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Division II  
State of Washington  
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No. 53126-7-II

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

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WILLIAM G. PARDEE and SHANNON D. PARDEE, husband and wife,  
*Appellants,*

vs.

EVERGREEN SHORES BEACH CLUB, a Washington nonprofit corporation, NICHOLAS PALMER and JANE DOE PALMER, husband and wife, JOHNNY KRAWCHOOK and JANE DOE KRAWCHOOK, husband and wife, KRIS KINNEAR and JOHN DOE KINNEAR, husband and wife, JON KNUTSON and JANE DOE KNUTSON, husband and wife, BRUCE BAMFORD and JANE DOE BAMFORD, husband and wife, SYLVIA DAVENPORT and JOHN DOE DAVENPORT, husband and wife, PAT ANDERSON and JANE DOE ANDERSON, husband and wife, ASHLEY LIEB and JOHN DOE LIEB, husband and wife, ZENE SNIDER and JOHN DOE SNIDER, husband and wife, AARON MACLEAN and JANE DOE MACLEAN, husband and wife, DAN SOLIE and JANE DOE SOLIE, husband and wife, and VANTAGE COMMUNITY MANAGEMENT, INC., a Washington profit corporation,  
*Respondents.*

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ON APPEAL FROM

THURSTON COUNTY SUPERIOR COURT

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**APPELLANTS' AMENDED OPENING BRIEF**

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## **ASSIGNMENT OF ERROR**

The trial court erred in granting, by its order dated February 22, 2019 (CP 705-707), summary judgment to the Defendants on all of Plaintiffs' claims asserted in its Second Amended Complaint for Damages, Declaratory Relief, and Injunctive Relief (CP 32-43), including various causes of action for violation of RCW 49.60 (the Washington Law Against Discrimination), including the Evergreen Shores Beach Club ("ESBC") and Defendants discriminating against the Plaintiffs in its rental process, by removing Plaintiff Shannon Pardee from the ESBC Facebook site, and by removing Plaintiff Shannon Pardee from the ESBC Board of Directors (Board) in retaliation for filing the lawsuit at issue; for defamation, defamation per se, and false light, for statements by Defendants in a notice of special meeting, a false police report, and on social media; for declaratory relief, including damages to Plaintiffs by virtue of Defendants imposing unreasonable charges on them to obtain ESBC records, and concluding that Defendants illegally attempted to amend the ESBC's covenants, conditions and restrictions (CC&Rs), illegally rented the ESBC park and recreation area to persons not members of the ESBC, refused to appoint an architectural planning committee required by the CC&Rs, and illegally created a CC&R enforcement policy that is contrary to the CC&Rs; and for civil conspiracy.

## **ISSUE**

As to causes of action Plaintiffs set forth in their Second Amended Complaint for Damages, Declaratory Relief, and Injunctive Relief (CP 32-43), in the alternative, whether genuine issue of material fact exist, or Defendants are not entitled to judgment as a matter of law, such that the trial court erroneously granted the Defendants summary judgment. (Assignment of Error)

## **STATEMENT OF THE CASE**

On February 20, 2018, the Plaintiffs filed an initial complaint (CP 3-30) alleging various causes of action against the ESBC, their homeowner's association, various past and present members of the ESBC Board, and others associated with them, alleging, among other things, causes of action under RCW 49.60 (the Washington Law Against Discrimination – "WLAD").<sup>1</sup> On August 7, 2018, the Plaintiffs filed a Second Amended Complaint for Damages, Declaratory Relief, and Injunctive Relief (CP 32-43) alleging various causes of action against the ESBC, various past and present members of the ESBC Board, and others

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<sup>1</sup> While Vantage Community Management, Inc. ("Vantage") was a defendant in the trial court, the trial court granted summary judgment in Vantage's favor, and Plaintiffs did not appeal that ruling. Technically, while Vantage is a respondent, Plaintiffs have no pending causes of action against it.

associated with them, for violation of RCW 49.60, including the ESBC and Defendants discriminating against the Plaintiffs in its rental process, by removing Plaintiff Shannon Pardee from the ESBC Facebook site, by removing Plaintiff Shannon Pardee from the ESBC Board in retaliation for filing the lawsuit at issue; for defamation, defamation per se, and false light for statements by Defendants on social media, a notice of special meeting, and in false police reports; for declaratory relief, including damages for Defendants imposing unreasonable charges on Plaintiffs to obtain ESBC records, and concluding that Defendants illegally attempted to amend the ESBC's covenants, conditions and restrictions (CC&Rs), illegally rented the ESBC park and recreation area to persons not members of the ESBC, refused to appoint an architectural planning committee required by the CC&Rs, and illegally created a CC&R enforcement policy that is contrary to the CC&Rs; and for civil conspiracy.

In order to facilitate the ability of the Defendants to file and have heard their motion for summary judgment beyond the deadline - January 11, 2019 - set by the trial court in its Order Setting Case Schedule entered on July 2, 2018 (CP 31), which scheduled trial for five days beginning on March 11, 2019, on December 18, 2018 the trial court issued an order granting Defendants' Motion to Amend the Order Setting Case Schedule (CP 371) and striking the December 21, 2018, hearing on the same. On

January 24, 2019, the trial court struck the hearing on the Defendants' Motion for Summary Judgment scheduled to occur on January 25, 2019, indicating it would "issue a ruling based on the written submissions." CP 580. On February 4, 2019, the trial court issued an ex parte Ruling on Summary Judgment (CP 581), wherein it stated:

The Court grants Defendants' Motion for Summary Judgment, filed December 14, 2018. Each of the separate, independent arguments presented by Defendants are legally correct and Plaintiffs have failed to present evidence warranting a trial on any of their claims under CR 56. While it is clear that Plaintiffs unfortunately have a difficult relationship with their neighbors, Plaintiffs have failed to prove that there is a genuine issue of material fact as to any of their remaining claims. Accordingly, Plaintiffs' claims are DISMISSED WITH PREJUDICE.

The prevailing party on this motion shall submit an Order consistent with this Ruling and CR 56(h) for entry by the Court.

Trial and Pre-Trial Dates are Stricken.

On February 15, 2019, the trial court issued an Order Denying Plaintiffs' Motion for Reconsideration (CP 600) of the trial court's February 4, 2019, Ruling on Summary Judgment, and striking the hearing on the same scheduled for February 22, 2019.

On February 22, 2019, the trial court entered ad Ex Parte Order Granting Defendants' Summary Judgment Motion (CP 705-707) stating, in relevant part:

"[T]he Court having considered the motion, the argument of counsel, and all relevant records and pleadings on file. . . . Being

fully advised of all relevant matters, IT IS HEREBY ORDERED as follows: Defendants' Summary Judgment Motion is hereby GRANTED pursuant to the Court's attached ruling on February 4, 2019, and this case is dismissed in its entirety with prejudice.

On March 22, 2019, the Plaintiffs filed a Notice of Appeal to Court of Appeals Division II (CP 709-715) with both the trial court and the Court of Appeals Division II, appealing the Ex Parte Order Granting Defendants' Motion for Summary Judgment entered by the trial court on February 22, 2019. Hence the fact we are now in this Court.

## ARGUMENT

### A. Legal Standard.

The appellate courts review a summary judgment ruling de novo and consider the same evidence heard by the trial court. *Hearst Comm'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 501, 115 P.3d 262 (2005). In ruling on a motion for summary judgment the court must consider the material evidence and all reasonable inferences therefrom most favorably for the nonmoving party; and when so considered, if reasonable people might reach different conclusions, the motion should be denied. *Jacobsen v. State*, 89 Wn.2d 104, 108-109, 569 P.2d 1152 (1977). See also *Fleming v. Stoddard Wendie Motor Co.*, 70 Wn.2d 465, 467, 423 P.2d 926 (1967). A genuine issue of material fact exists if reasonable minds could differ on the facts controlling the outcome of the litigation. *Bavand v. OneWest Bank, FSB*,

196 Wn. App. 813, 825, 385 P.3d 233 (2016). The nonmoving party avoids summary judgment by setting forth specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue of material fact. *Id.*

B. Plaintiffs' claims allege facts and produce evidence sufficient to establish discrimination or retaliation by Defendants in violation of RCW 49.60.

RCW 49.60.010 states in part:

The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of . . . creed . . . are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.

RCW 49.60.020 states: "The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof." The purpose of the WLAD is to deter and eradicate discrimination in Washington. *Specialty Asphalt & Const., LLC v. Lincoln Cty.*, 191 Wn.2d 182, 192, 421 P.3d 925 (2018). When the record contains reasonable but competing inferences of both discrimination and nondiscrimination, the trier of fact must determine the true motivation. *Id.* at 191-192. RCW 49.60.030 states in part:

(1) The right to be free from discrimination because of . . . creed. . . This right shall include, but not be limited to: . . .

(b) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement;

(Emphasis added). RCW 49.60.040(14) defines “full enjoyment of” as:

[I]ncludes the right to . . . admission of any person to accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement, without acts directly or indirectly causing persons of any particular . . . creed, . . . to be treated as not welcome, accepted, desired, or solicited.

(Emphasis added).<sup>2</sup> RCW 49.60.040(2) defines “Any place of public resort, accommodation, assemblage, or amusement” in relevant part as:

[I]ncludes, but is not limited to, any place, licensed or unlicensed . . . or where public amusement, entertainment, sports, or recreation of any kind is offered with or without charge, . . . or where the public gathers, congregates, or assembles for amusement, recreation, or public purposes . . . PROVIDED, That nothing contained in this definition shall be construed to include or apply to any institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations, though where public use is permitted that use shall be covered by this chapter;

(Emphasis added).

While arguably the ESBC is a “distinctly private” club,<sup>3</sup> when it permits public use of its facilities, or provides a place where the public –

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<sup>2</sup> RCW 49.60.040(19) defines “person” as:

[I]ncludes one or more individuals, partnerships, associations, organizations, corporations, cooperatives, legal representatives, trustees and receivers, or any group of persons; it includes any owner, lessee, proprietor, manager, agent, or employee, whether one or more natural persons; and further includes any political or civil subdivisions of the state and any agency or instrumentality of the state or of any political or civil subdivision thereof.

<sup>3</sup> *Tenino Aerie v. Grand Aerie*, 148 Wn.2d 224, 251, 59 P.3d 655 (2002) contains a good discussion of factors courts must consider in determining whether something is a “distinctly private” club.

not just ESBC members - gather, congregate, or assemble for amusement, recreation or public purposes (e.g., the Black Lake Regatta or the ESBC Facebook site), RCW 49.60.040(2) explains that it is subject to the scrutiny of the WLAD.

Webster's Third New International Dictionary, 533 (2002) defines the noun "creed" in part as including: "3 . . . **b** : a religion or religious sect . . . **c** : a formulation or epitome of principles, rules, opinions, and precepts formally expressed and seriously adhered to and maintained. . . ."<sup>4</sup>

To establish discriminatory action, "plaintiffs may rely on circumstantial, indirect, or inferential evidence." *Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cty.*, 189 Wn.2d 516, 526, 404 P.3d 464 (2017).

1. The ESBC did discriminate against Plaintiffs in its rental process.

RCW 49.60.215(1) addresses unfair practices in places of public

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<sup>4</sup> Some might argue that the word "creed" in the WLAD is synonymous with "religion." Leaving aside that Plaintiffs form principles and beliefs that they routinely express and seriously adhere to, which on many occasions are counter to what the Defendants support, these indeed emanate from religious foundations they live by. Furthermore, 42 U.S.C. §2000e(j) defines "religion" as including all aspects of religious observance and practice, as well as belief. Both *Kumar v. Gate Gourmet*, 180 Wn.2d 481, 328 Wn.2d 481 (2014), and *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 837 P.2d 618 (1992), involved religious expression and objections by employees, and their employer's accommodation of those religious beliefs. In *Kumar*, the court stated at page 489 that the parties stipulated to the fact that the term "creed" in the WLAD referred to religious beliefs. However, in the interests of broadly construing the reach of the WLAD, since it is to be liberally construed, the court's decision in *Riste v. Eastern Washington Bible Camp, Inc.*, 25 Wn. App. 299, 302, 605 P.2d 1294 (1980), referenced in *Kumar*, and which involved prohibited deed restrictions under the WLAD, makes clear that the courts use dictionaries to define undefined words in the WLAD: "Creed, as used in the statute and in its common dictionary meaning, refers to a system of religious beliefs." (Emphasis added).

resort, accommodation, or assemblage, and states in part:

It shall be an unfair practice for any person or the person's agent or employee to commit an act which directly or indirectly results in any distinction, restriction, or discrimination, . . . or the refusing or withholding from any person the admission, patronage, custom, presence, frequenting, dwelling, staying, or lodging in any place of public resort, accommodation, assemblage, or amusement,. . . .

The ESBC's Articles of Incorporation ("Articles") state that one of the purposes for the formation of the non-profit corporation was "to assume ownership of and the operation of and the governing of a tract of land . . . located [in] Division Three of [the ESBC] and contains approximately three hundred front feet on Black Lake, and which tract consists of that certain [11-acre] park and recreation area as shown on the plat of EVERGREEN SHORES in Thurston County." CP 253-254 (brackets added). Paragraph 2 of the Articles states that one of the purposes of corporation is the "enforcement of all the restrictive covenants applicable to the plat of EVERGREEN SHORES (all Divisions) of which the park and recreation area shall be an integral part." CP 254 (emphasis added). Paragraph 20 of the ESBC Division 3 CC&Rs addresses the ESBC park and recreation area, and that it is to be accessible by, and jointly used by all ESBC members, stating:

The developer, SUNDOWN, INC., has formed a separate non-profit corporation and has built and is paying for the clubhouse, swimming pool, and designated parking areas, and in addition will, in the future, include a grant to said non-profit corporation approximately

seven hundred (700) front feet of Black Lake on an area that is within EVERGREEN SHORES, DIVISION THREE, but will be accessible to EVERGREEN SHORES, DIVISION ONE and EVERGREEN SHORES, DIVISION TWO, and EVERGREEN SHORES, DIVISION TWO-A, and any additional divisions created in the plat of EVERGREEN SHORES, and will be jointly used by the owners of lots in all divisions of EVERGREEN SHORES.

CP 285 (emphasis added). On June 27, 1973, the developer of ESBC, SUNDOWN, Inc., executed a Quit Claim Deed, conveying to each lot owner in the ESBC, including Plaintiffs, a 1/482 interest in the ESBC's park and recreation area (Tract B) of Evergreen Shores. CP 396. A copy of the filed plat for Evergreen Shores Division 3, which shows Tract B at page 72 thereof, is provided at CP 397-399.

On January 29, 2018, then-ESBC Board President, Defendant Nicholas Palmer, sent e-mail correspondence to his fellow ESBC Board members, including Plaintiff Shannon Pardee, concerning the Black Lake Regatta ("Regatta") being held in the ESBC park and recreation area (Tract B), stating:

Good evening everyone!

Just wanted to start the conversation regarding the 2018 Regatta. Steve Whisman is the race director again this year and he wants to get things started sooner this year so we aren't up against a hard deadline. . . .

They are interested in a multi-year (2-4yr) contract so we don't start at ground zero each time.

Black Lake was selected for the 2020 Summer Nationals as well – that would potentially be a much larger race with more moving parts and logistics to figure out.

Let me know what you all think.

CP 392.

On January 31, 2018, Nicholas Palmer sent further e-mail correspondence to his fellow Board members (CP 393) concerning the Regatta, explaining that it was the one exception to the so-called “no events” policy for the ESBC park and recreation area, stating:

We have decided NOT to allow private parties at the park – weddings for example – because it provides NO benefit the (sic) the neighborhood as a whole, and we won’t shut down the park nor limit others from using the park or grounds for those types of events. We have had issues in the past with weddings in particular where the wedding party thought they could take over the park and now allow others into the grass and were telling people they couldn’t drive by at certain times or use certain parts of the park. The grounds are NOT included in a typical clubhouse or cook shed rental, nor is the pool. . . .

The Regatta has been the one exception to the ‘no events policy for several reasons-

- 1) It provides meaningful income for the community
- 2) The majority of the community benefits from the races and enjoys them being here
- 3) The community (and their family/friends get free admission to the races – this is why the bleachers up front and unobstructed are a non-negotiable item.
- 4) The Regatta provides their own insurance, security and damage deposit for the park and grounds
- 5) We’re able to keep the pool open and functioning.

(Emphasis added). In response to Palmer, on February 3, 2018, then-ESBC

Board member Brianna Manolopoulos stated (CP 394):

Does this mean that if anyone in the neighborhood wanted to plan an event, made it free to the community, had insurance for the event,

made a security deposit and did some work trade they would be allowed to hold the event?

Those sound like reasonable conditions, but it seems like they should be outlined and made publicly available.

If it's not available to anyone in the community and we want to grandfather in the Regatta, that seems like something we *should* codify somehow. My suggestion would be to draw up the language and then ask the members to vote on it at the annual meeting.

In response to Manolopoulos, Nicholas Palmer stated on February 5, 2018 (CP 395):

I think in many cases, yes – an event under those circumstances would be acceptable which is why it isn't specifically disallowed. The trouble is someone could have a wedding and 'invite' everyone in the neighborhood but that's still not something we'd want to shut down the park for. We can't outline every possible event and put it in writing so any policy would have somewhat vague (sic) and each proposed event approved or denied by the board.

This has not been an issue- we have not had very many people wanting to use the entire park for such an event. The insurance costs alone are astronomical for something like that.

(Emphasis added).

Consistent with Defendant Nicholas Palmer's no-events policy outlined above, and unlike the Regatta, the Common Area Rental Agreement only allows ESBC members to rent either the ESBC Clubhouse or Cookshed, located on the grounds of the ESBC park and recreation area, (Tract B) for certain times of day, but not the entire park and recreation area for consecutive days. CP 400-401. And beyond the Rental Agreement, the

criteria for who can rent the ESBC Clubhouse or Cookshed, is again arbitrary and discriminatory, and was entirely controlled by then-ESBC President Nicholas Palmer, and other unnamed individuals. In response to inquiries from Shannon Pardee on March 27, 2017, a few months after she was removed from the ESBC Facebook site (as explained below), to rental@evergreenshores.org (the ESBC rental e-mail address), concerning reserving the Clubhouse for a weekly meeting on the same day every week, then-President Nicholas Palmer responded to Pardee as follows the same day:

We would need to know the specific days you are requesting and what type of event you are planning.

Each day would be a separate rental and would require a new rental agreement and rental fee. We do not have the ability to do 'ongoing' rentals, nor can we guarantee the same day is available each week. Our clubhouse is very busy during the summer months.

...

E-mail is the best methods (sic) for rentals. There are multiple people involved in the process, so others need to be able to see the chain and what was discussed in order for the process to go smoothly.

(Emphasis added). CP 402-403. So although the Regatta can do ongoing rentals of the entire park and recreation area for a 2 to 4 year block, the ESBC members, including Plaintiffs, cannot. And who are the multiple people involved in the rental process who need to see the chain? Defendant Nicholas Palmer never specified. In response to Plaintiff Shannon Pardee's follow-up that same day about where she could find an availability schedule

for rental of the ESBC Clubhouse, and whether she should just pick days and hope they are available, and whether there was a calendar, Palmer responded as follows:

The ESBC Calendar on our website has most of the reserved days, but it's not 100% accurate. Best way is to pick days and we can assess from there. Unfortunately, rentals are a manual process between several people and reserved days don't always get reflected on the calendar.

(Emphasis added). CP 403.

As will be explained below regarding the Facebook site, Plaintiffs were discriminated against in renting the ESBC Clubhouse and Cookshed by having to suffer through an unnecessarily arbitrary process where dates were impossible to reserve because of their creed, or set of principles and opinions they expressed and adhered to, be they religious or otherwise, that Defendants disagreed with. That's why they made it difficult on Plaintiffs to rent the ESBC facilities as shown above. Not least of all, even though they and other ESBC Board members are entitled to jointly use and access the ESBC park and recreation area (Tract B), and actually own an undivided interest in it, the Defendants do not permit them, but only the Regatta, not a member of the ESBC, to rent the entire park and recreation area. That's because the Defendants agree with the creed of those involved with organizing the Regatta, while openly frowning on weddings or ESBC members they do not see eye-to-eye with using the same park and recreation

area.

Contrary to RCW 49.60.215(1), Defendants committed acts which either directly or indirectly resulted in distinction, restriction, or discrimination as to the rental of both the ESBC Cookshed and Clubhouse, and the entire ESBC park and recreation area (Tract B) for that matter.

2. Ms. Pardee's removal from the ESBC Facebook site constitutes discrimination under the WLAD.

The ESBC Facebook site clearly meets the definition of "any place of public resort, accommodation, assemblage, or amusement" in RCW 49.60.040(2) set forth above because on that site the public gathers, congregates, or assembles for amusement, recreation, or public purposes, which is also evidenced by the inclusion of non-ESBC members on that site.

Defendants attempt to distance themselves from the ESBC Facebook site by stating that the site is not the property, nor under the control of the ESBC, and note that Plaintiffs have conceded that the ESBC Facebook site has never been administered entirely by members of the ESBC Board, even though it has been administered by both Board members and ESBC members over time.

In a response to Plaintiff Shannon Pardee's complaint about excessive dog waste in the ESBC park and recreation area (Tract B) and the community pool, however, the ESBC Board responded through its e-mail

address info@evergreenshores.org as follows on May 28, 2015 (CP 404), and appeared to claim ownership of the ESBC Facebook site, stating in part:

Thanks for the e-mail. Loose, uncontrolled animals are a pretty big issue in our neighborhood and in our park. It is difficult, as volunteers, to police the park at all times. . . .

As a resident of Evergreen Shores, the common area is, in a way, an extension of your yard. Since we cannot be there at all times of the day, we appreciate it when residents kindly remind other residents about the rules, or suggestions to keep the activities less disruptive.

As far as the pool. You are correct that our website does say the old hours. The new hours were given at the Annual Meeting, as well as posted on our facebook page.

Thank you,  
ESBC Board

(Emphasis added). In addition, exemplars of ESBC Newsletters for June 2016, July 2016, and January 2018 (CP 406-418) all include a link to the ESBC Facebook site that states either “Connect with us” or “Confirm that you like this.”

In the Minutes of the January 23, 2017, ESBC Board Meeting, signed by then-ESBC Board President and Defendant Nicholas Palmer, the following summary is given of a discussion during the Board Meeting between Plaintiff William Pardee and Palmer concerning Palmer’s removal of Plaintiff Shannon Pardee from the ESBC Facebook site:

Facebook (FB) Page Access – Bill Pardee addressed the Board on Shanon Pardee’s behalf regarding access with posing on Evergreen Shores FB page. Shanon Pardee was removed for inappropriate

posting, which Mr. Pardee stated he assisted his wife with crafting some of the posts on the FB page. Some examples of posts from Shanon were in regards to hazardous dogs; CCR abandonment; Are Board meetings conducted appropriately. Nick addressed Mr and Mrs. Pardee and confirmed the Board is not affiliated with the FB page and is not the administrator of the site. The administrator of the site is not a Board member and the page is monitored by fellow homeowners. Some owners within the HOA use the FB page as a method for communication, which the FB page is administered by Bruce Banford (sic). Mr. Pardee requested Shanon Pardee be allowed FB access.

CP 419-422 (emphasis added). However, when Nicholas Palmer stated this, he was in fact an administrator of the ESBC Facebook site, along with fellow Defendants and ESBC Board members Jon Knutson and Kris Kinnear, future Board member and Defendant Bruce Bamford, Defendant Ashley Lieb, and future Board member and Defendant Aaron MacLean. CP 423-427. In fact, when Palmer made his statements at the January 2017 ESBC Board meeting, both before and after that date he, along with other current and former Board members, was actively an administrator of the site admitting people to be members of the ESBC Facebook site, and fellow Board member Defendant Jon Knutson in fact admitted a member Lindsey Michelle whose Facebook openly used expletives and stated: "Please F\*\*\* Off Thank you." CP 423-440. So, while Plaintiff Shannon Pardee's posts on legal concerns were inappropriate, the ESBC Facebook site's administrators permitted vulgar language on that site. Shannon Pardee was removed by Defendants from the ESBC Facebook site because they

disagreed with opinions and principles she formally expressed, and adhered to, namely calling out her fellow Board members and letting other ESBC members know when something they were doing or allowing to persist was either unlawful or illegal. Be it her religious grounding, or her expression of a set of beliefs and principles she felt strongly about on issues involving her neighborhood and the ESBC Board, she was removed by Defendants from the ESBC Facebook site because of her “creed,” as defined above.

In its Answer to Plaintiff’s Second Amended Complaint, Defendants freely admit that Defendant Nicholas Palmer was an administrator of the ESBC Facebook site in January 2017. CP 57. In a permanent announcement on the ESBC Facebook site dated November 27, 2016, Defendant Nicholas Palmer writes: “Evergreen Shores Residents – Important Information Facebook drama on this page? Use the ‘report post’ function on the post itself. You can also block certain users. Please note that we lightly moderate – you’re all grown ups.” CP 441. Another post from Nicholas Palmer on the ESBC Facebook site includes an advertisement for a part-time summer job as an ESBC pool monitor. CP 442.

3. Plaintiffs’ claim for retaliation under the WLAD was not ripe for summary judgment because Plaintiffs have provided evidence that, at the very least, demonstrates that Plaintiff Shannon Pardee’s participation in this lawsuit was a factor in her removal from the ESBC’s Board of Directors in May 2018.

To establish discriminatory action, “plaintiffs may rely on circumstantial, indirect, or inferential evidence.” *Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cty.*, 189 Wn.2d 516, 526, 404 P.3d 464 (2017).

RCW 49.60.210(1) addresses the unfair practice of retaliation under the WLAD and when that occurs, and states:

It is an unfair practice for any employer, employment agency, labor union, or other person to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter.

(Emphasis added).<sup>5</sup>

On May 2, 2018, after this lawsuit was filed, Defendant and then-ESBC Board President Nicholas Palmer sent Plaintiff Shannon Pardee Notice of a Special Meeting of the ESBC Board on May 21, 2018, *he himself* called to vote on her removal from the Board, citing her “general lack of candor, difficulty working with others, unprofessional communications, and interference with Board and Association projects and Association contractors.” CP 443. This was pure retaliation by Defendant

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<sup>5</sup> RCW 49.60.040(19) defines “person” as:

[I]ncludes one or more individuals, partnerships, associations, organizations, corporations, cooperatives, legal representatives, trustees and receivers, or any group of persons; it includes any owner, lessee, proprietor, manager, agent, or employee, whether one or more natural persons; and further includes any political or civil subdivisions of the state and any agency or instrumentality of the state or of any political or civil subdivision thereof.

Nicholas Palmer and the other Defendants for Ms. Pardee having filed the instant lawsuit, plain and simple. The social media barrage on the ESBC Facebook site which preceded Palmer's Notice, that Defendants had already removed Ms. Pardee from, by new administrator (and later Defendant and ESBC Board Secretary Zene Snider) and co-administrator and later Defendant Ashley Lieb, with a splash of motivation from Defendant Bruce Bamford, show a constant push through posts on the ESBC Facebook site to have Plaintiff Shannon Pardee removed from the ESBC Board, and assemble votes from ESBC members to achieve this for simply having filed this lawsuit that included claims under the WLAD. CP 444-452. In fact, in one social media post, Defendant Zene Snider asks Plaintiff Shannon Pardee what creed she is being discriminated for (CP 478). Defendant Zene Snider writes further on social media the following:

Important info regarding the needed numbers for the board meeting, and the essential vote to remove a problem board member: we do in fact need 300 votes from the Evergreen Shores homeowners, per the request of our board members attorney. This also means that that the more in attendance to the April meeting to vote, the better. We need 300 votes to remove this board member. Without you, our board will not be able to move forward with many of our community events, or budgeted improvements that happen every year. We may not be able to open the pool, and our HOA dues could quite possible increase due to the needed attorney fees to protect our board members from a frivolous lawsuit, by this problematic Board member. I am finding out whether or not we can gather proxy votes for those that cannot attend the meeting.

CP 450. And Defendant and then-ESBC Board member Bruce Bamford

adds:

I hope we do not let this string go quiet from all opinions except no slang or calling ANYONE names as this is a HUGE issue facing all residents. As I said the Board cannot answer any questions on these issue. SAD to be in this position with so much GREAT people on our board who care about ALL residents is all I can say to my friends on the board.

CP 451. Defendant Zene Snider then responded to Mr. Bamford, stating:

I agree Bruce Bamford. The lawyers' fees to provide representation for a frivolous lawsuit, against all but two board members, will come out of the community budget. This means that there won't be funds to do anything fun, and might possibly mean that we would have to increase dues to cover the lawyer fees. If that doesn't get your attention, nothing will.

*Id.* Bruce Bamford then stated: "Especially if we all run scared and board collapses under fear or Johnny [Defendant Johnny Krawchook] decides he can't do the pool that would affect a lot of people here." *Id.* (Brackets added). At one point, seeming to enjoy and relish the social media attack on Ms. Pardee on the ESBC Facebook site, Defendant Ashley Lieb in giddy and disturbing fashion indicates to Defendant Zene Snider that she should take over the attack because she needs rest, stating: "Feel free to take over Zene heheh im going to bed." CP 447.

In *Sambasivan v. Kadlec Med. Ctr.*, 184 Wn. App. 567, 591, 338 P.3d 860 (2014), the court noted that in 1996, RCW 49.60.210(1) was held to apply in a non-employee context to a former member of credit union who was expelled as a member by the credit union's board after providing a

declaration supporting an age and gender-based discrimination lawsuit brought by credit union employees. (Citing *Galbraith v. TAPCO Credit Union*, 88 Wn. App. 939, 946 P.2d 1242 (1997)).

Appellant in *Galbraith* was a member of TAPCO Credit Union, respondent, for several years. The respondent terminated appellant's membership for several reasons, including voluntarily assisting plaintiffs that had a pending Reduction in Force lawsuit against the respondent for discrimination under the WLAD. The court explained that the plain language of RCW 49.60.210 supports the conclusion that the WLAD is not limited to claims by employee against employer. *Galbraith*, 88 Wn. App. at 951. The court recognized that under RCW 49.60.210, "unfair practices" can be committed, not only by employers, but by any "other person" per the definition in RCW 49.60.040, since a credit union falls within the broad categories set forth in that definition. *Id.*; see also *Certification From the United States District Court for the Eastern District of Washington in Zhu v. North Central Educational Service District-ESD 171*, 189 Wn.2d 607, 404 P.3d 504, 510 (2017)(citing *Galbraith* and stating: "[A]s the Court of Appeals has held that it is an unfair practice for a credit union to expel a member because he assisted credit union employees in an antidiscrimination lawsuit, persuasively reasoning that a credit union is an "other person" for purposes of RCW 49.60.210.")

In *Galbraith*, after reviewing the language of RCW 49.60.210 and observing the strong public policy against discriminatory practices, the court stated that appellant had an actionable claim against respondent (credit union) for retaliatory discrimination under the WLAD, stating:

The broad language of RCW 49.60.210, the Legislature's mandate for liberal construction, and the strong public policy against discriminatory practices, support the conclusion that [appellant] has an actionable claim against [respondent] for retaliatory discrimination.

*Id.*

In *Galbraith* the court concluded that the trial court had improperly granted summary judgment in favor of respondent on appellant's retaliation claim under the WLAD, reasoning as follows:

To defeat summary judgment [respondent] must be able to demonstrate that (1) he opposed practices prohibited under WLAD or assisted with an anti-discrimination proceeding brought under WLAD; and (2) retaliation for this protected activity was a substantial factor behind [respondent's] decision to expel him. . . . [Appellant] has offered evidence that he assisted [respondent] employees with their anti-discrimination lawsuit against [respondent] and that his assistance was a factor in [respondent's] terminating his membership. [Appellant] has thus established a prima facie case giving rise to an "inference of discrimination. *Marquis*, 130 Wash.2d at 114, 922 P.2d 43. [Respondent] has offered evidence that, in addition to its discriminatory reason, it also expelled [appellant] for legitimate non-discriminatory reasons. Thus there are factual issues regarding [appellant's] retaliatory discrimination claim; summary judgment was inappropriate. We reverse and remand for trial, at which [appellant] "retains the final burden of persuading the trier of fact that discrimination was a substantial factor in [his] disparate treatment." *Marquis*, 130 Wash.2d at 114, 922 P.2d 43.

88 Wn. App. at 952 (emphasis added).

Like the appellant in *Galbraith*, Plaintiffs have provided evidence on social media and in Defendant Nicholas Palmer's own correspondence proposing Plaintiff Shannon Pardee's removal from the Board, that shows at the very least that Plaintiffs bringing this lawsuit, which included WLAD claims, was a factor in Defendants removing her from the Board. The lawsuit is front and center in the social media posts advocating for her removal (also observe the social media posts by Defendants discussed below beginning at Page 25 that were also retaliatory and designed to ultimately remove Plaintiff Shannon Pardee from the Board). As in *Galbraith*, given that Defendant Nicholas Palmer raises other grounds for Ms. Pardee's removal from the Board, intended to be independent from the instant lawsuit, there are factual issues regarding Plaintiffs' retaliation claim under the WLAD that too were inappropriate for summary judgment.

C. *The trial court should not have dismissed Plaintiffs' claims for defamation, defamation per se, and false light.*

Leaving aside Defendant Nicholas Palmer's Notice of Special Meeting in May 2015 (CP 443) discussed above, and Defendant Kris Kinnear's involvement with the phony 911 call made on May 15, 2018 (CP 453-455), just days before the Special Meeting of the Board to remove Plaintiff Shannon Pardee from the ESBC Board, both which included lies and untruths, even a casual review of the social media posts at issue in this

case on both the ESBC Facebook site and a nextdoor.com site fun by homeowners in the ESBC, shows the hatred and invective that Defendants spewed out towards Plaintiffs in an effort to destroy them. CP 444-452, 456-479.

In social media posts on the ESBC Facebook site by Defendants Zene Snider and Ashley Lieb (CP 456-471), following the filing of this lawsuit, they stated the following falsehoods about Plaintiff Shannon Pardee: She is a bully; she filed the instant lawsuit because she was voted out as ESBC Board Vice President; she was blocked from the ESBC Facebook site due to harassment and threatening to shoot people and their dogs if they came near her property; she made false claims towards her neighbors; she verbally, face-to-face, attacked Defendant Ashley Lieb's boyfriend Defendant Aaron MacLean; she screamed at the bus driver for being three minutes later than said pick-up time; she is unstable, to say the least; she was voted on to the ESBC Board because of the other Board members' fear of retaliation if they did not vote for her; because of her ESBC will not be able to anything else fun down at the ESBC Clubhouse, and the ESBC pool will not open since no one wants to deal with her; she is crazy; she is insane; she stopped the ESBC Board from completing anything after becoming an ESBC Board member due to always disagreeing with anything "good" for the ESBC; she wants to ban the Black Lake

Regatta because she was denied her request to use the ESBC Clubhouse free of charge for monthly home school meetings; the instant lawsuit she and her husband filed is frivolous; that she is suing all but two Board members; she is scaring away anyone that might volunteer in the Evergreen Shores neighborhood; and she is a problem Board member.

In additional social media posts on the ESBC nextdoor.com site by Defendants Zene Snider, Ashley Lieb, Dan Solie, and Aaron MacLean (CP 472-479), following the filing of this lawsuit, they stated the following falsehoods about Plaintiff Shannon Pardee: She was removed from the ESBC Facebook site for making threats to have “her husband come to their door and kick their f\*\* asses” and “shoot their dogs on site”; she was a plague to the Board when [Defendant Dan Solie] served on the Board, and is still a plague (notice Defendant Zene Snider responding: “Dan!!! We miss you!!!”); she is delusional; and she makes crazy claims.

Plaintiff Shannon Pardee never engaged in any erratic behavior on May 15, 2018, the day at issue that led to the phony 911 call (CP 453-455). Regardless of who actually called 911, Defendant Kris Kinnear was front and center in the police report of the incident, and listed as the complaining party (CP therein), whose sole concern was trying to conceal her identity rather than addressing any wrongdoing. The police report for the incident on May 15, 2018, gives this description of Defendant Kris Kinnear’s

involvement, stating in part:

THE CP HAS REQUESTED THAT HER INFORMATION, HER TEENAGE SON'S INFORMATION, AND HIS TEENAGE FRIEND'S INFORMATION NOT BE INCLUDED IN THE CALL. SHE IS A HOA BOARD MEMBER THAT IS BEING SUED BY THE OTHER INVOLVED PARTY, WHO IS ALSO AN HOA BOARD MEMBER. HER TEENAGE SON STATED HE AND HIS FRIEND WERE WALKING AROUND THE LOOP. . . WHEN THEY WERE PASSING BY A RESIDENCE . . . THEY HEARD YELLING AND LOOKED TO SEE WHAT IT WAS ABOUT. THE FEMALE AT THE RESIDENCE YELLED "KEEP LOOKING! COME DOWN HERE SO I CAN SHOOT YOU!" OR SOMETHING SIMILAR. I DISCUSSED THE CONTEXT OF WHAT WAS SAID, AND THE CP UNDERSTANDS IT IS NOT ENOUGH TO BE CONSIDERD A CHARGEABLE OFFENSE.

Pardee Decl., Ex. 17 (Emphasis added).

The claims in this police report were completely fabricated by Defendant Kris Kinnear in an effort to build the case for Plaintiff Shannon Pardee's removal from the ESBC Board at the May 2018 special meeting that Defendant Nicholas scheduled days earlier.

1. Plaintiffs have established that the statements by Defendants amounted to defamation and defamation per se.

To recover on a defamation claim, a plaintiff must prove: (1) falsity; (2) unprivileged communication; (3) fault; and (4) damages. *Stansfield v. Douglas County*, 107 Wn. App. 1, 16, 27 P.3d 205 (2001)(citing *Mark v. Seattle Times*, 96 Wn.2d 473, 486, 635 P.2d 1081 (1981)). The degree of fault necessary to make out a prima facie case of defamation depends on whether the plaintiff is a private individual or a public figure or public

official. *Id.* If the plaintiff is a private individual, a negligence standard of fault applies. *Id.* (Citing *Bender v. City of Seattle*, 99 Wn.2d 582, 599, 664 P.2d 492 (1983)). The alleged defamatory statement must be a statement of fact, not a statement of opinion. *Life Designs Ranch, Inc. v. Sommer*, 191 Wn. App. 320, 330, 364 P.3d 129 (2015). As the line between fact and opinion is sometimes blurry, the Court must consider the following factors to determine whether a statement is actionable: (1) the medium and context in which the statement was published, (2) the audience to whom it was published, and (3) whether the statement implies undisclosed facts. *Id.* The court should consider the entire communication and note whether the speaker qualified the defamatory statement with cautionary “terms of apparency.” *Id.* at 331.

As set forth above, the statements by Defendants survive summary judgment in that they satisfy the defamation standard above because they were false, not privileged, the Defendants were at the very least negligent in making them, and they damaged Plaintiffs’ reputations. Furthermore, they were certainly not opinion, but unqualified allegations of fact that were made by Defendants on the ESBC Facebook site in order to persuade ESBC members in a coordinated effort to remove Plaintiff Shannon Pardee from the ESBC Board.

A publication is defamatory per se (actionable without proof of

special damages) if it (1) exposes a living person to hatred, contempt, ridicule or obloquy, or to deprive him of the benefit of public confidence or social intercourse, or (2) injures him in his business, trade, profession, or office. *Life Designs Ranch, Inc. v. Sommer*, 191 Wn. App. 320, 328, 364 P.3d 129 (2015). Whether a given communication constitutes defamation per se may be either a question of law or a question of fact. *Id.* If the statements are sufficiently injurious to amount to defamation per se, the court assumes damages and the plaintiff need not prove actual damages. *Maison de France, Ltd. v Mais Oui!, Inc.*, 126 Wn. App. 34, 44-45, 108 P.3d 787 (2005). The imputation of a criminal offense involving moral turpitude has been held to be clearly libelous per se. *Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters*, 100 Wn.2d 343, 353, 670 P.2d 240 (1983). In all but these extreme cases, where the inquiry of what is libelous per se goes far beyond the specifics of a charge or crime, into the more nebulous areas of what exposes a person to hate or ridicule, becomes a question of fact for the jury. *Id.* at 354.

As set forth above, the statements by Defendants falsely impute criminal conduct to Plaintiff Shannon Pardee (CP 453-455), and include clear and blatant attempts mostly via social media to expose Plaintiffs to contempt, hatred or ridicule. CP 444-452, 456-479. Plaintiffs have proven that such statements amount to defamation per se.

2. Plaintiffs have established false light.

“False light differs from defamation in that it focuses on compensation for mental suffering, rather than reputation.” *Corey*, 154 Wn. App. at 762 (citing *Eastwood v. Cascade Broadcasting Co.*, 106 Wn.2d 466, 722 P.2d 1295 (1986)). “A false light claim arises when someone publicizes a matter that places another in a false light if: (a) the false light would be highly offensive to a reasonable person and (b) the actor knew of or recklessly disregarded the falsity of the publication and the false light in which the other would be placed.” *Eastwood*, 106 Wn.2d at 470-71. “So, like defamation, false light claims require a showing of falsity and knowledge of, or reckless disregard for that falsity.” *Corey*, 154 Wn. App. at 762. “Publicity” means “communication to the public at large so that the matter is substantially certain to become public knowledge, and that communication to a single person or a small group does not qualify.” *Fisher v. Dep’t of Health*, 125 Wn. App. 869, 879, 106 P.3d 836 (2005).

The statements at issue, set forth above satisfy the standard for establishing a claim for false light. The notion that the statements above by Defendants were made largely in a closed Facebook group (the ESBC Facebook site) intended for ESBC members - not the public at large - is erroneous because it ignores that other statements (CP 472-479) were made by Defendants on the ESBC nextdoor.com site, and that the ESBC

Facebook site includes those who are not members of the ESBC, including Defendants Dan Solie and Ashley Lieb.

D. Plaintiffs' requests for declaratory relief were not ripe for summary judgment.

It is generally held, under statutes similar to RCW 7.24, that declaratory and coercive relief may be combined in the same proceeding. *United Nursing Homes, Inc. v. McNutt*, 35 Wn. App. 632, 640, 669 P.2d 476 (1983). The court stated: "Granting damages in the declaratory action saved time and money and resolved the entire dispute." *Id.*

1. Regardless of whether Plaintiffs are currently seeking from Defendants review of ESBC records they previously sought, their cause of action for damages for Defendants previously imposing unreasonable charges for such records is not moot, but justiciable.

A case is technically moot if the court can no longer provide effective relief. *State v. Beaver*, 184 Wn.2d 321, 330, 358 P.3d 385 (2015); *Junamil v. Lakeside Casino, LLC*, 179 Wn. App. 665, 678, 319 P.3d 868 (2014). As explained in *Orwick v. City of Seattle*, 37 Wn. App. 594, 597, 682 P.2d 954 (1984), *rev'd on other grounds*, 103 Wn.2d 249 (1984), if a claim for damages exists, which represents an action for compensation for past misconduct, it cannot be mooted: "The dismissals have not affected their damage claim for compensation for past misconduct of the City. . . . A case is not moot where a court can still provide effective relief." See also *Board of Pardons v. Allen*, 482 U.S. 369, 370 n. 1, 107 S.Ct. 2415, 96

L.Ed.2d 303 (1987)(“The action is not moot, however. In addition to requesting injunctive and declaratory relief, the complaint sought damages. . . .”); *Bernhardt v. Cty. of Los Angeles*, 279 F.3d 862, 872 (9<sup>th</sup> Cir. 2002)(“A live claim for nominal damages will prevent dismissal for mootness.”)(citations omitted); *City of Richmond v. J.A. Croson Co.* 488 U.S. 469, 478 n.1., 109 S.Ct. 706, 102 L.Ed.2d 854 (1989)(“The expiration of the ordinance has not rendered the controversy between the city and appellee moot. There remains a live controversy between the parties over whether Richmond’s refusal to award appellee a contract pursuant to the ordinance was unlawful and thus entitles appellee to damages.”);

Paragraphs 21 and 32 of the Second Amended Complaint (CP 36 and 41) clearly state Plaintiffs have suffered *damages* in an amount to be proven at trial due to Defendants’ failure to let them inspect ESBC documents housed with Vantage Community Management, Inc. (“Vantage”), the community management company ESBC hired, and at the Evergreen Shores Beach Club Clubhouse, by imposing unreasonable costs of inspection far in excess of \$615 to inspect documents housed with Vantage, by completely ignoring their request to view documents housed at the Clubhouse, and by completely ignoring their abbreviated request for only legal correspondence housed at Vantage. At Paragraph 34 of the Second Amended Complaint (CP 41), Plaintiffs ask the trial court to resolve

their controversies with Defendants, including Vantage, by declaratory judgment. Furthermore, the “Prayer for Relief” in the Second Amended Complaint (CP 42), states that Plaintiffs pray for alternative forms of relief, including damages (A.), injunctive relief, including access to ESBC records housed at Vantage and the Clubhouse (B.5.), for a declaratory judgment setting forth Defendants’ rights and obligations (C.), and attorney fees and costs pursuant to RCW Chapters 49.60 and 64.38 (E.).

While Plaintiffs’ admission that they are no longer seeking access to ESBC records housed at Vantage arguably moots their claims for injunctive relief requesting access to such records (B.5. – CP 42), it does not moot their actions for damages and attorney fees and costs (A. and E. – CP 42) for the past conduct of Defendants in blocking access to records, and imposing unreasonable costs of inspection. Under the precedent above, Plaintiffs’ declaratory judgment action against Defendants as to access to records does not fail, since a justiciable controversy exists.

2. The ESBC’s attempts to amend the CC&Rs.

Paragraph 16 of the ESBC Division 3 Restrictive and Protective Covenants (“CC&Rs”) (CP 284), directly addresses enforcement of the CC&Rs, and allows for proceedings in equity to restrain violation of the CC&Rs, and states:

Enforcement shall be by proceedings at law or in equity against any person or persons violating or attempting to violate any covenants either to restrain violation or to recover damages.

(Emphasis added). See also *Mt. Park Homeowner's Ass'n v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994)(“Property owners have a right in equity to enforce restrictive covenants.”).

The interpretation of the language in restrictive covenants is a question of law. *Day v. Santorsola*, 118 Wn. App. 746, 756, 76 P.3d 1190 (2003). The primary goal in interpreting covenants that run with the land is to determine the intent or purpose of the covenants. *Id.*; *Wimberly v. Caravello*, 136 Wn. App. 327, 336, 149 P.3d 402 (2006)(“[O]ur primary task is to determine the intent of the drafters.”)(Brackets added). The courts apply basic rules of contract interpretation. *Wimberly*, 136 Wn. App. at 336. The courts interpret restrictive covenants to give effect to the intention of the parties to the agreement incorporating the covenants and to carry out the purpose for which the covenants were created. *Pritchett v. Picnic Point Homeowners Ass'n*, 2 Wn. App.2d 872, 879, 413 P.3d 604 (2018)(citing *Riss v. Angel*, 131 Wn.2d 612, 621, 934 P.2d 669 (1997)). The purpose of those establishing the covenants is the relevant intent. *Id.* at 879-880. The value of maintaining the character of the neighborhood in which the burdened land is located is a value shared by the owners of the other properties burdened by the same covenants. *Id.* at 880 (citations omitted).

Accordingly, we must place “special emphasis on arriving at an interpretation that protects the homeowners’ collective interests.” *Id.* (citations omitted). “If more than one reasonable interpretation of the covenants is possible regarding an issue, we must favor the interpretation which avoids frustrating the reasonable expectations of those affected by the covenants’ provisions.” *Id.* (citations omitted). In determining the intent of the parties to the agreement incorporating the covenants, we give “covenant language ‘its ordinary and common use’ and will not construe a term in such a way ‘so as to defeat its plain and obvious meaning.’” *Id.* (citations omitted); *Mains Farm Homeowners Ass’n v. Worthington*, 121 Wn.2d 810, 815, 854 P.2d 1072 (1993)(citations omitted); *Mt. Park Homeowners Ass’n v. Tydings*, 125 Wn.2d 337, 344, 883 P.2d 1383 (1994)(“A court must construe restrictive covenants by discerning the intent of the parties as evidenced by the clear and unambiguous language in the document.”) (Citations omitted). We examine the instrument in its entirety and use extrinsic evidence to “illuminate what was written, not what was intended to be written.” *Pritchett*, 2 Wn. App.2d at 880. (citations omitted). “[T]he intent of the homeowners who voted to adopt the covenants cannot be discerned through the post-hoc statements of individual board members.” *Pritchett*, 2 Wn.App.2d at 885 (brackets added).

Each Division<sup>6</sup> of the CC&Rs contains a provision outlining how and when CC&Rs may be changed or waived, which states:

Waiver or Change of Covenants: The restrictive covenants contained herein may be waived or changed by the majority of the then owners when land contours or other circumstances would cause an undue hardship. A majority of the then owners shall be the sole judge of the necessity for waiving or changing the restrictive covenants in cases of undue hardship.

CP 267, 275, 279-280, 285 (emphasis added).

In the minutes of the February 23, 2017 ESBC Board meeting (CP 480-482) the following is written about proposed amendments to the CC&Rs:

- CCR Amendments- Kendra McWain presented her CCR audit for the Board to review. Kendra shared the separate Divisions were very similar with minor differences. The amendment document is a working draft, which Kendra will continue to provide recommendation for amending and omitting information that needs to be better tailored to Evergreen Shores Beach Club HOA. The Board will collaborate together via email to finalize a draft that will be available to owners to review. A key will be provided as followed (sic): Blue - proposed new addition; Red - Proposed removal from current CCRs; Yellow - Proposed minor modifications. The efforts will be to update the CCRs by implementing more consistency throughout the Divisions. Kendra will form a redlined track changes document so all owners may see original CCR document and proposed amendments from the Board. All proposed amendments will be vetted by the Association's Attorney. Mailer notification will include a cover letter, notification of owner meeting, amendment(s), ballot, proxy, and return envelope. The owner meeting will allow for owners to speak before the Board regarding the amendments and will for a formal vote.

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<sup>6</sup> The Evergreen Shores neighborhood, which the ESBC Board administers, includes four divisions (1, 2, 2A, and 3).

At the ESBC annual meeting on May 17, 2017 (CP 483-485), Vantage made the following comments about revisions to the CC&Rs and ESBC Board priorities related to the same in the meeting minutes, stating in part:

[The ESBC] has four separate divisions and each division has different [CC&Rs]. The [Board] is planning to undertake a complete revision of the [CC&Rs]. The Board needs volunteers to help knock on doors and discuss the proposed CC&R changes. This project is about 6-12 months out but the Board would like to have volunteers in place to help move this process along.

(Brackets added).

In the February 2018 ESBC Newsletter a call is made for volunteers to participate on the CC&R Committee, which "will be working on revising and updating our CC&Rs, which are in bad need of updating! This committee will be a temporary committee, lasting through to a vote on passing the updated CC&Rs." CP 486-491.

Defendants never made the determination that circumstances caused an undue hardship warranting a change in the CC&Rs, as the latter requires. This constituted negligence of the Defendant ESBC Board members.

RCW 64.38.050 states in part: "Any violation of the provisions of this chapter entitles an aggrieved party to any remedy provided by law or in equity." RCW 64.38.025(1) addresses the duties of the board of directors of a homeowner's association such as the ESBC, and states:

Except as provided in the association's governing documents or this chapter, the board of directors shall act in all instances on behalf of the association. In the performance of their duties, the officers and members of the board of directors shall exercise the degree of care and loyalty required of an officer or director of a corporation organized under chapter 24.03 RCW.

(Emphasis added).

RCW 24.03.127, cross-referenced in RCW 64.38.025(1), establishes the duties of a director of a nonprofit corporation (such as ESBC – established May 16, 1969), and states in part:

A director shall perform the duties of a director, including the duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner such director believes to be in the best interests of the corporation, and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.

As the court indicates in *Waltz v. Tanager Estates Homeowners Ass'n*, 183 Wn. App. 85, 91-92, 332 P.3d 1133 (2014), RCW 24.03.127 establishes that ESBC Board members are potentially liable to the ESBC members for merely *negligent* acts, and states in part:

In the case of nonprofits organized under chapter 24.03 RCW, RCW 24.03.127 sets forth a reasonableness standard for directors in their dealings with the corporations and its members.

\* \* \*

Since the directors owed the Waltzes, as members of the corporation, the obligation to act in good faith with the care of an ordinarily prudent person, they could be liable to them for negligent actions. The trial court erred in applying the higher standard of gross

negligence. Thus, a new trial is needed at which the appropriate standard is applied.

(Emphasis added).

3. The CC&Rs prohibit the ESBC from renting the park and recreation area to non-members. Specifically, Plaintiffs' declaratory judgment claim as to Defendants' rental of the park and recreation area (Tract B) to the Black Lake Regatta and other outside third parties was not ripe for summary judgment because it ignores the fact that all ESBC members own Tract B as tenants in common (i.e., cotenants), and is contrary to the ESBC Articles and CC&Rs.

On June 27, 1973, the developer of the ESBC, SUNDOWN, Inc., executed a Quit Claim Deed, conveying to each lot owner, including Plaintiffs, a 1/482 interest in the park and recreation area (Tract B) of Evergreen Shores. CP 396. RCW 64.04.010 mandates that all conveyances of, and interests in, real estate in the state of Washington be by deed, and states in relevant part: "Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed." The June 27, 1973, deed created a tenancy in common between each ESBC member, including the Plaintiffs, Defendant ESBC members, and all other ESBC members, in the park and recreation area (Tract B).

RCW 64.28.020(1) creates a presumption of a tenancy in common where two or more persons receive an interest in real property, and states:

Every interest created in favor of two or more persons in their own right is an interest in common, unless acquired by them in

partnership, for partnership purposes, or unless declared in its creation to be a joint tenancy, as provided in RCW 64.28.010, or unless acquired by executors or trustees.

As the court explains in *Butler v. Craft Eng Construction, Inc.*, 67 Wn. App. 684, 695-696, 843 P.2d 1071 (1992), each cotenant in a tenancy in common has certain rights the other cotenants cannot infringe upon, namely the right to the possession, use and enjoyment of the *whole* of the property, stating:

These arguments are based upon a misunderstanding of the nature of a tenancy in common property interest. Each cotenant, regardless of the size of its undivided fractional share, has a co-equal right to the possession, use and enjoyment of the whole of the property, the only limitation being that it must exercise it right so as not to interfere with the co-equal rights of the other cotenants. *De La Pole*, 131 Wash. at 358, 230 P. 144.

*See also Herring v. Pelayo*, 198 Wn. App. 828, 837, 397 P.3d 125 (2017)(“Moreover, as tenants in common, the Pelayos and Herrings were each entitled to use, maintain, and possess the boundary tree, but not in a manner that ‘interfere[d] with the coequal rights of the other cotenants.’”)(citing *Cummings v. Anderson*, 94 Wn.2d 135, 143, 614 P.2d 1283 (1980), which recognized that “tenants in common have certain fiduciary duties toward each other”)(citing 4A R. POWELL, THE LAW OF REAL PROPERTY 605 (P. Rohan ed. 1979)).

In *Cummings*, 94 Wn.2d at 143, n.3, the court explained that two situations give rise to most of the problems involving existence and extent

of fiduciary relations between tenants in common, and stated that these are (1) the effort by one cotenant to buy in and later to assert a superior title to the detriment of his cotenants; and (2) the making of an agreement with other cotenants, in which some advantage is gained by ‘overreaching’ the others.” (Citing R. POWELL, *supra* at 619).

Even though Plaintiffs and their fellow ESBC members are entitled to jointly use and access the park and recreation area (Tract B), and actually own an undivided interest in Tract B as tenants in common, the Defendant ESBC Board members (they too fellow tenants in common) permit the Black Lake Regatta, not a member of the ESBC, to rent the entire park and recreation area, and exclude their fellow cotenants, including Plaintiffs. This was and is contrary to the rights of their cotenants to use, possess, and enjoy Tract B, and represented an attempt by a select few Defendant cotenants to assert superior title to Tract B over and above their fellow cotenants, and to make an agreement to overreach their fellow cotenants, including Plaintiffs, in violation of their fiduciary duties to their cotenants, including Plaintiffs. The conveyance in 1973 of Tract B to both Plaintiffs and Defendant cotenants as tenants in common was no accident, but was the intended consequence and result of a deliberate sequence of events set in motion by the founders and developer of the Evergreen Shores neighborhood via governing documents (Articles and CC&Rs) to protect

and preserve the *whole* of Tract B for the exclusive use, possession, and enjoyment of the ESBC members in perpetuity.

By contracting with the Regatta annually to rent property they and other ESBC members own (see above – and also CP 492-509 – which includes copies of the Regatta contract for 2015 through 2018, and declarations of ESBC members opposed to it), Defendant Nicholas Palmer and the other Defendant ESBC Board members have acted negligently by ignoring the ESBC Articles and Division 3 CC&Rs, thus triggering the Plaintiffs’ right to relief in equity pursuant to RCW 64.38.050.

The Preamble of the Division 3 CC&Rs (CP 282) sets forth the developer of the Evergreen Shores neighborhood’s purpose in enacting the ESBC CC&Rs, and states:

WE, the undersigned, officers of SUNDOWN, INC., being owners of all the property known as EVERGREEN SHORES, DIVISION THREE, in order to provide for the aesthetic, healthful, and uniform development of all said real property, and so as to provide further for a control of structures to be erected and improvements to be made upon said real property, on this 30 day of December, 1969, do hereby covenant and agree with each other to keep all of the covenants hereinafter set forth and which are hereby made applicable to the real property known as EVERGREEN SHORES, DIVISION THREE, and said covenants shall be binding upon the owners thereof to the extent provided in such covenants and subject to which covenants all of such property shall be owned, held, used, occupied, and developed.

(Emphasis added). The Preamble clearly establishes that all property in the Evergreen Shores neighborhood, including the park and recreation area (Tract B), shall be held, used and occupied consistent with the CC&Rs.

Paragraph 5 of the Division 3 CC&Rs (CP 283) includes a declaration of intent of the CC&Rs and states:

It is the intent that all dwelling and structures placed upon these lots be of a permanent finished residential and recreational character and appearance that does not detract from surrounding areas and is compatible and harmonious with the general area.

(Emphasis added). As defendant Nicholas Palmer readily admits in his January 31, 2018, e-mail correspondence (CP 393), the Regatta is the one exception to the no-events policy, and clearly not compatible or harmonious with the use of the park and recreation area by ESBC residents.

Paragraph 20 of the Division 3 CC&Rs (CP 285), mentioned earlier, specifically addresses the park and recreation area set out for the use of ESBC members in all ESBC Divisions (including Division 2 which Plaintiffs reside in). This Paragraph clearly mandates that the park be “jointly used by the owners of lots in all divisions” of ESBC, and not be cordoned off for exclusive use by the Regatta.

Article V, Section 1 of the ESBC Bylaws (CP 245) states in part:

Subject to any limitation in the Articles of Incorporation and these By-Laws, and the laws of the State of Washington, all the business and affairs of the corporation shall be controlled and conducted by the Board of Trustees.

(Emphasis added).

As Article V, Section 1 of the ESBC Bylaws alludes to, the ESBC Articles (CP 254) do in fact contain limitations on the control and conduct of the Board. Simply put, the Articles clearly demonstrate that one of the main obligation of the ESBC and its Board is to enforce the CC&Rs, of which the park and recreation area “shall be an integral part.”

Paragraph 3 of the Division 3 CC&Rs (CP 282), where the park and recreation area is located, prohibits certain temporary structures, including mobile homes and tents, and states:

Temporary Structures: No structures of a temporary character, including but not limited to trailers, basement houses, tents, garages, barns or other outbuildings shall be used on any lot at any time as a residence either temporarily or permanently. When referring to trailers, this term shall include all forms of trailers or mobile homes of any size, whether capable of supplying their own motive power or not, without regard to whether the primary purpose of which instrumentality is or is not the conveyance of persons or objects, and specifically including all automobiles, buses, trucks, cars, vans, trailers, and mobile homes even though they may be at any time immobilized in any way and for any period of time of whatever duration; provided, however, that tents and camper trailers shall be allowed as temporary residences for a period not to exceed one (1) month unless that period is extended, in writing, for a greater period of time by the Architectural Planning Committee.

The Defendants on the ESBC Board cannot reconcile allowing the Regatta, and its mobile homes and its tents, and other cars and other vehicles (such as trucks), that fill the park and recreation area as temporary

residences, with the provisions of the CC&Rs above. It can't be the exception in the last paragraph of Paragraph 3 of the Division 3 CC&Rs (CP 283), since that refers to someone being temporarily housed on a lot while they build a new structure on a lot (i.e., they are an ESBC member since they bought real property located in the ESBC), hence the mention of the Architectural Planning Committee giving permission to have temporary residences exist beyond one (1) month. To construe the covenant otherwise, would defeat the whole purpose of the CC&Rs above. Regardless, mobile homes and trucks are clearly prohibited under any circumstances in the park and recreation area under Paragraph 3 of the CC&Rs for Division 3. CP 282-283. Counter to this prohibition, the Regatta creates the presence of a lot of these in the park and recreation area (Tract B).

Paragraph 8 of the Division 3 CC&Rs (CP 283) states: "No noxious or offensive activity shall be carried on upon any lot, nor shall anything be done thereon which may become an annoyance or nuisance to the neighborhood." As the evidence above shows, the Regatta generates obnoxious noise; noxious odors; crowding; partying; blocks traffic on Lakeside Street in front of the gated entrance to the park and recreation area for vehicles; and constitutes a legal nuisance and annoyance under Paragraph 8 above. In other words, it violates the CC&Rs above.

The ESBC Articles of Incorporation state that one of the purposes

for the formation of the non-profit corporation was “to assume ownership of and the operation of and the governing of a tract of land . . . located on Division Three of [ESBC] and contains approximately three hundred front feet on Black Lake, and which tract consists of that certain [11-acre] park and recreation area as shown on the plat of EVERGREEN SHORES in Thurston County.” CP 253-254 (Brackets added). Paragraph 2 of the Articles states that one of the purposes of the ESBC is the “enforcement of all the restrictive covenants applicable to the plat of EVERGREEN SHORES (all Divisions) of which the park and recreation area shall be an integral part.” CP 254 (emphasis added). A copy of the filed plat for Evergreen Shores Division 3, which shows Tract B at page 72 thereof, is provided at CP 397-399.

What Defendant Nicholas Palmer absolutely ignores, does not understand, or is simply oblivious too, is that each ESBC member owns the park and recreation area (Tract B) via a tenancy in common, and each cotenant (including the Defendant ESBC Board members and Plaintiffs) has equal rights to possession, use, and enjoyment of the *whole* of Tract B, that their cotenants have no right to infringe upon, and if they do so infringe, violate fiduciary duties they owe to their cotenants. In other words, the Defendant cotenants that sit on the ESBC Board cannot cede the park and recreation area to any event, be it a wedding, the Regatta, or some other

function, that Defendant Nicholas Palmer readily admits would “shut down” the park and recreation area, and prevent his cotenants from the use, possession, and enjoyment of it, while at the same time violating the Articles and CC&Rs. As the court indicates in *Waltz v. Tanager Estates Homeowners Ass’n*, 183 Wn. App. 85, 91-92, 332 P.3d 1133 (2014), RCW 24.03.127 establishes that ESBC Board members are potentially liable to ESBC members for such *negligent acts*.<sup>7</sup> Consistent with these restrictions, the Common Area Rental Agreement only allows ESBC members to rent either the ESBC Clubhouse or Cookshed, located on the grounds of the park and recreation area, for certain times of day, but not the entire park and recreation area for consecutive days. CP 400-401. Such arrangement, unlike the Regatta, does not “shut down” the entire park, or result in Defendant cotenants infringing on their cotenants’ (including Plaintiffs) rights to the use, possession, and enjoyment of the park and recreation area (tract B).

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<sup>7</sup> RCW 64.38.025(1) addresses the duties of the board of directors of a homeowner’s association such as ESBC, and states:

Except as provided in the association's governing documents or this chapter, the board of directors shall act in all instances on behalf of the association. In the performance of their duties, the officers and members of the board of directors shall exercise the degree of care and loyalty required of an officer or director of a corporation organized under chapter 24.03 RCW.

(Emphasis added).

4. The ESBC is required to appoint an architectural planning committee, but has not done so.

The CC&Rs of every ESBC Division (CP 267, 275, 280, and 285) require that an Architectural Planning Committee be formed and established, consisting of three officers of the Board, and similarly state:

Architectural Control. No building or structure shall be placed, erected, or altered on any lot until the construction plans and specifications and a plan showing the location of the structure have been submitted and approved in writing by the Architectural Planning Committee, which shall be comprised of three (3) members who will be the elected officials of the EVERGREEN SHORES BEACH CLUB, INC. The determination of the Architectural Planning Committee will be based upon the quality of the workmanship and materials, harmony of exterior design with existing structures, and the location of the proposed building or structure with respect to the topography and finish grade elevation.

The ESBC and Defendant Board members have not complied with this provision. Plaintiffs have a right to enforce this covenant.

5. Defendants are prohibited from creating an enforcement policy independent from the CC&Rs.

The CC&Rs of every ESBC Division (CP 267, 275, 279, 284) contains a provision establishing the exclusive method of enforcement of the CC&Rs, which states:

Enforcement: Enforcement shall be by proceedings at law or in equity against any person or persons violating or attempting to violate any covenants either to restrain violation or to recover damages.

Proceedings at law or in equity to impose damages for violation of the CC&Rs, or to restrain violations of the same per the CC&Rs, equate to

actions in court, and the alternative remedies of either requesting an injunction to restrain a violation (in equity), or seek damages (at law). Black's Law Dictionary, 1241 (8<sup>th</sup> ed.) defines "proceeding" as: "1. The regular or orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment." It is clear that the developer of the ESBC neighborhood wanted to prevent ESBC Board actions against Board members for alleged violations of the CC&Rs without the due process protection of the courts. The alternative is that if the Board had an issue with a particular ESBC member they could take action outside the court system by imposing fines and possibly placing a lien on their property. The Board's unilateral passage of an Enforcement Policy with Fine and Fee Schedule (CP 288-293), which allows for the imposition of monetary fines against ESBC members for alleged violations of the CC&Rs runs directly counter to the language in the CC&Rs above.

E. *Given the evidence set forth above, Plaintiffs have established a claim for civil conspiracy against Defendants.*

In *W.G. Platts v. Platts*, 73 Wn.2d 434, 439, 438 P.2d 867 (1968) the Court explains that where means are employed, or purposes are accomplished, which are themselves tortious, that co-conspirators who do not act but simply promote the acts of fellow co-conspirators will be held liable. Also, a finding that a conspiracy exists may be based on

circumstantial evidence. *Corbit v. JI Case Co.*, 70 Wn.2d 522, 529, 424 P.2d 290 (1967). The test of the sufficiency of the evidence to prove a conspiracy is that the circumstances must be inconsistent with a lawful or honest purpose and reasonably consistent only with existence of the conspiracy. *Id.*

The Plaintiffs have shown evidence above of a conspiracy amongst the Defendants to discriminate in violation of the WLAD, to defame and put in a false light Plaintiff Shannon Pardee, and to violate the governing documents of the ESBC community (Articles, Bylaws, and CC&Rs).

#### CONCLUSION

For the foregoing reasons, this case should be remanded for trial on the causes of action set forth in Plaintiffs' Second Amended Complaint for Damages, Declaratory Relief, and Injunctive Relief (CP 32-43) because genuine issues of material fact remain, and Defendants are not entitled to judgment as a matter of law on those causes of action.

DATED this 28<sup>th</sup> day of June 2019.

Respectfully submitted,



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William G. Pardee, Appellant  
WSBA #31644

**DECLARATION OF SERVICE**

I, William G. Pardee, hereby certify as follows:

I am a counsel of record for Plaintiffs, and am over the age of 18.

On the date set forth below, I served via e-mail a copy of the “Appellants’

Amended Opening Brief” on the following:

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