural History

On September 27, 2014, Defendant Lana Chaney Harmon bought the property located at 441 Hansen Road, Woodland, Washington, from Benjamin A. Thomas, Jr., and Linda Kae Ferris, co-trustees of the Benjamin A. Thomas, Sr., Credit Shelter Testamentary Trust (hereinafter, “the Trust”). CP 486 The property was subject to covenants and restrictions at the time of sale. Lana Chaney Harmon signed a copy of the covenants at closing. CP 496 Although Lana Chaney Harmon and Sunshine Harmon (hereinafter, “the Harmon’s”) are husband and wife, only Lana Chaney Harmon took title to the property.

Shortly after purchasing the property, the Harmon’s began violating the covenants. They placed a metal container on the property, constructed a number of temporary structures, and lived in an RV onsite for over a year and a half. CP 581-82 During this time, Benjamin A. Thomas worked with the Harmon’s to bring them into compliance with the covenants. CP 581-82 Through personal discussions and letters from his attorney, Mr. Thomas repeatedly warned the Harmon’s that they needed to comply with the covenants, and he often allowed them additional time to bring their property into compliance. CP 581-82, 584, 590, 593 For example, Mr. Thomas wrote a personal letter to the Harmon’s regarding several covenant violations on October 27, 2014, wherein he demanded abatement. CP 584

The Harmons responded on November 13, 2014, with a letter that admitted to the behavior that Mr. Thomas had complained about but denied that any of it violated the covenants. CP 586-87 Mr. Thomas nonetheless worked with the Harmons for the next eleven months to abate these and many other covenant violations. CP 581-82 By October of 2015, however, Mr. Thomas had had enough. On October 7, 2015, his attorney wrote the Harmons a letter warning that they had lived in their RV for too long, had built a number of nonconforming temporary structures, and had placed a metal container on their property. CP 590-91 The letter asked the Harmons to abate these violations and warned that Mr. Thomas would file suit to enforce the covenants. CP 590-91

The Harmons ignored the October 7, 2015, letter. On December 14, 2015, the Trust's attorney wrote a second letter, again complaining of the fact that the Harmons were still living in an RV and still maintaining numerous temporary structures on the property. CP 593-94 Photographs of the various temporary structures that have been placed on the Harmons' property can be seen at CP 598-605.

On December 18, 2015, counsel for the Trust wrote his final letter demanding that the Harmons cease their various violations of the covenants and restrictions. This letter specifically threatened suit and referenced the award of attorney fees under Paragraph 13. CP 693

On December 31, 2015, the Harmons wrote a letter wherein they denied receiving any prior correspondence from Mr. Thomas or the Trust's attorney (even though they responded in writing to these letters at least once) and denied any violation of the covenants. CP 596

The Harmons then began construction of an enormous metal building that violated the covenants. Mr. Thomas sent the Harmons a copy of the lawsuit that he intended to file if they continued with the construction. CP 596 The Harmons ignored the warning. When asked about this in her deposition, Lana Harmon gave the following testimony:

Q. So when [the barn] was still only poles, you were aware that Tom's attorneys were going to probably file suit against you on the barn; is that right?

A. We thought he was just threatening us because it was – it said it was – the draft said it was a non-permitted structure.

Q. Okay. But –

A. And it was permitted.

Q. But you had received threats of [a] lawsuit over the barn when it was still only poles; correct?

A. Yes.

Q. And then the lawsuit came?

A. Yes.

Q. And then you finished the barn; correct?

A. Yes.

* * *

Q. But you made the choice to move forward with the construction, even though you knew there was a threat of a lawsuit; correct?

A. Yes.

Q. Okay. And you could have stopped and waited; is that correct?

A. Waited for what?

- Q. Waited for the controversy about the barn to be resolved.
- A. I don't see how it could be resolved when we were getting threatened for a lawsuit while it hadn't even been built yet.

CP 545-46

The Trust filed suit on February 23, 2016. CP 479 At that time, the barn was still under construction. The Harmons ignored the lawsuit and completed the barn in violation of the covenants.

The covenants require all outbuildings to be of similar material, color, and design, including siding and roofing, as the owner's dwelling.¹ The purpose of the covenant is to protect the appearance of the neighborhood by requiring the residents' homes and outbuildings to be complimentary in design and materials. The covenants, at Paragraph 3, state:

[B]arns, garages, and recreational vehicle storage buildings shall be allowed provided that any outbuildings shall be constructed in a permanent fashion and shall be completed in compliance with all applicable government authority including necessary permits and in [sic] specifications. Any outbuilding construction shall be completed within one (1) year of the start of construction. **All outbuildings must compliment (i.e., be similar to) the house style in material, color, and design, which shall include siding and roofing.**

CP 490 (Emphasis added)

¹ Paragraph 5 of the covenants requires that all homes built in the subdivision have "lap siding or better on all surfaces and twenty-year composition roofing or better." CP 491

The Harmons' home has hardy-plank style lap siding and an asphalt shingle roof. CP 611-12 The barn had sheet metal roofing and siding. CP 607-609 The dissimilarity between corrugated metal sheeting of the barn and the hardi-plank siding and asphalt shingles of the home is readily apparent. *See* CP 611-12 and 607-09

The Trust's demand that the Harmons comply with these covenants was consistent with other enforcement actions taken by the Trust. On two separate occasions, when Mr. Thomas learned that other homeowners in the subdivision were planning to build metal buildings, he took immediate action. Both homeowners complied with his demands and covered their outbuildings with asphalt shingles and lap siding that matched the homes that they had built on their property. CP 581, CP 613-19, and CP 620-28 Andy Philpot, one of the homeowners that Thomas prevented from building a metal building, stated "This cost me an additional \$25,000. * * * My family has complied with the covenants and doing so has cost us a lot of money. It would be unfair and wrong if others in the subdivision were allowed to get away with breaking the rules." CP 614 George Trice, the other homeowner, agreed, noting that he had spent an additional \$70,000.00 siding and roofing his shop due to Mr. Thomas's enforcement of the covenants. CP 620-21 Trice also stated that his daughter, who lives next
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door in the subdivision, was likely to spend an extra \$30,000.00 on her barn in order to comply with the covenants. CP 621

The Trust's lawsuit also sought to restrain the Harmons from placing temporary structures on their property in violation of the covenants. Since purchasing the property, the Harmons have placed numerous temporary shacks thereon from time to time, most of which have been thrown together with chain link fence, sheet metal, wood, and tarps. CP 598-605 Despite the fact that these shacks seemed to come and go, the Harmons denied that they were "temporary structures" as defined by the covenants. Paragraph 6 of the covenants states:

No shacks, garages, barns or other out buildings or structures of a temporary character shall be used on any lot or parcel at any time. All structures must be built on a permanent foundation.

CP 491

The Trust's complaint named "Lana Chaney Harmon" and "John Doe Harmon" as defendants. CP 481 The complaint alleged that Lana Chaney Harmon and John Doe Harmon were married. CP 482 The complaint also alleged that the Trust had demanded that the Harmons cease and desist the covenant violations alleged therein and that the Harmons had ignored these demands. CP 483 The complaint further

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alleges the Trust's right to recover attorney fees under Paragraph 13 of the covenants. CP 484

The Harmons filed their *pro se* answer March 15, 2016, wherein they deny any violation of the covenants. CP 498 Sunny Harmon signed the answer as a party defendant, despite being named as "John Doe Harmon" in the caption. CP 501

The Harmons' *pro se* answer does not deny that the Trust gave them pre-suit demands to cease and desist the covenant violations alleged in the Trust's complaint. Paragraph 11 of the complaint states "In spite of demands to the defendants by the plaintiffs to cease and desist and to abide by the Covenants, defendants have failed to correct their non-conforming use of the premises." CP 483 The Harmons' answer states, "In answer to Paragraph 11 of Plaintiff's Complaint, Defendants deny failing to correct non-conforming uses of the premises. Defendants have complied with covenants." CP 500

Paragraph 13 of the complaint states "Defendants' actions have violated said covenants and defendants have failed to accede to plaintiffs' demands to abide by the covenants." CP 483 The Harmons' answer responds as follows, acknowledging that said demands were made, "In answer to Paragraph 13 of Plaintiff's Complaint, Defendants deny any
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actions that have violated said covenants and deny failing to accede to plaintiff's demands to abide by the covenants." CP 500

On August 23, 2016, the Harmons filed an amended answer, this time drafted by their trial counsel Robert Birk, that similarly failed to deny that the Trust had given them pre-suit notice of the covenant violations. [Appendix]²

On August 18, 2017, the Trust filed a motion for partial summary judgment with regard to the nonconforming temporary structures and the roofing and siding of the barn. CP 520 The remedy sought by the Trust was permanent injunction. CP 528 The trial court granted the Trust's motion in whole on October 25, 2017. CP 767

After the summary judgment ruling, but prior to entry of judgment, the Harmons stipulated to the dismissal of their numerous harassment counterclaims against the Trust. CP 772

On July 9, 2018, the Trust filed a motion for entry of final judgment against the Harmons. CP 781 The delay in entering final judgment was the result of the time the trial court allowed the Harmons to remove and replace the siding and roofing on the barn.³ The Trust's motion sought the entry of judgment permanently enjoining the Harmons

² The Trust has filed a supplemental designation of clerk's paper that includes the Harmons' amended answer.

³ The trial court's order granting partial summary judgment gave the Harmons 150 days to remove and replace the roofing and siding on the barn.

from placing temporary structures on the property and an award of attorney fees. CP 781-82 The Trust also filed a motion to amend the case caption to replace “John Doe Harmon” with “Sunshine Harmon.” CP 813

These matters were heard on August 1, 2018. With regard to the caption change, the clerk’s notes state, “Mr. Birk [Harmon counsel] addresses court – agrees to motion to amend case caption and objects to entry of final judgment.” CP 813 The trial court granted the agreed motion to add Sunshine Harmon as a defendant, [CP 813, 814-15] but continued the hearing to August 29, 2018, ordering the Harmons’ counsel to provide written attorney fee objections by August 8, 2018.

Counsel for the Harmons obeyed the court and filed objections that spend seven pages complaining about the amount of the attorney fees claimed by the Trust. The Harmons never, however, challenged the Trust’s right to recover attorney fees under Paragraph 13 of the covenants and restrictions. CP 816-21 The Harmons made no allegation in this pleading, nor any other pleading filed in this case, that the Trust had failed to provide them with adequate warning of suit under Paragraph 13 of the covenants.

On August 29, 2018, the trial court entered final judgment against the Harmons, permanently enjoining the erection of temporary structures and awarding the Trust \$21,871.94.

B. Argument

I. THE TRIAL COURT WAS REQUIRED BY WASHINGTON LAW TO AWARD ATTORNEY FEES TO THE TRUST AND, THEREFORE, COULD NOT HAVE ABUSED ITS DISCRETION IN DOING SO.

The attorney fee clause at Paragraph 13 is mandatory. “[T]he parties instituting such suit or action shall be entitled to recover attorney’s fees in such suit or action.” CP 494 While the trial court had discretion regarding what amount of attorney fees were reasonably incurred, the court was powerless to refuse to award fees to the prevailing party. RCW 4.84.330 provides:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney’s fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party ... shall be entitled to reasonable attorney’s fees in addition to costs and necessary disbursements.

In discussing the mandatory nature of RCW 4.84.330, the Washington Supreme Court in *Singleton v. Frost*, 108 Wash.2d 723, 729, 742 P.2d 1224 (1987), stated:

There is no authority to support an interpretation of RCW 4.84.330 other than as mandating an award of reasonable attorney’s fees to the prevailing party where a contract so provides. An interpretation allowing the trial court to deny recovery of reasonable attorney’s fees at its discretion or whim would render the statute meaningless.

When a contract says that attorney fees shall be awarded to the prevailing party, the trial court must award fees. The only question that is left to the trial court's discretion is the amount of fees awarded, and the Harmons do not assign error in this regard.

II. THE HARMONS FAILED TO RAISE ANY ARGUMENT AT THE TRIAL COURT LEVEL THAT THE TRUST HAD FAILED TO PROVIDE THE PRE-SUIT DEMAND REQUIRED BY PARAGRAPH 13.

The Harmons, for the first time on appeal, argue that the Trust failed to give them a pre-suit demand for compliance as prerequisite to recovering attorney fees under Paragraph 13. Until now, the Harmons have never challenged the Trust's right to collect attorney fees in the event that the Trust prevailed. Review of the entire court file will reveal no such argument.

Washington law generally prohibits claims of error raised for the first time on appeal. The Washington Supreme Court in *Washburn v. Beatt Equipment Co.*, 120 Wash.2d 246, 290-91, 840 P.2d 860 (1992), stated:

The appellate court may refuse to review any claim of error which was not raised in the trial court. RAP 2.5(a). Arguments or theories not presented to the trial court will generally not be considered on appeal. *Hansen v. Friend*, 118 Wash.2d 476, 485, 824 P.2d 483 (1992); *In re Marriage of Tang*, 57 Wash.App. 648, 655, 789 P.2d 118 (1990).

* * *

While new arguments are generally not considered on appeal, the purpose of RAP 2.5(a) is met where the issue is advanced below and the trial court has an opportunity to consider and rule on relevant authority. *Bennett v. Hardy*, 113 Wash.2d 912, 917, 784 P.2d 1258 (1990).

The only arguments raised by the Harmons with regard to the award of attorney fees related to the amount of the fees, not the Trust's right to fees under Paragraph 13. The Court of Appeals should refuse to consider this new argument.

III. THE HARMONS' ANSWER TO THE TRUST'S COMPLAINT ADMITS THAT THE TRUST DEMANDED COMPLIANCE BEFORE FILING SUIT.

The Harmons' answer and amended answer acknowledge the Trust's pre-suit demands when the Harmons, in both answers, deny that they failed to accede to these demands. That is, rather than denying that the Trust demanded compliance, the Harmons denied that they failed to accede the Trust's demands for compliance.

Moreover, CR 8(d) provides that "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are admitted when not denied in responsive pleadings." Neither the Harmons' *pro se* answer nor their counsel-drafted amended answer affirmatively denies having received a pre-suit demand for

compliance. As such, the Harmons have admitted these allegations by operation of CR 8(d) and cannot complain on appeal that the pre-suit notice was never given.

IV. THE HARMONS' ANSWER FAILS TO SPECIFICALLY ALLEGE FAILURE OF A CONDITION PRECEDENT AS REQUIRED BY CR 9(C) AND CR 8(C).

Civil Rule 9(c) states:

(c) Condition Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

A condition precedent is an event occurring after the making of a valid contract which must occur before a right to immediate performance arises. *Jones Associates, Inc. v. Eastside Properties, Inc.*, 41 Wn.App. 462, 466, 704 P.2d 681 (1985)(citing *Koller v. Flerchinger*, 73 Wn.2d 857, 860, 441 P.2d 126 (1968) and *Silverdale Hotel v. Lomas & Nettleton Co.*, 36 Wn.App. 762, 770, 677 P.2d 773 (1984)).

The Harmons now argue that the Trust's right to attorney fees was subject to a condition precedent, namely, pre-suit demand for compliance. Civil Rule 9(c) requires that this defense be specifically alleged in the Harmons' answer and made with particularity. The Harmons' answer,
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however, does exactly the opposite in that it admits that the Trust made pre-suit demands for compliance.

This affirmative defense is also covered by Civil Rule 8(c). The purpose of this rule is to give the plaintiff an opportunity to raise and try all factual issues related to the defense. 1 Kelly Kunsch, *Washington Practice: Methods of Practice*, sec. 5.4, at 72 (1997); see also *Mahoney v. Tingley*, 85 Wn.2d 95, 100, 529 P.2d 1068 (1975) (certain defenses are required to be pleaded affirmatively in order to avoid surprise). In general, affirmative defenses are waived unless they are (1) affirmatively pleaded, (2) asserted in a motion under CR 12(b), or (3) tried by the express or implied consent of the parties. *Henderson v. Tyrrell*, 80 Wn.App. 592, 624, 910 P.2d 522 (1996).

While “condition precedent” is not specifically listed in CR 8(c), the rule does contain the following catch-all: “any other matter constituting an avoidance or affirmative defense.”

The Division III Court of Appeals in *Harting v. Barton*, 101 Wn.App. 954, 961, 6 P.3d 91 (2000), defined an “avoidance or affirmative defense” as “[a]ny matter that does not tend to controvert the opposing party’s prima facie case.” (quoting *Shinn Irrigation Equip., Inc. v. Marchand*, 1 Wash.App. 428, 430–31, 462 P.2d 571 (1969)). In *Harting v. Barton*, the defendant alleged that the plaintiff failed to provide a notice of

default and failed to submit to mediation as required by the contract. Neither of these allegations was contained in the defendant's answer. The court found that both of these arguments were covered by CR 8(c) and, therefore, were waived by defendant's failure to plead them.

Similarly, the Harmons now claim that the Trust has no right to collect attorney fees, not because the Trust did not prevail, but because the trust failed to provide a pre-suit demand for abatement. This is an "avoidance," and therefore, must be made affirmatively by pleading or it is waived.

V. THE RECORD CONTAINS EVIDENCE OF THE TRUST'S PRE-SUIT DEMANDS FOR COMPLIANCE WITH THE COVENANTS.

Mr. Thomas and the Trust's attorney wrote four letters to the Harmons leading up to the lawsuit. These letters documented numerous covenant violations, including the placement of temporary structures on the property. While the letters did not specifically address the siding or roofing on the barn (it had not been built yet), the Harmons admit that they were provided with a copy of the Trust's lawsuit prior to when it was filed, that this warned them that the Trust believed that the barn violated the covenants, and that they ignored this warning. CP 545-46

If the Harmons believed that they had not been provided sufficient pre-suit notice of the Trust's claims, they had a duty to notify the Trust by

way of their answer and to bring the matter before the court. Had they done so, the record could have been developed more fully in this regard.

There can be no question, however, that the Harmons received pre-suit notice with regard to their violation of the ban on temporary structures. There is also no question that the Trust prevailed on its claims in this regard. As such, the Trust is entitled to recover its attorney fees regardless of whether the Harmons received a pre-suit demand for compliance with regard to the barn. Having never raised the issue of pre-suit demand and having never argued for segregation of attorney fees, the Harmons cannot do so now in their reply brief.

VI. SUNSHINE HARMON WAS NAMED AS A “JOHN DOE” IN THE INITIAL COMPLAINT AND, WITH THE CONSENT OF HIS ATTORNEY, SPECIFICALLY NAMED AS A DEFENDANT BY COURT ORDER.

After the summary judgment hearing, but before final judgment was entered, the Trust brought a motion to replace “John Doe Harmon” with “Sunshine Harmon” in the case caption. This was done in anticipation of judgment.⁴ The Harmons’ counsel agreed to the order and the trial court signed it. If this was error, it was invited error.

Moreover, at no time did the Harmons complain that Sunshine Harmon was not a proper party to this action. Sunshine Harmon signed

⁴ The motion to add Sunny Harmon as a named defendant was scheduled to be heard on the same day that the Trust’s motion for final judgment was originally scheduled.

the Harmons' original *pro se* answer as a defendant. The *pro se* answer names "Lana Chaney Harmon and Sunny Harmon, husband and wife" as defendants. CP 498 The Harmons filed an amended answer after retaining trial counsel in August of 2016. The caption of the amended answer refers to "Sunny Harmon" as a defendant. [Appendix] The answer goes on to allege six counterclaims, all of which seek damages for the "defendants." [Appendix] Harmons' counsel similarly placed "Lana Chaney Harmon, and Sunshine Harmon, husband and wife," in the case caption as defendants. CP 629, 640, 644, 663, 701, 767, and 816 Sunshine Harmon signed a declaration on September 17, 2017, which states "I am one of the Defendants in the above-captioned action." CP 640 When these claims were later dismissed by the Harmons, the stipulated order doing so refers to "Defendants Lana Chaney Harmon and Sunny Harmon." CP 772

If Sunshine Harmon was not a proper defendant in this action, he was required to say so in his answer or amended answer. He certainly should not have had his attorney agree to an order adding his name to the caption of the case shortly before entry of judgment against him and his wife. Similarly, if Sunshine Harmon was not a proper judgment debtor, he should have objected at the time judgment was entered. This is yet another argument raised for the first time on appeal. The Appellate Court should not allow Sunshine Harmon to change course and raise a new

argument on appeal, thereby denying the Trust of the opportunity to develop the record. This new allegation raises myriad factual questions regarding the Harmons' marital community and community liability that will remain forever unanswered because the Harmons admitted, let alone failed to contest, that Sunshine Harmon was a proper defendant subject to judgment.

VII. THE COURT PROPERLY FOUND THAT THE HARMONS, AS A MATTER OF LAW, HAD VIOLATED THE COVENANTS AND RESTRICTIONS.

Generally, the purpose of a restrictive covenant is to set up a system of private land use regulation and enforcement. *See Riss v. Angel*, 131 Wn.2d 612, 622-23, 934 P.2d 669 (1997)(citing *Joslin v. Pine River Dev. Corp.*, 367 A.2d 599, 601 (N.H. 1976)). “[P]rivate land use restrictions have been particularly important in the twentieth century when the value of property often depends in large measure upon maintaining the character of the neighborhood in which it is situated.” *Riss*, 131 Wn.2d at 623, 934 P.2d 669.

Property owners are entitled to the enforcement of restrictive covenants. *Hollis v. Garwall, Inc.*, 87 Wn.App. 220, 222, 941 P.2d 11 (1997)(citing *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 883 P.2d 1383 (1994)). In construing a restrictive covenant, the court's primary objective is to determine the intent of the parties. *Riss*, 131 Wn.2d at

621, 934 P.2d 669; *Metzner v. Wojdyla*, 125 Wn.2d 445, 886 P.2d 154 (1994); *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 815, 854 P.2d 1072 (1993); *Hollis v. Garwell*, 87 Wn.App. at 224, 941 P.2d 11; *Lakes at Mercer Island Homeowners Ass'n v. Witrak*, 61 Wn.App. 177, 179, 810 P.2d 27 (1991). The Washington Supreme Court in *Riss v. Angel* stated:

The court's goal is to ascertain and give effect to those purposes intended by the covenants. . . . ***The court will place special emphasis on arriving at an interpretation that protects the homeowners' collective interests.***

131 Wn.2d at 623-624, 934 P.2d 669 (1997)(Emphasis added).

In construing a portion of a restrictive covenant, the court must look at the entire document. *Riss*, 131 Wn.2d at 621, 934 P.2d 669; *Mountain Park v. Tydings*, 125 Wn.2d at 344, 883 P.2d 1383; *Burton v. Douglas County*, 65 Wn.2d 619, 622, 399 P.2d 68 (1965). By looking at the entire document, the court can discern the intent, or purposes, of those who originally established the covenants. *Riss*, 131 Wn.2d at 621, 934 P.2d 669. The court must give the words in the covenant their common and ordinary meaning. *Riss*, 131 Wn.2d at 620, 934 P.2d 669; *Metzner*, 125 Wn.2d at 450, 886 P.2d 154; *Mains Farm*, 121 Wn.2d at 815, 854 P.2d 1072; *Hollis*, 87 Wn.App. at 224, 941 P.2d 11; *Krein v. Smith*, 60 Wn.App. 809, 811, 807 P.2d 906 (1991).

(i) *The Barn*

Paragraph 5 of the covenants and restrictions impose the following requirements on all dwellings in the subdivision: “The dwelling structures shall have lap siding or better on all surfaces and twenty-year composition roofing or better.” CP 491 The dwelling that the Harmons built meets these requirements by having hardi-plank lap siding and an asphalt shingle roof. CP 611-12

Paragraph 3 of the covenants requires the following with regard to outbuildings, such as the Harmons’ barn: “All outbuildings must compliment (i.e. be similar to) the house style in material, color and design, which shall include siding and roofing materials.” CP 490 In order to comply with Paragraph 3, the Harmons’ barn must have siding and roofing that “compliment[s] (i.e. [is] similar to) the[ir] house style in material, color and design.”

Thus, there are two questions before the court. First, is the barn’s corrugated sheet metal roof similar in style, material, and design to the house’s asphalt shingle roof? The question answers itself. It is hard to imagine two materials that are more dissimilar in style, material, and design than an asphalt composite shingle and a sheet of corrugated metal.

The same is true for the second question. Is the barn’s corrugated sheet metal siding similar in style, material, and design to the house’s

hardi-plank lap siding? The court can compare the pictures of the barn and the house if the answer is not obvious enough. CP 607-609 and 611-152 Wood-composite, horizontally lapped plank siding could not be more dissimilar in style, material, and design than corrugated sheet metal.

When pressed to explain how it was that these materials could be similar, Lana Chaney Harmon offered the following:

Q. Well, would you think it's in violation because your house has lap siding and your barn has metal vertical siding?

A. No.

Q. Okay.

A. They both shed water.

Q. And your house has an asphalt roof and your barn has a metal roof?

A. They're the same color and they both provide the same function.

* * *

Q. Tell me in what way metal vertical siding is similar to wooden lap siding.

A. It's not exact.

Q. Tell me how it's similar. Tell me –

A. They both shed water.

Q. It sheds water?

A. They're the same color. They provide the same function.

Q. Okay. So any siding that sheds water is – so basically any siding is similar to any other siding; right? Cause it all sheds water?

A. I think it would be similar in that. Yes.

Q. Tell me one – imagine for me one kind of siding that's not similar to your siding on your house. Any kind.

- A. I don't really understand your question. I don't know the different –
- Q. All you have to –
- A. -- types of siding.
- Q. All you have to do to be similar to siding, your siding, is shed water? I think every siding on the planet is similar to your siding. Is that true?
- A. I would say that if it's the same color as your house or almost the same color, then it would be similar.

* * *

- Q. What's your roof made out of on the barn?
- A. Metal.
- Q. What's your roof made out of on your house?
- A. It's asphalt, I guess.
- Q. Is that a different material?
- A. It's different material providing the same function. But it's similar.
- Q. How is asphalt similar to metal?
- A. It's similar in its function and color. And it does match the house.
- Q. It's similar in function?
- A. Yes.
- Q. Because it acts as a roof?
- A. Yes.

CP 545-46

The Harmons have never offered the court a coherent interpretation of the covenants that would support the conclusion that the roof and siding on the barn are similar to the roof and siding on the house. Instead, the Harmons attempt to confuse the issue by arguing that there is no metal building ban in the covenants and, therefore, the covenants are ambiguous. But the Trust has not taken the position that the covenants explicitly ban

metal outbuildings.⁵ The question before the court was not simply whether the barn was covered in metal roofing and siding. The question was whether the roofing and siding on the barn was similar in material, color, and design to the roofing and siding on the Harmons' house.

Summary judgment is proper where the pleadings, depositions, affidavits and admissions on file show that no genuine issue of material fact exists as a matter of law. *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985). Statements, even if in an affidavit, that are conclusory allegations, speculative statements, or argumentative assertions, are not facts which are sufficient to defeat summary judgment. *Peterick v. State*, 22 Wn.App. 163 (1977); *Turngren v. King County*, 33 Wn.App. 78 (1982).

The Harmons cannot prevent summary judgment by unreasonably denying that which is obvious--the materials used to side and roof the barn are dissimilar, under any definition of that word, to the materials used to side and roof the house. Summary judgment is appropriate if, in view of all the evidence, reasonable persons could reach but one conclusion. *Schweickert v. Venwest Yachts, Inc.*, 142 Wn.App. 886, 893, 176 P.3d 577 (2008); *Dowler v. Clover Park School Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676

⁵ Metal roofing and siding is not allowed on dwellings under Paragraph 5. Since outbuildings must be similar to dwellings, it follows that there can be no metal roofing and siding on outbuildings. While an outright ban on metal roofing and siding would have been more straightforward, there is nothing confusing about the requirement that the roofing and siding of an outbuilding must be similar in material, color, and design to the roofing and siding of the house.

(2011). As demonstrated by the questions and answers in Lana Harmon's deposition, reasonable minds can find but one conclusion--corrugated metal roofing and siding are dissimilar in material and design from asphalt shingles and hardi-plank lap siding. Summary judgment was proper without reference to extrinsic evidence.

(ii) Temporary Structures

The Harmons do not challenge the court's ruling with regard to their placement of temporary structures, shacks, and lean-tos around the property. While they do challenge whether a permanent injunction should have been granted, they do not deny that they breached the covenants and restrictions in this regard.

This, of course, brings the analysis back to the question of attorney fees. There is no dispute that the Trust gave multiple pre-suit warnings to the Harmons with regard to nonconforming temporary structures. The Trust filed suit on this claim and prevailed, thus entitling the trust to attorney fees. Even if the court were to allow the Harmons to raise pre-suit notice under Paragraph 13 at this late hour, the result would be the same. The Trust prevailed and the court properly awarded attorney fees.

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VIII. THE COURT DID NOT FIND THAT THE CONTRACT WAS AMBIGUOUS AND, EVEN SO, THE STANDARD OF REVIEW IS DE NOVO.

The Harmons claim that the trial court found the covenants to be ambiguous and, therefore, summary judgment was improper. This position is wrong on both the facts and the law. First, a trial court's colloquy whilst ruling is not that court's "findings." A trial court's findings and conclusions are expressed through its orders. If the court had found the contract to be ambiguous, it would have made a specific finding in this regard and it would have been expressed in its order, or at the very least, in a statement that begins with "The court finds . . ." The trial court's statement merely expressed the court's belief that, even if the contract were found to be vague, the Trust would prevail based on extrinsic evidence. RP 10-11

Second, the trial court's musings whilst considering a motion do not bind the Court of Appeals. The standard of review in this proceeding is *de novo*. *Anderson v Weslo, Inc.*, 79 Wn.App. 829, 833, 906 P.2d 336 (1995). This court engages in the same inquiry as the trial court. *Wilson Court Ltd. v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 698, 952 P.2d 590 (1998). If the trial court did, in fact, find that the contract was ambiguous, the trial court was wrong. There is nothing ambiguous about requiring a house and barn to have roofing and siding that is similar in material and design, and there are
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hardly three building materials on this earth that are more dissimilar than corrugated steel sheets, asphalt shingles, and hardi-plank lap siding.

By reviewing the entire document, the court can see the contracting parties' intent to require homes and outbuildings in the subdivision to complement each other. The covenants accomplish this by clearly stating that an outbuilding must have a similar style, color, and building materials, including roofing and siding, to the home located on that same lot. This contributes to the beautification of the subdivision. The Harmons offer no alternate meaning for the covenants that makes any sense at all, let alone protects the collective interests of the homeowners in the subdivision. It is not enough to argue that the covenant is vague or ambiguous. The Harmons also need to come forward with an alternate interpretation of the contract that (a) makes sense and (b) supports their position that steel, asphalt, and wood-composite are similar.

But the Harmons' proposed interpretation of the covenant makes all siding and all roofing similar so long as it protects the structure from water intrusion and is the same color. This is nonsense. The Trust's proposed interpretation of the covenant is the only reasonable interpretation available.

A contractual provision is ambiguous when its terms are uncertain or when its terms are capable of being understood as having more than one

meaning. *Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn.App. 267, 275, 883 P.2d 1387 (1994). A provision, however, is not ambiguous merely because the parties suggest opposing meanings. *Id.* at 275, 883 P.2d 1387.

“[A]mbiguity will not be read into a contract where it can be reasonably avoided.” *McGary v. Westlake Investors*, 99 Wn.2d 280, 285, 661 P.2d 971 (1983). The Harmons are asking the court to do exactly that which is prohibited by the above rule. Instead of looking for a way to reasonably interpret the contract and avoid ambiguity, the Harmons ask the court to get creative and find ways to make it ambiguous.

In *Hollis v. Garwell*, the Washington Supreme Court applied the context rule from *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990) to the interpretation of covenants. The *Hollis* court stated that extrinsic evidence of the surrounding circumstances may be relevant in discerning the intent of the parties “where the evidence gives meaning to words used in the contract.” *Hollis*, 137 Wn.2d at 695, 934 P.2d 669. The court went on to state:

However, admissible extrinsic evidence does *not* include:

- Evidence of a party’s unilateral or subjective intent as to the meaning of a contract word or term;
- Evidence that would show an intention independent of the instrument; or

-- Evidence that would vary, contradict, or modify the written word.

Hollis, 137 Wn.2d at 695-96, 934 P.2d 669 (emphasis not added) (citing *In re Marriage of Schweitzer*, 132 Wn.2d 318, 326-27, 937 P.2d 1062 (1997); *U.S. Life Credit Life Ins. Co. v. Williams*, 129 Wn.2d 565, 569-70, 919 P.2d 594 (1996); *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 189, 840 P.2d 851 (1992)).

While the trial court's statement that Thomas's intent was "the one we're looking at" (RP 9/27/17, p.11) is probably incorrect, the court's reference to extrinsic evidence was proper. As discussed in *Hollis v. Garwell*, extrinsic evidence is always admissible, ambiguous contract or not. In *Hollis*, the trial court was asked to interpret the covenants and restrictions applicable to a residential subdivision. The covenants and restrictions were put into place by the original owners of the land in question. One party submitted an affidavit of one of the original developers of the property, which provided sworn testimony as to what he intended the covenant to mean. The trial court struck the affidavit and the Washington Supreme Court *affirmed*, stating:

[T]his is not admissible under *Berg*, as it is the unilateral and subjective intent of 1 of 10 of the original contracting parties.

Id. at 696, 934 P.2d 669.

Harmons seem to be asking for a trial wherein Thomas takes the stand and swears that the contract means one thing, and the Harmons take

the stand and swear that it means something else. This is not what is anticipated by the context rule in *Berg* and *Hollis*. To create a genuine issue of fact as to the meaning of the contract, the Harmons cannot simply deny the meaning of the words in that contract. And for all their complaining about the words of the contract being vague, confusing, or ambiguous, the Harmons cannot come up with an interpretation of the contract that makes steel, asphalt composite, and wood composite “similar” under any reasonable interpretation of that word.

IX. COVENANTS ARE ENFORCEABLE BY INJUNCTION WITHOUT A SHOWING OF SUBSTANTIAL INJURY AND, THEREFORE, THE TRIAL COURT’S REMEDY WAS NOT ONLY PROPER, IT WAS REQUIRED UNDER WASHINGTON LAW.

The Harmons argue for the application of Washington’s general three-part test with regard to whether a claimant is entitled to injunctive relief. This is the wrong standard. Restrictive covenants are enforceable by injunctive relief without showing substantial damage caused by the violation. *Metzner*, 125 Wn.2d at 450, 886 P.2d 154. *See also Piepkorn v. Adams*, 102 Wn. App. 673, 684, 10 P.3d 428 (2000). The prevailing party need only show (1) that he or she has a clear legal or equitable right, and (2) that he or she has a well-grounded fear of immediate invasion of that right. *Hollis*, 137 Wn.2d at 699, 974 P.2d 836.

In the case at bar, the Harmons built a barn that violated the covenants and refused to bring it into compliance during months of litigation. The Trust had clear legal right under the covenants and a well-grounded fear that the Harmons were never going to voluntarily remove and replace the barn's roofing and siding.⁶ As for the temporary structures ban, the Trust provided the court with numerous photographs taken over a time span of several months showing how the Harmons had erected various shacks, shanties, and tents around their property. They had been sent several letters prior to suit being filed and, even after suit was filed, continued in this conduct. It cannot be said that the Trust did not have a clear legal right and a well-grounded fear of immediate invasion of that right. It cannot be said that the trial court abused its discretion in granting the Trust's request for injunctive relief. *Wimberly v. Caravello*, 136 Wn.App. 327, 340, 149 P.3d 402 (2006) (a trial court's decision to grant injunctive relief is reviewed under the abuse of discretion standard).

⁶ Which raises another concern with regard to the Harmons' new argument that pre-suit notice was not provided as to the barn. The Harmons refused to remove the steel roofing and siding from the building for over two years while the case was in litigation. They would be hard-pressed to argue that had demand been made before suit was filed that they would have immediately complied. Furthermore, the action was already pending when the Harmons installed the roofing and siding. Additional demands to remove the siding and roofing would have been a futile act.

Furthermore, the Harmons did not argue for the three-party test at the trial court level. CP 637-38 They should not be allowed to do so on appeal. Instead, the Harmons asked the court to consider the relative hardship created by an injunction, i.e., “balance the equities.” The trial court refused. RP 9/27/17, p. 11

The Harmons assign no error on appeal to the trial court’s refusal to balance the equities. They should not be allowed to do so in their reply brief. Even so, these arguments would fail. Injunctive relief against the breach of a restrictive covenant will be denied if the harm done to the defendant by granting the injunction will be disproportionate to the benefit secured by the plaintiff. *Holmes Harbor Water Co., Inc. v. Page*, 8 Wn. App. 600, 603, 508 P.2d 628 (1972). However, the benefit of the doctrine of balancing of the equities, or relative hardships, is reserved for the innocent defendant who proceeds without knowledge or warning that his activity encroaches upon another’s property rights. *Hollis*, 137 Wn.2d at 699-700 (citing *Bach v. Sarich*, 74 Wn.2d 575, 582, 445 P.2d 648 (1968)).

In *Bach*, the Supreme Court found that the defendants were not an innocent party where they had proceeded to construct an apartment building “with full knowledge that their right to do so was contested and that there was a real likelihood . . . that the case on the merits would be

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decided against them.” 74 Wn.2d at 581, 445 P.2d 648. This ruling was reiterated in *Hollis v. Garwell*:

Restrictive covenants are designed to make residential subdivisions more attractive for residential purposes and are enforceable by injunctive relief. To establish the right to an injunction, the party seeking relief must show (1) that he or she has a clear legal or equitable right, and (2) that he or she has a well-grounded fear of immediate invasion of that right. Garwell relies on *Holmes Harbor Water Co. v. Page*, in support of its position. *Holmes* holds that a court considering whether to grant an injunction may consider and weigh equitable factors, such as the relative hardship likely to result to the defendant if an injunction is granted and to the plaintiff if it is denied.

However, in *Bach v. Sarich*, this court held that the benefit of the doctrine of balancing the equities, or relative hardships, is reserved for the innocent defendant who proceeds without knowledge or warning that his activity encroaches upon another’s property.

In this case, the Plaintiffs had informed Garwell of the restriction on the use of the land. With this information, and knowing that Plaintiffs objected to its activities, Garwell proceeded with its mining and rock crushing operation. Garwell was not without knowledge or warning that its activities encroached upon the rights of others. Garwell is not entitled to a balancing of the equities prior to the imposition of an injunction.

Hollis, 137 Wn.2d at 699-700, 974 P.2d 836. (Internal Citations Omitted)

Stated another way, “if a party takes a calculated risk by proceeding, despite notice that doing so violates the property rights of others, that party

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forfeits the right to a balancing of the equities.” *Green v. Normandy Park*, 137 Wn. App. 665, 698-699, 151 P.3d 1038 (2007).

In a zoning violation case, the Division II Court of Appeals found that where a continuous violation exists, “the equities must be very compelling indeed to avoid an injunction.” *Radach v. Gunderson*, 39 Wn. App. 392, 400, 695 P.2d 128 (2003). In *Radach*, the trial court found that the zoning violation in question caused no financial harm to the plaintiffs, but ordered an injunction nonetheless. The Court of Appeals affirmed, stating:

The Radachs sued to protect their view and to prevent the City from allowing encroaching buildings to destroy the legally enforceable setback line. Injunctions have often been used to protect such interests. Although the trial court found that the injury did not devalue the Radachs’ property, a demonstrable financial loss is not essential to support an injunctive remedy for a zoning violation. The improper set back creates a continuous condition which adversely affects the Radachs’ enjoyment of their property. A continuing injury is remedied properly by injunction. In our view, the equities must be very compelling indeed to avoid an injunction to correct a clear violation of a zoning ordinance.

Id. at 399-400, 695 P.2d 128.

Although *Radach* involved the violation of a zoning ordinance, there is no rational argument for not applying its reasoning to the case at bar. Covenants and restrictions are often referred to as private land use agreements and they serve the same function as zoning ordinances.

In *Wimberly v. Caravello*, 136 Wn. App. 327, 149 P.3d 402 (2006) and *Arnold v. Melani*, 75 Wn.2d 143, 152, 437 P.2d 908 (1968), the group of defendants not entitled to the balancing of the equities includes those that are merely negligent. “The court may withhold even a mandatory injunction if it believes the injunction would be oppressive, if it finds the offending party did not simply take a calculated risk, act in bad faith, or negligently, willfully or indifferently locate the encroaching structure.” *Id.* at 340-41, 149 P.3d 402.

The Harmons were warned when they broke ground on the construction of the barn that the Trust believed that this structure violated the covenants and suit would be filed. The Harmons ignored this warning and completed construction of the barn while this action was pending. The trial court rightfully refused the Harmons’ request for a balancing of the equities.⁷ The Harmons assign no error to this decision and should not be allowed to do so in their reply brief.

⁷ The court will also note that the Harmons provided no competent evidence creating a question of fact regarding the balance of equities. The only evidence of hardship that they placed in the record was a bid from a contractor to tear down and build an entirely new barn that complied with the covenants. This testimony was unsworn, and the Trust brought a motion to strike under CR 56(e) that was not ruled on by the trial court. CP 761 Furthermore, the bid did not provide an estimate of the cost of removing and replacing the existing siding on the barn and, therefore, was irrelevant.

X. THE TRUST IS ENTITLED TO RECOVER ATTORNEY FEES ON APPEAL UNDER PARAGRAPH 13 OF THE COVENANTS.

Paragraph 13 of the covenants provides that the prevailing party in an action to enforce the covenants shall be entitled to attorney fees. CP 492-93 The Court of Appeals should affirm the trial court, thus making the Trust the prevailing party on appeal. The trust requests an award of attorney fees and costs incurred defending this appeal.

C. Conclusion

The Court of Appeals should affirm the trial court and award the Trust its attorney fees and costs incurred defending this appeal.

DATED: May 20, 2019

Respectfully submitted:



MATTHEW J. ANDERSEN, WSBA 30052
Of Attorneys for Respondents

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CERTIFICATE

I certify that on this day I caused a copy of the foregoing BRIEF OF RESPONDENTS to be emailed to their respective email address and mailed, postage prepaid, to Appellants' attorney, addressed as follows:

Corey Evan Parker
Law Office of Corey Evan Parker
1275 12th Avenue NW, Suite 1B
Issaquah, WA 98027
Fax No.: (877) 802-8580
Email: corey@coreyevanparkerlaw.com

DATED this 20th day of May 2019, at Longview, Washington.


KARA L. COPE

APPENDIX

FILED
SUPERIOR COURT

2016 AUG 23 PM 12 26

COWLITZ COUNTY
STACI MYKLEBUST, CLERK

BY 

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

BENJAMIN A. THOMAS, JR. and LINDA
KAE FERRIS, Co-Trustees of the Benjamin A.
Thomas, Sr. Credit Shelter Testamentary
Trust;

Plaintiffs,

vs.

LANA CHANEY HARMON and SUNNY
HARMON, husband and wife,

Defendants.

Case No.: 16-2 00203 1

FIRST AMENDED ANSWER,
AFFIRMATIVE DEFENSES and
COUNTERCLAIMS

Come now the Defendants, by and through their attorney, and in answer to Plaintiff's
Complaint, admit, deny and allege as follows:

I. ANSWER

1. Defendants admit Paragraph 1 of Plaintiff's Complaint, that this Court has jurisdiction
over this matter, and the real property which is the subject matter of this matter is located in
Cowlitz County, Washington.

2. Defendants admit Paragraph 2 of Plaintiff's Complaint, that Plaintiffs are Co-Trustees of
the Trust and Grantors of the described real property underlying this matter.

3. Defendants admit Paragraph 3 of Plaintiff's Complaint, that Defendants Lana Chaney
Harmon and Sunny Harmon reside on and own said property, commonly known as 446

1 Hansen Road, Woodland Washington 98674.

2 4. Defendants admit Paragraph 4 of Plaintiffs' Complaint, that the real property conveyed by
3 plaintiffs to defendants on or about September 30, 2014, was recorded under Cowlitz County
4 Auditor's File Number 3508906.

5 5. In answer to Paragraph 5 of Plaintiff's Complaint, Defendants admit that the Plaintiffs
6 adopted Covenants and Restrictions and incorporated same as part of the deed of real property
7 conveyed between Plaintiffs and Defendants. Defendants admit the Covenants place some
8 restrictions on Defendants' use of the premises but deny the Covenants bar Defendants' present
9 use of the premises.

10 6. In answer to Paragraph 6 of Plaintiffs' Complaint, Defendants deny maintaining structures
11 on the premises which are temporary and/or non-compliant with the Covenants. Defendants
12 admit to maintaining structures that were approved by Plaintiffs for storage during construction
13 of their home. Said structures were removed upon or prior to completion of said home.
14 Defendant's home was certified for occupancy by Cowlitz County on February 9, 2016.

15 7. In answer to Paragraph 7 of Plaintiff's Complaint, Defendants admit that paragraph 6 of
16 the Covenants prohibit the placement of "shacks, garages, barns or other outbuildings or
17 structures of a temporary character." Defendants deny those Covenants prohibit Defendant's
18 outbuilding barn.

19 8. Defendants admit Paragraph 8 of Plaintiffs' Complaint that paragraph 3 of the Covenants
20 state outbuildings shall be constructed in a permanent fashion and in compliance with
21 governmental requirements including permits and specifications.

22 9. In answer to Paragraph 9 of Plaintiffs' Complaint, Defendants admit they have initiated
23 construction of a barn that is permitted by Cowlitz County, and allowed by the Covenants.
24 Defendants deny said barn violates the Covenants.

1 10. In answer to Paragraph 10 of Plaintiffs' Complaint, Defendants admit paragraph 3 of the
2 Covenants allows owners to build permanent barns, which barns must "compliment [sp] (i.e. be
3 similar to) the house style in material, color and design, which shall include siding and roofing."
4 Defendants deny their barn violates said Covenants.

5 11. In answer to Paragraph 11 of Plaintiffs' Complaint, Defendants deny their use of the
6 premises are non-conforming. Defendants have complied with the Covenants.

7 12. In answer to Paragraph 12 of Plaintiff's Complaint, Defendants admit that Plaintiffs
8 assert an ability to file suit to enforce Covenants, but deny violating said Covenants.

9 13. Defendants deny Paragraph 13 of Plaintiffs' Complaint, deny violation of the Covenants,
10 and deny failing to accede to demands made within the Covenants.

11 14. Defendants deny they are in violation of the Covenants, thus deny Paragraph 14 of
12 Plaintiffs' Complaint.

13 15. Defendants deny violating the Covenants, and deny causing damage to plaintiffs based
14 upon adjacent property values and marketability, thus deny Paragraph 15 of Plaintiffs'
15 Complaint.

16 16. In answer to Paragraph 16 of Plaintiffs' Complaint, Defendants deny violating the
17 Covenants, thus deny Plaintiffs have the right to enjoining uses of the premises.

18 17. Defendants deny Plaintiffs entitlement to bring suit against Defendants' use of the
19 property which does not violate the Covenants, thus Defendants deny Paragraph 17 of Plaintiffs'
20 Complaint.

21 II. FIRST AFFIRMATIVE DEFENSE

22 18. Plaintiffs' Complaint fails to state instances of Defendants' actual violations of
23 Covenants and fails to state a claim for relief.
24
25

1 III. SECOND AFFIRMATIVE DEFENSE AND FIRST COUNTERCLAIM

2 19. Plaintiffs reallege and restate paragraphs 1 through 17 herein as paragraph 19 of their First
3 Counterclaim.

4 20. Plaintiffs' sale instruments alleged herein include allowing attorney fees to a prevailing
5 plaintiff, and attorney fees are reciprocally available to a prevailing defendant. Defendants pray
6 for reasonable attorneys fees and costs to be allowed, in an amount to be approved by the court.

7 IV. SECOND COUNTERCLAIM

8 21. Defendants reallege and restate paragraphs 1 through 17 herein as paragraph 21 of their
9 Second Counterclaim.

10 22. Plaintiff Benjamin Thomas Jr. is a resident of Cowlitz County, Washington.

11 23. A significant portion of Defendant's property is covered by growing grass.

12 24. During Summer, 2016, Plaintiff Benjamin Thomas Jr. approached Defendants and offered
13 to mow and remove cut grass from Defendants' real property.

14 25. Defendants specifically declined said offer made by Benjamin Thomas.

15 26. During Summer, 2016, Benjamin Thomas Jr., despite knowledge that Defendants did not
16 consent to his severing grass and harvesting hay from Defendants' real property, directed his
17 agent or employee to cut and remove hay from Defendants' real property.

18 27. Said removed hay had a market value of \$75.00.

19 28. Pursuant to RCW 4.24.60, Defendants are entitled to treble damages of \$225.00 plus
20 attorneys fees in an amount to be approved by the court.

21 V. THIRD COUNTERCLAIM, in the alternative to the Second Counterclaim

22 29. Defendants reallege paragraphs 21 to 25 and 27 above as paragraph 29.

23 30. During Summer, 2016, Benjamin Thomas, by his agents or employees, had a duty to not
24 remove hay from Defendant's property.

1 31. During Summer, 2016, Benjamin Thomas Jr, by his agents or employees, breached said
2 duty and negligently cut and removed hay from Defendants' property.

3 VI. FOURTH COUNTERCLAIM

4 32. Defendants reallege paragraphs 1 through 17 and 22 as paragraph 32 herein.

5 33. On November 18, 2014, Defendants were the owners of cut logs on their real property.

6 34. On November 18, 2014, Plaintiff Benjamin Thomas Jr, having knowledge that the cut
7 logs on Defendants' real property were the property of Defendants, by and through his agents or
8 employees, entered Defendants' real property and removed the logs.

9 35. Said logs removed had a value of \$3,000.00.

10 36. Pursuant to RCW 64.12.30, Defendants are entitled to treble damages of \$9,000.00.

11 VII. FIFTH COUNTERCLAIM, in the alternative to the Fourth Counterclaim

12 37. Defendants reallege and replead paragraphs 32 through 33 and 35 as paragraph 37.

13 38. Plaintiff Benjamin Thomas Jr. had a duty to not remove Defendants' logs from
14 Defendants' property.

15 39. On November 18, 2014, Benjamin Thomas Jr. by his agents or employees breached said
16 duty and negligently removed said logs from Defendants' property.

17 VIII SIXTH COUNTERCLAIM

18 40. Defendants reallege and restate paragraphs 1 through 17 and 22 herein as paragraph 40.

19 41. During September, 2014 Benjamin Thomas Jr. twice threatened to run over Defendants'
20 child and her Chihuahua with his bulldozer.

21 42. During September 2014, Benjamin Thomas Jr. threatened to shoot one of Defendants'
22 large mixed breed dogs.

23 43. During April, 2014, Benjamin Thomas Jr. stopped people on the road to Defendants'
24 home, disparaged Defendants and their home, and turned the visitors away.

1 44. On various dates since September, 2014, Plaintiff Benjamin Thomas Jr. parks his heavy
2 equipment and his personal vehicle on the road to Defendants' home, compromising Defendants'
3 access to their home.

4 45. During the Summer of 2015, while knowing members of Defendants' family suffer from
5 asthma, placed a burn pile within 100 feet of Defendants' home and burned said pile while the
6 wind carried smoke toward Defendants' home.

7 46. After September 2014, Plaintiff Benjamin Thomas Jr. gave verbal approval for a pole barn
8 to be erected by Defendants, then reversed himself; for Defendants to have commercial signs on
9 business vehicles to be parked at Defendants' home, then reversed himself; and complained to
10 Defendants about their home not yet being completed on time while time to complete the home
11 to comply with the Covenants was not at risk of running out.

12 47. Plaintiff Benjamin Thomas Jr. removed logs during November 2014 from Defendants'
13 property without permission.

14 48. Plaintiff Benjamin Thomas Jr. removed hay from Defendants' property without
15 permission

16 49. Plaintiff Benjamin Thomas during 2015 and 2016 repeatedly asserted violations of
17 Covenants when such Covenants had not been violated

18 50. During the Winter of 2014-2015, Benjamin Thomas Jr. stated he intended to make the
19 Defendants so miserable that they would leave.

20 51. The described acts of Plaintiff Benjamin Thomas Jr. were done maliciously and with
21 intention of inflicting severe mental and emotional distress and anxiety.

22 52. The described acts of Plaintiff Benjamin Thomas Jr. have caused Defendants severe
23 mental, emotional and physical distress, anguish, anxiety and illness, all to Defendants' general
24 damages in the sum of \$10,000.00.

1 WHEREFORE, Defendants pray on Plaintiffs' Complaint and Defendants' First Counterclaim,
2 as follows:

- 3 1. Dismissal of Plaintiffs' Complaint with prejudice;
- 4 2. For an award of costs; and
- 5 3. Defendants' prevailing party attorney fees on Plaintiff's Complaint

6 On their Second Counterclaim:

- 7 1. Treble damages of \$225.00; and
- 8 2. Defendants' costs and reasonable attorneys fees as approved by the court.

9 On their Third Counterclaim:

- 10 1. \$75.00; and
- 11 2. Defendants' costs.

12 On their Fourth Counterclaim:

- 13 1. Treble damages of \$9,000.00; and
- 14 2. Defendants' costs.

15 On their Fifth Counterclaim:

- 16 1. \$3,000.00; and
- 17 2. Defendants' costs

18 On their Sixth Counterclaim:

- 19 1. General damages of \$10,000.00; and
- 20 2. Defendants' costs.

21
22 
23 Robert A. Birk, WSBA No.: 16521
24 Attorney for the Defendants
25 And Trial Attorney

1 WHEREFORE, Defendants pray on Plaintiffs' Complaint and Defendants' First Counterclaim,
2 as follows:

- 3 1. Dismissal of Plaintiffs' Complaint with prejudice;
- 4 2. For an award of costs; and
- 5 3. Defendants' prevailing party attorney fees on Plaintiff's Complaint

6 On their Second Counterclaim:

- 7 1. Treble damages of \$225.00; and
- 8 2. Defendants' costs and reasonable attorneys fees as approved by the court.

9 On their Third Counterclaim:

- 10 1. \$75.00; and
- 11 2. Defendants' costs.

12 On their Fourth Counterclaim:

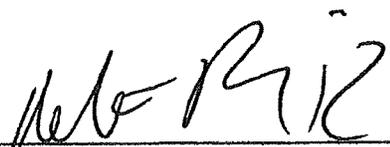
- 13 1. Treble damages of \$9,000.00; and
- 14 2. Defendants' costs.

15 On their Fifth Counterclaim:

- 16 1. \$3,000.00; and
- 17 2. Defendants' costs

18 On their Sixth Counterclaim:

- 19 1. General damages of \$10,000.00; and
- 20 2. Defendants' costs.

21 
22 _____
23 Robert A. Birk, WSBA No.: 16526
24 Attorney for the Defendants
25 And Trial Attorney

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that the following is true and correct.

I am over the age of 18, competent to testify, not a part to this action, and am attorney for Plaintiff herein. On the date set forth below, I served the foregoing First Amended Answer, Affirmative Defenses and Counterclaims via U.S. Mail, on the following person(s):

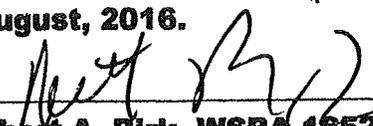
Matthew Andersen

Attorney at Law

1700 Hudson Street, 3rd Floor

Longview WA 98632

Signed at Portland Oregon this 22nd day of August, 2016.



Robert A. Birk, WSBA 16526

WALSTEAD MERTSCHING PS

May 20, 2019 - 1:47 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52486-4
Appellate Court Case Title: Benjamin A. Thomas, Jr., et al., Respondents v. Lana C. Harmon, et al.,
Appellants
Superior Court Case Number: 16-2-00203-1

The following documents have been uploaded:

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