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NO. 53126-7-II

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

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

v.

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.

**BRIEF OF RESPONDENT EVERGREEN
SHORES BEACH CLUB**

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I. INTRODUCTION

The lawsuit resulting in this appeal is simply a dispute amongst neighbors taken too far. When the Appellants did not get their way, they could not reconcile that reasonable people could possibly disagree with them and instead chose to make everybody's life incredibly difficult. When the Respondents did not bend to the will and outbursts of the Appellants, the Appellants instigated litigation using theories of law designed to protect vulnerable members of our society. The pettiness of the claims was evident from the beginning and the trial court recognized as much when it granted the Respondents motion for summary judgment. The respondents respond to the appellants appeal of that decision and are confident that this court will see the wisdom used by the trial court and affirm its ruling.

II. STATEMENT OF ISSUES

1. Did the trial court correctly find that the Appellants failed to present evidence warranting a trial on the claims of discrimination, retaliation, defamation, defamation *per se*, and false light?

2. Did the trial court correctly determine that Appellants failed to prove that there were any genuine issues of material fact as to any of their remaining claims, including all claims for declaratory and injunctive relief?

III. STATEMENT OF THE CASE

A. Factual And Procedural Background

Appellants (the “Pardees”) and the individual Respondents are members or former members of the Evergreen Shores Beach Club (“ESBC”), a homeowners association. Additionally, most of the individual Respondents are current or former board members of the ESBC Board of Trustees (“Board”).

The case arises from a series of disputes involving the Pardees in opposition to ESBC and the Board. Specifically, the Pardees alleged violations by ESBC and the Board of ESBC’s governing documents, including the Covenants, Conditions and Restrictions (“CCRs”), the Articles of Incorporation (“Articles”) and the Bylaws (collectively “governing documents”).

Additionally, on August 7, 2018, the Pardees filed a Second Amended Complaint (“Complaint”) (CP 32-43) in which they alleged that they were the victims of discrimination, retaliation, defamation and that the defendants named in the Complaint violated the governing documents and should be liable for damages related to those claims and violations. The basis of the Pardees’ Complaint was that Ms. Pardee was treated unfairly by ESBC and the Board as the result of her being a member of a protected class. Then, when Ms. Pardee took issue with the allegedly

unfair treatment, the Pardees claim that ESBC and the Board defamed her and retaliated against her by removing her from her Board position and from a Facebook page.

Following a lengthy period of discovery, including depositions of many of the principal parties, the Respondents filed a motion for summary judgment with prejudice against the Pardees (“MSJ”) (CP 97-123). As part of that motion, ESBC explained to the trial court using clear evidence from the depositions of the parties and the prevailing case law, that there was no discrimination against Ms. Pardee based on her status as a member of a protected class. Additionally, it showed that the statements that allegedly defamed Ms. Pardee were either statements of fact that were at least generally true, or were statements of opinion. Finally, ESBC successfully demonstrated to the trial court that the issues on which the Pardees sought declaratory and injunctive relief were related to either hypothetical disputes, moot issues (by the Pardees’ own testimony), or that the actions taken by ESBC were allowed by the plain text of the governing documents.

The Pardees attempted to argue that the term “creed” as used in Washington’s Law Against Discrimination (“WLAD”) (RCW 49.60) could mean a person’s personal, undefined beliefs as opposed to a religion or specific religious or spiritual belief and that was the basis of the alleged

discrimination. The Pardees also attempted to argue that unflattering comments about a person made within a small community of homeowners constituted defamation. Additionally, the Pardees claimed that a difference in opinion on the interpretation of bylaws and even a minor deviation from the strict adherence to specific provisions constituted a *per se* violation under Washington law and that ESBC and the Board should be liable to the Pardees for damages as a result.

The trial court granted the Respondents' MSJ on February 4, 2019 (CP 581), opining that the Pardees "failed to present evidence warranting a trial on any of their claims under CR 56." *Id.* The trial court also found that, "while it is clear that Plaintiffs [the Pardees] unfortunately have a difficult time with their neighbors, Plaintiffs have failed to prove there is a genuine issue of material facts as to any of their remaining claims." *Id.* The Pardees filed a motion for reconsideration (CP 582-597), which was denied on February 15, 2019. (CP 600) The Pardees then filed this appeal.

IV. ARGUMENT

A. Standard of Review.

In reviewing a summary judgment order, this court evaluates the matter *de novo*, performing the same inquiry as the trial court. *Snohomish County v. Rugg*, 115 Wn. App. 218, 224, 61 P.3d 1184 (2002).

B. The Trial Court Properly Granted ESBC's Motion for Summary Judgment.

The trial court granted ESBC's motion for summary judgment because it found that ESBC's legal arguments were correct regarding the claims brought by the Pardees and that there were no remaining genuine issues of material fact which could result in a finder of fact determining that ESBC was liable to the Pardees under any of the claims included in the Pardees' Complaint. (CP 581) Because the trial court's findings and legal determinations were correct based on the clear meaning of the WLAD, the lack of evidence presented by the Pardees, and the lack of genuine issue of material fact remaining, this court should affirm the trial court's order.

1. The Trial Court Properly Ruled That the Pardees Did Not Present Sufficient Evidence to Warrant a Trial on the Claims of Discrimination and Retaliation.

The Pardees claim that ESBC discriminated against Ms. Pardee because of her sex, disability, and creed in violation of Washington's Law Against Discrimination ("WLAD"), RCW 49.60.030(1)(b). The Pardees alleged that this discrimination took the form of increased scrutiny on Ms. Pardee's attempt to rent the clubhouse and cook shed of the Evergreen Community Park ("Park") and removal of Ms. Pardee from a Facebook group. The Pardees further allege that ESBC retaliated against Ms. Pardee

by removing her from the Board due to the filing of the lawsuit that gives rise to this appeal.

a) The Pardees failed to establish a *prima facie* case of discrimination against the Respondents.

To make a *prima facie* case under the WLAD, a plaintiff must establish four elements: (1) that the plaintiff is a member of a protected class, RCW 49.60.030(1); (2) that the defendant is a place of public accommodation, RCW 49.60.215; (3) that the defendant discriminated against the plaintiff, whether directly or indirectly, *Id.*; and (4) that the discrimination occurred “because of” the plaintiff’s status or, in other words, that the protected status was a substantial factor causing the discrimination, RCW 49.60.030. *State v. Arlene's Flowers, Inc.*, 187 Wn.2d 804, 821–22, 389 P.3d 543, 551–52 (2017), cert. granted, judgment vacated on other grounds, 138 S. Ct. 2671, 201 L. Ed. 2d 1067 (2018)

The Pardees make no assertion that any disability contributed to the alleged discrimination. Therefore the factors for finding discrimination based on disability will not be addressed here. Instead, the Pardees claim that Ms. Pardee was discriminated against because of her “creed”. However, rather than accepting that creed is synonymous with religion, the Pardees claim that creed should be defined more broadly to include “a formulation or epitome of principles” (as defined in Webster’s

Third International Dictionary, 533(2002)). In addition to this being an absurd attempt to obfuscate the literal meaning of words by using alternative definitions, there is significant Washington authority to establish that the term “creed “ is a synonym for religion within the context of the WLAD.

Washington courts have long equated the term “creed” in the WLAD with the term “religion” in Title VII of the Civil Rights Act of 1964 (Title VII). *Kumar v. Gate Gourmet Inc.*, 180 Wn.2d 481, 489, 325 P.3d 193, 197 (2014).¹ The trial court considered the Pardees’ argument that “creed” as defined in the WLAD can mean an amorphous and undefined set of ethical and/or moral principles that are not previously established, are individualistic, and determined only by the person by whom the characteristic is claimed. The trial court found this argument insufficient.

¹ See *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 61–62, 837 P.2d 618 (1992) (stating that “Title VII of the Civil Rights Act of 1964 is the federal counterpart to our state law” and referring to “federal and state law against religious discrimination”) (emphasis added). *Accord Riste v. E. Wash. Bible Camp, Inc.*, 25 Wn.App. 299, 302, 605 P.2d 1294 (1980) (finding the term “creed,” as used in the WLAD, to mean “a system of religious beliefs”).

As an example of why the Pardees argument is dangerous, Webster's dictionary also now includes an alternative definition of the word "literally" that states "literally" can be, "used in an exaggerated way to emphasize a statement or description that is not literally true or possible." Courts use the plain meaning of words that most clearly and obviously reflect the intent of the drafters rather than use alternative definitions reflecting obfuscation of the English language. Our starting point must always be "the statute's plain language and ordinary meaning." *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wash.2d 9, 19, 978 P.2d 481 (1999). If "creed" can mean "literally" any personal belief or motto or preferences for behavior, then it also would mean "literally" nothing.

In addition to providing zero legal authority showing that the courts have interpreted the term "creed" in the manner the Pardees desire, the Pardees also do not state which specific part of Ms. Pardee's "creed" was the basis for the alleged discrimination. They also do not provide any evidence that demonstrates that ESBC or the Board stated any particular belief held by Ms. Pardee was the reason for her dismissal from the Board or for the allegedly extended time it took for the Board to grant her access to the clubhouse. Simply stating that there must have been a reason for something is not proof that the reason exists. In fact, Mr. Pardee admitted in his deposition testimony (CP 101) that Ms. Pardee was able to rent the

portion of the park she requested (the cookshed) once the board completed the necessary procedural steps. He actually stated that, “nobody said specifically you can’t rent it.” *Id.*

The Pardees attempt to conflate the terms arbitrary and discriminatory when describing the process for renting the park. As an organization run by volunteers, there may have been inefficiencies which caused Ms. Pardee to be frustrated and feel as though the process was arbitrary, but that has nothing to do with discrimination and the Pardees have never presented any evidence of specific discrimination against Ms. Pardee. There is no evidence presented that other people seeking to rent the facilities were treated any differently than Ms. Pardee. Not only would the Pardees have to show that they were treated differently, but they would have to show that the reason for the allegedly disparate treatment was a specific fact about them that made them members of a protected class. The Pardees fail on both counts, which is why the trial court properly concluded that there was no discrimination against the Pardees.

Additionally, the Pardees claim that Ms. Pardee’s removal from a Facebook group that talked about ESBC activities was an act of discrimination. Yet, the Pardees again fail to provide any evidence that Ms. Pardee was removed from the group based on her inclusion in a protected class of people. Further, there is no evidence provided by the

Pardees that the removal was for anything beyond personality clashes. The Pardees' argument rests on the allegation that the Facebook group in question was run by ESBC Board members and that ESBC is directly responsible for controlling who has access to the Facebook page. Not only are the Pardees inaccurate, but they also miss the point. Ms. Pardee does not allege that she was removed from the Facebook group because of her status as a woman, a disabled person or a member of a religious creed, and, therefore, there is no protection under the WLAD. Frankly, the Pardees attempts to fit themselves into a protected class is distasteful given that the purpose of the statute is to protect vulnerable members of our society. People who cannot get along with others is not a protected class of people. The trial court found that the Pardees' argument does not pass legal muster, and this court should affirm the trial court's ruling on this issue.

b) The Pardees failed to establish retaliation.

The Pardees allege that Ms. Pardee was retaliated against by being removed from the ESBC Board and that any adverse action taken against a WLAD plaintiff is tantamount to retaliation.

To maintain a retaliation claim under the WLAD (RCW 49.60), a plaintiff must establish that (1) she participated in a statutorily protected activity, (2) an adverse employment action was taken against her, and (3)

her activity and the employer's adverse action were causally connected. *Hollenback v. Shriners Hosps. For Children*, 149 Wn.App. 810, 821, 206 P.3d 337 (2009). The plaintiff need not show that retaliation was the only or “but for” cause of the adverse employment action, but she must establish that it was at least a substantial factor. *Allison v. Housing Auth. of City of Seattle*, 118 Wash.2d 79, 85–96, 821 P.2d 34 (1991). *Sambasivan v. Kadlec Med. Ctr.*, 184 Wn. App. 567, 590, 338 P.3d 860, 872 (2014).

In *Galbraith v. TAPCO Credit Union*, 88 Wn. App. 939, 946-52, 946 P.2d 1242 (Div. 2) (1997), a case concerning a credit unions decision to terminate a member’s membership, the court stated that the “WLAD is not limited to employment discrimination but rather guarantees the right to be free of discrimination in non-employment settings as well.” The court avoided using “employment” language by stating that, to defeat summary judgement, the plaintiff had to show 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 [the credit union’s] decision to expel him.”

Interestingly, a case came out one year later that seems to disagree. In *Malo v. Alaska Trawl Fisheries, Inc.*, 92 Wn. App. 927, 930, 965 P.2d

1124 (Div. 1)(1998), the Court concluded that the plaintiff, a captain of a trawler, could not sue his co-captain for his part in refusing to rehire the plaintiff because the co-captain was not an employer. The Court wrote:

Provisions in a statute are to be read in the context of the statute as a whole. Applying these principles of statutory construction to the present statute, we hold that the general term “or other person” is restricted by the words “employer,” “employment agency” and “labor union.” The section, read as a whole, is directed at entities functionally similar to employers who discriminate by engaging in conduct similar to discharging or expelling a person who has opposed practices forbidden by RCW 49.60. There, Campbell did not employ, manage or supervise Malo. He was not in a position to discharge Malo or to expel him from membership in any organization.

The Pardees’ argument fails under both Galbraith and Malo. If this Court were to adopt Malo’s reasoning, which is the most recent and analogous authority on this issue, then the Pardees have failed to establish that they have a claim for retaliation at all. Not only have they failed to establish that the Board discriminated against Ms. Pardee, but they have failed to prove that the Board is functionally similar to an employer for which they could remove her from the Board. That is because no member of the ESBC Board was in a position to remove Ms. Pardee from the

Board. Such a removal could only be accomplished by a vote of the entire membership. And that is exactly what occurred here. Over 300 members voted her off of the Board. Similarly, the Pardee's argument fails under Galbraith because they provided no evidence that Ms. Pardee was retaliated against for engaging in a protected activity or that the protected activity was a substantial factor behind the Board's decision to remove her from office. As stated above, the members of the HOA voted her off the Board.

However, for the sake of argument, even if the Pardees were able to establish discrimination, which the trial court properly concluded they failed to do, then the Respondents have provided evidence of a legitimate nondiscriminatory reason for the allegedly adverse action. As stated throughout the record, Ms. Pardee was informed directly of the reasons for her removal from the Board. Specifically those reasons were, "general lack of candor, difficulty working with others, unprofessional communications, and interference with board and ESBC projects and their contractors." (CP 443). In fact there is substantial evidence in the record that Ms. Pardee's disagreements with Board members and her disruptive activities long preceded the filing of the subject lawsuit, and that her actions separate and apart from the litigation activities continued to interfere with the regular business of the ESBC. As a result, the Board

determined that her continuing in her position as a director would continue to adversely affect the community.

There is no evidence presented, besides innuendo and presumption, to demonstrate that this was not the sole reason for her removal. The Board did not vote Ms. Pardee off of the board, but instead it was 300 members of her community that voted to remove her from her Board position. The alleged facts presented by the Pardees only prove that the community at large was organized and resolved to rid itself of an individual who made their lives more difficult on a regular basis. This court should affirm the trials court's finding that the Pardees failed to establish a claim for retaliation.²

² Of note, the *Mikkelson* case cited by the Pardees is not on point as it relates to the act of discrimination as opposed to retaliation. The word "retaliation" appears nowhere in the opinion. The inferential evidence standard also only creates a rebuttable presumption, and when the presumption is rebutted (as it was here), then the plaintiff would have the burden to present evidence of pretext or that retaliation was a substantial factor in the adverse action to the extent that creates a genuine issue of material fact. The Pardees presented no evidence of pretext to the trial court.

2. The Trial Court Properly Ruled that the Pardees Did Not Present Sufficient Evidence to Warrant a Trial on the Claims of Defamation, Defamation *per se* and False Light.

a) The Pardees failed to establish that the statements made by ESBC and the Board were not true or went beyond personal opinion.

ESBC carefully analyzed each of the statements that formed the basis of the Pardees' defamation claims and established to the trial court that *all* of the statements were either substantially true or were personal opinion and were, therefore, not defamatory. Rather than rebutting ESBC's analysis, the Pardees merely "disagree", skip any reasonable analysis and actually continue to present false evidence to this court in an attempt to continue with their baseless claims.

A defamation plaintiff must prove four elements: (1) falsity, (2) an unprivileged communication, (3) fault, and (4) damages. *LaMon v. Butler*, 112 Wn.2d 193, 197, 770 P.2d 1027, *cert. denied*, 493 U.S. 814, 110 S.Ct. 61, 107 L.Ed.2d 29 (1989). "When the defamed party is a public figure or public official, he or she must establish actual malice. If, on the other hand, the defamed party is a private figure, only negligence need be shown." *Demopolis v. Peoples Nat'l Bank*, 59 Wn.App. 105, 108 n. 1, 796 P.2d 426 (1990) (citing *LaMon*, 112 Wn.2d at 197, 770 P.2d 1027). "The negligence standard is that the defendant knew or, in the exercise of reasonable care, should have known that the statement was false or would create a false

impression in some material respect.” *Vern Sims Ford, Inc. v. Hagel*, 42 Wn.App. 675, 680, 713 P.2d 736 (1986) (citing *Taskett v. KING Broadcasting Co.*, 86 Wash.2d 439, 445, 546 P.2d 81 (1976)).

A threshold requirement of defamation is that the alleged defamatory statement be a statement of fact and not just opinion. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 55, 59 P.3d 611 (2002). To determine whether the statement is actionable, the court must consider: “(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.” *Dunlap v. Wayne*, 105 Wash.2d 529, 539, 716 P.2d 842 (1986). Whether a statement is one of fact or opinion is a question of law unless the statement could only be characterized as either fact or opinion. *Id.* at 540.

With respect to falsity, Washington does not require a defamation defendant to “prove the literal truth of every claimed defamatory statement.” *Mark v. Seattle Times*, 96 Wn.2d 473, 485, 635 P.2d 1081 (1981). “A defendant need only show that the statement is substantially true or that the gist of the story. *Mohr v. Grant*, 153 Wn.2d 812, 825, 108 P.3d 768, 775 (2005) (quoting *Mark v. Seattle Times*, 96 Wn.2d 473, 485, 635 P.2d 1081 (1981)). “The prima facie case must consist of specific, material facts, rather than conclusory statements, that would allow a jury to find that each element of defamation exists.” *LaMon v. Butler*, 112 Wn.2d 193, 197, 770 P.2d 1027 (1989).

Here, all of the allegedly defamatory statements are either substantially true or are merely opinion. The statements quoted by the Pardees that state that Ms. Pardee is a “bully”, she is “unstable”, “Crazy”, “insane”, a “plague”, “delusional”, etc. are subjective determinations that do not imply undisclosed facts- i.e. they are personal opinions based on peoples’ interactions with Ms. Pardee. The Pardees brief discusses only statements that are either opinions or that have been shown to be substantially true. Meanwhile, in the first paragraph of the Pardees’ brief, they discuss “Kris Kinnear’s involvement with the phony 911 call made on May 15, 2018)” (CP 453-455). However, it has been clearly established that Ms. Kinnear was not involved in the 911 incident. The Pardees go on to cite CP 455 and state that Ms. Kinnear is listed as the complaining party when in fact Ms. Kinnear did not make the 911 call that day and her name does not appear anywhere on the 911 call sheet. (CP 453-455). Further, the Pardees do not explain where the 911 call may have been published or by whom. It is this clear lack of engagement with the facts that pervades the Pardees’ defamation claims.

b) The Pardees have failed to present evidence that the statements made by ESBC and the Board were defamation *per se*.

A defamatory publication is libelous 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. *Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 100 Wn.2d 343, 353, 670 P.2d 240, 245 (1983). Defamation per se generally requires imputation of a crime or communicable disease. *Davis v. Fred's Appliance, Inc.*, 171 Wn. App. 348, 367, 287 P.3d 51, 61 (2012). Truth is an absolute defense to a *per se* defamatory statement.” *Id.*

The Pardees allege that the statements made in the 911 call constitute defamation *per se*, though they fail to present evidence as to who actually made the phone call and even if they did they fail to present evidence that said statement was published. Finally, the Pardees make the conclusory statement that they have proven that such statements are defamation *per se*, however, they fail to provide the court with more than statements that amount to opinion and do not imply facts not known to the general community to whom they were published.

c) The Pardees have failed to present evidence of false light.

False light differs from defamation in that it focuses on compensation for mental suffering, rather than reputation. *Eastwood v. Cascade Broadcasting Co.*, 106 Wn.2d 466, 471, 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.” *Id.* at 470–71, 722 P.2d 1295. So, like defamation, false light claims require a showing of falsity and knowledge of, or reckless disregard for that falsity. *Corey v. Pierce Cty.*, 154 Wn. App. 752, 762, 225 P.3d 367, 373 (2010).

Besides the fact that the statements allegedly giving rise to a claim for false light have all been shown to be either substantially true or personal opinion, the statements were also made to a largely closed community of people and not widely distributed to the public at large. Additionally, the Pardees are not making any claims for medical expenses which is generally the focus of false light claims (e.g. claims for mental anguish resulting in psychological treatments) likely because they are unable to prove damages for mental suffering. The trial court found a clear lack of evidence that could potentially prove the Pardees false light claim and properly dismissed the claim. This court should affirm.

C. The Trial Court Properly Granted ESBC’s Motion for Summary Judgment regarding the Pardees’ claims for Declaratory and/or Injunctive Relief.

1. The trial court properly dismissed the Pardees claim for declaratory relief related to its request to review ESBC’s records.

The Pardees conceded that they are no longer seeking review of ESBC’s records. Therefore, the trial court properly granted summary judgment on the Pardees request for declaratory relief because there is no issue remaining for a trier of fact to decide. The Pardees claim that the

request should survive summary judgment because they should be compensated for ESBC's prior allegedly bad actions, but the Pardees are incorrectly assuming that their concession that they no longer want to review the records was the reason for the trial court's decision. It is more likely that the request was denied because there was no evidence presented that the Pardees were ever denied access or suffered damages as a result of being unable to access records. ESBC's property manager, Vantage, received a request from the Pardees to review ESBC's records and Vantage explained that there was a large volume and that it would cost \$615 dollars to inspect the documents. The Pardees then brought their lawsuit before inspecting the records. The Pardees were not denied access to the records they sought and they now no longer seek to review those records. Therefore, the trial court properly denied the request as part of its ruling on summary judgment and this court should affirm.

2. The trial court properly found that ESBC did not violate the CCRs when it considered amending the CCRs.

The Pardees allege that the Board has violated the CCRs by considering amendments without the alleged requirement that the CCRs can only be changed do to an undue hardship as a result of "land contours or other circumstances". The Board was only just beginning to consider updating portions of the CCRs (as is clear from the communications cited

by the Pardees). They were planning to reach out to the community members and get input on potential changes. (CP 114) According to the Pardees the violation that gives rise to this request for declaratory relief is that there was no articulation of the circumstances creating undue hardship necessitating the changes.

The Pardees once again miss the point and further demonstrate that this lawsuit is simply an unwarranted extension of a dispute between neighbors. The Board had not actually proposed specific changes at the time the Pardees filed this lawsuit. The purpose of seeking declaratory relief appears to be for the express purpose of preventing the Board from making any changes even if changes are needed. The purpose of the statutes and the cases cited by the Pardees was not to prevent communities from improving their communities, but rather to prevent wanton violations of CCRs that would likely cause damage to peoples real property. The consideration of changes and deliberation amongst a community regarding the best way to improve their community is not the type of activity that is meant to be curtailed. The Board did not take unilateral action or any action at all, it simply let the community know it was considering making some changes and was asking for input. The trial court likely determined that this issue was not ripe for declaratory relief as there has been no

action taken by the Board and there were no specific proposed changes, therefore this court should affirm.

3. The Trial court properly denied the Pardees request for declaratory judgment related to the Black Lake Regatta's rental of the park.

The Pardees spend 8 pages of their brief explaining how the use of the ESBC clubhouse and park property for the Black Lake Regatta is in violation of the CCRs and therefore that the court should step in and prevent ESBC from renting its property to the organization that runs said event. The legal theory that the Pardees attempt to use is that the Evergreen community members own the park as tenants in common and, by renting to a non-tenant entity, tenants who have an equal right to use the property are excluded from use of their property. This is an absurd theory that would have terrible consequences when considering a community park.

The purpose of interpreting CCRs is for the Court to determine the intent of the parties. *See Riss v. Angel*, 131 Wn. 2d 612, 621, 934 P.2d 669 (1997). Not only is there no provision of the CCRs that restricts the use of the property to residents only, but the Board and ESBC did not act unilaterally to allow the Black Lake Regatta to rent the park to the detriment of the community members. The Board actually presented the plan to the community at large and note that this one event would be an

exception to the general rule of not renting out the entire park for events. The purpose of not renting out the entire park for events was to ensure that the community members would always have access to at least a portion of the park. By presenting this to the community and allowing the community at large to vote on whether to create this one-off exception, the Board did not act at all, rather the community acted as a whole. The Black Lake Regatta was also forced to create a section of seating that would be for the use of community members only and community members were granted free admission to the event.

While the Pardees may prefer to not allow the Black Lake Regatta to go forward, the majority of the community acted together to vote favorably for the event. The CCRs were created to establish the expectations and restrictions for the community, they were not created to be the strict, forever rules of the community even when the community members determine that changes should be made. The Pardees' theory, community members (as owners of the entire park as tenants in common) would need access to the entire park at all times to ensure their property rights were not impinged upon. When taken to its logical conclusion, this would prevent any person from renting or reserving any portion of the park because it could prevent other community members from using that portion of the park. The trial court likely determined that it was not the

court's place to prevent a community from coming together and making their own determinations for how best to use its property. This is not a situation where Board members were acting for their own benefit or that a minority of community members were profiting by excluding other community members. This court should affirm the trial court's decision.

4. The Trial Court correctly denied the Pardees' request for declaratory relief regarding the appointment of an architectural committee.

The CCRs clearly do not require the appointment of an architectural committee when such a committee's assistance is not required. (CP 116). The CCRs simply explain the duties of such a committee if appointed. The purpose of this committee would be to assist the Board and if the Board does not require the assistance of the committee then there is no requirement for one to be appointed. The Pardees failed to present evidence that an architectural committee is required and thus the request for declaratory judgment was properly denied and this court should affirm.

5. The trial court correctly determined that the enforcement actions of ESBC were not in violation of the governing documents.

The Pardees assert that the provision of the governing documents that indicates that enforcement shall be by proceeding at law or in equity equates to legal proceedings in a court of law. The plain meaning of the

quoted language is inapposite to the Pardees' assertion. The word "or" comes before "in equity" meaning that in equity is clearly meant to have a different meaning (which it literally does) than "at law". A proceeding in equity can (and here it does) mean a proceeding of any kind seeking a fair outcome. Here, the alleged action in violation of this provision was the creation of a Fine and Fee schedule for violations of the CCRs by ESBC homeowners. That schedule was created by the Board for the purpose of equitably enforcing minor violations of CCRs without incurring the costs of litigation over minor offenses. Any dispute regarding the terms of that policy could be brought to the attention of the Board or, if necessary, litigated; but, the initial creation of the policy is clearly allowed by the plain language of the CCRs and does not violate governing documents in any way. The trial court made this same determination and this court should affirm.

D. The Pardees Presented No Evidence of Civil Conspiracy.

The Pardees simply make a conclusory statement that that they have shown evidence of civil conspiracy but make no presentation of what that evidence might be. They fail to provide sufficient evidence to raise a genuine issue of material fact on this issue especially because the trial court also found that there was no underlying tort about which anybody

could have conspired. Without any underlying tort and without any presentation of evidence supporting the civil conspiracy claim, this court should affirm the trial court's ruling.

V. CONCLUSION

The trial court determined that the Pardees failed to present any evidence that could possibly allow a reasonable finder of fact to find in their favor and thus determined that a trial was not warranted. The Pardees did nothing in their appeal to present new evidence or present any evidence that could create a genuine issue of material fact that could result in a verdict in their favor. Thus, the Pardees have failed to meet their burden and this court should affirm the trial court's decision on summary judgment.

RESPECTFULLY SUBMITTED this 7th day of August, 2019.

BETTS, PATTERSON & MINES, P.S.

By /s/ Shawna M. Lydon

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CERTIFICATE OF SERVICE

I, Sally Phillips, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts Patterson & Mines, One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on August 7, 2019, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Brief of Respondent; and**
- **Certificate of Service.**

Counsel for Plaintiffs William G. Pardee and Shannon D. Pardee
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- U.S. Mail
- Hand Delivery
- Facsimile
- Overnight
- E-mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 7th day of August, 2019.

/s/ Sally Phillips
Sally Phillips, Legal Assistant

BETTS, PATTERSON & MINES, P.S.

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