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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

JAMES AND MARCIA KRELL

Appellants/Plaintiffs

vs.

KIRK AND KIM BOYS

Respondents/Defendants

Appellants' Reply Brief

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A. SUMMARY OF RESPONSE

"*But for* the easement rights afforded by the covenants, the Krells would have no basis for their lawsuit against Boys." *Brief of Respondent Kirk and Kim Boys,* page 21. Location and intended use of Krells' easement are established in the CC&R's and conceded to. Boys and PLTHA admitting to Krells' pled title claim results in judgment quieting title. RCW 7.28.120. The Trial Court concluded Krells have easement rights (CP 529), but erred by dismissing. A judgment quieting title must issue so that the easements scope may be determined. The Court should issue an order that Krells easement exists per the CC&R Sec. 14.3, read in conjunction with Sec 4.15, which does not allow new fences. This is required so the Court can balance the rights and determine if there is a compelling need for a gate (part of a fence) and determine if it is an unreasonable interference to Krells.

PLTHA and Boys' unreasonable interference of both installing and allowing a gate are in dispute. Boys do not agree that the scope of rights between Krells and Boys is unhindered ingress and egress with <u>no gate</u> and their claim of "neutrality" is disingenuous. This is evident in Boys denial in the pleadings to the unreasonableness of the gate and the resistance to a judgment quieting title in Krells' favor. Boys moved for dismissal of a purported agency claim, not the pled title and rights claim.

B. RESPONSE TO CONTESTED FACTS

Boys claim there was a lack of facts to justify the dismissal. This is not supported by the record. Boys argue PLTHA had independent reasons to apply for a gate and Boys claim Wagner informed them he was submitting the application on behalf of PLTHA, citing CP 240-241 as an argument to distance Boys from PLTHA. *Brief of Respondent Kirk and Kim Boys,* page 21. Facts construed in a light most favorable to Krells show Boys and PLTHA working together. There is a difference in submitting "for" the association and submitting "from" the association. Wagner testified "I said I would resubmit it *from* the Association to standardize the gates on Building 400" [emphasis added] (CP 241 line 14-15), and Wagner specifically knew the Boys wanted the gate for safety reason (CP 325). Hale testified Boys requested the gate (CP 72-73). PLTHA submitted a copy of the Human Rights Commission Investigative findings (CP 74, 202-206), containing a finding by an administrative agency that the "gate was installed at the request of the Boys." Boys object to this as hearsay, but it's the co-defendant and co-conspirator that introduced it initially, and it's a statement made by a party opponent in a prior hearing which further showed Respondents acting in concert. ER 801(d) (1) & (2). Jim Krell testified the "courtyard is currently controlled by the Boys and PLTHA" (CP 341). Boys agree the primary motivation by PLTHA to put in the gate was for "safety"

of the Boys grandchildren. Wagner testified that "adding a fence is not our jurisdiction" (CP 320) and also testified that there was no express authority given to PLTHA to install gates for "safety" reasons (CP 315-317). There is no pled claim by PLTHA to any rights in Boys Courtyard (CP 14-15), only argument in the briefing, and the Trial Court erred allowing PLTHA to give evidence that the general easement per Sec 14.1 included a gate. Wagner admits that the CC&Rs and the townhome policies do not explicitly give PLTHA authority to install gates in courtyards (CP 310-311, 320). Wagner agreed PLTHA had no ownership interest in Boys courtyard (CP 322-323), all facts showing PLTHA acting <u>for Boys</u>. No gate existed from August 2002 until installed fall 2016 (CP 342), thus showing Boys acts were the contributing cause. These facts, among others, dispute Boys assertions that there was a "lack of specific facts", and significant portion of Boys brief is dedicated to disputing the facts about "agency" however "agency" is not really the issue, rather its title to the easement, scope and interference.

PLTHA has mischaracterized the nature of the dispute by claiming the Krells courtyard is the only one that did not have a gate. PLTHA argues that until recently, this was the only ungated shared courtyard on Heron Road. *Brief of Respondent Port Ludlow Townhome Association*, page 4. Wagner confirmed many buildings didn't have gates (CP 322) Buildings 100, 200, 300 and 800 do not all have courtyard gates (CP 343). "Standardization" of

building appearance fails as a reason; it has to be for Boys safety. Respondents worked together, creating a reason for the gate. Respondent's claim the gate is ADA compliant, yet nothing in the record other than their assertions supports their claim, but whether its ADA compliant or not is irrelevant. Krells are wanting it removed because it violates the plain language of the CC&R's as new construction and it hinders them with their medical issues. Although PLTHA installed it, its Boys' gate affixed to their property. Yet, Boys claim without any basis they would be subject to association fines, civil liability and criminal action for "tearing out PLTHA's gate." *Brief of Respondent Kirk and Kim Boys*, page 15, which conflicts with PLTHA statement it has no "ownership interest" in the Courtyard (CP 322-323). It's Boys Lot TH-17 and legally their gate. Both Respondents raised disputed facts that precluded summary dismissal.

C. PLTHA'S UNPLED TITLE CLAIM

In the Trial Court PLTHA opposed appeal of the issues pertaining to it and objected to clearer CR 55(b) findings. PLTHA is now asking this Court to review the case as it pertains to the ruling they obtained establishing a gate easement per the general easement that never mentions gates or fences. PLTHA obtained an order that an easement for gate installation exists in the courtyard because (a) the Master Association approved the "Owner" application for Boys Lot TH-17 and (b) PLTHA's

authority to install the gate comes from Sec 14.1(CP 140). A party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along. Dewey v. Tacoma Sch. Dist. No. 10, 95 Wn. App. 18, 26, 974 P.2d 847, 852 (1999). Similar to Gunn v. Riely, 185 Wn. App. 517, 528, 344 P.3d 1225, 1231 (2015) where the Court held CR 8(c) requires an affirmative defense to be pleaded in the party's answer, RCW 7.28.130 required PLTHA to affirmatively plea its interest, but factually it could not because its officers stated they had no "ownership interest" in Boys courtyard. PLTHA never pled an easement right and it is not entitled to attorney fees, especially considering it agrees that the easement Krells are enforcing under the CC&Rs exists.

D. IN REM PROCEEDING WITH THE SERVIENT ESTATE

Boys are necessary parties under CR 19 and RCW 7.28.010 in this *in rem* proceeding. Boys never claim they are not a necessary party, only that no controversy exists with them. Instead its PLTHA who has no interest in this issue that conflates what is a necessary party under RCW 7.28.010, and the burden of the non-moving party at summary judgment. *Brief of Respondent Port Ludlow Townhome Association Page* page 16-17. PLTHA's position is not supported by any on point authority, as well as it defies logic. A "party" per RCW 7.28.010 is "Any person having a valid

subsisting interest in real property… against the person claiming the title or some interest therein." A necessary party is set forth in CR 19(a). PLTHA believes the fee simple owner, the party with the greatest bundle of sticks, is not a necessary party to a proceeding to quiet title and declare the scope of an easement upon the servient estate without citation to any actual authority. In Magart v. Fierce, 35 Wn. App. 264, 267, 666 P.2d 386, 389 (1983), the Court found that the quiet title action must be dismissed for failure to name an indispensable party with a potential reversionary interest. Under the holding in Magart, failure of Krells to name Boys would have resulted in the claim being dismissed contradicting PLTHA's argument.[1].

E. RESPONSE TO "LACK OF CONTROVERSY"

Court's review the justiciability of a claim de novo. Kitsap Cty. v. Kitsap Cty. Corr. Officers' Guild, Inc., 179 Wn. App. 987, 994, 320 P.3d 70, 74 (2014). Respondents argue that if Boys didn't physically place the gate, then it necessarily follows the controversy between the dominant and the servient estate is not ripe, but no case supports this. The disingenuous argument that Krells failed to prove Boys controlled PLTHA's gate installation and Respondents assertion that no justiciable controversy exists because Boys and PLTHA agreed with the title claim as grounds for

[1] Application of Magart 35 Wn. App. 264, if Boys were not named, could have resulted in dismissal for the correct reasons, which is a reason Boys were named.

dismissal is also not supported by Respondents' citation to authority. PLTHA concedes the quiet title action and declaration of rights is the correct action when a real property dispute exists. *Brief of Respondent Port Ludlow Townhome Association* page 12-13. So it's not an issue of the correct action, it's a question if there is a dispute over rights, title and scope of the easement. PLTHA contends that this case "lacks an actual, present dispute when the challenged action has not yet occurred." *Brief of Respondent Port Ludlow Townhome Association* Page 19. To claim the challenged action has not occurred is to ignore reality and the argument is untenable. The gate is there and placed over Krells objection by Respondents working together. Krells don't want a gate, PLTHA does, Boys now claim "neutral", but the facts show they advocated for the gate which they want for "safety." Boys worked with Wagner who knew PLTHA was not an "Owner." Boys received a pecuniary gain by benefitting from a gate, and it's legally Boys' gate affixed to their Lot TH-17. Leaving the gate that is not expressly authorized anywhere in the CC&Rs may ripen into an adverse possession claim. See Littlefair v. Schulze, 169 Wn. App. 659, 278 P.3d 218 (2012). The time to adjudicate the issue is now.

PLTHA and Boys cite to inapplicable UDJA cases such as To-Ro Trade Shows v. Collins, 144 Wn.2d 403, 406, 27 P.3d 1149, 1150 (2001) which involved a dispute arising from the State's enforcement of the

licensing statute. A speculative question of legal rights and constitutionality of a statute differs from declaring expressly granted rights per CC&Rs. Respondents cite to Ames v. Pierce Cty., 194 Wn. App. 93, 374 P.3d 228 (2016). Ames involves a declaration of rights under RCW 7.24.010, not a quiet title action and interpretation of CC&Rs per RCW 7.24.020. PLTHA cites to Lewis Cty. v. State, 178 Wn. App. 431, 315 P.3d 550 (2013), which analyzed the Court's authority to "declare rights, status and other legal relations" per RCW 7.28.010, but our case is not hypothetical of what the Boys might allow in the future, it's the gate they are allowing right now. Borrowing an argument from our State Supreme Court- if the validity of the UDJA can be defeated merely by agreeing the with Plaintiff, "then the declaratory judgments act is more of a joke than an important and effective part of the law of the state." Associated Indem. Corp. v. Wachsmith, 2 Wn.2d 679, 685, 99 P.2d 420, 423 (1940)[2]. No plaintiff would have their property rights declared by the court if the defendant could have the case dismissed by agreeing to plaintiffs' interpretation of a deed. Boys rely upon Bloome v. Haverly, 154 Wn. App. 129, 140, 225 P.3d 330, 335 (2010)

[2] The full quote is "'If declaratory actions are to be shunted into the discard upon the happening of such a contingency, and if their validity and effectiveness can be defeated merely by bringing a subsequent action for direct relief in another tribunal, then the declaratory judgments act is more of a joke than an important and effective part of the law of the state, and it would be far better to have it repealed than to allow it to remain on the statute books as an impotent step-child of the legislature." Associated Indem. Corp. v. Wachsmith, 2 Wn.2d 679, 685, 99 P.2d 420, 422–23 (1940)

where Division I found neither party was entitled to the declaratory relief requested over a view covenant and building restrictions, but in that case there were no measurable standards to judge the controversy by. Id. Here there are standards in the CC&Rs, only "Owners" submit ARC applications, new fences are not allowed, "gates" are not expressly permitted, and "safety" and "standardization" are not in the CC&Rs.[3] PLTHA has an easement for maintenance of structures, not new construction.

Krells were not seeking an advisory opinion on abstract or speculative questions about future blocking. See Walker v. Munro, 124 Wn.2d 402, 418, 879 P.2d 920, 929 (1994). Quiet title actions are statutorily created remedies to resolve property disputes, they are not "advisory opinions," RCW 7.28.010. The focus of the justiciability question is whether the question sought to be adjudicated is appropriate for the court to address. Lee v. State, 185 Wn.2d 608, 616, 374 P.3d 157 (2016) The Trial Court was required to find "the superior title, whether legal or equitable, shall prevail." RCW 7.28.120. It "must" prevail. Finch v. Matthews, 74 Wn.2d 161, 166, 443 P.2d 833, 837 (1968). The Trial Court "may" declare rights under a deed, RCW 7.24.020, and although the statute is not compulsory regarding declaring rights, quieting rights is. There is no final

[3] Further, the issue of what PLTHA was obligated and permitted to do under the CC&R's were contested facts. "Safety" and "standardization" were reasons outside the 4 corners of the documents.

judgment against Boys lot establishing Krells' easement rights. "[E]very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled." CR 54(c).

Krells are entitled to their judgment, and the fact that Respondents both agree the easement exists does not equate to lack of controversy. PLTHA claims that "Krells quiet title action was appropriate only to the extent that the parties had asserted competing claims of ownerships*." Brief of Respondent Port Ludlow Townhome Association* page 15. The error of the Trial Court finding PLTHA easement rights in the Boys courtyard proves there are "competing claims of ownership," because Krells assert Sec. 14.3 and Sec. 4.15 correctly interpreted by the plain language precludes a gate, whereas PLTHA claims (but never pled) Sec 14.1 expressly permits a gate. Clearly a controversy exists over the rights and scope, yet neither Respondent contradicts the rule that an answer by defendant that does not deny allegations in a complaint is, in effect, admission thereof.

F. KRELLS ARE NOT REQUIRED TO RAISE ISSUES OF FACT AGAINST THEMSELVES.

Boys and PLTHA concede Krells have an easement right, yet conclude "As a result, there is no genuine issue of material fact and the Krells have no basis for a quiet title claim as a matter of law." See *Brief of Respondent Port Ludlow Townhome Association* page 15. Boys claim

"Krells' claim did not arise out of disputed easement rights." *Brief of Respondent Kirk and Kim Boys*, page 20. This is simply frivolous, both Respondents are adverse as shown above.

Boys and PLTHA have turned the CR 56 standard on its head, claiming Krells failed to rebut the CR 56 motion. Neither Respondent fully explains why Krells are not entitled to their judgment as a matter of law. Quite frivolously, Respondents contend Krells didn't raise a genuine issue of fact -against themselves- by arguing something differently at the CR 56 motion than Krells title claim per Sec 14.3. Krells aren't going to argue their easement does not exist- contradicting their title claim. Boys and PLTHA's unreasonable argument allows any defendant the ability to say, "I agree with everything plaintiff claims against me, and therefore, I get a dismissal because there is no dispute to litigate against me." Defendants will argue there is "no controversy" and thus "no issues of fact" as a tactic to have plaintiffs' claims dismissed, avoiding the merits. There is simply no authority to support Respondents' position.

There is no "failure of proof" by Krells of an essential element of the quiet title claim. Krells easement was established by admission that it exists per CC&Rs Sec 14.3. PLTHA has not applied the law correctly in Byrd v. Pierce Cty., 425 P.3d 948, 957 (2018). The Krells have the right to compel others who assert a hostile right to come forward, state their right

and submit it to judicial determination. Id. Byrd applied correctly shows the unsustainability of PLTHA arguments. In Byrd, this Court upheld a dismissal of a quiet title claim "because it failed to allege any 'valid subsisting interest' and a right to 'possess[ ]' a right of way over" Pierce County's property. Parties are required to plea their interest. RCW 7.28.130. PLTHA did not, (CP 14-15) yet the result was a finding Krells easement existed, but erroneous dismissal of Krells claim supported by that finding.

G. BOYS LOT AND BOYS GATE

Boys mischaracterize the nature of the litigation by asserting Krells made only one claim against them about a Principal/Agent relationship. Agency does not determine the title and rights claim. Who has ownership in the bundle of sticks, where did it come from and what rights and privileges (scope) go with the rights is the claim against Lot TH-17. Only fee simple "Owners" (See CC&R Sec 1.42, CP 109) may submit an ARC application for their town home lot property and Wagner confirmed they do not process ARC applications from non-owners (CP 324). Boys contend Wagner applied as a "requestor" by crossing out "owner" on the first page. On the ARC application p. 2, Wagner signed as "owner" (CP 150) contradicting the status as "requestor". Per the CC&R's "No building or structure (including fences or any manmade obstruction) shall be built or placed or thereafter altered on any Lot…[until approved by LMC and if

construction] undertaken in violation hereof, may be abated by legal proceedings instituted by…any aggrieved party." Sec. 11.1. Further "[t]he Owners of any Town Home Lot subject to LMC architectural control shall first obtain approval from the LMC. Sec. 11.3.1 (CP 135-137). Lot Owners submit applications, not PLTHA. PLTHA was acting at Boys request because PLTHA is not a titled owner to any lot or common area (Master Association is) and all agreed Lot TH-17 is Boys parcel. Boys cite to Afoa v. Port of Seattle, 191 Wn.2d 110, 126, 421 P.3d 903, 912 (2018). This case analyzed RCW 4.22.070, which states in part "A party shall be responsible for the fault of another person…where both were acting in concert." Krells allegation in Section 3.5 (CP 3) that PLTHA used its power to apply on "behalf" of the Boys falls under RCW 4.22.070. Respondents acting in concert put up the Boys gate for Boys, because PLTHA does not own the courtyard. Krells' complaint Sec. 3.5 is a statement of what occurred. PLTHA agrees it has no ownership interest in the courtyard or the town homes, nor is there any reference to PLTHA property ownership in the CC&R's. (CP 89,90, 93-96, 111). The law holds when combined with labor, the gate becomes 'improvements' to real property. Pinneo v. Stevens Pass, Inc., 14 Wn. App. 848, 851, 545 P.2d 1207, 1209 (1976). Boys own the gate, not PLTHA and Boys were not in an "impossible position" to object to the gate. See *Brief of Kirk and Kim Boys*, page 15, par. 1. If Boys are

being honest about being "neutral" on the gate, knowing it is a burden on Krells due to their medical issues, Boys should object, remove the gate and end this controversy as it is their Lot TH-17 where it exists.

Boys assertion "A homeowners association's voluntary decision to accommodate a homeowners request does not mean the association was subject to the control of the homeowner" with citation to Afoa, 91 Wn.2d at 126, is off point and irrelevant. see *Brief of Respondent Kirk and Kim Boys*, page 10. Afoa does not make this statement of law as it pertains to HOAs and Boys "controlling" PLTHA is not determinative. Either PLTHA's right to gate the easement exists per the CC&Rs or it does not. The error with the Trial Court's reasoning is that nothing in the CC&Rs actually says PLTHA may gate the courtyard, which is an unpled claim raised in briefing. In fact, the plain language in CC& Rs Sec 1.42, Sec 4.15 (no wall fence or hedge shall be constructed) Sec. 5.2.2. 10.2 & 10.2.1 (PLTHA maintenance obligations), Secs. 11.1, 11.3.1, 14.1 (PLTHA maintenance easement), and Sec. 14.3 (Krells easement rights), do not support the Trial Court's ruling PLTHA has an easement right to make a new fence or new construction and to affix a gate to Boy's property. The case of Standing Rock Homeowners Ass'n v. Misich, 106 Wn. App. 231, 241, 23 P.3d 520, 526 (2001) has direct applicable language where it held "Both sides concede the easement deed is silent on the subject of gates."

and therefore the court must factually examine the situation of the property, the parties, and surrounding circumstances at trial. By the governing documents and the law, it is Boys' gate on their lot and there is no authority to install gates.

H. BOYS DUTY TO NOT UNREASONABLY INTERFERE

PLTHA misconstrues the procedural history of the case by claiming that Krells failed to raise at the Trial Court the duty Boys owed Krells, by citing to the authority relied upon in Zonnebloem, LLC v. Blue Bay Holdings, LLC, 200 Wn. App. 178, 401 P.3d 468, (2017). *Brief of Respondent Port Ludlow Townhome Association*, page 18, fn. 3. Yet Boys agree the issue was raised citing CP 263, 276, contradicting PLTHA. *Brief of Respondent Kirk and Kim Boys*, page 5. The argument by Boys that Boys didn't owe Krells a duty was a new argument in their rebuttal summary judgment briefing (CP 367-368) responding to Krells CR 56 motion response that "as we sit today, the Boys allow the gate to remain, which is a continuing interference with the easement" (CP 276). Boys claimed in rebuttal that they had no duty to Krells, as an additional reason there was "no controversy," contending they have no obligation to ensure the Krells easement rights are not interfered with. But that was not the basis Boys originally asked to be dismissed, it was a lack of agency. Krells *Motion for Reconsideration and Clarification* (CP 394-406) informed the Trial Court a controversy

continued to exist because Boys allowed a gate to remain on Lot TH-17 (CP 397-398). The Boys' duty was an issue raised in the Trial Court.

PLTHA claims Krells have asserted Boys must "protect" the easement, and in doing so, must "maintain" the Courtyard for the Krells. See *Brief of Respondent Port Ludlow Townhome Association* Page page 22. This is another mischaracterization by the governing body that should be neutral in the dispute between the dominant and servient estate. It is correct that servient owners ordinarily owe no duty to the dominant owner to repair or maintain the easement, but PLTHA reliance on Donner v. Blue, 187 Wn. App. 51, 347 P.3d 881 (2015) and Crystal Ridge Homeowners Ass'n v. City of Bothell, 182 Wn.2d 665, 343 P.3d 746 (2015) are misplaced. Krells did not claim Boys had to "repair" the easement because of a damage caused by Krells use.

A claimed duty of the servient estate to maintain and repair for the benefit of the dominant estate is not the same as the legally recognized duty of the servient estate to not unreasonably interfere with the dominant estate. An obligation to protect a neighbor's easement rights from the actions of an independent third party comes from the duty to not unreasonably interfere, which is a fact based question. The duty to not unreasonably interfere is the law in Washington as set forth in Zonnebloem, LLC v. Blue Bay Holdings, LLC, 200 Wn. App. 178, 401 P.3d 468, (2017); Nw. Properties Brokers

Network, Inc. v. Early Dawn Estates Homeowner's Ass'n, 173 Wn. App. 778, 295 P.3d 314 (2013); Littlefair v. Schulze, 169 Wn. App. 659, 278 P.3d 218 (2012); Colwell v. Etzell, 119 Wn. App. 432, 81 P.3d 895 (2003); Rupert v. Gunter, 31 Wn. App. 27, 640 P.2d 36 (1982); Thompson v. Smith, 59 Wash.2d 397 367 P.2d 798 (1962). The Trial Court could not have found on these contested facts that no duty had been breached by the Boys.

The Court in Littlefair held that a dominant estate owner has the right to protect his rights in the easement by requiring the servient estate owner to remove any structure that could deny the easement owner his full easement rights. Littlefair, 169 Wn. App. at 666. Krells are denied their full easement rights by the gate, and thus legally can require Boys remove it, another reason they are a named necessary party in this *in rem* proceeding. If a third party erects the structure with the permission of the servient estate, then the servient estate may have liability. Zonnebloem, even if only dicta, reaffirmed this reasoning that comes from Thompson by citing to Restatement (Third) of Property: Servitudes § 4.9 "actions that make it more difficult to use an easement ...are prohibited…unless justified by needs of the servient estate." See Zonnebloem 200 Wn. App. at 184. This balancing of rights, placing the burden on the proponent of the gate was foreclosed when the Trial Court dismissed out the servient estate. Krells have the right

to "protect" their easement.[4] Boys knew Krells were trying to "protect" their access all along. Boys allowing PLTHA to install the gate that is not expressly permitted is unreasonable interference and thus their failure to "protect" breached their duty. Krells cannot "protect" their easement from the servient owner if the Court will not let their *in rem* claim go forward.

Boys argued Krells have conflated existence, scope and interference of easement rights in analyzing the CC&Rs. *Brief of Respondent Kirk and Kim Boys*, page 19. These concepts overlap, but what both Respondents fail to comprehend is Krells must first establish the easement's existence (where does it come from) before the Court can render a decision on the scope and interference questions. Boys state they have no position on the gate, relying on letter they sent (CP 356) where they state they "have no interest in interfering with the Krells easement rights, however those rights are ultimately construed by the Court." They should have been construed as including "no gate" if Boys are not contesting the scope. Boys did interfere by having the title claim wrongfully dismissed under an agency argument. Whether PLTHA has demonstrated a sufficient need for a gate on a

[4] Case law puts the burden on Boys to justify the need for the gate, which they could not show in a factually contested CR 56 motion. Rupert v. Gunter, 31 Wn. App. 27, 640 P.2d 36, (1982) The Trial Court correctly left the "reasonableness" of the gate for trial, but incorrectly dismissed the Krells quiet title and declaration of rights claim.

courtyard it has no ownership in, and if that outweighs Krells medical limitations still remains to be decided by the Trial Court.

I. ATTORNEY FEES ERRONEOUSLY SHIFTED.

PLTHA argument for why Boys (and apparently PLTHA) is entitled to attorney fees is frivolous. Boys "prevail" only due to the erroneous dismissal and for no other reason. The only possible issue Boys could have prevailed on per their CR 56 motion, which did not shift fees, is their misinterpretation of Krells alleging PLTHA acting on behalf of Boys to show them acting in concert. Principal/Agency was not the issue being litigated requiring an interpretation or enforcement of the CC&Rs. There can be no fee shifting in Boys favor. PLTHA spuriously claims Krells lack competent evidence to support an essential element of their title claim, meaning Boys and eventually PLTHA prevail triggering the attorney fee clause in the CC & Rs, See *Brief of Respondent Port Ludlow Townhome Association Page* pages 10-11, and 27. As shown above, the "element" PLTHA frivolously claims Krells lack, is not proof of their easement rights under Sec 14.3, rather it's the "lack of controversy" because Boys and PLTHA agree with what was pled. All elements of the quiet title claim have been established by stipulation. This is set forth in the PLTHA order, paragraph (1) (CP 529) where the Court found Krells easement over Boys servient estate exists. What is lacking is the Trial Court properly giving

Krells their judgment per RCW 7.28.120 and CR 54(c). This is the issue that triggers the fee shifting.

PLTHA has misconstrued the procedural history, arguing that "the basis for the attorney fee award is under the CC & R's is Sec 19.1, not RCW 4.84.330." *Brief of Respondent Port Ludlow Townhome Association* Page Page 28. Krells analyzed CC&Rs Sec 19.1 and RCW 4.84.330 because <u>this was the basis</u> for why attorney fees were awarded against them per the Trial Court's written order. (CP 392-393). PLTHA claims the purpose of the CC&R's attorney fee shifting section is to "act as an incentive against frivolous lawsuits, encouraging parties to resolve the disputes without litigation." *Brief of Respondent Port Ludlow Townhome Association* Page Page 31. Then PLTHA should not have installed a gate knowing Krells objected or took a non-neutral position in the dispute, by acting for Boys. Boys and PLTHA should have stipulated to a judgement quieting title to Krells easement under Sec. 14.3, instead of forcing them to defend a CR 56 motion.

PLTHA effort to apply the "last antecedent rule" to RCW 4.84.330 is bound by "common sense," yet again, a careful review of their argument defies logic. Krells did not claim they are entitled to attorney fees for the reason that fees are unilaterally applied, which is what PLTHA suggests. The authority relied upon holds RCW 4.84.330 is mutually applied. <u>Bank</u>

of New York v. Hooper, 164 Wn. App. 295, 305, 263 P.3d 1263, 1268 (2011). In this case, Division III noted that "defending against the foreclosure" was not an "action on the contract." That is more in line with Krells' argument that Boys' attorney fees must relate to those "which are incurred to enforce the provisions" of the CC&Rs. The phrase, "incurred to enforce" must be fees incurred in an "action on a contract", where the contract "specifically provides that attorneys' fees and costs…are incurred to enforce." The statute is clear that if it "shall be awarded to one of the parties," then the "prevailing party" is entitled to their fees. There must be a connection to the enforcement action and the claim for attorney fees. Boys and PLTHA have not "prevailed" enforcing or interpreting the CC&R's differently from what Krells pled regarding their title and Boys have not prevailed on a scope determination about the gate, which they claim they are "neutral" on. PLTHA's order held Krells easement existed as pled (CP 529), which is why Hernandez v. Edmonds Memory Care, LLC, 10 Wn.App.2d 869, 450 P.3d 622, (2019) applied correctly would have Krells awarded fees, not Boys, because Krells win the quiet title. PLTHA attempt to distinguish Hernandez is to argue that Krells claim was "frivolous" yet, again fully admitting and conceding the quiet title action and declaratory judgment is the correct action for a property dispute. But for these ongoing

frivolous arguments, Krells should have had their judgment quieting title consistent with the Court's findings (CP 529).

Attorney fees are proper against PLTHA for those hours spent responding to the issues raised by PLTHA because they are directly related to the erroneous dismissal of the quiet title claim, they are incurred to "enforce" their easement existence and rights in the CC & R's and obtain a judgment under RCW 7.28.120 quieting title, and for responding to arguments that have no authority to support them.

Attorney fees are proper against Boys for those hours spent responding to Boys because Krells have an order from the trial court finding they have an easement, but don't have a judgment quieting title reflecting that order due to Boys arguments about "agency" and "lack of controversy" the caused a dismissal, for fees incurred by Krell who have to appeal to "enforce" their easement existence and rights in the CC & R's and obtain a judgment under RCW 7.28.120 quieting title, and have had to respond to arguments that are not backed up by authority. Krells request remand to direct they are the prevailing party and should be awarded fees incurred at the Trial Court.

J. CONCLUSION

Respondents agreeing to Krells title claim was an admission to Krells' easements existence under CC&R's section 14.3, and the Trial Court should have given Krells judgment as required by law. Boys' neutral

position after the gate blocking the easement was installed, did not equate to a "lack of controversy." Boys have a legal duty to not interfere with the easement. Their level of interference was a contested issue of fact. Krells request a reversal of the Trial Court, an order directing that a judgment quieting title to their easement be entered, an order directing that between the dominant and servient estate, no gate is allowed, thus reserving for the upcoming trial if PLTHA has established both legally and factually if a gate should exist on the courtyard it has no ownership interest in. Krells request attorney fees.

Dated this 30 day of July, 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:

[X] Email to the following:

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Dated this _30__ day of July, 2020, at Poulsbo, Washington.

Melissa S. Colletto

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Melissa S. Colletto
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