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No. 542811-II

Jefferson County Cause No. 18-2-00139-16

IN THE COURT OF APPEALS, DIVISION II

FOR THE STATE OF WASHINGTON

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JAMES AND MARCIA KRELL

Appellants/Plaintiffs

vs.

KIRK AND KIM BOYS

Respondents/Defendants

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Appellants' Opening Brief

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## **A. INTRODUCTION**

This appeal deals with these questions-(1) when a good faith claim is made showing a controversy and the Defendant does not contest, does that result in judgment for Plaintiff or dismissal of Defendant, (2) who are the appropriate parties in an easement dispute and (3) does the servient estate have a duty to take affirmative action to prevent harm to the dominant estate by third parties? Appellants Jim and Marcia Krell (hereinafter referred to as “Krells”) seek a reversal of the order dismissing Respondents Kirk and Kim Boys (hereinafter referred to as “Boys”) and reversal of the judgment awarding \$28,483.94 attorney fees to Boys. Krells, the dominant estate, brought a quiet title action per RCW 7.28.010 and declaration of rights claim to establish their expressly granted easement across the Boys courtyard, the servient estate, when Boys allowed the Co-Defendant and Respondent Port Ludlow Townhome Association (hereinafter referred to as “PLTHA”) to install a gate on Boys lot. Krells also claimed a quiet title, declaration of rights, trespass and damages against PLTHA.

Krells averred they have easement rights in Boys’ courtyard per the CC&Rs’ section 14.3. Boys and PLTHA admitted in their answers Krells express easement rights existed. Boys and PLTHA denied Krells’ claim the scope of the easement did not permit a gate and the gate was unreasonable, putting the scope at issue. Krells’ claim (1) the CC&Rs do not expressly

authorize a gate and are silent, (2) Boys and PLTHA claim that the gate was necessary for “standardization” and “safety” is not supported (3) and the gate was an unreasonable interference due to Krells’ medical needs. PLTHA did not plea any interest in the Boys’ courtyard. Boys changed their stance in litigation, taking no position if the gate is unreasonable, claiming no controversy now existed. Boys moved for dismissal per CR 56 on the theory there were no facts to show PLTHA acting as Boys agent and then in rebuttal briefing contended there was no dispute to resolve. The Trial Court granted dismissal with prejudice, finding no agency, and no dispute to Krells quiet title claim, refusing to determine the scope, but allowing the gate to remain for now. The Trial Court held Boys “prevailed,” awarding Boys \$28,483.94 in attorney fees, when it should have issued judgment quieting title and declaring no gate in Krells’ favor.

## **B. ASSIGNMENT OF ERRORS**

1. The Trial Court erred by dismissing Boys from the action, necessary parties to an *in rem* proceeding, without making a final determination concerning the rights of the parties.
2. The Trial Court erred by holding no party was disputing the Krells’ easement, but then dismissed the Krells’ quiet title claim to the easement across Boys’ courtyard.

3. The Trial Court erred by dismissing Krells' declaration of rights claim against Boys, when there was an issue raised in the pleadings to be resolved concerning the scope of the easement, there was nothing in the governing documents that expressly permitted a gate, and whether a gate was needed for safety or standardization reasons was contested, but then Boys changed their position in their briefing, stating they did not contest the easement parameters of "no gate."
4. The Trial Court erred dismissing Boys because the Trial Court is required to balance rights between the dominant and servient estates and Boys owed Krells a duty not to unreasonably interfere and whether Boys breached that duty is a factual question.
5. The Trial Court erred by finding Boys the prevailing party and then awarding attorney fees under RCW 4.84.330 and the CC&Rs, when Boys never enforced or prevailed on an interpretation of the CC&Rs different from what Krell pled.

### **C. STATEMENT OF ISSUES**

1. Should this Court find that the Boys were necessary parties to an *in rem* proceeding because they are the fee simple owner of the underlying courtyard where Krells' easement exists and there was a genuine dispute concerning the existence of a blocking gate?

2. Should this Court find as a matter of law Krells are entitled to the relief they pled, their easement exists and the scope between the dominant and servient estate should be declared to be free of a gate since Boys no longer contest Krells' pled claim?
3. Should this Court find that Boys had a duty to take affirmative action to preclude or mitigate a third party from blocking Krells' easement?
4. Should the Court reverse the award of attorney fees to the Boys since they did not litigate a claim under the merits of the CC&Rs and there is nothing in the record to show they incurred fees "to enforce the provisions of such contract or lease," (RCW 4.84.330)?
5. Should the Court award Krells attorney fees on appeal because they focused the litigation and enforced the easement?

#### **D. STATEMENT OF CASE**

##### **1. Factual Background**

The facts that led to Boys dismissal are as follows. The properties are governed by CC&Rs (CP 92-147, 174-179) and two levels of homeowners' associations. A Master Association known in the documents as the Ludlow Bay Village Association ("LBVA"), with an Architectural Control Committee ("ARC") and a townhome association, known as The Town Homes at Ludlow Bay Association ("THLBA), a/k/a the Port Ludlow Town

Home Association (“PLTHA<sup>1</sup>”) (CP 106), with limited authority to do maintenance on the townhomes (CP 92-147, 175-178). Krells purchased 36 Heron Road, Port Ludlow, WA, also known as parcel Lot TH-18, on August 20, 2014 (CP 2). The home is a townhouse in Port Ludlow, designed so that adjacent units are accessed through shared courtyards. Krells’ lot is adjacent to Boys’ lot, and Krells entry through the shared courtyard lies entirely upon Boys real property, the servient estate (CP 2, 289-290, 296, 298, 341). A gate did not exist at the entry from Tract A, known as Heron Road, onto the shared courtyard with the Boys, parcel Lot TH-17 (CP 324). Krells did not want a gate, seeking an unobstructed entry<sup>2</sup> (CP 190-191, 288). Both have health concerns. Jim Krell, age 79 has prostate cancer and rheumatoid arthritis, Marcia Krell, age 77 has Mal de Debarquement Syndrome (MdDS), a rare neurological disorder that affects balance and a gate causes them difficulty entering their home, even with an ADA compliant latch (CP 203, 290, 293, 296, 345-346, 357, 359).

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<sup>1</sup> On many documents and in the pleadings, THLBA is commonly referred to as PLTHA, so for ease of reference, Krells will continue to use PLTHA to refer to the association that governs the town home lots. Please note, these are not condos.

<sup>2</sup> 13 Q. And why did you choose the unit you  
14 chose?

15 A. Because the floor plan in the homes that  
16 we looked at were different floor plans, different  
17 location, and the easy entry. Several had gates,  
18 which was the reason for not being interested.

19 Q. The gates were a deal-breaker for you?

20 A. Yes.

- a) Lots are governed by CC&Rs, but none of the governing documents explicitly permit a gate.

PLTHA installed a gate on Boys' Lot TH-17 courtyard (herein "courtyard" or "courtyard easement" or "easement" area). This is not "common area" under association authority, or part of Tract A, Heron Road (CP 107, 289-290, 298, 304, 329). Krells stated in their Complaint (CP 4) they have an access easement across the Boys' courtyard, expressly created under paragraph 14.3 of the CC& Rs.

Section 14.3 Access And Use Easements Within The Town Home Lots. Each town home is located on a cluster of several Town Home Lots. An easement is hereby reserved, conveyed and created upon, across and over each Town Home Lot within a cluster of Town Home Lots on which a town home is located in favor of, and for the benefit of, each Town Home Lot within the cluster and the Owners, Residents, Occupants, tenants, guests and invitees thereof, for purposes of **ingress, egress, utilities and use of driveways, walkways and common courtyards**, if applicable, adjacent to each town home [emphasis added].

(CP 140). Boys and PLTHA admit this averment (CP 18 & 12). Krells took depositions of current and past PLTHA officers, current president Richard Bleek ("Bleek"), current secretary Lewis Hale ("Hale") and past president Al Wagner (Wagner), who applied for and installed the gate. Hale testified PLTHA directs and has authority to require maintenance as set forth in the

CC&Rs (CP 327). A general maintenance easement exists across the townhome lots to permit the PLTHA to discharge duties they are obligated or permitted to perform.

Section 14.1. Maintenance Easement. An easement is reserved and granted to the Associations, their officers, Directors, agents, employees and representatives, upon , across, over, in and under all properties within the Ludlow Bay Village, **as reasonably necessary**, to enable the Associations to perform the duties and functions which they are **obligated or permitted** to perform pursuant to this Master Declaration. [emphasis added]

(CP 140). This easement is silent on gates. The maintenance easement arises only if its “reasonably necessary” and a gate is not necessary. Per the 2011 Amendment to the CC&Rs paragraph 5.2.2(b) PLTHA is obligated to do the following:

(B) Managing and providing for the maintenance of the exterior appearance of all Dwelling Units within the Town Home Lots and Detached Garage Lots, which maintenance may include and **shall be limited** to (1) painting; (2) roof repair and replacement; (3) gutters and downspouts; (4) siding repair and replacement; and (5) landscaping including fences (collectively, “Exterior Appearance Items”); [emphasis added]

(CP 175-176). There is no mention of gates, only maintenance of fences. PLTHA's obligation is limited to maintenance of Exterior Appearance Items. The 2011 Amendment to the CC&Rs' paragraph 10.2 permits:

The Town Home Association shall be entitled to manage and provide for the maintenance of the Town Home Lots and improvements thereon **to the extent provided herein**, specifically including:

10.2.1 Managing and providing for the maintenance of the exterior appearance of all buildings (excluding porches, decks and railings), improvements and landscaping located on Town Home Lots, which maintenance may include, **but shall be limited to Exterior Appearance Items**. [Listed as above in paragraph 5.2.2(B)]. **Each Town Home Lot Owner shall be responsible for all other repair and maintenance** on their Town Home Lot, **including but not limited to**, decks/porches and railings associated therewith, water lines, from the water meter to uses on the Town Home Lot, sewer service lines from the Town Home Lot boundary, fireplaces and chimney, plumbing, exterior and interior glass, appliances, heating and cooling systems, concrete walkways and private driveways. [emphasis added]

(CP 176-177). In two places in the CC&Rs PLTHA authority is expressly limited to certain Exterior Appearance Items 1-5 for maintenance, never addressing gates, only permitting maintenance of existing fences ("to the extent provided herein"). New construction is not mentioned, and thus not

expressly permitted. All other items other than Exterior Appearance Items, including but not limited to possible gates, are the responsibility of owners like Boys. Weighing against the idea of new gates, the CC&Rs do not allow installation of new walls or fences in the Courtyards, per paragraph 4.15.

Section 4.15 Walls, Fences and Hedges. Unless constructed by declarant during initial development of Ludlow Bay Village, **no wall, fence or hedge shall be constructed, placed or maintained on any lot within Ludlow Bay Village** [emphasis added]

(CP 118-119). The gate is new construction that did not exist when Krells purchased. Krells averred this paragraph in their complaint (CP 5) and Boys admitted to its accuracy (CP 18) but Boys denied its application of “fence” to the gate PLTHA installed on their lot, raising a contested issue in the pleadings. Installation of the gate that is part of new fencing violates Sec 4.15. PLTHA has stated that courtyard fences are the responsibilities of the townhome lot owners, not the PLTHA. In a December 1, 2015 Board Meeting the following was discussed and agreed:

1. Recently there have been questions raised regarding the lot lines within the townhome community. It is generally understood that there are situations where townhomes, garages, decks and fences were not situated correctly on individual owned lots as platted. **It was agreed that these are issues for individual owners to resolve and the Town Homes at Ludlow Bay Association has no authority/responsibility over these issues.** [emphasis added]

(CP 349). PLTHA had taken a hands-off position on courtyards as they are not common area or Exterior Appearance Items. This was signed by Hale. Wagner admits that the CC&Rs and the townhome policies do not explicitly give PLTHA authority to install gates in courtyards (CP 310-311). Rather, Wagner believed PLTHA's authority was inherent in "standardization" and "safety," but admitted his claimed authority was never expressly given to PLTHA in the CC&Rs (CP 315-317). Wagner testified that "adding a fence is not our jurisdiction" meaning PLTHA's (CP 320). Wagner confirmed many buildings didn't have gates (CP 322). Hale stated the authority for a gate was the Master Association's, not PLTHA's, but not citing any authority in the CC&Rs (CP 328, 330). Hale also confirmed financial responsibility for maintenance is on the owners (CP 327).

**b) Boys Gate Application For "Safety" Reasons Is Denied.**

The dispute started when Boys applied to PLTHA and then the Master Association ARC on July 6, 2016 (CP 181) to allow installation of a gate on their courtyard for their grandchildren's safety, but their grandkids had never ran from the courtyard onto Heron Road (CP 299, 306<sup>3</sup>). Boys' grandchildren are infrequent visitors—a couple of weeks in the summer,

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<sup>3</sup> 8 Okay. And how many times do you think during  
9 that time period the grandkids ran into Heron Road?  
10 A. Zero.

and about 5-7 days in spring and fall, (CP 305, 344), whereas Krells live year round. Boys' application for the gate was denied because the Master Association ARC determined placing gates on courtyards for "safety" exceeded its authority under the CC&Rs (CP 181, 314-315<sup>4</sup>). Gates are not expressly permitted.

c) PLTHA applies as "owner" of Boys' lot, working with Boys.

Shortly after Boys' original gate application was denied, PLTHA, through Wagner, submitted a new ARC application for the gate as an "owner" of Boys' Lot TH-17(CP 149-150, 322-323), citing the reason was for "standardization" of the buildings (CP 149-150). PLTHA and Wagner are not "owners" of Lot TH-17 and have no possessory interest in the courtyard. Wagner testified he discussed the need for the gate with the Boys, planning to make up a reason for it (CP 239, 241<sup>5</sup>). Current president Bleek believed the request for the gate was made from the Boys (CP 337). Secretary Hale testified Boys requested the gate. "In October 2016,

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<sup>4</sup> A. The first application went to the ARC, And they sent it back because they said they have no jurisdiction over safety; theirs is just strictly architectural. And then I think the Boys we're told to resubmit it with the architectural idea in mind, that they would do it by architectural need versus safety need.

Q. Okay. And you, the Townhome Association, didn't have jurisdiction, I guess over safety either, did they?

A. No.

<sup>5</sup> A. ...And All I can remember is that when they turned back, when the ARC turn back to the Association, the fact that they didn't approve it because of safety being in the original application, I think I discussed this with the Boys. And I said I would resubmit it from the Association to standardize the gates on Building 400.

[PLTHA] constructed a gate in front of the Boys' and the Krells' property, **based upon a request by the Boys** to protect their grandchildren and to standardize the townhome entrances on Heron Road." [emphasis added] (CP 72-73). In the "Investigative Findings of the Washington State Human Rights Commission, Case NO. WSHRC: 16HD-0283-16-7, HUD No. 10-17-490-8 finding 7 states: "Respondent Wagner states that the gate installation application was made in order to install a gate that would complete the standardization of fencing... **Respondent states the gate was installed at the request of the Boys...**" [emphasis added] (CP 350-352). The statement is admissible under ER 801(d)(2) & 805. Krells received an email from Hale referencing the original Boys' gate ARC application. (CP 257, 260). Kirk Boys admitted speaking to Wagner about his gate ARC application (CP 308). Wagner knew he signed PLTHA's application as "owner" even though PLTHA had no "ownership interest" in Boys' courtyard (CP 322-323<sup>6</sup>). Jim Krell testified Boys had actual knowledge of Wagner's intent to resubmit PLTHA's gate application for Boys, listing emails he reviewed, ER 802(d)(1) (CP 343). Kirk Boys testified it's the PLTHA responsibility to maintain his gate, communicating with PLTHA

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<sup>6</sup> Q. Okay. I just want to make sure, though, that at the time did you think or have any reason to believe the Townhome Association had an ownership interest in the area where the gate was being installed?

A. Absolutely not.

by email (CP 358). PLTHA's gate application was rescinded by the ARC on 8/23/16 for failure to notify "all interested parties"-the Krells- meaning Boys knew about application (CP 150). ARC Chair Kori Ward emailed Boys a copy of PLTHA's application (CP 208). ARC conditions for the gate, show Boys were responsible for making arrangements for repairing and landscaping on their courtyard after the gate was installed (CP 151).

The ARC approved PLTHA's application, with four conditions (CP 151). PLTHA installed the gate on Boys' courtyard prior to condition No. 3 being resolved, installation with an ADA latch (CP 151), with knowledge that Krells objected and five weeks prior to Krells' ARC appeal hearing. Krells were following the appeal guidelines (CP 172). Boys participated in Krells' Master Association ARC appeal. The Master Board's findings state "LBVA Board listened to presentation by appellants, the applicant (Al Wagner for the Townhome Boards **and members Kirk and Kim Boys**)" [emphasis added] (CP 193, 343). Boys were advocating for the gate and Wagner carried the process forward for the Boys after they were initially denied. (CP 149-150, 324-325). Boys accepted Wagner's endorsement and approval for PLTHA to pay for the gate on their courtyard (CP 196-198). PLTHA should not be paying for Boys' gate, as this is a "pecuniary gain" prohibited by CC&Rs Article II (CP 160). Wagner was expending association funds for the Boys (CP 325). Neither the Boys nor the PLTHA

sought Krells' permission before installing the gate on the courtyard (CP 292-293 318, 333). Yet Wagner was aware of Krells' easement, but specifically chose not to speak with them before installing the gate (CP 318). PLTHA then instituted a rule that it would fine Krells \$300 for every occurrence the gate was left open, with PLTHA counsel sending a threatening letter to Krells even though Wagner testified they never actually investigated if Krells are the ones that left the gate open (CP 70, 346-347).

Boys' claim they did not give PLTHA permission to install the gate and they did nothing as Wagner moved the gate application for their courtyard forward with the Master Association ARC (CP 234). The facts show Boys requested the gate, and participated in PLTHA's resubmittal of their gate application. PLTHA installed the gate for the Boys who accepted the "pecuniary gain" benefiting their Lot. The evidence contradicted Boys claims of no agency relationship. Agency does not decide Krells' claims.

**d) PLTHA Rational for the Gate is "Safety" And "Standardization."**

The reasons for Boys gate are contested. People frequently walk up and down Heron Road, (CP 294, 302, 313, 331, 345), but Respondents claim its unsafe. There is safe pedestrian access (CP 345). Kim Boys would walk the grandchildren up Heron Road to the swimming pool (CP 300-301). A gate would have zero impact upon the grandchildren coming from Heron Road

(CP 307). Hale testified 20 mph was probably the max speed (CP 332). The directional sign into the neighborhood directs drivers down Gull Drive, away from Heron Road (CP 353). Far less actual traffic is “speeding” than claimed (CP 321, 345). Adjacent cluster townhome buildings—100, 200, 300 and 800—do not have courtyard “gates” to slow pedestrian traffic entering onto Heron Road (CP 343), and Wagner agreed. (CP 322). Jim Krell testified: “And homeowners meet their neighbors out in the road...Heron Road is a safe road. I've seen the Boys go up the middle of the road with the grandkids” (CP 294). There was no history of accidents, no history of law enforcement being contacted regarding speeding and no traffic studies. (CP 312-313, 335-336), thus the facts did not support “safety” as a reason for the gate. Wagner admits that “I don’t know that anything in the governing documents refers to safety anywhere” (CP 315).

The townhome cluster buildings are not all “standardized” with entry gates. Buildings 100, 200, 300 and 800 do not all have courtyard gates, thus Wagner’s claim that “standardization” justified his application on behalf of the Boys is not supported (CP 343). Wagner admitted none of the governing documents expressly stated installation of a gate was authorized for “standardization” of the buildings, stating that “you won’t see it in the governing documents, not that I know of any way” (CP 311, 316-317).

## 2. Procedural Background.

- e) Krells sue the servient estate Boys and PLTHA who installed the gate for them. Both admit Krells' easement exists.

After the gate was installed by PLTHA for Boys, Krells appealed to the LBVA and filed a claim with the Human Rights Commission. An adjustment to the locking mechanism was ordered to make the gate ADA compliant. This did not resolve the issue. Krells then sued Boys and the PLTHA, the purpose of which was to remove the gate, first pleading their easement existed and then the gate was unreasonable. Krells pled:

3.13 An access easement exists across Boys' parcel TH-17 for the benefit of Krells' parcel TH-18. Said easement was expressly conveyed under Article 14.3 of the CC&Rs. Installation of a gate has severally [sic] limited the scope and use of the easement and was done so over the objection of the dominant estate, Krells.

3.14 The PLTHA has unreasonably blocked said access easement by installation of a gate over Krells' objection, causing damage in an amount to be proven at trial.

(CP 4). Boys did not contest Krells' quiet title, admitting the easement existed -"Boys admit an easement exists in accordance with § 14.3" (CP 18). However Boys contested the scope of the easement -"and deny the remainder of the paragraph [3.13] for lack of information"- further denying

Sec. 3.14, the gate on their parcel was unreasonable, also for alleged lack of information<sup>7</sup> (CP 18).

f) Boys move to dismiss, changing their position on the reasonableness of the gate, now taking no position.

After almost 8 months of litigation and discovery, PLTHA (CP 20) and Boys (CP 211) jointly moved for dismissal of all claims per CR 56. Boys dismissal was premised on a claimed lack of an agency relationship with PLTHA (CP 212-222) which had nothing to do with Krells quiet title or declaration of rights claim against Boys. The Trial Court granted Boys motions for reasons beyond their requested relief, to include that there was “no controversy” before the court, (CP 386-393) because Boys changed their position in rebuttal briefing, contending there was no dispute to resolve, because they no longer contested the scope (CP 368-370). The Trial Court also granted in part PLTHA’s motion for summary judgment by dismissing Krells’ quiet title claim, trespass to easement claim and in addition concluding PLTHA has an easement to install a gate per the CC&R sections cited above, quieting title in PLTHA’s favor (CP 392-393). This claim was never pled (CP 14-15), only raised in briefing, an issue Krells

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<sup>7</sup> If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. CR 8(b)

raised to the Trial Court as a violation of RCW 7.28.130<sup>8</sup>. (CP 281-282, 400-401) The Trial Court did not grant PLTHA's motion that the gate was a reasonable obstruction within the courtyard, ordering that claim should proceed to trial (CP 393).

**g) Krells are denied judgment and ordered to pay Boys' attorney fees.**

Krells filed a motion for reconsideration raising several points, including that Krells were entitled to judgment in their favor, not dismissal, (CP 394-406), but were denied. (CP 416-416). Krells then filed a motion for CR 54(b) findings on the dismissed claims and dismissal of Boys and/or a demand for judgment to which Krells were entitled under CR 54(c) and for clearer findings regarding PLTHA under CR 56(d) (CP 470-477). Krells filed proposed findings in an attempt to clarify the holdings (CP 478-484). PLTHA objected to CR 54(b) findings as it pertained to Krells' claims against it (CP 497). Boys did not object to CR 54(b) findings on their dismissed claims but objected to Krells' detailed findings (CP 513-515). Boys also claimed that their denial for lack of information did not raise a controversy as to the scope of the easement (CP 505-507). The Trial Court entered CR 54(b) findings by adopting Boys' order. Krells' appeal is limited

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<sup>8</sup> The defendant shall not be allowed to give in evidence any estate in himself, herself, or another in the property, or any license or right to the possession thereof unless the same be pleaded in his or her answer. RCW 7.28.130

to those issues pertaining to the dismissal of Boys per the ruling under CR 54(b), although Krells discuss PLTHA's claims as background.

The Trial Court correctly cited to RCW 7.28.010 as applicable for the quiet title action, but then incorrectly dismissed the quiet title action and declaratory judgment, apparently on the basis there were no contested facts due to Boys and PLTHA not contesting Krells' claims (CP 389). The Trial Court also held that "without specific facts showing a real possibility that the Boys plan to block Krells' easement in the future" it would decline ruling on Krells' request for an order determining the scope of the easement and barring Boys from blocking the courtyard (CP 389). This was illogical, a gate was and is sitting on Boys' courtyard, they allowed it, and Krells asked the Court to declare it was unreasonable. The Trial Court held there was no "existing dispute for the Court to resolve" (CP 557) because the Boys choose not to contest removal of the gate, BUT leaving the gate. Finally, the Trial Court held Boys prevailed in the litigation because the Trial Court dismissed them, incorrectly finding Boys were entitled as a matter of law to attorney fees per the CC&Rs and RCW 4.84.330 (CP 524-527). The Trial Court ruled that it was "not persuaded that because Boys did not contest the validity of the Krell's access easement that they did not prevail." (CP 526). Boys timely appealed (CP 547). PLTHA is party to this

appeal, but Krells object to PLTHA advocating for Boys like they did at the Trial Court. PLTHA has no standing to assert the servient estates rights.

## **E. ARGUMENT**

### **3. Standard of Review.**

Summary judgment dismissal orders are reviewed de novo. Zonnebloem, LLC v. Blue Bay Holdings, LLC, 200 Wn. App. 178, 182–83, 401 P.3d 468, 470–71 (2017). On summary judgment, Court’s construe all evidence and reasonable inferences in favor of the nonmoving party Id. Summary judgment is only appropriate when the record shows “no genuine issue as to any material fact” and “the moving party is entitled to a judgment as a matter of law.” CR 56(c) Id. On summary judgment, the moving party has the initial burden to show there is no genuine issue of material fact. Id. A moving defendant meets this burden by showing that there is an absence of evidence to support the plaintiff’s case. Id. Once the moving party has made such a showing, the burden shifts to the nonmoving party to set forth specific facts that rebut the moving party’s contentions and show a genuine issue of material fact. Id.

The issue the Trial Court was asked to resolve in Boys CR 56 motion was: “Should this Court dismiss the Boys from this litigation when there is no evidence the Boys recruited the PLTHA as their agent to install the gate”

(CP 214). Krells' claims against Boys involved quiet title and declaration of rights concerning the easement, not just PLTHA's factually contested actions as Boys' agent. Yet, it appeared the Court's rationale for dismissal was the "lack of controversy" under the Uniform Declaratory Judgment Act (UDJA) RCW 7.24. et seq. There were genuine factual disputes as to Boys' role in the gate applications and initially genuine disputes over the scope of the easement until Boys changed. The Trial Court erred because the "absence of evidence" it relied upon was Boys' assertion in their CR 56 motion they took no position on the gate. The Trial Court should have issued judgment in Krells' favor on the existence and scope of easement. The Trial Court erred by finding Boys prevailed and then awarded attorney fees.

**4. This is an *in rem* proceeding and Boys were necessary parties.**

An easement holder must establish his or her legal right first through a quiet title and declaration of rights claim. Krells' claim under RCW 7.28.010 is equitable to resolve the competing claims of the easements rights in the courtyard, gate vs. no gate, and therefore Boys as the servient estate were necessary. Boys' narrow CR 56 motion initially asked for dismissal because of a claimed lack of evidence of agency (CP 214). Krells in response to complete dismissal pointed to the fact that Boys are necessary (CP 275-276). In rebuttal, Boys incorrectly assert that Krells cannot sue

them as the servient estate under a quiet title and declaratory judgment theory (CP 364) by citing to Kobza v. Tripp, 105 Wn. App. 90, 18 P.3d 621, (2001). Krells quiet title was to establish easement rights in Boys' courtyard and the declaration of rights was to establish easement parameters of no gate because it was unreasonable and not necessary. The person who benefits from an easement is the dominant estate owner, and the person that has a property interest in the land subject to the easement is the servient estate owner. M.K.K.I., Inc. v. Krueger, 135 Wash.App. 647, 654-55, 145 P.3d 411 (2006). The Trial Court should not have dismissed Boys who were necessary.<sup>9</sup> Krells were required to name Boys per RCW 7.28.010. "Any person having a valid subsisting interest in real property [i.e. Krells], and a right to the possession thereof... against the person claiming the title or some interest therein. Authorities hold that in a quiet title action, the defendant is any person who claims title or any lesser interest in the land See. § 11.6. Parties defendant, 18 Wash. Prac., Real Estate § 11.6 (2d ed.). The action is sometimes described as one "against the whole world": the judgment or decree quieting title purports **to declare the state of title completely, as to everyone**. [emphasis added]. § 11.3. Nature and purpose

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<sup>9</sup> Krells maintained at the Trial Court that Boys CR 56 motion itself was frivolous (CP 276) because this concept is so basic and fundamental in real property law that its universally accepted. A quiet title and declaratory judgment action is normal when an easement dispute arises, and the appropriate party should include the servient estate.

of quiet title, 18 Wash. Prac., Real Estate § 11.3 (2d ed.). This is an “*in rem*” proceeding.

An action to quiet title is equitable and designed to resolve competing claims of ownership...An action to quiet title allows a person in peaceable possession or claiming the right to possession of real property to compel others who assert a hostile right or claim to come forward and assert their right or claim and submit it to judicial determination. Even if the claim ...is absolutely invalid, **the parties are still entitled to a decree saying so.** [citations omitted] ... “the object of the statute is to authorize proceedings for the purpose of stopping the mouth of a person who has asserted or who is asserting a claim to the plaintiff’s property. It is not aimed at a particular piece of evidence, but at the pretensions of the individual[.]” [emphasis added]

Kobza, 105 Wn. App. at 95. In Kobza, the owners of the dominant estate sued the servient estate, seeking to quiet title to an easement. Id. at 92. It was extremely strange for Boys to argue Kobza for the proposition that Krells had “no standing” to assert their claim against Boys (CP 364). This Court cited to Kobza in Byrd v. Pierce Cty., 5 Wash.App.2d 249, 266, 425 P.3d 948, 957 (2018) noting that RCW 7.28.120 holds that the superior title between the parties, whether legal or equitable, shall prevail. Id. Access was the issue in Byrd, and this Court found that failure “to allege any ‘valid subsisting interest and a right to “possess[ ]” a right of way over the

County's property for commercial access to the Subject Property was not properly pled.<sup>10</sup> Id. at 267. But unlike the Plaintiff in Byrd, Krells did ask title be quieted in their easement and interpretation of the CC&Rs (CP 5-6).

A trial court has authority to quiet title in the dominant owner to an easement based on the instrument creating the easement. Kave v. McIntosh Ridge Primary Rd. Ass'n, 198 Wn. App. 812, 819–20, 394 P.3d 446, 450 (2017). In Kave the Defendant asserted a counterclaim to “quiet title to the trail easement” Id. at. 817. This Court did not hold that a quiet title action was inappropriate, rather only that the trial court lacked equitable authority to order relocation of an easement. Id. 820. The Court quieted title to an easement across the servient estate in favor of the dominant estate in Kirk v. Tomulty, 66 Wn. App. 231, 233, 831 P.2d 792, 793 (1992). In Olson v. Trippel, 77 Wn. App. 545, 549, 893 P.2d 634, 637 (1995) the dominant estate sued to quiet title against the servient estate, with the dominant estate prevailing. It was not dismissed.

Pursuant to the Uniform Declaratory Judgments Act (UDJA), chapter 7.24 RCW, “[a] person interested under a deed ... may [ask a court to determine] any question of construction ... arising under the instrument

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<sup>10</sup> PLTHA's alleged easement in the courtyard is not before the Court due to the denial of the CR 54(b) findings, but this issue was raised to the Trial Court, that PLTHA did not plea any actual interest (CP 13-14 and see 281 400-401) instead relying upon an argument it has an interest in “community easements.” (CP 381). Easements over common areas was not before the court.

... and obtain a declaration of rights ... or other legal relations thereunder.” RCW 7.24.020. Bloome v. Haverly, 154 Wn. App. 129, 140, 225 P.3d 330, 335–36 (2010). The UDJA is “remedial” in nature. RCW 7.24.120. Id. Its purpose is to “settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations,” and courts should liberally construe and administer it. RCW 7.24.120. Id. Krells have been left with uncertainty as to their title and easement scope claims. There is not a dormant, hypothetical, speculative, or moot disagreement going on. The gate is still on Boys courtyard and Krells object.

In declaring rights, the Court has the authority to determine the scope of the easement, i.e. the parameters. Sunnyside Valley Irr. Dist. v. Dickie, 149 Wn.2d 873, 884, 73 P.3d 369, 374 (2003). Parameters include not just the length and width, but the use. In determining the permissible scope of an easement, the court looks to the original intention and determines if the use is reasonable or unreasonable, a question of fact. Logan v. Brodrick, 29 Wn. App. 796, 799, 631 P.2d 429, 431 (1981). Then an easement holder may obtain any appropriate remedy for unreasonable interference with an easement. Zonnebloem, LLC 200 Wn. App. at 184. See also Restatement (Third) of Property (Servitudes) § 8.3 (2000). This Court also noted in Zonnebloem, LLC that The Restatement (Third) of Property Servitudes § 8.3 (2000) states that one appropriate remedy is a claim for

compensatory damages noting this is consistent with the general rule that the holder of a nonpossessory interest in property can sue for damage to that interest. Citing to Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc., 170 Wash.2d 442, 458, 243 P.3d 521 (2010). A party cannot get to the question of “reasonableness” without first establishing the legal rights to balance the actions against. This is an in rem proceeding in which Krells named the servient owner, Boys, who are a necessary party.

Boys’ CR 56 motion regarding agency should have had no bearing on the quiet title action and the Court should have found in Krells’ favor based upon its own ruling. Both Respondents admitted to the courtyard easements existence, but it’s not true no dispute existed initially by Boys over the scope, gate v. no gate (CP 17, 296, 343- 344). Krells complaint paragraph 3.13 was denied by Boys as to reasonableness of the gate (CP 4, 17). Boys just changed their position. The Trial Court has not rendered a ruling as to who has superior title, which is what is at issue and per RCW 7.28.100, quiet title actions shall be liberally construed to settle disputes. The law states superior title “shall” prevail, and in Kobza and per CR 54(c) parties are entitled to a decree.

**5. Boys admitting the easement existed should have resulted in a favorable judgment for Krells, not dismissal of their claim.**

All pleadings shall be so construed as to do substantial justice. CR 8(f). Krells are required under RCW 7.28.100, RCW 7.28.120 and CR 8 to plea where their legal right to enter the courtyard free of a gate comes from. Failure to plea this would be grounds for an argument that the pleading is deficient under CR 12(b)(6). Issues arise upon the pleadings when a fact or conclusion of law is maintained by one party and controverted by the other RCW 4.40.010. The moment Boys or PLTHA admitted that Article 14.3 of the CC&Rs established Krells' easement right, that dispute was resolved for purposes of who "prevails" (CP 12, 17) Until a Defendant files an answer, a Plaintiff does not know if they are going to contest the easement. Per CR 8(b) an answering party shall admit or deny the averments upon which the adverse party relies. An answer that a party lacks information works as a denial. CR 8(b). Per CR 8(d) averments are admitted when not denied in the responsive pleading.

If the Defendant does not contest the allegation set forth in the complaint then Plaintiff is not required to prove it, which has been the rule since the beginning of jurisprudence in Washington. In an early case, Lake v. Steinbach 5 Wash. 659, 32 P. 767(1893) the Court held that an answer stating that defendant does "not deny or admit" allegations of complaint

controverts no allegation, and is, in effect, admission thereof. See also Spangler v. Glover, 50 Wn.2d 473, 482, 313 P.2d 354, 359 (1957) (facts pleaded if not denied in the answer, are deemed admitted). Card v. W. Farmers Ass'n, 72 Wn.2d 45, 48, 431 P.2d 206, 208 (1967) (failure to answer counterclaim generally means averments admitted). Richards v. Lawing, 175 Wash. 544, 27 P.2d 730 (1933). (Where plaintiff's answer to defendant's cross complaint does not controvert allegations of cross complaint, allegations must be taken as true.) Murphy v. Murphy, 44 Wn.2d 737, 739, 270 P.2d 808, 809 (1954) (When a fact was admitted by the pleadings, there is no necessity for any evidence to support this finding.)

The Trial Court ruled "Here, there is no evidence to suggest that either defendant is disputing that the Krells have a valid access easement of the subject property; nor is there any dispute over the parameters or bounds of the Krells' easement [emphasis added] (CP 428). Krells' superior title "shall" prevail per RCW 7.28.120, and per CR 54(c) "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in her or his pleadings." Kelly v. Powell, 55 Wn. App. 143, 149, 776 P.2d 996, 999 (1989), on reh'g (Nov. 30, 1989). Boys admitting the easement exists left the Trial Court with no discretion but to enter judgment quieting title, not dismissal. Absent a compelling equitable reason, Boys no longer contesting

the scope left the Court with no discretion to declare the rights other than Krells claim of no gate, not dismissal. Boys changed position is not now a “lack of controversy;” raised for the first time in rebuttal briefing (CP 368).

If Krells pled a tort claim with damage, the answer by Boys that they don’t contest liability does not result in dismissal. If Krells pled a breach of contract claim, the answer by Boys they don’t contest the fact a breach exists does result in dismissal. If Krells were the landlord, and pled a wrongful detainer, the answer by Boys that the don’t contest the landlord’s rights to the property would result in the writ being issued, not dismissal. Given Boys position, the only option was favorable judgment for Krells.

**6. All easement disputes require the Court to declare and then balance the rights of the parties.**

Boys and PLTHA changed the status quo creating a controversy. The governing documents are silent regarding “gates”, and if the document creating the easement is ambiguous or even silent on some points, the rules of construction call for examination of the situation of the property, the parties, and surrounding circumstances.” Colwell v. Etzell, 119 Wash.App. 432, 439, 81 P.3d 895 (2003). If the easement language is ambiguous on its face, the Court will be required to look to the intent of the developer in interpreting the scope of the easement. Id. The court's goal is to ascertain

and give effect to those purposes intended by the covenants. Wilkinson v. Chiwawa Communities Ass'n, 180 Wn.2d 241, 250, 327 P.3d 614, 619 (2014). While interpretation of the covenant is a question of law, the drafter's intent is a question of fact. Id. at 250. The Court gives covenant language “its ordinary and common use” considering the instrument in its entirety. Id. The lack of an express term with the inclusion of other similar terms is evidence of the drafters' intent. Id. The term “gate” is not present and Krells showed a reasonable interpretation of the CC&Rs might even preclude gates under Section 4.15. (CP 118-119). The term “gate” not being included should be given weight. Wilkinson 180 Wn.2d at 251. Only by looking outside the four corners of the document could the Trial Court find evidence to support the scope of the easement allowed a gate. Because the Trial Court found the parameters of the easement are not in dispute, then it would necessarily follow that the “parameter” of no gate is the only conclusion reached under the governing documents. To conclude otherwise would raise a genuine issue of material fact, and the current gate’s reasonableness remains a triable issue between Krells and PLTHA.

Is Boys allowing the gate a reasonable interference? To answer that, the Court is required to engage in a balancing test to determine the reasonableness of the intrusion. Whether or not servient estate may erect [or allow another to erect] and maintain a gates across an easement depends

upon the intention of the parties connected with the original creation of the easement, as shown by the circumstances of the case; the nature and situation of the property subject to the easement; and the manner in which the way has been used and occupied. Rupert v. Gunter, 31 Wn. App. 27, 30–31, 640 P.2d 36, 39 (1982). This balancing test must be applied to all easement disputes over the scope; the general rule was set forth in Thompson v. Smith, 59 Wash.2d 397 367 P.2d 798 (1962)<sup>11</sup>.

The Thompson Court stated the trial court had authority to make the servient owner guarantee removal of the encroachment **when and if** it interfered with the use of the easement and that the servient owner would be required to repair any damage to the road. Id. at 410. Balancing parties' rights is the law as this is equitable relief, even if requested as a declaratory judgment. This Court noted that injunctive relief is an equitable remedy even though the case was pleaded as a declaratory judgment. NW. Properties Brokers Network, Inc. v. Early Dawn Estates Homeowner's Ass'n, 173 Wn. App. 778, 789-790, 295 P.3d 314, 320 (2013). Krells pled both equitable and legal relief. (CP 5-6). The facts and procedure in NW Properties are similar, because the parties did not dispute the existence, or nature of their relative easement rights, but instead disputed their relative

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<sup>11</sup> There may be limited times, as set forth in fact specific cases where a Trial Court could determine the scope based upon the written documents alone, but this is clearly not one of those cases, as "gate" is not in any written document.

burdens and the allowable uses of the undisputed easement. NW. Properties, 173 Wn. App. at 790–91. The gate’s existence and the requirement to seek prior approval to open was a factual issue of unreasonable interference. Id. at 792. There was no dismissal for a “lack of controversy.”

In Littlefair v. Schulze, 169 Wn. App. 659, 665, 278 P.3d 218, (2012), this Court noted that the rights of both dominant and servient estate owners must be construed to permit a due and reasonable enjoyment of both interests so long as that is possible. In Littlefair, the Trial Court ordered a fence removed to prevent loss of a major portion of the 40-foot easement. Littlefair, 169 Wn. App. at 667. Turning to Comment c to the Restatement (Third) of Property: Servitudes § 4.9 (2000) “The owner of the servient estate is not entitled to interfere unreasonably with legitimate enjoyment of the servitude. ... Actions that make it more difficult to use an easement ... are prohibited by the rule stated in this section, unless justified by needs of the servient estate.” All authority requires the Court balance the equities between the servient and dominant estate when one of the parties puts it at issue, and Krells put it at issue. Boys cannot escape the fact they were a necessary party so the balancing could happen. Yet, when the Trial Court did hear from the opposition, Krells were not given the judgment they were entitled to per CR 54(c), instead their claims were dismissed. The only conclusion that could be reached when balancing rights between that

dominant and servient estate -based upon Boys' position -is quiet title to easement with no gate.

**7. Boys have a duty to protect Krells' easement rights.**

The weight of authorities hold that the servient estate's duty is not to unreasonably interfere or avoid unreasonable interference. Zonnebloem, LLC, 200 Wn. App. at 184. What is reasonable or unreasonable is a factual issue, and Krells asked the Trial Court to declare that the gate was unreasonable (CP 4-6). Boys argued to the Trial Court that they have no obligation—as the servient estate—to remove the obstruction from the easement even though they are aware of it hindering Krells' access (CP 367-368, VP 39). Boys contend, without citation to any authority, that they “have no legal obligation towards the Krells to advocate for their own easement interests” (CP 367-368). Boys' position is contrary to what this Court stated in Zonnebloem, LLC. There are circumstances in which a servient estate owner can be liable for wrongful interference with an easement for failing to take a reasonable affirmative action to facilitate the easement holder's use of the easement. Id. at 186–87. The question posed by Zonnebloem LLC in dicta is whether the servient estate, by doing nothing, has breached that duty when doing nothing causes harm. Id. at 186. This Court decided that there was no authority that a servient estate owner

can be subject to liability for failing to give up a property right to facilitate an easement holder's use of the easement and there was nothing that compelled the servient estate to give more than what was prescriptively used. Id. at 186-187. Neither situation applies here, but following the logic in Zonnebloem shows Boys have a duty, and whether it was breached is a factual issue.

Boys claim "Krells cannot point to any legal authority, and in fact there is none, standing for the proposition that a property owner has a legal obligation to defend and protect a neighbor's easement rights from the actions of an independent third party" (CP 368). It's unclear if the Trial Court was swayed by the argument when it dismissed Boys, but Krells contend this is wrong. If the duty exists to avoid unreasonable interference there must be circumstance where the servient estate breaches that duty by allowing third parties to interfere on its property. Boys are not giving up property rights, rather Boys are charged to take reasonable steps to deny others to interfere with Krells' express rights.

Whether reasonable affirmative action is necessary to facilitate the easement holder's use of the easement is a factual question and goes back to the rule in Thompson. The court may direct the servient owner to guarantee removal of the encroachment when and if it interferes. Thompson 59 Wash.2d at 410. Boys are suggesting Thompson's balancing test simply

stops when a third party is involved, yet as noted above, it's the court's obligation to balance rights. The following questions illustrate the application of the rule.

- (1) Can a servient estate allow a third party to put a gate across an ingress and egress access, blocking the dominant estate?
- (2) Is the dominant estate's property right being interfered with, if the servient estate is allowing an interference by a third party?
- (3) Does a third party's occasional in gross maintenance easement that exists when "reasonably necessary" take precedence over or outweigh a dominant estates appurtenant daily ingress and egress easement?

Answering each factually intensive question requires the court to balance rights, which required Boys to be part of the litigation. Krells were denied the opportunity to resolve these issues and argue Boys breached a duty. Boys involvement is undeniable. They applied for the gate and they knew Krells were objecting to the gate because of their medical conditions (CP 308). Boys know HOA rules only allow an "owner" to apply and PLTHA is not an owner, and Boys agree PLTHA does not own their courtyard. Boys allowed PLTHA to apply, and Boys then advocated for the gate with the Master Association ARC. If the parameters of the easement between Krells and Boys should be no gate because Boys do not object to

the gate's removal (CP 356-358), then the duty owed by Boys was to safeguard Krells NO gate courtyard easement. Yet Boys have not agreed to no gate on the courtyard as it remains. For Boys to "facilitate" this easement, at the very least Boys could have looked to less intrusive options as testified by Jim Krell, but they did not (CP 345). The Boys could have admitted in their answer the gate was unreasonable, but they did not, putting it at issue. The Boys could have avoided months of litigation and expensive discovery by stipulating that between them and Krells they would agree to no gate on the easement, but they did not, only stating they won't contest the gate's removal (CP 358). Do Boys have an obligation to remove it? If Boys removed the gate Krells would not be subject to \$300 a day fines for the gate being left open.

Boys know Hale and Wagner testified there was no express authority whatsoever in the governing documents that permitted PLTHA to install gates (CP 310-311, 315-317, 320, 328, 330). Boys know the CC& R's are silent on gates. Boys know Wagner and Hale never testified PLTHA has interpreted its documents to allow gates, or that PLTHA never pled an interest in Boys courtyard which is required under RCW 7.28.130, and that only PLTHA attorneys argued in briefing PLTHA has authority to gate the courtyard per a maintenance easement. Taking "no position" in the litigation regarding the gate allowed PLTHA to advocate to the Trial Court

a gate was reasonable, something Boys could have—as the servient estate owner—said “no” to (CP 357-358). If Boys told PLTHA that “no gate” is the correct parameters of the easement, which according to the Trial Judge and the Boys, they are not disputing Krells claim, then PLTHA has the burden to prove in Court why a gate is necessary for “safety” and “standardization.” The record shows PLTHA officers wouldn’t go as far as the Trial Court who held the CC&Rs gave PLTHA rights in the courtyard to install gates. Boys were in a position to point out this error, but did not. Instead Boys caused harm by frivolously moving for dismissal of the quiet title and declaration of rights claim against them, the result of which permitted the gate to remain as a continuing unreasonable blocking of Krells easement. Boys further convinced the Trial Court not to enter an order barring the very gate that Boys claimed they took no position on. Then Boys obtained an order they “prevailed” in the litigation to declare a gate was unreasonable and exacted attorney fees against Krells. Now Krells have to appeal to undo this harm.

Each step Boys did or did not take is a factual issue as to whether their duty not to unreasonably interfere or to avoid unreasonable interference has been breached. The Court should not have dismissed them under CR 56.

**8. It was an error of law to award Boys attorney fees.**

A trial court decision awarding attorney fees is an issue of law. Boules v. Gull Indus., Inc., 133 Wn. App. 85, 88, 134 P.3d 1195, 1196 (2006), as amended (June 14, 2006). Boys claim they successfully defended all of the Krells' causes of action arising out of the applicable covenants because they achieved their desired legal result, dismissal of the claims. The Boys have not prevailed on the construction, enforcement or interpretation of CC&Rs Sec. 14.3, and therefore cannot trigger the fee shifting under the CC&Rs Sec. 19.1, because there is no logical or causal connection between the CC&Rs and why the Trial Court dismissed Boys. Boys think they "successfully defended" because Boys agree Krells easement exists and took a no contest position on the scope? Boys argue its unfair they had to expend funds to defend themselves (CP 508), which they could have avoided.

The Trial Court erroneously determined that in this litigation it did not matter whether an enforcement action on the merits was litigated, (CP 563), and the Trial Court failed to render favorable judgment for the correct party. RCW 4.84.330 defines a prevailing party as "the party in whose favor final judgment is rendered." Hertz v. Riebe, 86 Wn. App. 102, 105, 936 P.2d 24, 26 (1997). That has been interpreted to mean the party who substantially prevailed. Id. The statute focuses on the relief afforded to the

parties for the entire suit whether or not the underlying claim provides for fees. *Id.* RCW 4.84.330 states “In any action on a contract or lease ... where such contract or lease specifically provides that attorneys’ fees and costs, **which are incurred to enforce the provisions** of such contract or lease.” [emphasis added] The statute is unambiguous, fees recoverable here are those which are incurred to enforce the CC&Rs, and Boys have enforced nothing. Covenants are real property contracts with the enforceability being a question analyzed against contract law. Lake Limerick Country Club v. Hunt Mfg. Homes, Inc., 120 Wn. App. 246, 254, 84 P.3d 295, 299 (2004) The applicable Section 19.1 states fees are shifted to that party that prevailed in litigation relating to an amendment, construction, enforcement, or interpretation, which Boys did not do, as they essentially agree with Krells. Boys fees is based upon the erroneous dismissal, not the CC&Rs.

The Trial Court relied upon Hernandez v. Edmonds Memory Care, LLC, 10 Wn.App.2d 869, 450 P.3d 622, (2019) which analyzed RCW 60.04.181(3), acknowledging a distinction the Trial Court was trying to make (CP 563 footnote 3). Hernandez applied correctly would have Krells winning as the “prevailing party.” Plaintiff laborers sued defendant company, who did not dispute the laborers’ wage claims. *Id.* at. 870. Division I upheld the Trial Court that found Plaintiff was the “prevailing party.” Hernandez took the definition of “prevailing party” and broadly

applied it, even though Defendant did not contest Plaintiffs' claims on the merits, because the Trial Court found that while the issue was uncontested, Plaintiffs did "win" and the filing of the complaint helped focus the dispute. Id. at 874. Correctly applying the outcome in Hernandez should have led the Trial Court to conclude Krells prevailed, not Boys.

Fees incurred that are tied to the litigation concerning the merits of the contract are a factor for determining prevailing party for attorney fees under RCW 4.84.330. In Herzog Aluminum, Inc. v. Gen. Am. Window Corp., 39 Wn. App. 188, 192, 692 P.2d 867, 870 (1984), the prevailing party's "action" on the contract invalidated it. In Boules, the Court analyzed fees awarded for a voluntary dismissal, and determined fees were appropriate because the litigation arose out of the transaction. Boules 133 Wn. App. at 89. In this case the fee shifting clause in the purchase and sale agreement stated "any litigation...arising out of this transaction." Id. In the case Wachovia SBA Lending v. Kraft, 138 Wn. App. 854, 862, 158 P.3d 1271, 1275-76 (2007), this Court looked at the definition of "final judgment," but declined to interpret RCW 4.84.330 to include a suit dismissed without prejudice to yield a "prevailing party." On review the Supreme Court noted that RCW 4.84.330 is designed to make a unilateral attorney fees provision bilateral when a contracting party receives a final judgment. Wachovia, 165 Wn.2d at 494. A "final judgment" is court's last

action that settles the rights of the parties and disposes of all issues in controversy, the substantive issues are fully resolved. Id. at 492. Here, the Trial Court refused to settle the title rights. In Wachovia the effect of the dismissal was to leave the parties as if the claim was never brought. Here if the dismissal of Boys was for lack of controversy, then functionally the parties ought to be back to their original positions, as if the claim was never brought, and thus no one prevailed.

Further precedent exists that litigation must tie to “enforcement” as seen in the In Re Marriage of McCausland cases. In the unpublished decision, this Court noted that neither party was successful in “enforcing” the terms of a 2000 Spousal Agreement, and denied attorney fees. In re Marriage of McCausland, 112 Wn. App. 1029 (2002). In the subsequent second appeal published decision, this Court repeated itself that “enforcement” of the contract was a factor, but looked at discretionary fees under RCW 26.09.140. McCausland v. McCausland, 129 Wn. App. 390, 413, 118 P.3d 944, 956 (2005), rev’d, 159 Wn.2d 607, 152 P.3d 1013 (2007), as amended (Mar. 2, 2007). In considering attorney fees in the second appeal this Court noted that the Respondent had prevailed regarding his position under RCW 26.09.140 but that under both the 2000 Spousal Agreement and RCW 4.84.330 held that, “only where a party prevails in an enforcement action are they entitled to an award of attorney fees” per RCW

4.84.330. Id. at 416-417. Thus “prevailing” on a legal argument outside enforcement was not enough to shift fees per RCW 4.84.330. The Supreme Court on review affirmed that neither party had substantially prevailed on the enforcement of a contract and did not award fees. McCausland v. McCausland, 159 Wn.2d 607, 621, 152 P.3d 1013, 1020 (2007), as amended (Mar. 2, 2007). The case law shows that being dismissed alone is not enough to shift fees, there must be a causal connection to fee shifting clause and the relief obtained. Thus, litigation invalidating, arising out of, or enforcing a contract shifts fees, but no authority exists that agreeing to the plaintiff’s interpretation of the contract means the defendant “prevails”. The only scenario where Boys could have prevailed and be awarded fees is if they prevailed in litigation “relating to” interpretation and enforcement of the CC&Rs different from Krells stated position in the pleadings.

#### **9. Krells request attorney fees on Appeal, RAP 18.1**

Per RAP 18.1(a) Krells request attorney fees per Sec. 19.1 and RCW 4.84.330 because they have had to appeal to “enforce” the CC&R’s by asking this Court to reverse the dismissal of the quiet title action and direct an order be entered that their easement exist, this was the judgment they were entitled to CR 54(c). Krells have further incurred fees “interpreting” the CC&R’s by having to have the declaratory judgment dismissal reversed

as the only parameters that should exist for the courtyard easement between the dominant and servient estate is no gate because it's unreasonable. Krells "prevail" in the litigation relating to the CC&Rs.

#### **F. CONCLUSION**

Krells request a reversal of the dismissal of Boys as necessary party to this *in rem* proceeding. Krells request an order directing the Trial Court enter judgment in Krells' favor on the quiet title claim per RCW 7.28.120 and that their easements rights exist as stated in the CC&Rs. Krell request an order directing judgment be entered on their declaratory judgment claim that the scope of the easement (the parameters) between the servient and dominant estate is that a gate is unreasonable obstruction between these parties, and thus no gate is the only acceptable condition per Boys' stated position. Krells ask for an order finding Boys had a duty to not allow a third party to interfere with Krells easement, reversing dismissal and remanding to determine if Boys duty was breached. Krells ask for reversal of the award of fees to Boys as the prevailing party. Krells ask for their fees.

Whether PLTHA maintenance easement allows gates in the courtyard will unfortunately have to wait until a later date, something Krells tried to avoid by asking for CR 54(b) findings (CP 472-475) or more specific CR 56(d) findings pertaining to PLTHA, which the Trial Court

declined to do (CP 561). Thus the only question on appeal are the rights between Krells as the dominant estate and Boys as the servient estate.

Dated this 20th day of April 2020.

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## CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee of Cross Sound Law Group, PLLC, over the age of 18 years, not a party to nor interest in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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Dated this \_\_\_\_ day of April 2020, at Poulsbo, Washington.



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Melissa S. Colletto  
Legal Assistant

# CROSS SOUND LAW GROUP

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